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Domestic courts in investor-state arbitration : partners, suspects, competitors

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Domestic Courts in Investor-State Arbitration

Partners, Suspects, Competitors

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TABLE OF CONTENTS

1. SETTING THE STAGE.....	1
1.1. THE SCOPE OF THE INQUIRY	1
1.2. BY WAY OF INTRODUCTION: THE CHEVRON-ECUADOR DISPUTE CONCERNING THE <i>LAGO AGRIO</i> LITIGATION	2
1.3. THE METHOD OF THE INQUIRY	5
1.4. THE ANALYTICAL TOOLS EMPLOYED AND THEIR LIMITATIONS	6
1.4.1. Monism, Dualism and the Principle of Supremacy of International Law.....	6
1.4.1.1. <i>Monism and Dualism</i>	7
1.4.1.2. <i>The Principle of Supremacy of International Law</i>	9
1.4.2. <i>Res Judicata</i> , <i>Lis Pendens</i> and other Jurisdiction/Conflict-Regulating Principles.....	12
1.4.2.1. <i>Res Judicata (finality of adjudication)</i>	12
1.4.2.2. <i>Lis Alibi Pendens and Related Conflict-Regulating Principles and Rules</i>	16
1.4.3. The Concepts of “Standard of Review” and Deference	18
1.4.3.1. <i>The Different Standards of Review</i>	21
1.4.3.2. <i>The Notion of Deference and Reasons for its Application</i>	23
1.5. ORGANIZATION OF THE INQUIRY.....	25
2. THE HISTORICAL FRAME OF REFERENCE.....	27
2.1. THE FUNCTIONAL SHIFT: INVESTOR-STATE ARBITRATION ESTABLISHES ITSELF AS PROCEDURAL ALTERNATIVE TO DOMESTIC LITIGATION	27
2.1.1. The “Legalization” of Dispute Settlement and the Emergence of the Law of International Claims ...	28
2.1.2. The Rise of Individuals’ Private Right of Action and the Advent of Contract-Based Arbitrations.....	30
2.1.3. The Establishment of ICSID as a Decisive Step in the De-Politicization of Investment Disputes	34
2.1.4. Investor-State Arbitration as an Exclusive Remedy.....	36
2.1.5. The Onset of Bilateral Investment Treaties and the Entrenching of Direct Recourse to Treaty-Based Investment Arbitration	39
2.2. THE SUBSTANTIVE SHIFT: THE RISE OF INTERNATIONAL STANDARDS OF TREATMENT AND DOMESTIC LAW’S DECLINING IMPORTANCE TO THE ADJUSTMENT OF INVESTMENT DISPUTES.....	42
2.2.1. Initial Standard-Setting through Early Treaties of Commerce.....	42
2.2.2. The Emergence of Minimum Standard(s) of Treatment under Customary International Law	45
2.2.3. The Challenges to International Standards: From Calvo to CERDS	48
2.2.4. The Move Towards the Internationalization of Investment Contracts.....	51
2.2.5. The “Treatification” of Investment Law in the Twentieth century	53
2.3. REASONS FOR AVOIDING DOMESTIC COURTS: FROM THE STANDARD OF CIVILIZATION TO THE PROBLEM OF IMPARTIALITY AND EFFICIENCY OF DOMESTIC PROCEDURES	56
2.3.1. Measuring Legal Systems through the Lens of Civilization.....	56
2.3.2. Colonial Rule and the Introduction of Western Systems of Administration of Justice.....	59
2.3.3. Regimes of Extraterritoriality and the Administration of Justice by Means of Consular and Mixed Courts	60
2.3.4. Governance through International Law: Minimum Standards of Administration of Justice and the Doctrine of Denial of Justice.....	63
2.3.5. From the Problem of Civilization to the Quest for a Neutral and Efficient Forum	64

2.4. CONCLUSIONS.....	69
PART I	71
I. INTRODUCTION INTO PART I	73
I.1. FORMAL FUNCTIONS PERTAINING TO THE ASSISTANCE IN, AND SUPERVISION OF, THE ARBITRAL PROCESS AND ITS OUTCOME.....	74
I.2. INFORMAL ROLES IN THE LAW- AND FACT-ASCERTAINMENT PROCESS	77
I.3. THE DUAL EFFECTS OF DOMESTIC JUDICIAL PRONOUNCEMENTS.....	77
3. THE ROLE OF DOMESTIC JUDICIAL DECISIONS IN THE ASCERTAINMENT OF LAW AND FACTS BEFORE INVESTMENT TRIBUNALS	79
3.1. THE UNREMITTING RELEVANCE OF DOMESTIC LAW IN INVESTMENT ARBITRATION.....	79
3.2. THE RELEVANCE OF DOMESTIC JUDICIAL DETERMINATIONS IN THE LAW-ASCERTAINMENT PROCESS.....	81
3.2.1. Reliance on Domestic Judgments to Ascertain the Law Applicable to the Arbitration Agreement.....	82
3.2.1.1. <i>Law Governing the Agreement to Arbitrate before the ICSID Centre</i>	82
3.2.1.2. <i>Law Governing the Agreement to Arbitrate in non-ICSID Arbitrations</i>	84
3.2.1.3. <i>Ascertainment of the Law Governing the Agreement to Arbitrate</i>	84
3.2.2. Reliance on Domestic Judgments to Ascertain the Law Applicable to the Cause of Action.....	86
3.2.3. Reliance on Domestic Judgments to Ascertain the Law Applicable by Virtue of <i>Renvoi</i>	88
3.2.3.1. <i>The Nationality of Natural Persons</i>	91
3.2.3.2. <i>The Nationality of Corporate Entities</i>	92
3.2.3.3. <i>Attribution of Corporate or other Entities' Conduct to the State</i>	95
3.2.3.4. <i>The Existence of a Protected Investment</i>	96
3.2.3.5. <i>The Legality of an Investment</i>	99
3.2.3.6. <i>Existence of Obligations (for the Purposes of Umbrella Clauses)</i>	101
3.2.3.7. <i>Other Potential Instances of Renvoi</i>	103
3.2.4. Reliance on Domestic Judgments to Ascertain the Law Relevant to Determining the Factual Predicate of the Claim	103
3.2.4.1. <i>Contractual Matters relevant to the Treaty Claim</i>	105
3.2.4.2. <i>Other Instances where the Domestic Legal Framework is Relevant to the Treaty Claim</i>	108
3.2.4.3. <i>Questions of Restitution and Compensation</i>	110
3.3. Factual Import of Domestic Judicial Determinations.....	111
3.4. CONCLUSIONS.....	112
4. THE LEGAL EFFECTS OF SPECIFIC JUDICIAL DETERMINATIONS	113
4.1. RELEVANCE OF THE CONTEXT? MAPPING THE CIRCUMSTANCES IN WHICH WEIGHT WAS (NOT) ACCORDED TO DOMESTIC JUDICIAL PRONOUNCEMENTS	113
4.1.1. Domestic Court's Findings of Domestic Law.....	114
4.1.1.1. <i>Judicial Pronouncements Relevant to Determining the Existence or Scope of Tribunal's Jurisdiction</i>	114
4.1.1.2. <i>Judicial Pronouncements Relevant to the Determining the Merits of the Claim</i>	116
4.1.2. Domestic Courts' Findings of Fact.....	118
4.1.2.1. <i>Judgments as Relevant Facts</i>	118
4.1.2.2. <i>Judicial Findings of Fact</i>	119
4.1.2.3. <i>Conduct of Parties in Domestic Litigation</i>	120

4.1.3. Is the Context thus Relevant?	120
4.2. ARGUMENTS FOR DENYING EFFECT TO DOMESTIC JUDICIAL DETERMINATIONS.....	121
4.2.1. Arguments based on, or building on the Idea of Supremacy of International Law	121
4.2.1.1. <i>Superiority of International Adjudicatory Bodies over Domestic Judicial Organs</i>	121
4.2.1.2. <i>Preventing Abuse of Domestic Law and the Principle Against Self-Judging</i>	122
4.2.2. Arguments Based on Categorical Distinctions between International and Domestic Law and the Resulting Differences between International and Domestic Adjudicatory Bodies ...	123
4.2.2.1. <i>The Argument on the “Separate and Distinct” Dispute Settlement Arrangements</i>	124
4.2.2.2. <i>The Separateness of Legal Orders Argument</i>	125
4.2.3. Reliance on Specific Powers, Duties, or (the Absence of) Obligations.....	125
4.2.3.1. <i>Kompetenz-Kompetenz principle</i>	125
4.2.3.2. <i>Rules Pertaining to the Appreciation of Evidence</i>	127
4.2.3.3. <i>Absence of Specific Obligations</i>	128
4.2.4. Arguments Pertaining to Identity of Actions in the Formal Sense	129
4.2.5. Supporting Argumentation	130
4.2.6. Policy Rationale(s) Against Granting Legal Effects to Domestic Pronouncements	133
4.3. ARGUMENTS SUPPORTING ACCEPTANCE OF DOMESTIC JUDICIAL PRONOUNCEMENTS	134
4.3.1. <i>Res Judicata</i> on Points of Domestic Law	134
4.3.2. Acceptance of, and Deference to, Domestic Courts’ Decisions	136
4.3.3. Doctrine of Collateral Estoppel.....	137
4.3.4. Policy Rationales in Favour of Granting Legal Effects to Domestic Pronouncements.....	138
4.4. FACTORS AFFECTING RECEPTION OF SPECIFIC JUDICIAL DETERMINATIONS ON THE PART OF INVESTMENT TRIBUNALS	140
4.4.1. Factors Determining the Evidentiary Value of Judicial Determinations.....	140
4.4.1.1. <i>Domestic Courts’ Expertise in Domestic Law</i>	140
4.4.1.2. <i>Attitude of the Litigating Parties towards the Judgment</i>	141
4.4.1.3. <i>Quality of the Domestic Judgment</i>	141
4.4.2. Standard of Review Applicable to the Scrutiny of Judicial Determinations	145
4.5. CONCLUSIONS.....	146
 5. DOMESTIC JURISPRUDENCE AS AN AID TO THE INTERPRETATION AND APPLICATION OF DOMESTIC LAW	 149
5.1. REASONS FOR RESORTING TO DOMESTIC JURISPRUDENCE IN THE LAW ASCERTAINMENT PROCESS	149
5.1.1. Uncertainties Concerning the Applicable Statute	150
5.1.2. Uncertainties Concerning the Law in General	151
5.1.3. Factual Relevance	153
5.2. THE SCOPE OF INVESTMENT TRIBUNALS’ LAW-ASCERTAINMENT DUTIES.....	154
5.2.1. The Legal Weight of Domestic Jurisprudence: From Sources of Law to Evidence of Interpretation and Application of Domestic Law	154
5.2.2. Duty to Consider Domestic Jurisprudence in the Interpretation and Application of Domestic Law	155
5.2.3. Duties pertaining to the Possession, Acquisition, and Application of Knowledge of Domestic Jurisprudence	157
5.2.3.1. <i>Duty to Know Domestic Jurisprudence</i>	157
5.2.3.2. <i>Duty to Become Acquainted with Domestic Jurisprudence</i>	160
5.2.3.3. <i>Duty to Pursue Proprio Motu Research into Relevant Domestic Jurisprudence</i>	162
5.2.3.4. <i>Duty to Seek Parties’ Views on Relevant Jurisprudence</i>	164
5.2.3.5. <i>Duty to Apply Accurate Law and Jurisprudence</i>	166

5.3. FACTORS AFFECTING RECEPTION OF DOMESTIC JURISPRUDENCE IN THE LAW-ASCERTAINMENT PROCESS.....	168
5.3.1. Factors Determining the Evidentiary Value of Domestic Jurisprudence.....	169
5.3.1.1. <i>Bias of the Judicial Decision-Maker</i>	169
5.3.1.2. <i>Propriety of the Domestic Judicial Process</i>	170
5.3.2. The Standard of Review Applicable to Tribunals’ Scrutiny of Domestic Jurisprudence.....	171
5.4. THE LAW ASCERTAINMENT PROCESS: LEGAL METHODS AND TECHNIQUES.....	173
5.4.1. Methods of Jurisprudential Analysis: Analogies and Adverse Inferences.....	173
5.4.2. Obstacles to law ascertainment – Issue not Addressed by Courts.....	175
5.4.3. Obstacles to Law Ascertainment – Issue not Addressed by Legislator.....	176
5.4.4. Obstacles to Law Ascertainment – Jurisprudence Unsettled or Contradictory.....	178
5.4.4.1. <i>Refusal to Take Position on Unsettled or Contradictory Jurisprudence</i>	179
5.4.4.2. <i>Picking and Choosing from Available Jurisprudence</i>	181
5.4.4.3. <i>Assessment</i>	182
5.5. CONCLUSIONS.....	183
 PART II.....	 185
 II. INTRODUCTION INTO PART II.....	 187
II.1. RESPONSIBILITY OF THE STATE FOR THE CONDUCT OF JUDICIAL ORGANS.....	187
II.2. OBLIGATIONS OF STATES WITH REGARD TO JUDICIAL ORGANS.....	189
 6. STATE RESPONSIBILITY FOR DENIAL OF JUSTICE.....	 191
6.1. THE CUSTOMARY INTERNATIONAL LAW “DELICT” OF DENIAL OF JUSTICE.....	191
6.1.1. Attempting to Define Denial of Justice – An Indeterminate Standard?.....	191
6.1.2. Responsibility for Domestic Judicial Decisions.....	195
6.1.2.1. <i>In Search of a Test for a Wrongful Judgment</i>	196
6.1.2.2. <i>The Standard of Review</i>	199
6.2. DENIAL OF JUSTICE IN INVESTMENT TREATY ARBITRATION.....	201
6.2.1. Denial of Court Access.....	204
6.2.1.1. <i>The Question of Actual Availability of Domestic Procedures</i>	205
6.2.1.2. <i>Refusal to Judge in Disguise</i>	205
6.2.1.3. <i>The Problem of Inconsistencies between Judicial Remedies</i>	206
6.2.1.4. <i>Restrictions on the Right of Access to Courts</i>	207
6.2.2. Denial of Justice for Undue Delays.....	208
6.2.2.1. <i>Assessing by Comparing</i>	209
6.2.2.2. <i>Towards a Multi-Factor Methodology</i>	210
6.2.3. Fundamental Breaches of Due Process in the Conduct of Proceedings.....	212
6.2.3.1. <i>Impact on Investors’ Rights</i>	214
6.2.3.2. <i>Consequences on the Judicial Outcome</i>	214
6.2.3.3. <i>Assessing Irregularities on their Own Terms</i>	215
6.2.3.4. <i>Possibility of Rectification</i>	216
6.2.3.5. <i>Proving Lack of Judicial Independence and Impartiality</i>	217
6.2.4. Denial of Justice arising out of Content of the Judgment.....	218
6.2.4.1. <i>Focus on Procedural Failures as a Way to Avoiding Direct Review</i>	221
6.2.4.2. <i>An Assessment of a Judgment on its Formal Qualities</i>	222

6.2.5. Evaluating the Modern Standard of Denial of Justice.....	224
6.3. STANDARDS OF REVIEW APPLIED TO DETERMINING THE PROPRIETY OF THE JUDICIAL OUTCOME	225
6.3.1. Scrutiny of Courts' Treatment of Points of Domestic Law	225
6.3.1.1. <i>Points of Domestic Law Relevant to the Claim</i>	225
6.3.1.2. <i>Points of Domestic Law Relevant to the Powers of the Judicial Organ</i>	229
6.3.2. Scrutiny of Courts' Treatment of Points of Fact.....	231
6.3.3. Scrutiny of Courts' Exercise of Discretionary Powers	233
6.3.4. Technique for Discounting the Relevance of Improprieties	235
6.4. CONCLUSIONS.....	236
 7. STATE RESPONSIBILITY FOR VIOLATIONS OF SPECIFIC TREATY STANDARDS	 239
7.1. DENIAL OF JUSTICE DISTINGUISHED FROM VIOLATIONS OF OTHER TREATY STANDARDS	239
7.2. OBLIGATIONS TO PROVIDE A SYSTEM OF ADEQUATE JUDICIAL PROTECTION	241
7.2.1. The <i>Unglaube</i> Case: The Duty to Provide “Adequate Legal Remedies” as part of the Fair and Equitable Treatment Standard	243
7.2.2. The Duty to Make a Functioning System of Courts and Legal Remedies Available to the Investor as Part of the Full Protection and Security Standard.....	244
7.2.3. The <i>Belokon</i> Case: Unavailability of Judicial Remedies as a Breach of the Non-Impairment Clause ..	246
7.2.4. The <i>ADC</i> Case: Availability of an “Actual and Substantive Legal Procedure” as a Condition for Lawful Expropriations	247
7.2.5. The <i>Cherron</i> Case: Free-Standing Treaty Obligation to Provide “Effective Means for Asserting Claims and Enforcing Rights”	248
7.2.6. One and the Same Systemic Obligation?	252
7.3. THE OBLIGATION NOT TO EXPROPRIATE WITHOUT COMPENSATION AND THE PROBLEM OF JUDICIAL TAKINGS.....	253
7.3.1. Predicating an Expropriation Claim upon Judicial Conduct	254
7.3.2. Wrongfulness of Judicial Conduct as a Predicate of Expropriation Claims	256
7.3.2.1. <i>Judicial Expropriations Predicated Upon the Existence of a Denial of Justice</i>	256
7.3.2.2. <i>Judicial Expropriations Predicated Upon Other Violations of International Law</i>	258
7.3.2.3. <i>Judicial Expropriations Predicated Upon Violations of Domestic Law</i>	260
7.3.2.4. <i>Factual or Legal Predicate?</i>	261
7.3.3. The Relevance of the Origin of the Injury.....	263
7.3.3.1. <i>Judicial Injuries resulting from Legislative Failure</i>	264
7.3.3.2. <i>Judicial Injuries resulting from Wrongful Acts of other Organs</i>	265
7.4.3.3. <i>Judicial Decisions Forming Part of Composite Wrongful Acts</i>	266
7.3.3.4. <i>What Role for the Sole Effects Doctrine?</i>	268
7.4. OTHER TREATY OBLIGATIONS AIMED AT PROVIDING LEGAL AND ECONOMIC SECURITY TO INVESTMENTS.....	269
7.4.1. Umbrella Clauses	269
7.4.2. Protection of Legitimate Expectations	271
7.5. OTHER OBLIGATIONS POTENTIALLY REQUIRING JUDICIAL TREATMENT OF A DEFINED KIND	274
7.5.1. More of the Same? Clauses Prohibiting Discriminatory and Arbitrary Treatment	275
7.5.2. No-Less-Favourable-Treatment Obligations – Value-Added Standards?.....	276
7.5.3. Judicial Violations of the FET Standard Otherwise than Through Denial of Justice.....	277
7.5.3.1. <i>Can the FET Standard be Engaged on Account of Lesser Judicial Improprieties than those Required for Denial of Justice?</i>	277

7.5.3.2. <i>Is Divergent Application of the Same Standard to Different State Organs Possible?</i>	281
7.6. OBLIGATIONS REQUIRING A PARTICULAR JUDICIAL RESULT	282
7.6.1. Provisions Requiring Non-Discriminatory Outcomes	282
7.6.2. Compensation Provisions	285
7.6.3. Transfers Provisions	285
7.6.4. Specific Provisions relating to the Operation of the Investment	286
7.7. STANDARDS OF REVIEW APPLIED TO DETERMINING VIOLATIONS OF DISCRETE TREATY STANDARDS	286
7.7.1. Standards of Review Applied to Establishing the Wrongfulness of Judicial Conduct as a Predicate of Expropriation Claims	287
7.7.2. Standards of Review Applied to Determining Failures to Provide a System of Adequate Judicial Protection	288
7.7.3. Standards of Review Applied to Determining the Arbitrariness of Judicial Decisions	288
7.8. CONCLUSIONS.....	289
 8. THE JUDICIAL FINALITY REQUIREMENT	 293
8.1. JUDICIAL FINALITY AS A SUBSTANTIVE CONDITION OF CLAIMS OF DENIAL OF JUSTICE	293
8.1.1. The <i>Loewen</i> Case and the Endorsement of the Judicial Finality Rule	294
8.1.2. The Rationale for the Judicial Finality Rule in the Context of Denial of Justice	296
8.1.3. Application of Judicial Finality to All Claims of Denial of Justice	297
8.2. JUDICIAL FINALITY FOR VIOLATIONS OF OTHER TREATY STANDARDS PREMISED ON JUDICIAL CONDUCT	299
8.2.1. Judicial Finality, NAFTA, and Measures “Adopted or Maintained”	299
8.2.2. Judicial Finality and the “Effective Means” Provision	300
8.2.3. Judicial Finality and Expropriation Claims	301
8.3. JUDICIAL FINALITY AND CLAIMS PREMISED ON THE CONDUCT OF NON-JUDICIAL ORGANS	302
8.4. JUDICIAL FINALITY – IS A CONSISTENT APPROACH ACTUALLY POSSIBLE?	307
8.4.1. Judicial Finality as a Condition Relating to Determining Breaches of the Primary Obligation	307
8.4.2. Judicial Finality as a Condition Attaching to the Special Nature of Judicial Activity.....	311
8.5. THE APPLICATION OF THE JUDICIAL FINALITY RULE IN PRACTICE	315
8.5.1. Scope of the Judicial Finality Requirement.....	316
8.5.2. Exceptions to the Judicial Finality Requirement.....	317
8.5.2.1. <i>Reasonable Prospect of Success</i>	319
8.5.2.2. <i>Reasonable Possibility of an Effective Remedy</i>	319
8.5.2.3. <i>Obvious Futility</i>	320
8.5.3. Standard of Review Adopted in Determining the Applicability of Exceptions to the Judicial Finality Requirement.....	321
8.6. CONCLUDING OBSERVATIONS.....	323
 PART III	 327
 III. INTRODUCTION INTO PART III	 329
III.1. THE DEMISE OF THE LOCAL REMEDIES RULE AS A GENERAL ORDERING PRINCIPLE	331
III.2. WAYS TO REGULATE JURISDICTIONAL COMPETITION	333

9. REGULATION AS A QUESTION OF ARBITRAL TECHNIQUE: THE APPROACH OF INVESTMENT TRIBUNALS TO REGULATING JURISDICTIONAL COMPETITION	335
9.1. AVOIDING JURISDICTIONAL OVERLAPS THROUGH THE EXERCISE OF DISCRETION IN THE PROCESS OF INTERPRETATION AND APPLICATION OF RELEVANT NORMS.....	335
9.1.1. Removing Potential Jurisdictional Overlaps at the Stage of Interpretation of the Applicable Norm.....	336
9.1.1.1. <i>Interpretation of Umbrella Clauses</i>	336
9.1.1.2. <i>Interpretation of Treaty Dispute Settlement Clauses</i>	338
9.1.1.3. <i>Interpretation of Contractual Dispute Settlement Clauses</i>	340
9.1.2. Removing Potential Jurisdictional Overlaps at the Stage of Application of Specific Treaty Terms – The Problem of Counterclaims.....	341
9.2. AVOIDING JURISDICTIONAL OVERLAPS THROUGH CLAIM SPLITTING.....	345
9.2.1. Application of the Contract/Treaty Distinction in Practice.....	351
9.2.2. When Both Worlds Collide: Applying the Contract/Treaty Distinction to Claims under Umbrella Clauses	355
9.2.3. Avoidance of Forum Selection through Simple Redressing of Claim?.....	358
9.3. REGULATING INTERACTIONS IN CASES OF JURISDICTIONAL OVERLAP	360
9.3.1. Denial of Jurisdiction.....	361
9.3.2. Inadmissibility of the Claim as a Bar to the Exercise of Jurisdiction.....	362
9.3.3. Assertion of Jurisdiction Irrespective of the Jurisdiction of the Domestic Forum.....	366
9.4. CONCLUDING OBSERVATIONS.....	369
 10. REGULATING INTERACTIONS THROUGH SPECIFIC TREATY PROVISIONS.....	 371
10.1. TREATY PROVISIONS REGULATING THE RELATIONSHIP BETWEEN DOMESTIC AND INTERNATIONAL REMEDIES	371
10.1.1. Choice-of-Forum Provisions	372
10.1.1.1. <i>Fork-in-the-Road Clauses</i>	372
10.1.1.2. <i>Reversible Choice-of-Forum Provisions</i>	372
10.1.1.3. <i>No U-Turn Clauses</i>	373
10.1.1.4. <i>Provisions Relating to Previously Agreed Contractual Remedies</i>	373
10.1.2. Sequencing Clauses	373
10.1.2.1. <i>Mandatory Local Litigation Requirements</i>	373
10.1.2.2. <i>Other Provisions Preventing Concurrent Recourse to Different Procedures</i>	374
10.2. REVERSING THE IRREVERSIBLE: STRATEGIES FOR AVOIDING FORKS IN THE ROAD	374
10.2.1. Triple Identity Requirement as a Condition for Triggering the Fork?	375
10.2.2. In Search for a Balanced Approach to the Application of Forks in the Road.....	377
10.2.2.1. <i>Fundamental Basis Test for Determining Identity of Actions</i>	378
10.2.2.2. <i>Factual Test for Determining Identity of Parties</i>	380
10.2.3. Relevance of Treaty Language	381
10.3. SKIPPING THE UNNECESSARY: STRATEGIES FOR AVOIDING LOCAL LITIGATION REQUIREMENTS	382
10.3.1. Avoidance of Mandatory Litigation Clauses through Reliance on MFN Clauses	384
10.3.2. Release from Mandatory Litigation due to Futility	388
10.3.2.1. <i>The Legal Basis for the Futility Exception</i>	388
10.3.2.2. <i>The Standard for Assessing Futility</i>	389
10.3.3. Is There a Proper Approach to the Application of the Mandatory Litigation Requirements?	391
10.3.3.1. <i>Towards a Balanced Approach to Their Interpretation?</i>	392

10.3.3.2. Towards a Non-Formalistic Approach to Their Application?	393
10.4. CONCLUDING OBSERVATIONS	395
11. REGULATING INTERACTIONS AT THE LEVEL OF THE INVESTOR: WAIVERS AND OTHER RENOUNCEMENTS OF TREATY REMEDIES..	397
11.1. REGULATING JURISDICTIONAL CONFLICTS BY MEANS OF AGREEMENT BETWEEN INVESTOR AND HOST-STATE.....	397
11.1.1. Forum Selection Clauses	398
11.1.1.1. <i>The Question of Material Scope</i>	399
11.1.1.2. <i>Competence of Domestic Forum over Treaty Claims</i>	400
11.1.1.3. <i>Exclusive Nature of Treaty Tribunal's Jurisdiction</i>	400
11.1.2. Contractual Waiver of Treaty Rights	401
11.1.2.1. <i>Disposability</i>	402
11.1.2.2. <i>Permissibility of Waivers</i>	405
11.1.2.3. <i>Conditions for Waivers to be Effective</i>	408
11.1.3. Agreements Post-Dating the Emergence of an Investment Dispute	411
11.2. RESOLUTION OF JURISDICTIONAL CONFLICTS AS A RESULT OF THE LITIGANTS' CONDUCT	411
11.2.1. Waiver by Conduct	412
11.2.2. Estoppel	414
11.3. CONCLUDING OBSERVATIONS.....	416
12. FINAL CONCLUSIONS AND REFLECTIONS	419
12.1. DOMESTIC COURTS AS PARTNERS	419
12.2. DOMESTIC COURTS AS SUSPECTS	420
12.3. DOMESTIC COURTS AS COMPETITORS	422
12.4. THE RISE OF ARBITRAL POWER OVER DOMESTIC COURTS – FINAL REFLECTIONS	423
12.4.1. Between Authority and Competence: Who Ultimately Decides?.....	424
12.4.2. Regulation, Co-Ordination: Return to the Local Remedies Rule?	425
12.4.3. Domestic Courts, Investment Arbitration, and the Rule of Law	428
SAMENVATTING (SUMMARY IN DUTCH) – NATIONALE RECHTSPRAAK IN INVESTERINGSARBITRAGE: PARTNERS, VERDACHTEN, CONCURRENTEN.....	433
SUMMARY – DOMESTIC COURTS IN INVESTOR-STATE ARBITRATION: PARTNERS, SUSPECTS, COMPETITORS.....	441
LIST OF LITERATURE	447
Academic	447
Other Documents	461
LIST OF CASES	465
Awards and Decisions by Investment Arbitral Tribunals.....	465
Judgments, Awards, and other Decisions by Other International Adjudicatory Bodies.....	478
Judgments and other Decisions of Domestic Courts.....	483
LIST OF TREATIES, CONVENTIONS, AND OTHER INSTRUMENTS (INCLUDING DRAFTS AND MODEL TEXTS).....	485
Conventions	485
International Investment Agreements (including Drafts and Model Texts)	485
Arbitration Rules	486
CURRICULUM VITAE	489

1. SETTING THE STAGE

1.1. The Scope of the Inquiry

This is a study on the roles of domestic courts in investment arbitration – the latter being understood here as the specific procedural mechanism that allows an investor from one country to bring a case directly against the country in which it has invested before an arbitral tribunal that operates outside of the judicial system of that country.¹ Several years ago, it started as a study on the interaction between such arbitral tribunals and domestic courts. But as the whole concept of interaction is underpinned by the idea of a two-way casual effect,² the original plan turned out to be overambitious.³ The study presently focuses instead on one particular aspect of the relationship between the two adjudicatory bodies: by looking only at how arbitral tribunals treat domestic courts and their decisions when arbitrating investment disputes.⁴ The study thus investigates the approaches taken and attitudes held towards domestic courts by investment tribunals, in terms of trust/distrust, deference/disregard, and/or respect/ignorance.⁵ Its purpose is to take stock of the ever-growing jurisprudence of arbitral tribunals; not only with a view to making sense of it, but with the intent to developing a coherent theory on how domestic courts are perceived by international adjudicators. Therefore, in being a study on the roles that investment tribunals themselves accord to domestic courts when performing their adjudicative functions,⁶ this is not an inquiry into the role that domestic courts can generally play in the settlement of investment disputes between foreign investors and host States.

The study posits that the roles performed by domestic courts in the context of investment arbitration are multiple ones, but that domestic courts can chiefly be conceptualized in three ways: as partners, as suspects, and as competitors. As *partners*, in the sense that domestic courts can assist arbitral tribunals in the determination of certain points of fact or law (and primarily, domestic law⁷ of the host state). As *suspects*, in the sense that their conduct can itself be

¹ For a similarly broad understanding, see eg R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) at 220ff. This same procedural mechanism is generally also referred to as investor-State arbitration (cf eg CF Dugan (et al), *Investor-State Arbitration* (OUP 2008)). The notions of ‘investment arbitration’ and ‘investor-State arbitration’ will be used throughout this study interchangeably.

² In the Oxford dictionary, ‘interaction’ is defined as ‘reciprocal action or influence’, implying that two or more different matters affect one another.

³ The original plan would have called for an examination of not only the effects of domestic courts on investment tribunals, but also of the effects of investment tribunals on domestic courts. With over 190 recognized countries in the world, each with their own legal system, this would have called for complicated sampling, and potentially caused other methodological problems as well.

⁴ The ‘interactional’ aspect of the relationship between domestic courts and investment tribunals has not remained entirely unexplored. For an interesting foray into this issue, see RB Ahdieh, ‘Between Dialogue and Decree: International Review of National Courts’ (2004) 79 New York University Law Review 2029, describing this interaction as a form of ‘dialectical review’; a hybrid pattern of judicial interaction, which combines elements of both transnational judicial dialogue and appellate review.

⁵ For a somewhat similar approach, see M Pinto, ‘National and International Courts – Deference or Disdain?’ (2008) 30 Loy. LA Int’l & Comp. L. Rev. 247.

⁶ For a somewhat similar analytical approach, see eg A Nollkaemper, ‘The Role of Domestic Courts in the Case Law of the International Court of Justice’ (2006) 5(2) Chinese Journal of International Law 301, analyzing the role of domestic courts in the jurisprudence of the International Court of Justice in relation to the development of international law and the settlement of international disputes.

⁷ The terms ‘national law’, ‘municipal law’ and ‘domestic law’, which will be used hereafter interchangeably, denote the internal law of a state and have the meaning equivalent to the French expression *droit interne*.

injurious to the investor and its investment, and therefore itself may become the object of scrutiny by arbitral tribunals. As *competitors*, in the sense that domestic courts may themselves provide an avenue for redressing injuries suffered by the investor, and thereby compete with arbitral tribunals in the resolution of investment disputes.⁸ This study further posits that these roles are fluid ones. In some respects, these roles can be performed concurrently: whilst being competitors in relation to contract claims, for example, domestic courts can still be partners when it comes to determining issues relating to points of law that governs the contract. In other respects, these roles may be mutually exclusive: once doubts will emerge as to the procedural propriety of a particular judicial decision, such decision will no longer be relied upon for law- or fact-ascertainment purposes. It goes without saying that the roles may change over time and in relation to the context.⁹

These abstract propositions can best be appraised in the contest of a concrete example. The dispute between Chevron and Ecuador concerning the Lago Agrio area can serve as an illustration of the type of issues that I intend to explore in the present study.

1.2. By Way of Introduction: The Chevron-Ecuador Dispute concerning the *Lago Agrio* Litigation

The dispute originates in Texaco's involvement, through its subsidiary TexPet, in oil exploration activities in Ecuador's Oriente region. Between 1964 to 1992, TexPet, as part of a consortium of oil companies, operated a number of oil pits in the Lago Agrio oil field, extracting in that time nearly 1.5 billion barrels of Amazon Crude. While turning Ecuador into the second-largest oil exporter in Latin America, the discovery of oil in that part of the Amazon came with an enormous environmental price tag. The contamination of water and soil resulting from drilling activities brought about severe environmental damage, affecting the health of the indigenous communities and other residents of the Lago Agrio area. After ceasing its operations in Ecuador, TexPet committed itself to, and eventually conducted environmental remediation of selected parts of the production areas. Yet, the extent of this remediation work was only proportionate to TexPet's share in the consortium. The remainder of the clean-up was to be performed by the Ecuadorian national oil company, PetroEcuador. As of 1976, the latter formally maintained a majority stake in the consortium; though, in practice, it only held operational responsibility for the Lago Agrio oil field from 1990 onwards. Following completion of its part of the remediation work, TexPet entered with the Ecuadoran government into specific agreements, which absolved it from further claims against it for environmental damage. By then, however, the inhabitants of the sites affected by TexPet's operations had already moved to seek relief for environmental damage directly from Texaco – setting in motion a protracted litigation saga that would eventually span across a variety of jurisdictions, ranging from domestic litigation to proceedings before international investment tribunals.

⁸ It goes without saying that, from the vantage point of domestic courts, the role(s) played on their part by investment tribunals could actually be conceptualised in the same way. First, domestic courts can turn to the jurisprudence of international investment tribunals in interpreting and applying investment treaties in the domestic legal order. Second, domestic courts can review the propriety of an investment award at the stage of its enforcement or following a petition for review or annulment. Third, domestic courts may equally perceive international tribunals as competitors.

⁹ The involvement of domestic courts in the conduct of the arbitral process provides an interesting illustration. Normally, the courts of the seat of an (international) arbitration, including potentially an investment-related one, will be capable of providing support to arbitral tribunals. Yet, an abuse of domestic courts' supervisory powers resulting in undue interferences in the arbitral process will on its part engage the responsibility of the State. See S Sattar, 'National Courts and International Arbitration: a Double-Edged Sword?' (2010) 27 Journal of International Arbitration 51.

In 2003, after unsuccessfully attempting for almost nine years to obtain compensation by means of class actions in US courts,¹⁰ the inhabitants of the affected areas resorted to Ecuadorean courts in an effort to hold Texaco liable – and by then also Chevron, following the latter’s acquisition of Texaco – for environmental damage allegedly caused by negligent petroleum extraction practices. In 2011, the Provincial Court of Justice of Sucumbíos, Lago Agrio, found Chevron responsible for widespread pollution and ordered it to pay in excess of 19 billion USD in damages – an amount eventually reduced by Ecuador’s Supreme Court to 9.51 billion USD.¹¹ Way before that judgment was delivered, however, Chevron commenced on its part investor-State arbitration against Ecuador pursuant to the 1993 US-Ecuador bilateral investment treaty,¹² taking issue with the manner in which the Lago Agrio litigation was conducted, as well as with the environmental claims that were the subject of the Ecuadorean court proceedings.¹³ Furthermore, with a view to preempting the Lago Agrio plaintiffs from collecting on any adverse judgment, Chevron brought a civil lawsuit before US courts under the Racketeer Influenced and Corrupt Organizations Act (RICO) against the lawyers behind the Ecuadorean litigation.

In the long awaited award delivered on 30 August 2018, the Arbitral Tribunal in the investment arbitration eventually ruled that the conduct of the Ecuadoran judicial branch in the context of the Lago Agrio litigation amounted to a denial of justice, as well as violated the terms of the settlement agreements. Having no powers to declare the Lago Agrio judgment void, the Tribunal ordered Ecuador to suspend the enforceability of the judgments and to take steps to preclude all third parties from enforcing it.¹⁴ The award followed a series of previous decisions, in which the Tribunal otherwise decided that the settlement agreements releasing the company from

¹⁰ In 1993, a class action complaint was filed against Texaco in the US Federal District Court for the Southern District of New York, on behalf of Maria Aguinda and an estimated 30,000 other indigenous and settler inhabitants of the Oriente Region, who claimed compensation for personal injuries and damage to their own property allegedly caused by TexPet’s actions. A further, related complaint was filed in 1994, on behalf of Gabriel Ashanga Jota and a putative 25,000 other indigenous and settler residents of Peru, who claimed to have been harmed by transboundary pollution from Texaco’s operations in Ecuador. In 2002, both lawsuits were jointly dismissed on grounds of *forum non conveniens*: Ecuador was deemed to be a more appropriate venue for litigating these claims. *Aguinda v Texaco Inc* 142 F Supp 2d 534 (SDNY, 2001). A consolidated appeal from the judgments was rejected, and the judgment was confirmed by the Court of Appeals on 16 August 2002. *Aguinda v Texaco Inc* 303 F 3d 470 (2d Cir, 2002). For procedural details, see J Kimberling, ‘Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco’ (2006) 38 NYU Journal of International Law and Politics 413, at 474ff.

¹¹ *Maria Aguinda Salazar y otros v Chevron Corporation* Sentencia definitiva, Corte Provincial de Justicia Sucumbíos, Sala Unica de la Corte Provincial de Justicia de Sucumbíos (14 February 2011) File 2003-0002. The judgment was upheld by the appellate division of the same court in 2012, and by the Supreme Court of Ecuador in 2013. *Maria Aguinda Salazar y otros v Chevron Corporation* National Court of Justice, Civil and Corporate Division (12 November 2013) Judgement n 174-2012.

¹² This was not the first arbitration of this type that Chevron had brought against Ecuador. In 2006, Chevron already commenced proceedings under the same treaty, taking issue with the conduct of the Ecuadorean Government and the inaction of Ecuadorean courts in relation to several domestic court cases relating to certain contractual claims of TexPet, which had been pending in their dockets for more than fifteen years without any proper resolution. In 2010, the Arbitral Tribunal decided in Chevron’s favor, finding that Ecuador violated the applicable treaty. See *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Partial Award on the Merits)* (UNCITRAL, PCA Case No 34877, 30 March 2010). The Tribunal subsequently awarded Chevron almost 78 million USD in damages, and almost an additional 19 million USD in interest. See *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Final Award)* (UNCITRAL, PCA Case No 34877, 31 August 2011). Though not directly linked to the Lago Agrio litigation, the first arbitration proceedings were arguably deployed with a view to obtaining a strategic advantage that could later be used in the event of an adverse outcome in the Ecuadorian proceedings.

¹³ For the details of Chevron’s claims, see *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* Claimants’ Notice of Arbitration of 23 September 2009, available at <www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf> accessed 12 June 2018.

¹⁴ *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* (Second Partial Award on Track II) (UNCITRAL, PCA Case No 2009-23, 30 August 2018).

further remediation work did not exclude all types of environmental claims against TexPet,¹⁵ and that at least some of the complaints in the Lago Agrio litigation did not fall within the scope of the settlement agreements, and were thus not wholly barred under Ecuadorian law.¹⁶ By the time the award was delivered, a US District Court judge had already ruled in the RICO litigation that the Ecuadorean judgment in the Lago Agrio litigation was the product of fraud and racketeering activity, and enjoined the lawyers from collecting on it in US courts¹⁷ – even if not otherwise prohibiting them from having the Ecuadorean judgment recognized and enforced in third-countries.¹⁸

This saga provides a textbook example of how different dispute resolution mechanisms can concurrently be employed by opposing litigants in the context of complex transnational disputes.¹⁹ It provides an interesting example of how investor-State arbitration may be used as a way of responding to litigation before a forum deemed prejudicial to the interests of the foreign investor. The saga also raises several complicated questions pertaining to the interplay between domestic and international legal procedures – such as about the extent to which domestic courts can be used to enjoin litigants from pursuing arbitration proceedings,²⁰ or about the possibility of an investment arbitral tribunal to cause the suspension of the enforcement of local court judgment.²¹

For the purposes of the present inquiry, however, the importance of the saga lies elsewhere. Its pertinence is especially in the fact that it provides a good sketch of the types of issues that are likely to arise before investment tribunals in situations where the investor may concurrently be entangled in proceedings before domestic courts in relation to the same or closely related sets of facts. These issues can be arranged in the following sets of questions:

- In the *first* place, the Lago Agrio proceedings give rise to questions pertaining to the normative role of domestic judicial decisions in the context of international investment arbitration. For instance, are investment tribunals such as the one established under the

¹⁵ *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (First Partial Award on Track I)* (UNCITRAL, PCA Case No 2009-23, 17 September 2013). Specifically, the Tribunal found that the releases from liability under the settlement agreements did not extend to individuals' environmental claims for personal harm in respect of individuals' rights. It also found that those agreements had legal effect under Ecuadorian law precluding any 'diffuse' claim against Chevron by either Ecuador or individuals not claiming personal harm.

¹⁶ *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (Decision on Track 1B)* (UNCITRAL, PCA Case No 2009-23, 12 March 2015).

¹⁷ *Chevron Corporation v Donziger* 974 F Supp 2d 362 (SDNY 2014). The Court found that Donziger and his associates violated the RICO statute, as well as common law, by *inter alia* foisting fraudulent evidence on an Ecuadorian court, coercing Ecuadorian judges, illegally writing much if not all of the impugned Ecuadorian court's decision, as well as procuring the signature of an Ecuadorian judge in part by the promise of a 500,000 USD bribe. In 2016, the judgment was affirmed by the US Court of Appeals for the Second Circuit, which found that Donziger and his associates engaged in 'a parade of corrupt actions [...] including coercion, fraud and bribery'. *Chevron Corporation v Donziger* 833 F 3d 74, 126 (2d Cir 2016). On 19 June 2017, the US Supreme Court denied the petition for writ of certiorari (137 S Ct 2268 (2017)).

¹⁸ The Lago Agrio plaintiffs have tried to obtain recognition of their Ecuadorian judgment in Argentina, Brazil, and Canada. At the time of this writing, the attempts in Argentina and Brazil had already failed. The proceedings in Canada, whilst rejected at first instance, were still on appeal.

¹⁹ On this aspect of the saga, see eg MA Gomez, 'A Sour Battle in Lago Agrio and Beyond: The Metamorphosis of Transnational Litigation and the Protection of Collective Rights in Ecuador' (2015) 46 U Miami Inter-Am L Rev 153.

²⁰ For instance, the Lago Agrio plaintiffs, later joined by Ecuador, unsuccessfully petitioned the US courts to stay the arbitration proceedings. See *Republic of Ecuador v Chevron Corporation* Nos 09 Civ 9958, 11 10 Civ 316, 2010 WL 1028349 (SDNY March 16, 2010). The United States Court of Appeals for the Second Circuit affirmed the decision on 17 March 2011. *Republic of Ecuador v Chevron Corporation* Docket Nos 10-1020-cv (L) 10-1026 (Con).

²¹ By an Interim Order of 9 February 2011, later confirmed through several Interim Awards, the Arbitral Tribunal demanded from Ecuador 'to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case.' See *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (Order for Interim Measures)* (UNCITRAL PCA Case No 2009-239, 9 February 2011).

- US-Ecuador investment treaty bound by domestic court's findings on points of law and/or fact? If not, under what circumstances will investment tribunals nonetheless take them into account in deciding matters before them? Does it matter in that respect whether the findings are those of a court of the State that is also the respondent in an international arbitration (such as the Court of Justice of Sucumbíos)? Or are investment tribunals more inclined to take into account findings of third-state courts (such as the US District Court deciding the RICO litigation)? And ultimately, how are investment tribunals actually supposed to determine points of domestic law (such as those pertaining to the scope of the TexPet's release from liability pursuant to the settlement agreements)?
- In the *second* place, this case gives rise to the question what the yardstick is pursuant to which the conduct of domestic courts can be scrutinized by an international adjudicatory body when such conduct is itself perceived as injurious to the investor and its investment. In particular, what are the applicable standards through which an investment tribunal can determine the propriety of conduct of the domestic judiciary? To that end, how stringent those standards actually are? But also how intensively are investment tribunals actually expected to scrutinize the conduct of domestic courts?
 - In the *third* place, the saga eventually also elicits the question who is ultimately to decide particular matters. In particular, is it for the investment tribunal itself to decide the relevant contractual issues? Can such tribunal be barred from pronouncing itself on specific matters? Must it, for example, await that specific matters are decided first by domestic courts?

The three parts, in which this inquiry is divided, seek to respond to these sets of questions respectively.

1.3. The Method of the Inquiry

The approach in this study is largely an empirical one, in the sense that it seeks to determine what in fact occurs in the practice of international investment tribunals.²² The jurisprudence of the latter is ever growing, the total of known cases having reached the number of 817 by mid-2017.²³ This notwithstanding, the analysis does not adopt a particular sampling method, but attempts to be a comprehensive one, in the sense that it seeks to study all relevant arbitral decisions,²⁴ regardless of their legal basis, or the forum administering them. Thus, while the large majority of investment arbitrations today are brought under bilateral- and other types of investment treaties, the analysis includes contract-based investment arbitrations, as well as arbitrations commenced on the basis of domestic investment statutes. Furthermore, while around two-thirds of known cases today were filed before the International Centre for Settlement of Investment Disputes (ICSID), the analysis is not limited to decisions rendered under the ICSID Convention or the ICSID Additional Facility Rules. It equally includes those rendered in arbitrations conducted pursuant Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), under the auspices of the Arbitration Institute of the Stockholm Chamber of

²² cf Nollkaemper (n 6), 302.

²³ UNCTAD, 'Special Update on Investor-State Dispute Settlement: Facts And Figures' (2017) No 3 IIA Issue Note (UNCTAD/DIAE/PCB/2017/7) <http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf> accessed 12 June 2018.

²⁴ The 'relevance' is determined in each case by the legal issue considered. For example, some cases are relevant because some of the claims related to alleged wrongdoings on the part of domestic courts. Others are relevant because of particular pronouncements on the role of domestic jurisprudence in determining points of applicable domestic law. On many issues, the 'leading cases'/'landmark decisions' approach is followed, in that greater consideration is given to decisions that are cited especially often.

Commerce (SCC), and the London Court of International Arbitration (LCIA), among other facilities. The study attempts to be exhaustive up to the end of 2017.²⁵

The orientation of this study is expository, in the sense that it examines the practice of investment tribunals with a view to determining the main principles that guide these tribunals in their treatment of domestic courts and their decisions. To some extent, it is also evaluative, in the sense that it attempts to provide an assessment of the investment tribunals' practice, not only from the point of view of internal jurisprudential coherence, but also in comparison to the practice of other international adjudicatory bodies, both past and present ones.²⁶ In spite of its moderately comparative orientation, the inquiry does not otherwise pursue comparative law methods more broadly. In that sense, it does not systematically examine how legal systems other than that of international law deal with the conduct or decisions of "foreign" adjudicatory bodies; even if, admittedly, it does sporadically venture into examining how certain matters are dealt with in other types of arbitration, especially in international commercial arbitration.

The examination of the investment tribunals' practice is premised on what has sometimes been called a "rules-based" approach to international law, in the sense that it is focused on discerning the existence of legal rules as they are, in their concrete terms, and not as they should be.²⁷ Pursuant to Article 38(1) of the ICJ Statute, decisions of adjudicatory bodies may well constitute only subsidiary sources of international law. In the context of investment arbitration, however, arbitral practice plays a prominent role in the ascertainment and development of the law: not only because of the often indeterminate nature of the norms that investment tribunals are bound to apply in determining investment disputes, but also in the view of the many discretionary powers that they enjoy in relation to procedural issues. The focus on the principles that are followed, and the rules that are applied in relation to domestic courts in the context of investment arbitration seems therefore particularly warranted. This not to say that the inquiry may not sporadically engage in certain policy considerations as to the wisdom, or lack thereof, of particular approaches followed in practice. However, it is beyond the scope of the present study to examine more generally how things can be improved.

1.4. The Analytical Tools Employed and Their Limitations

Throughout the present inquiry, reference will frequently be made to certain conceptual tools that are customarily employed in studying the relationship between different adjudicatory bodies in general, as well as the relationship between international and domestic courts in particular. Three types of such tools appear particularly relevant, and therefore require some exposition already at the initial stage. Tools that provide ways to conceptualize the relationship between the *different legal orders* in which both types of adjudicatory bodies operate (1.4.1); tools that provide ways for *regulating interactions* between such bodies (1.4.2.); and tools that can be applied in the *process of reviewing* the decisions of one type of bodies by the other ones (1.4.3).

1.4.1. Monism, Dualism and the Principle of Supremacy of International Law

The positions that investment tribunals have adopted in their practice towards domestic courts and their decisions appears to have frequently hinged on their general understanding, and views on the relationship between international and domestic law. The practice of investment

²⁵ Some decisions rendered prior to that may nonetheless have been excluded from the analysis, as awards in investment arbitration are frequently released to the public with some delay.

²⁶ On the distinction between expository and evaluative scholarship, see R Cryer et al, *Research methodologies in EU and international law* (Hart 2011) 9-10.

²⁷ For a similar approach, see K Parlett, *The Individual in the International Legal System* (CUP 2011) 7-9.

arbitration is not unique in this sense. Conceptual constructs about the nature of this relationship have also generally shaped the way in which courts and jurists approached the relations between international and domestic adjudicatory bodies. Obviously, these have ultimately influenced their views on whether or not these relations had to be regulated or managed.²⁸ Two questions have been fundamental in this respect: in the first place, whether the relationship between international and domestic law can (or should) be considered in terms of a *divide* or in terms of a *continuum* (1); and in the second place, which of the bodies of law (or legal orders) should take *priority* (2).

1.4.1.1. *Monism and Dualism*

The former question has traditionally been approached through the lenses of the “dualist” and “monist” schools of thought. According to the dualist school, international and domestic law remain separate and largely autonomous legal systems, each of which governing relations between different subjects (one between states, the other between individuals with each other and state organs), having distinct fields of application (one in the international sphere, the other in the domestic), having different sources of their rules (one based on State consent, the other on the domestic legislative procedure), and therefore each of which supreme in its own sphere.²⁹ According to the monist school, in contrast, international and domestic law are essentially part of one and the same legal system, of which all types of law are simply branches, with international law assuming a superior position within that order.³⁰

The doctrinal discussions on monism and dualism have somewhat lost on relevance in the course of the twentieth century, as preference has been given to practice over theory.³¹ But this is not to say that both theoretical models cannot provide at least a starting point from which to proceed the inquiry.³² Indeed, it seems that a certain level of theoretical discussion as to whether international and domestic law are part and parcel of the same juridical reality or quite distinct normative realities cannot be avoided if one is to study the relationship between domestic

²⁸ See on this, Y Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP 2007) 78 ff.

²⁹ The leading exponents of the dualist view were Triepel, Strupp and Anzilotti (see eg H Triepel, *Völkerrecht und Landesrecht* (1899) and *ibid*, ‘Les rapports entre le droit interne et le droit international’ (1923) 1 *Recueil des cours* 77; K Strupp, ‘Les règles générales du droit de la paix’ (1934-I) 47 *Recueil des cours* 259, 389-418; and D Anzilotti, *Corso di diritto internazionale* vol I (3rd edn, 1928) 51ff, later followed by various representatives of the ‘Italian school’ (eg Ago, Arrangio-Ruiz)) and British writer Oppenheim (see L Oppenheim, *International Law: A Treatise*, vol 1 (1905) 25-29).

³⁰ The major protagonists defending the monist view in this debate were the representatives of the ‘Austrian school’, namely Kelsen, Kunz and Verdross (see eg H Kelsen, ‘Les rapports de système entre le droit interne et le droit international public’ (1927) 14 *Recueil des Cours* 227, and *ibid*, *Principles of International Law* (2nd edn, 1966); JL Kunz, ‘On the Theoretical Basis of the Law of Nations’ (1924) 10 *Transactions of the Grotius Society* 115; A Verdross, ‘Le fondement du droit international’ (1927 I) 16 *Recueil des cours* 247, and *ibid*, ‘Règles générales du droit international de la paix’ (1929-V) 30 *Recueil des cours* 271), as well as Scelle (G Scelle, ‘Règles générales du droit de la paix’ (1933-IV) 46 *Recueil des cours* 327, and *ibid*, *Precis de droit des gens: principes et systématique* (Recueil Sirey 1932-34)) the monist-naturalist scholar Lauterpacht (H Lauterpacht, ‘Règles générales du droit de la paix’ (1937-IV) 62 *Recueil des cours* 95, at 75-80) and American authors, such as Brierly and Starke (JG Starke, ‘Monism and Dualism in the Theory of International Law’ (1936) 17 *British Yearbook of International Law* 66). There is also a monist theory which posited domestic law as the superior among the two, but this will be left outside the present discussion. See on this eg A Decencière-Ferrandière, ‘Considérations sur le droit international dans ses rapports avec le droit de l’Etat’ (1933) 40 *RGDIP* 45.

³¹ See eg I Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 33-34, suggesting that the logical consequences of both theories conflict with the practice of international and national organs; or RY Jennings and AD Watts, *Oppenheim’s International Law*, vol 1 (9th edn, OUP 1992) 54, arguing that ‘the main practical questions which arise... are answered not by reference to doctrine but by looking at what the rules of various national laws and of international law prescribe’.

³² As appropriately noted in a recent contribution on this topic, ‘[w]hatever the pitfalls of the theoretical conceptions of monism and dualism, at least they provided observers with a perspective on how to understand the relationship between international and national law and, in their normative dimensions, with a view on the direction in which that relationship should evolve.’ J Nijman and A Nollkaemper, ‘Introduction’ in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP 2007) 2-3.

courts and international investment tribunals. Namely, according to dualism, a rule of domestic law – and by extension, a domestic judgement – cannot purport to create normative effects in international law (and *vice versa*), since each of the systems is self-contained and therefore recognizes as existing only those rules that are part of the system (unless, however, a rule of the system itself refers to an external rule, which then becomes relevant for the system).³³ Monism, on the other hand, leaves open the possibility for a rule of domestic law (and so, too, domestic judgments) to have normative effects on the international plane. By treating domestic and international law as part of the same legal system, it does not automatically deny domestic law the character of a legal rule in the international sphere (but classifies it in terms of a hierarchical relationship).

International adjudicatory bodies seem to have often embraced a dualist attitude towards domestic law and domestic courts in their judgments.³⁴ In international jurisprudence, it is thus not difficult to find pronouncements to the effect that legal acts originating in the domestic legal order will necessarily lack normative effect in the sphere of international law. According to the well-known statement of the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia* (1926), “[f]rom the standpoint of International Law and the Court which is its organ, municipal laws are *merely facts* which express the will and constitute the activities of States, in the same manner as do *legal decisions* or administrative measures.”³⁵ Once domestic judgments are thus treated as *facts*, they cannot possibly generate effects in the international legal order. It is debatable whether the PCIJ was actually consistent in its treatment of domestic laws as facts,³⁶ or generally in its adherence to the dualist precepts of separation between legal orders.³⁷ But it has been precisely through denying them legal normativity that the PCIJ (as well as other international adjudicatory bodies) were able to ignore the pronouncements of domestic courts. Thus, in the jurisdictional phase of the same *Certain German Interests in Polish Upper Silesia* case, the PCIJ argued that a Polish court and itself were “not courts of the same character” and thus found no reason why it could not entertain an application in relation to a Germany company, where the

³³ For a discussion regarding key theoretical assumptions adhered to by the dualist school, see G Arangio-Ruiz, ‘International Law and Interindividual Law’ in *ibid*, 15–51.

³⁴ Shany (n 28), 81-82.

³⁵ Case concerning *Certain German Interests in Polish Upper Silesia* (Germany v Poland) (Merits) PCIJ (ser A) No 7 (1926), 19 (emphasis added). For adherence to the PCIJ’s proposition, see *Georges Pinson (France) v United Mexican States* (V UNRIAA 327, 19 October 1928) 393; and *The ‘Monte Confurco’ Case* (Seychelles v France) (Judgment) (ITLOS, Application for Prompt Release, 18 December 2000) [72] (‘When determining whether the assessment made by the detaining State in fixing the bond or other security is reasonable, the Tribunal will treat the laws of the detaining State and the decisions of its courts as relevant facts.’).

³⁶ Indeed, in several other cases, the PCIJ interpreted and applied domestic laws as legal rules proper, and its findings on points of domestic law had direct consequences in the international proceedings. See eg *German Settlers in Poland (Advisory Opinion)* PCIJ (ser B) No 6 (10 Sept 1923), 29-34, where the PCIJ did not find any impediments to closely examine the German Civil Code and the Code of Civil Procedure to conclude that the German settlers acquired a valid right to those lands (*jus ad rem*), which was enforceable by legal proceedings; *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Péter Pázmány University v. The State of Czechoslovakia)* (Judgment) [1933] PCIJ (ser A/B) No 61, 228-38, where the PCIJ did not regard itself debarred from determining for itself whether the university enjoyed legal personality under Hungarian law and whether or not this legal personality was separate from that of the entity known as the University Fund; or *Lighthouses case between France and Greece (France v Greece)* (Judgment) PCIJ (ser A/B) No 62 (17 March 1934), 21-24, where the PCIJ had no constraints to pronouncing that a concessionary contract between the Ottoman Government and a French firm had been duly entered into, after having satisfied itself that the contract had been validly made in accordance with Turkish law concerning public utility concessions and the requirements of the Ottoman Constitution. See generally CW Jenks, ‘The Interpretation and Application of Municipal Law by the Permanent Court of International Justice’ (1938) 19 *British Year Book of International Law* 67.

³⁷ See in this regard also K Marek, ‘Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour permanente de justice internationale’ (1962) 33 *Revue Générale de Droit International Public* 260, demonstrating that the dualist standpoint has never been adhered to with consistency in the PCIJ jurisprudence.

latter had a parallel suit with the same object pending before that court.³⁸ Similar arguments were occasionally adopted by other international adjudicatory bodies.³⁹

Even from the perspective of dualism, however, the question can still be asked whether the normative reach of domestic legal acts is only limited with respect to the international claim before the international adjudicatory body, or whether such limitation is one that applies in general. In the view of the Chamber of the International Court of Justice in the *Eletronica Sicula (ELSI)* case (1989), for example, only the former would seem to be the case. Based on its famous proposition that “[c]ompliance with municipal law and compliance with the provisions of a treaty are different questions” and hence “[w]hat is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision”,⁴⁰ the Chamber thus concluded that it did not “follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law”.⁴¹ Elsewhere, however the Chamber conceded that, “[w]here the determination of a question of municipal law is essential to the Court’s decision in a case, the Court will have to weigh the jurisprudence of the municipal courts”.⁴²

In the context of investment arbitration, one may wonder whether the traditional dualist perspective, at least one premised on the complete closeness of legal systems, is of much practical value. The rationale for the treatment by some international courts of domestic laws as facts can chiefly be sought in the fact that many of them are limited in their competence to apply other sources of rules than international law. Many investment tribunals, in contrast, are competent to directly apply domestic law, alongside international law, wherever necessary. Furthermore, with its theory of separateness, dualism does not appear particularly useful as a method for ordering and regulating the relations between international courts and tribunals on issues where international law itself makes reference to domestic law.⁴³

1.4.1.2. *The Principle of Supremacy of International Law*

Closely related to the doctrinal debates on monism and dualism is the question of supremacy: which of the two legal orders is to take precedence over the other in the case of conflict. At least insofar as the international sphere is concerned,⁴⁴ the supremacy of international law over

³⁸ Case concerning Certain German Interests in Polish Upper Silesia (Germany v Poland) (Preliminary Objections) PCIJ (ser A) No 6 (1925), 20.

³⁹ See eg *Affaire des chemins de fer Bužau-Neboiași (Allemagne contre Roumanie)* (III UNRIAA 1827, 7 July 1939) at 1836, rejecting the argument that the Romanian Government could avoid an international obligation towards the German Government by invoking a judgment rendered by a Romanian court, noting that “[i]n general, national and international decisions move in different spheres. With regard to foreign States, national court decisions are less judgments than mere manifestations of state activity, similar in principle to those of any other organ of the State. It is in the internal order only that the authority of *res judicata* by a national court finds its application.”

⁴⁰ *Eletronica Sicula SpA (ELSI)* (United States of America v Italy) (Judgment) [1989] ICJ Rep 15, [73].

⁴¹ *ibid* [124].

⁴² *ibid* [62].

⁴³ See eg K Hobér, ‘Res Judicata and Lis Pendens in International Arbitration’ (2013) 366 *Recueil des cours* 99, at 389, questioning the appropriateness of treating domestic law as facts in the context where international courts and tribunals interpret and apply domestic law. For a broader critique, see further A Paulus, ‘The Emergence of the International Community and the Divide Between International and Domestic Law,’ in Nijman and Nollkaemper (n 32) 216, at 217, who claims that ‘the radical opposition between monism and dualism fails to grasp the (post)modern plurality of legal orders at the international level and the complicated inter-connectedness between “the international” and “the domestic”’.

⁴⁴ The supremacy of international law can be relative (ie limited to the international sphere, as the dualist claim it to be) or absolute (ie applicable also in the domestic sphere, as the monist claim it to be). There is at least agreement that in the international legal order international law prevails over a State’s domestic law. cf A Schaus, ‘Article 27. Convention of 1969’ in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) at 700-01.

municipal law is now a generally established principle.⁴⁵ There is an abundance of statements by international courts and tribunals to the effect that a State may not rely upon its constitution and domestic laws as justification for its failure to perform a treaty and other international obligations,⁴⁶ nor that it can plead deficiencies of its national law as a ground for the non-observance of its international obligations.⁴⁷

The argument of supremacy of international law, as a particular element in the dualism/monism debate, has provided another ground for refusing to accord normative relevance to domestic judicial outcomes in international proceedings. Especially renowned in this regard is the PCIJ's dictum in the *Factory at Chorzów* case (1928) that "attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court [...] is impossible"⁴⁸ – a proposition through which the Permanent Court rejected in that case the possibility that the invalidation by a Polish court of the title to property could have removed the very grounds on which a claim of expropriation under international law had been based. Yet, the propensity of international adjudicatory bodies to claim hierarchical superiority as a way to disregarding domestic judicial procedures or outcomes has stretched beyond cases where claims grounded in international law were contingent on domestic law. International tribunals have asserted hierarchical superiority also in situations where the claims before them were otherwise grounded in domestic law.⁴⁹

⁴⁵ In most general terms, the ICJ affirmed 'the fundamental principle of international law that international law prevails over domestic law' in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12 [57]. See also *George Pinson case* (n 35) at 393 ('il est incontestable et incontesté que le droit international est supérieur au droit 'interne').

⁴⁶ See eg *SS 'Wimbledon'* (United Kingdom v Germany) (Judgment) PCIJ (ser A) No 1 (17 Aug 1923), 29; *Greco-Bulgarian 'Communities'* (Advisory Opinion) PCIJ (ser B) No 17 (31 July 1930), 32; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) PCIJ (ser A/B) No 44 (4 Feb 1932), 24; *Free Zones of Upper Savoy and the District of Gex* (Judgment) PCIJ (ser A/B) No 46 (7 June 1932), 167; *Fisheries case* (United Kingdom v Norway) (Judgment) [1951] ICJ Rep 116 at 132; *Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v. Sweden) (Judgment) [1958] ICJ Rep 55, at 67.

⁴⁷ This principle was endorsed by judicial decision as long ago as the arbitral award in *Alabama Claims Arbitration* (Award) (14 September 1872) reproduced in JB Moore (ed), *History and Digest of the International Arbitrations to which the United States has been a Party* (GPO 1898) 656 ('whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed'). See also *Exchange of Greek and Turkish Populations* (Advisory Opinion) PCIJ (ser B) No 10 (21 Feb 1925), 20; and *Jurisdiction of the Courts of Danzig* (Advisory Opinion) PCIJ (ser B), No 15 (3 March 1928), 26-27. In so far as treaties are concerned, art 27 of the Vienna Convention on the Law of Treaties (1969) expressly provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. The ICJ confirmed that this article reflects a well-established rule of customary law. *Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep 14, [121]. In the context of the law of state responsibility, the principle is also well established that the characterization of a given act as internationally wrongful is not dependent of its characterization as lawful by internal law of the state concerned. Article 3 of Articles on State Responsibility (ASR). *Reparation for Injuries suffered in the service of the UN* (Advisory Opinion) [1949] ICJ Rep 174, 180 ('[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible ... the Member cannot contend that this obligation is governed by municipal law').

⁴⁸ *Case concerning the Factory at Chorzów* (Germany v Poland) (Merits) [1928] PCIJ (ser A) No 17, 33-34.

⁴⁹ Supremacy was either asserted in the sense of supremacy of international adjudicatory bodies over domestic ones, or in the sense of prevalence of international decisions over domestic ones. For the former argument, see e.g. *S.A.I.M.I. Claim* (13 November 1951), (1951) 18 ILR 471 ('an international tribunal set up by a treaty, has supremacy over municipal courts. If a municipal court is seized of this case, it is necessary, in order that the international tribunal may hear and decide the claim, that the claimants should discontinue the proceedings in the municipal court. '); and similarly, *Guillet-Jacquemin Claim* (29 August 1949), (1951) 18 ILR 403; and *Ottos Claim* (18 September 1950) (1951) ILR 435. For the latter argument, see e.g. *Nicolas Soqaci v. Austria et al.* (Decision of 14 May 1927), reproduced in *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, Vol. VII (Paris: Recueil Sirey, 1928), 785, at 791; or *E-Systems, Inc., Claimant, v. The Government of the Islamic Republic of Iran, Bank Melli Iran, Respondents. E-System, Inc. v. Iran* (Decision of 4 February 1983), (1983) Iran-USCTR 2, 51. One must not confound cases where supremacy has been asserted in a general sense with situations where the international tribunal had been vested with exclusivity over certain claims by means of the jurisdiction-conferring

But as in the case of monism and dualism, one may wonder whether the principle of supremacy can validly be employed as an ordering principle that could effectively govern the interactions between domestic courts and investment tribunals.⁵⁰ At the very least, it is debatable whether a claim to superiority premised on the “international” nature of the adjudicatory body can namely be made on the part of investment tribunals, at least with the same force as in the case of other international adjudicatory bodies. It may be true that the majority of investment tribunals today operate *on the basis of* international investment treaties (in the sense that the arbitration agreement in most cases originates from the investor’s acceptance of the offer to arbitrate that the host State has expressed in one such applicable treaty). However, this fact alone does not make such tribunals international in nature,⁵¹ since the agreement to arbitrate – from which the investment tribunals in each case derive their adjudicatory powers – remains essentially a contractual commitment entered into between a State and a private party.⁵²

More significant, on the other hand, is the fact that at least some of these investment tribunals operate within the framework of a stand-alone regime that has itself been created by a treaty – namely, the ICSID Convention. Apart from deriving their existences from a treaty, ICSID tribunals in fact also operate in a way that is substantially delocalized (i.e., they remain isolated from the courts of the seat of the arbitration, and their applicable *lex arbitri* is international law⁵³). Whether or not this is sufficient to characterize ICSID tribunals as international tribunals proper eventually depends on one’s definition of such tribunals.⁵⁴ But these features certainly distinguish them from non-ICSID investment tribunals, which remain subject to the control of the courts of the seat of arbitration, and whose awards depend for their enforcement on the New York Convention.⁵⁵

Even if one accepts the international nature of ICSID investment tribunals, it is still open to discussion whether the latter can really be said to operate in a hierarchical relationship towards domestic courts. In many investment treaties, recourse to ICSID arbitration is namely treated as a functional alternative to litigation of domestic courts, which can also be forfeited in the event that the investor chooses to bring its dispute before domestic courts. In the presence of such fork-

instrument. The latter has been the case in the *Sehryn Case (Interlocutory)* (1903) IX UNRIAA 380, which – though often referred to in the jurisprudence of investment tribunals – is therefore inapposite as a general precedent.

⁵⁰ See e.g. A Crivellaro, ‘Consolidation of Arbitral and Court Proceedings in Investment Disputes’, (2005) 4(3) LPICT 371, suggesting at 389-394 that ICSID tribunals are supra-national forums that, as such, enjoy primacy over internal proceedings.

⁵¹ For a general discussion, see HE Kjos, *Applicable Law in Investor-State Arbitration* (OUP 2013) 44-46, who also convincingly rejects the application of international law as a defining characteristic of an international tribunal.

⁵² Cf Amerasinghe, *Jurisdiction of International Tribunals* (Brill 2003) 11, explaining that ‘arbitral tribunals created by the consensual acts of a state, on the one hand, and a foreign private individual (or even a national of the state), on the other, are not international tribunals, though they may conveniently be described as “transnational” tribunals.’ For a similar view, see also G Petrochilos, *Procedural law in international arbitration* (OUP, 2004), 247.

⁵³ See Kjos (n 51), 53-59. But see also O Chukwumerije, ‘International Law and Article 42 of the ICSID Convention’ (1997) 14 *Journal of International Arbitration* 79, at 82, who argues that it is not international law *per se* that regulates the conduct of ICSID tribunals, but rather the ICSID Convention and the regulations and rules adopted pursuant thereto, and thus rejects the argument of international law being generally the *lex fori* of ICSID tribunals.

⁵⁴ See Amerasinghe (n 52), at 11, who considers ICSID tribunals to be international tribunals because of the international source of their creation; or RP Alford, ‘Federal Courts, International Tribunals, and the Continuum of Deference’ (2003) 43 *Virginia Journal of International Law* 675, at 687-99, treating ICSID tribunals as international tribunals on the basis of US domestic practice. cf Kjos (n 51), 53-59, who goes only as far as to treat ICSID tribunals as ‘internationalized’. cf also J Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications 1978) at 21; Chukwumerije (n 53), at 82; or V Heiskanen, ‘Forbidding *Depeçage*: Law Governing Investment Treaty Arbitration’ (2009) 32 *Suffolk Transnat’l L Rev* 367, at 399, who consider them as quasi-international or transnational tribunals.

⁵⁵ See generally JJ van Haersolte-van Hof and EV Koppe, ‘International arbitration and the *lex arbitri*’ (2015) 31 *Arbitration International* 27, at 54-61.

in-the-road provisions,⁵⁶ claiming supremacy based on the tribunal's "international" nature alone remains somewhat questionable.

1.4.2. *Res Judicata*, *Lis Pendens* and other Jurisdiction/Conflict-Regulating Principles

Next, it is appropriate to consider two specific principles – that of *res judicata* and *lis pendens* – which, together with related judicial doctrines and techniques, are customarily applied to regulating cases where the exercise of adjudicatory authority by different dispute settlement bodies over aspects of the same, or closely related, disputes run into conflict with each other.⁵⁷ These principles are of interest to the present inquiry, not from the point of view of their potential for regulating jurisdictional interactions between domestic courts and investment tribunals in general, but because of the justification that they may provide for investment tribunals to ignore domestic judicial procedures or their outcomes.

1.4.2.1. *Res Judicata* (finality of adjudication)

The doctrine of *res judicata* – literally translated from Latin as “a thing adjudicated” – refers to the principle that an earlier and final decision by an adjudicative body (be it a standing court or an arbitration tribunal, be it a domestic or an international one) ought to be conclusive as between the parties in subsequent proceedings on the same matter. The principle is of early origin and application, and common as it is to many different legal cultures and traditions, it has frequently been considered as a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute.⁵⁸ Underpinning the principle are both a public and a private rationale.⁵⁹ The principle is primarily one of public policy, to the extent that it seeks to prevent unnecessary waste of judicial resources by foreclosing re-litigation of already settled cases, and that it fosters legal certainty by precluding future judgments from contradicting earlier ones.⁶⁰ At the same time, it is undoubtedly also in the private interest of individual litigants to be protected from the annoyance of repeated litigation on the same matters.⁶¹

⁵⁶ On the scope and effect of these provisions, see Chapter 10.

⁵⁷ See eg A Reinisch, ‘The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes’ (2004) 3(1) LPICT 37–77; C MacLachlan, ‘*Lis pendens*’ in *international litigation* (Nijhoff 2009); or K Hobér, ‘*Res Judicata* and *Lis Pendens* in International Arbitration’ (2013) 366 *Recueil des Cours* 99–405. See also ‘ILA Interim Report on *Res Judicata* and Arbitration’ reproduced in (2009) 25(1) *Arbitration International* 35.

⁵⁸ See eg ICJ, *Effect of awards of compensation made by the UN Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47, at 53 (referring to ‘a well-established and generally recognized principle of law’); and generally B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953), at 336. Sometimes, the principle is also regarded as ‘a principle of international law’ (*Trail smelter case (United States/Canada)* (1938/1941) 3 UNRIAA 1905, at 1951), or principle of customary international law (see Y Shany, *The Competing Jurisdiction of International Courts and Tribunals* (OUP 2003), at 245).

⁵⁹ In domestic jurisprudence, the rationale for the doctrine is often sought in the Latin maxims of *interest reipublicae ut sit finis litium* and *nemo debet bis vexari pro una et eadem causa*. The same rationales have also been considered applicable in the transnational and international contexts. See eg Hobér (n 43), 120. See also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, at [115], emphasizing that two purposes, one general and one specific, underlie the principle of *res judicata*: first, the stability of legal relations which requires that litigation come to an end; and second, the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.

⁶⁰ See R von Moschzisker, ‘*Res Judicata*’ (1928–29) 38 *Yale L J* 299, at 300, who also points to a certain resemblance on that ground between the doctrines of *res judicata* and *stare decisis*.

⁶¹ On the public and private rationales of the doctrine, see further, E Harnon, ‘*Res Judicata* and Identity of Actions: Law and Rationale’ (1966) 1 *Isr L Rev* 539, at 542–47, otherwise submitting that the public interest should be the main consideration underlying the doctrine of *res judicata*.

The principle of *res judicata* is understood to generate a two-fold effect.⁶² On the one hand, the fact that a particular decision is qualified as *res judicata* implies that it has obtained binding effects between the parties and that, consequently, will have to be implemented (positive effect of *res judicata*). In this sense, the term *res judicata* is simply a shorthand for saying that a decision produces normative effects; i.e., that it has shaped a new legal situation between the litigants, which are now under a legal obligations to comply with it (*res judicata facit jus inter partes*).⁶³ This understanding is of relevance also for the purposes of the present analysis, inasmuch as it raises the question about the legal effects of a domestic judicial decision on subsequent litigation before an international investment tribunal – particularly if the principle of *res judicata* could be understood to apply not only as between litigants, but also as between courts.⁶⁴ The converse effect of *res judicata*, on the other hand, is that it forecloses renewal of an action on the same subject matter (negative effect of *res judicata*). Understood in this latter sense, *res judicata* becomes synonymous with the concept of preclusion and operates in the same way as estoppel.⁶⁵

A distinction is sometimes made between different forms of preclusion, which is why the principle of *res judicata* also differs in its application as between legal systems. In most legal systems, the principle is chiefly considered to bar further litigation on an event which was the subject of a previous legal cause of action that has already been finally decided (claim preclusion/direct estoppel). In some judicial systems, the principle of *res judicata* is also considered to bar re-consideration of issues of fact or law that have already been determined in earlier proceedings between the same parties, even where the subsequent suit concerns a different cause of action than the initial one (issue preclusion/collateral estoppel). In some situations, the principle even bars re-consideration of issues that could have been raised in the earlier proceedings but were not raised (constructive estoppel).⁶⁶ In the practice of international courts and tribunals, the principle appears to have been applied in all three senses.⁶⁷ Some of these distinctions are not without relevance for the purposes of the present inquiry. Used in the sense of claim preclusion, the principle of *res judicata* raises the question whether – and if so, under what circumstances – a domestic judicial decision could have the effect of precluding an investment tribunal to reconsider a particular claim. (This matter will be considered more closely in Part III of the present inquiry). Used in the narrower sense of issue preclusion, in contrast, the principle of *res judicata* raises the question whether a domestic judicial decision could bar an investment

⁶² This distinction is based upon that identified by FL Keller in *Ueber Litis Contestation und Urtheil nach classischem römischem Recht* (Gessner 1827) 197 ff, as per RW Millar, 'The Premises of the Judgment as *Res Judicata* in Continental and Anglo-American Law' (1940-41) 39 Mich L Rev 1, at 5.

⁶³ See eg PCIJ's Advisory Opinion on Polish Postal Service in Danzig (Poland v High Commissioner of the League of Nations and Free City of Danzig) (Advisory Opinion) [1925] PCIJ (ser B) No 11, at 30, applying the concept of *res judicata* in the sense of a judgment having 'binding force'; or Société Commerciale de Belgique (Belgium v Greece) (Judgment) PCIJ (ser A/B) No 78 (15 June 1939), 175 ('Recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of that award are definitive and obligatory.')

⁶⁴ In some domestic legal systems, particularly adversarial ones, *res judicata* is listed as an affirmative defense and must be specifically pled by defendants. Adopting such a relative principle of *res judicata* are many common law countries (as per Harmon (n 61), 546). In other systems, particularly those of the civil law tradition, the courts might have to take account of a former judgment even on their own initiative. The principle was applied in such absolute sense in Roman procedural law (see eg Engelmann, *A History of Continental Civil Procedure* (Boston 1927) 365), and continues to be applied in Germany, for example. See generally RW Millar (n 62), at 7-8.

⁶⁵ On the notion of preclusion, see further AD Vestal, 'Rationale of Preclusion' (1964-1965) 9 St Louis U LJ 29.

⁶⁶ On this distinction and its historical origins, see 'Developments in the Law – *Res Judicata*' (1951-52) 65 Harv L Rev 818, at 820-21.

⁶⁷ See eg *The Pious Fund Case (United States of America v Mexico)* (IX UNRIAA 1, 14 October 1902) at 13 (instance of claim preclusion); Request for Interpretation of the Judgment of 11 June 1998 in the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections) (Nigeria v Cameroon) (Judgment)* [1999] ICJ Rep 31, [16] (instance of issue preclusion); or *Delgado Case* (1991) Moore's Arbitrations, vol 3, 2196, at 2199 (instance of constructive estoppel).

tribunal from reconsidering particular questions, particularly where there has been a judicial determination on a parties' legal relationship that is of relevance to the claim before the investment tribunal. (This aspect of *res judicata* will be further considered in Part I of the inquiry that follows).

The application of the principle of *res judicata* is subject to specific conditions. In order for a particular previous decision to give rise to claim preclusion, most legal systems require there to be: (1) identity of parties, (2) identity of prayers for relief (*petita*), and (3) identity of the legal grounds on which the claim is based (*causa petendi*).⁶⁸ Where this so-called test of "triple-identity" is not satisfied, the principle of *res judicata* is considered to find no application. Legal systems, however, diverge considerably as to how the three prongs of that test are applied in practice. While many civil legal systems adhere to very formal(istic) approaches to determining identity, common law jurisdictions, and especially the US courts, are instead rather flexible in the application of the triple-identity test.⁶⁹ In the international context, the practice is not entirely uniform as to how stringently the different prongs of the test are to be applied. In the typical configuration of proceedings before, respectively, domestic courts and international tribunals, the triple-identity test itself may frequently prevent decisions originating in the domestic legal order to generate effects on the international plane. This may not necessarily be because *res judicata* would not actually be capable of applying in vertical jurisdictional interactions, as some have argued,⁷⁰ but largely because domestic courts and international tribunals generally apply different bodies of law and adjudicate disputes between different litigants, meaning that the conditions of the triple-identity test will rarely, if ever be met.

While the triple-identity test will frequently bar claim preclusion, such test will usually not be an impediment to issue preclusion. Hence, in situations where international adjudicatory bodies are called upon to apply both domestic and international law – such as in the case of investment arbitration – the principle of *res judicata*, when applied in the narrower sense of issue preclusion, may therefore nonetheless play a role. The question, however, is under what circumstances this will be the case. First, it is necessary to bear in mind that, in the practice of international courts and tribunals, the operation of *res judicata* has been considered to be restricted to points directly determined in the judgment or award, and not necessarily extending to the reasons underlying the particular decision.⁷¹ Second, international courts and tribunals appeared

⁶⁸ In international jurisprudence, the classic exposition of these three essentials of the doctrine can be found in Judge Anzilotti's dissenting opinion in *Interpretation of Judgments Nos 7 and 8 (Factory at Chorzów)* [1927] PCIJ (ser A) No 13, at 23. See also *Trail Smelter* (n 58), 1952, confirming the traditional elements for identification being the parties, object, and cause. Sometimes, the question of *petitum* and *causa petendi* are commonly considered under the notion of identity of matter. Cf *Pious Fund Case* (n 67) at 13; or *Polish Postal Service in Danzig* (n 63) at 30.

⁶⁹ For a discussion, see P Martinez-Fraga and HJ Samra, 'The Role of Precedent in Defining *Res Judicata* in Investor - State Arbitration' (2012) 32 *Northwestern J Int'l Law & Bus* 419, at 423-31.

⁷⁰ See eg Brownlie, *Principles of Public International Law* (6th edn, Clarendon Press 2003) at 50 ('There is no effect of *res judicata* from the decision of a municipal court so far as an international jurisdiction is concerned ...'). Following in Brownlie's footsteps also Reinisch (n 57), at 51 ('*Res judicata* and *lis pendens* do not apply, however, with regard to proceedings before national courts, on the one hand, and international tribunals, on the other hand. Therefore, international dispute settlement organs are also not considered to be bound by decisions of national courts or tribunals.')

⁷¹ See eg *Company General of the Orinoco Case (France-Venezuela)* (10 UNRIAA 184, 1905) at 276 ('The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.'). *Polish Postal Service in Danzig* (n 63) at 28-30; or *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (Interpretative Decision)* (XVIII UNRIAA 3, 14 March 1978) at 294, [28]. For the endorsement of the narrower test in the context of investment arbitration, see eg *AMCO v Indonesia (Resubmitted)* 89 ILR 552, at 560; or *Waste Management v Mexico (II) (Decision on Mexico's Preliminary Objection concerning the Previous Proceedings)* (ICSID Case No ARB(AF)/00/3, 26 June 2002) [39]-[46]. For the contrary proposition, see *Pious Fund Case* (n 67), at 12-13 ('all parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and [...] they all serve to render precise

prepared to accord the force of *res judicata* to an incidental decision on a preliminary point, which was not the subject of the main claim, but only in the event that the finding on such preliminary point constituted a condition essential to that previous decision.⁷²

The principle of *res judicata* is not without limitations. Neither in domestic legal systems, nor in international adjudication is the principle considered an absolute one. Since judges and adjudicators are fallible, most legal systems provide for post-adjudication procedures to correct mistakes that had occurred in the adjudication. As these can lead to the modification or elimination of a decision, they operate as an exception to the rule of finality of judgments.⁷³ Hence, in many domestic legal systems, a decision will only enjoy *res judicata* effects once it is no longer capable of being subject to modification or reversal.⁷⁴ However, in the context of international adjudication, where procedures allowing for full or partial reconsideration of previous decisions are generally the exception rather than the rule, the binding effect of a decision does not depend upon its non-contestability (or non-reviewability).⁷⁵ In fact, it is questionable whether the mere possibility of one adjudicatory body's review of decision by another should in itself be taken to preclude the *res judicata* effects of such decisions.⁷⁶ The better position is that the sanctity of *res judicata* attaches, in principle, to any final decision of an international tribunal, but that its binding effects can nonetheless be subject to challenge where the decision has not been validly rendered. Such a challenge, however, will be contingent upon the agreement of the parties.⁷⁷ Furthermore, a decision may be devoid of binding force as between the parties only in such limited circumstances as to when it is found to be vitiated by excess of jurisdiction,⁷⁸ resting on inadequate reasoning,⁷⁹ or containing a "manifest" or "essential" error.⁸⁰ And the scope of nullity will generally have to be kept to a minimum.⁸¹

the meaning and the bearing of the *dispositif* (decisory part of the judgment) and to determine the points upon which there is *res judicata* and which thereafter can not be put in question'.

⁷² *Factory at Chorzów (Interpretation)* (n 68), 18-20.

⁷³ Broadly speaking, a distinction can be made between the *reopening* of a decision (which entails a reexamination of the decision by the same adjudicatory body that rendered it), and *review* of a decision (which entails a reexamination of the decision by another, usually hierarchically superior adjudicatory body). Substantive differences will however exist between legal systems as to the scope of such reexamination (facts, applicable law, procedure), method of review (trial de novo, review on the record, fresh evidence), procedure etc. See generally, PE Herzog and D Karlen, 'Attacks on Judicial Decisions' in M Cappelletti (ed), *International encyclopedia of comparative law*, vol XVI (Brill Nijhoff 2014) ch 8. See also C Brown, *A Common Law of International Adjudication* (OUP 2007) 156-58.

⁷⁴ See generally A Zeuner and H Koch, 'Effects of Judgments (*Res Judicata*)' in M Cappelletti, *ibid* ch 9.

⁷⁵ In the context of ICJ proceedings, for example, a judgment 'is final and without appeal' (art 60 ICJ Statute), and its binding effect is not contingent upon the passing of the ten year time frame within which a revision could be requested (art 61(5) ICJ Statute). In the context of ICSID arbitration, an award is binding on the parties and enforceable, regardless of whether the period within which its annulment can be requested has lapsed. A stay of enforcement is not automatic in such case, but remains within the discretion of the Annulment Committee (art 52(5) ICSID Convention).

⁷⁶ If non-reviewability is not a condition for the finality of judgments in some developed legal systems such as that of the US, there is little reason why such a condition should apply in the international context, particularly in circumstances where the reconsideration of other adjudicatory body's decisions is non-institutionalized and merely sporadic. For the contrary opinion, see Reinisch (n 57), at 51, suggesting that the rule of *res judicata* does not apply in the relations between national courts and international tribunals on account of the fact that 'international tribunals are frequently called upon to "review" the international legality of decisions of national courts.'

⁷⁷ The reviewing body must be granted an express mandate to review the decision in question. See *Monastery of Saint-Naoum (Advisory Opinion)* [1924] PCIJ (ser B) No 9, 21-22; and *Société Commerciale de Belgique* (n 63), 174. Furthermore, the parties conduct with respect to the impugned decision may be relevant to whether or not its validity can actually be challenged. cf *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)* (Judgment) [1960] ICJ Rep 192. See also *The Government of Sudan / The Sudan People's Liberation Movement/ Army (Abeyi Arbitration) (Final Award)* ICGJ 422 (PCA 22 July 2009) [450], suggesting that the parties could agree to the reopening of questions that had otherwise been accepted as finally and bindingly determined by an earlier decision of a different body.

⁷⁸ Cf. *The Orinoco Steamship Company Case (United States, Venezuela)* (XI UNRIAA 227, 25 October 1910), at 238 referring to excessive exercise of jurisdiction and essential error in the judgment as reasons for nullity of an arbitral decision.

The question of validity is one that is also of relevance in the application of the principle of *res judicata* across the domestic/international law divide. To the extent that domestic court's findings of fact, or holdings on points of law, could possibly give rise to issue preclusion, the question arises as to the scope and standard of the international body's review over the domestic court's pronouncements. In other words, under what circumstances will the international body be justified to disregard a previously rendered decision of a domestic court?

1.4.2.2. *Lis Alibi Pendens and Related Conflict-Regulating Principles and Rules*

Of further relevance in attempting to conceptualize the relationship between domestic courts and international investment tribunals is the doctrine of *lis alibi pendens* (or litispendence).⁸² This aims at preventing proceedings involving the same parties on the same subject matter before a second adjudicatory body if the same action (*lis*) is already pending (*pendens*) elsewhere (*alibi*).⁸³ Insofar as its object is to prevent the possibility of conflicting judgments, the doctrine operates as a pre-emptive corollary of the principle of *res judicata*.⁸⁴ The difference between the two is essentially only in their temporal application: if *res judicata* operates as a bar to consecutive (re-)litigation of the same matter, the principle of *litispendence* essentially does so with respect to parallel litigation. Just as in the case of the former, the application of the latter is thus, at least in principle, subject to the triple identity test (of identical parties, causes of action and relief).⁸⁵

But while variations of the rule of litispendence are capable of being found in most major legal systems, it has occasionally been doubted whether the doctrine of *lis alibi pendens* can actually find direct application in proceedings before adjudicatory bodies operating in the international context.⁸⁶ Indeed, some consider the doctrine to be only applicable within the same legal system.⁸⁷ Others, in contrast, argue in favor of the existence of a general principle of law preventing duplicative proceedings also between different legal systems – even if, arguably, not one of direct application, but one operating through specific legal techniques, such as the doctrine of *forum non conveniens*, the principles of comity and abuse of rights, or by means of anti-suit injunctions.⁸⁸ At the same time, the view is also taken that such general principle is not one applicable to vertical

⁷⁹ Arbitral Award Made by the King of Spain (n 77); Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment) [1991] ICJ Rep 53.

⁸⁰ *Trail smelter case* (n 58), at 1953.

⁸¹ *Abyei Arbitration* (n 77), [416]-[424].

⁸² The notion is usually described as ‘doctrine’ (cf *Certain German Interests in Polish Upper Silesia* (n 38)). Unlike *res judicata*, *lis pendens* is not one single rule or principle, but can better be seen as a sub-set of rules pertaining to the regulation of multiple proceedings concerning the same, or closely related, disputes, including by means of the doctrines of *forum non conveniens* and abuse of process, and the so-called first-in-time rule. See further ‘ILA Final Report on Lis Pendens and Arbitration’ reproduced in (2009) 25(1) *Arbitration International* 3, at 7ff.

⁸³ Though embedded in many domestic legal systems, the principle of *lis alibi pendens* is of later vintage than that of *res judicata*. C McLachlan traces it back to the scholarship of seventeenth-century Dutch jurists. See *Lis Pendens in International Litigation* (Brill 2009) at 29.

⁸⁴ McLachlan, *ibid* at 21-23.

⁸⁵ Reinisch (n 57), at 50-51. But see ILA (Report Lis Pendens) (n 82), 32, recommending that parallel proceedings be defined in terms of parties and issues that are “the same or substantially the same”, rather than in terms of the triple identity test.

⁸⁶ *Certain German Interests in Polish Upper Silesia* (n 38) (“It is a much disputed question in the teachings of legal authorities and in the jurisprudence of the principal countries whether the doctrine of litispendance, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations, in the sense that the judges of one State should, in the absence of a treaty, refuse to entertain any suit already pending before the courts of another State, exactly as they would be bound to do if an action on the same subject had at some previous time been brought in due form before another court of their own country”).

⁸⁷ Shany (n 28), 158-59.

⁸⁸ McLachlan (n 83), 354ff.

jurisdictional interactions between international and domestic bodies (as opposed to interactions between courts of different domestic legal systems, which sit in horizontal relationship with each other).⁸⁹ It is debatable, however, whether this is because litispendence as such is not capable of arising as between adjudicatory bodies that are not “of the same character”, or whether this is merely because the conditions for its application (i.e. the identity of actions and/or parties in domestic and international litigation) will commonly be lacking.⁹⁰

As Part III of the present study will demonstrate, investment tribunals primarily relied on a strict triple-identity test as a reason *not* to decline jurisdiction over particular claims, or else suspend or stay their own proceedings in favour of litigation before domestic courts. Indeed, such a formalistic approach has also happened to guide their interpretation and application of instruments that were otherwise designed precisely with a view to encouraging the parties to opt for litigation in just one forum (such as contractual forum selection clauses, or fork-in-the-road clauses included in investment treaties). The question can eventually be asked as to why a more flexible approach towards litispendence has been deemed possible in some contexts of vertical interactions between domestic and international adjudicatory bodies,⁹¹ but not in the context of investment arbitration. Particularly if one considers that the incidence of an international adjudicatory body suspending its own proceedings pending the outcome of procedures before domestic courts would not be entirely without precedent.⁹² Particularly in situations where the issues of domestic law pending before domestic courts appeared to be of importance to international proceedings, international adjudicatory bodies were not always disinclined to defer to such proceedings.⁹³ Nor to make other arrangements to the effect that the domestic courts would be capable of pronouncing upon a final decision before the matter would then be taken up by the international body itself.⁹⁴

⁸⁹ *ibid* 362; D Reichert, ‘Problems with parallel and duplicate proceedings: the litispendence principle and international arbitration’ (1992) 8 *Arbitration International* 237.

⁹⁰ The arguments adopted by the PCIJ in *Certain German Interests in Polish Upper Silesia* (n 38) appear to have been based on both grounds.

⁹¹ See in particular C Schreuer, ‘Concurrent Jurisdiction of National and International Tribunals’, (1975/1976) 13 *Houston Law Review* 508, at 510-513, suggesting that a “formalistic conception of litispendence does not make much sense” in the particular case “where international organs have assumed functions of domestic judicial organs” and arguing especially against restricting the inquiry to the “formal participants in national and international proceedings”, suggesting instead that the focus should be on “the true beneficiaries of a claim before determining whether there is a substantial identity of proceedings”.

⁹² The UN Compensation Commission, for example, had the practice of suspending its own proceedings when proceedings had been initiated before domestic courts. See on this N Wühler, ‘The United Nations Compensation Commission: A new Contribution to the Process of International Claims Resolution’ (1999) 2 *J Int’l Eco Law* 249 at 260.

⁹³ See *Estate of Jean-Baptiste Caire (France) v United Mexican States* (V UNRIAA 516, 7 June 1929) at 525, where the Presiding Commissioner of the Franco-Mexican Commission considered that there was no principle of international law that would preclude the Commission from considering a claim brought before it under an international convention, while the same claim was still pending before a national court of Mexico, save for ‘the special cases in which, for example, the Franco-Mexican Commission would be confronted with preliminary questions of civil law, pending before the ordinary courts in Mexico, whose solution would be of decisive importance for the claim for damages before the Franco-Mexican Commission (the preliminary question of whether real property owned by a person whose property rights are contested in a civil court of Mexico, but in the meantime, presented to the said Commission a claim for compensation due to destruction of the same real property, etc..)’.

⁹⁴ See *Prince von Pless Administration (Order of 4 February 1933)* PCIJ (ser A/B), No 52, at 16 (‘Whereas the Court does not consider it necessary to pass upon the question of the applicability of the principle as to the exhaustion of internal means of redress in the present Order since, in any event, it will certainly be an advantage to the Court, as regards the points which have to be established in the case, to be acquainted with the final decisions of the Supreme Polish Administrative Tribunal upon the appeals brought by the Prince von Pless and now pending before that Tribunal; and as the Court must therefore arrange its procedure so as to ensure that this will be possible’).

1.4.3. The Concepts of “Standard of Review” and Deference

The last concept that is of central importance to the present analysis is that of the “standard of review”. The term originates in the common law tradition where it is often used in the context of public law adjudication to describe the scrutiny applied by a court in reviewing actions taken by other branches or levels of government (such as a governmental agency or the legislative), or more generally, the scrutiny applied by a superior court in reviewing decisions of a lower court in the exercise appellate jurisdiction.⁹⁵ In the international context, the concept is now generally understood to refer to the *nature and intensity of scrutiny* applied by an international adjudicatory body in reviewing the actions of the State and its organs.⁹⁶ This is also the understanding of the concept that will be employed for the purposes of the present inquiry.⁹⁷

The standard of review is essentially the legal methodology that a body exercising some form of supervisory jurisdiction employs in carrying out its supervisory task. In the public law context, this task consists of reviewing the conformity of another body’s measures with certain prescribed standards, mostly in circumstances where such measures intrude on protected rights and interests while pursuing a public policy objective. Inasmuch as such review normally requires consideration of the factual or legal grounds on which the impugned measure was based, the concept of standard of review can also be described as the *degree of intrusiveness* into the reviewed body’s decision-making process; or conversely, as the *degree of deference* that the reviewing body grants to the reviewed body before it is prepared to substitute the latter’s assessment with its own assessment.⁹⁸ This assessment may either concern the reasons leading to the adoption of the

⁹⁵ See eg P Bryden, ‘Understanding the Standard of Review in Administrative Law’ (2005) 54 University of New Brunswick Law Journal 75; or P Gazaway, ‘Appellate Standard of Review: Friend or Foe’ (1989-90) 13 American Journal of Trial Advocacy 887. On the origins of the concept in US law, see eg K Kunsch, ‘Standard of Review (State and Federal): A Primer’ (1994) 18 Seattle University Law Review 11. This is not to say that civil law systems lack similar concepts; in the European legal tradition, some of the ideas underlying the concept of standard of review find expression in the notion of ‘margin of appreciation’ as used in domestic administrative law. See L. Gruszczynski and W Werner, ‘Introduction’, in L. Gruszczynski and W Werner (eds), *Deference in international courts and tribunals: standard of review and margin of appreciation* (OUP 2014), 1-4.

⁹⁶ On the different uses of the concept in the international context, see Gruszczynski and Werner, *ibid*. The editors define the concept as ‘the nature and intensity of review by [an international] court or tribunal of decisions [or other actions that involve some form of prior determination] taken by governmental authority’ (at 2), relying on the definition used by J Bohanes and N Lockhart, ‘Standard of Review in WTO Law’, in D Bethlehem et al, *The Oxford Handbook of International Trade Law* (OUP 2009) 378, at 379. This is the understanding that the concept has also gained in some investment law literature. See eg WW Burke-White and A von Staden, ‘Private Litigation in a Public Law Sphere: the Standard of Review in Investor-State Arbitrations’ (2010) 35 Yale Journal of International Law 283, at 286; T Chen, ‘The Standard of Review and the Roles of ICSID Arbitral Tribunals in Investor-State Dispute Settlement’ (2012) 5 Contemporary Asia Arbitration Journal 23, describing the concept as ‘the level of intensity of the scrutiny that the reviewing body will exert over the decision or regulation being reviewed’ (at 26); or C Henckels, ‘The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration’ in Gruszczynski and Werner, *ibid* 113, defining the concept as the ‘degree of scrutiny of the decision of a primary decision-maker employed by an adjudicator’ (at 114).

⁹⁷ This is preferable than using more tautological definitions such as in AT Katselas, ‘Do Investment Treaties Prescribe a Deferential Standard of Review?’ (2012) 34 Michigan Journal of International Law 87, defining standard of review as ‘a standard of scrutiny’ (at 90).

⁹⁸ On this, see eg Bohanes and Lockhart (n 96), at 379; SW Schill, ‘Deference in Investment Treaty Arbitration: Reconceptualizing the Standard of Review through Comparative Public Law’ (2012) SIEL Working Paper No 2012/33, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095334> accessed 13 June 2018, referring to deference as ‘a limitation in a court’s or tribunal’s level of scrutiny concerning decisions taken or determinations made by a host state institutions because the adjudicator respects the reasons for a state’s decision or conduct even if its own assessment might be different’ (at 6); or A Roberts, ‘The Present – Investment Arbitration as a Governance Tool for Economic International Relations? The Next Battleground: Standards of Review in Investment Treaty Arbitration’ in A Jan van den Berg (ed), *Arbitration: The Next Fifty Years* (Kluwer Law International 2012) 170, speaking of the degree of deference adopted ‘to determining how strictly tribunals will scrutinize governmental conduct and how readily they will substitute their own views for those of respondent States’ (at 172).

impugned measure, or the justifications subsequently advanced in its defence. Hence, deference operates in legal reasoning in two dimensions: it can either relate to the extent of reviewability, or to the question of justifiability.⁹⁹ The latter dimension is more strongly present in the international context, where the intensity of the scrutiny is not so much an issue about how far the reviewing body can reconsider the original measure before intervening in it, but – given that the pronouncements of an international court will mostly leave the original decision unaffected – more often about how much weight an international adjudicatory body should assign to State’s justifications in relation to conduct that could potentially amount to a violation of the applicable international norm.¹⁰⁰

While often intertwined in practice, however, the reviewability and justifiability essentially relate to different aspects of the inquiry.¹⁰¹ In relation to the subject of the present inquiry, *reviewability* relates for example to the question whether in circumstances where a domestic court has given certain interpretations of national law or made certain findings of fact that are relevant for the dispute at hand, an international investment tribunal should consider such issues afresh, or whether it should in principle accept the domestic courts’ pronouncement on these points. It is in this latter aspect that the notion of standard of review will primarily be applied in Part I of the present inquiry. The aspect of *justifiability*, in contrast, relates to the question of how far an investment tribunal should go in evaluating the domestic courts’ findings of fact, interpretations of national law, and/or the application of the latter to the facts, when scrutinizing the propriety of particular judicial decision with a view to deciding whether a breach of an investment treaty obligation has occurred. It is in this aspect that the notion of standard of review will primarily be employed in Part II of the present inquiry.

Given the centrality of the concept of standard of review to the present inquiry, it is important at this stage to further elaborate on the scope and methods of its application. Conceptually, the standard of review must be distinguished from the standard of conduct prescribed by the primary norm.¹⁰² Whereas it is the normative content of the obligation that provides the measure for assessing the validity of the State’s action, the standard of review merely describes the type of judicial scrutiny used for such assessment.¹⁰³ Primary obligations, of course, differ in their nature and scope. In international law, not all legal norms subject States to equally exacting obligations. Some obligations provide more limited conduct-guidance, meaning that they can conceivably be performed in different ways that may all be equally consistent with the same

⁹⁹ On this distinction between reviewability and justifiability, see in particular RStJ Macdonald, ‘The margin of appreciation’ in RStJ Macdonald, F Matscher, H Petzold (eds), *The European system for the protection of human rights* (Nijhoff 1993) 83, at 84–85.

¹⁰⁰ The question of justification, and the weight that a reviewing body should assign to the assessment of the State, most often arises in relation to the inquiry whether the limitation of a treaty right falls within the scope of a particular treaty-based exception. This is why in the investment law context the question of standard of review began first to be raised in the analysis of the application of claw-back/NPM clauses found in some investment treaties. See eg Burke-White and von Staden (n 96), 297–301; or Chen (n 96), 34–38.

¹⁰¹ Reviewability can also refer to the threshold question whether or not an issue can properly be considered by the reviewing body at all. However, this dimension of reviewability is purely a question of *scope* of review, whereas the *standard* of review is essentially a question that operates only after an issue has been determined to lie within the scope of review.

¹⁰² See C Henckels, ‘Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference’ in AK Bjorklund (ed), *Yearbook on International Investment Law and Policy, 2012–2013* (OUP 2014) 305, at 310, emphasizing the distinction between the normative content of the obligation and the standard of review.

¹⁰³ This has occasionally had the consequence of standards of review being conflated with the standards of state responsibility. See eg R Moloo and JM Jacinto, ‘Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law’ in K Sauvant (ed), *Yearbook of International Investment Law and Policy 2011/2012* (OUP 2013), defining the term standard of review as ‘the criterion by which an adjudicative entity assesses the validity of a legislative, executive or administrative action.’ For a similar conflation of the standard of review with the primary norm in a domestic law context, see K Kunsch (n 95), defining the standard of review as ‘the criterion by which the decision of a lower tribunal will be measured by a higher tribunal to determine its correctness or propriety’ (at 15).

norm.¹⁰⁴ As a consequence, States are provided with certain discretion as regards the choice of means and manners in the way they implement such obligations, which ultimately has consequences for the question of compliance, and by implication, responsibility. The determination of the standard of conduct is therefore a question of ascertaining the content of a primary norm, which revolves around the issue whether a particular obligation should be construed as a strict one, or as one providing a margin of discretion. This is not to say that the question of standard of conduct is entirely unrelated to the question of standard of review. Both concepts are often intertwined, since the less exacting the conduct required by the primary norm (i.e. the greater its normative flexibility), the less intensive (and the more deferential) the scrutiny of the reviewing body can be.

Nor is it to say that deference itself may not play a role already in the content-ascertainment of the primary norm. The latter is namely not a mechanic process, but is subject to the application of interpretative techniques used by the adjudicatory body. Potentially then, also in construing a treaty provisions in a manner that permits greater regulatory autonomy for states, the adjudicatory body is exercising a form of deference.¹⁰⁵ This form of deference is reflected, for example, in the margin of appreciation doctrine which has been developed in the jurisprudence of the European Court of Human Rights (ECtHR), pursuant to which States are granted a certain degree of deference in the way they comply with their obligations under the European Convention of Human Rights.¹⁰⁶ However, this must not be equated with the standard of review. In fact, to the extent that the level of deference afforded to national authorities pursuant to the margin of appreciation is a variable one, the doctrine actually entails the application of different standards of review, whereby the wider the margin, the lower the standard of review can be said to be.¹⁰⁷

The standard of review must also be distinguished from particular methods of review, which are discrete legal techniques that are used to determine the permissibility of interference with the primary norm.¹⁰⁸ Examples of such methods are the proportionality analysis, which is often applied by domestic constitutional courts, the ECtHR, and the ECJ to determine the permissibility of interferences with particular rights, the least-restrictive means (LRM) test applied by the WTO Dispute Settlement Bodies, or the no other means available-test adopted by some

¹⁰⁴ See Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *European Journal of International Law* 907, at 914-17, explaining that normative flexibility can usually be observed in relation to standard-type norms (which set broad standards rather than providing detailed rules – arguably, this is the case with many of the standards of treatment prescribed by investment treaties), discretionary norms (which explicitly or implicitly allow States some discretion), and result-oriented norms (which lay down obligations of result, as opposed to obligations of conduct).

¹⁰⁵ See A Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G Huscroft, *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008) 184, at 190 arguing that legal interpretation is always driven by evaluative judgments of two kinds: a substantive evaluation, which refers to an evaluation of the merits of interpreting a particular legal provision in one way or another; and an institutional evaluation, which engages judges' views about the desirability of their interfering with a decision based on concerns about the limits of their institutional role. In her view, deference is part of the latter and thus also plays a role as a doctrine of interpretation. See also Shany, *ibid* at 910, arguing that norm-application and norm-interpretation intertwine, in the sense that the construction of international norms in an ambiguous manner might facilitate the exercise of judicial deference and vice versa, and hence, the policy rationales that support granting national actors some deference and those which sustain judicial acknowledgement of normative ambiguity reinforce one another.

¹⁰⁶ See M Ambrus, 'The European Court of Human Rights and Standards of Proof: an Evidentiary Approach towards the Margin of Appreciation', in L Gruszczyński and W Werner (n 95), 235, noting that the margin of appreciation focuses in its original meaning on the extent to which a State has discretion in a particular case, and at the same time delineates the level of scrutiny applied by the Court (at 236).

¹⁰⁷ It is precisely due to the indeterminacy of the doctrine in relation to standards of review that some have expressed doubts as to its suitability in the adjudication of investment disputes. See J Arato, 'The Margin of Appreciation in International Investment Law' (2014) 54 *Virginia Journal of International Law* 545.

¹⁰⁸ Henckels (n 102), 310.

investment tribunals.¹⁰⁹ Standards of review are often conflated with such methods, but they remain conceptually distinct, as the same method of review may entail the application of different standards of review. Thus, in performing the proportionality test, the reviewing body can assess the balance between the policy goal and the means used to reach that particular objective by according different weight to the authorities' determinations of the legitimacy of a particular objective or the suitability of a particular means. For instance, it can form its own view as to whether the chosen means really is suitable, or it can merely accept it as suitable as long as there is a rational connection between it and the policy goal.¹¹⁰

1.4.3.1. *The Different Standards of Review*

If expressed in relation to the degree of deference that the judicial body grants to the assessment of body under review, the standards of review can be classified along a spectrum, ranging from the most stringent scrutiny at one extreme, to total deference at the other, with intermediate variations in between. While each legal system may label these standards differently,¹¹¹ the following could be considered as essential archetypes.

On the one hand of the spectrum, there is what one could call the *de novo*-type of review. This represents the most intrusive/least deferential standard of review, which entails full scrutiny of the initial action and its motivation, whereby the reviewing body reassesses the determinations made by the reviewed body as if the latter had not taken a decision at all. The assessment takes the form of a “correctness” test, which means that the reviewing body determines whether a particular decision is the best one and, if necessary, substitutes its judgment for that of the body under review. In short, the final word rests with the reviewing body. In domestic legal systems, this type of review is often applied by a superior court reviewing questions of law. It is usually also applied in reviewing questions of jurisdiction in the context of set aside procedures of arbitral awards by the courts of the seat of the arbitration.¹¹² In the international context, an example of such an exacting standard is embodied in the no other means available test, which has been applied by some investment tribunals when scrutinizing necessity defences.¹¹³ At the other end of the spectrum, one can find the standard of *full deference*, which implies that the determinations underlying the initial decision, including the decision itself, are not questioned. The body under review has the final view on the matter.

In between these two extremes, there is a variety of more-or-less deferential standards that are based on what can broadly be called the *reasonableness*-type of review. The assessment in this case takes the form of a “reasonableness” test, which requires the reviewing body to determine, not whether the body under review was correct in arriving at the particular decision, but merely whether the decision in question falls within a range of possible/acceptable options. Whether or not an option will be considered acceptable is essentially context-dependent; for reasonableness cannot be determined in the absolute. The acceptability of the option chosen will,

¹⁰⁹ For a discussion of the different methods of review, see in particular Burke-White and von Staden (n 96), 302-14.

¹¹⁰ See thus C Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’ (2012) 15 Journal of International Economic Law 223, at 238-41, discussing the importance of utilizing appropriate standards of review in the application of the proportionality analysis.

¹¹¹ For a categorization of different standards of review in the US legal system, see eg MS Davis, ‘A Basic Guide to Standards of Judicial Review’ (1988) 33 South Dakota Law Review 469. For a discussion of the standards of review applicable in public law adjudication in the German legal system, see Burke-White and von Staden (n 96), 319-22. As observed by Bohanes and Lockhart (n 96), 380, each legal system develops a standard that suits its own particular needs.

¹¹² See C Lévesque, “‘Correctness’ as the Proper Standard of Review Applicable to ‘True’ Questions of Jurisdiction in the Set-Aside of Treaty-Based Investor-State Awards” (2014) 5 Journal of International Dispute Settlement 69.

¹¹³ See eg *Sempra Energy International v Argentine Republic (Award)* (ICSID Case No ARB/02/16, 28 September 2007) [350]-[351].

as a minimum, depend on whether or not the particular choice is open to justification. Usually, however, the justification itself will have to be backed by cogent reasons.¹¹⁴ The intensity of the reasonableness test will usually depend on how far the cogency/adequacy of those reasons will be scrutinized by the reviewing body.¹¹⁵ The least intensive variation of the reasonableness test finds expression in a *manifest/patent unreasonableness*-type of review. Its negative formulation entails that a particular decision will remain acceptable, as long as there is some relevant material supporting the grounds on which it is founded.¹¹⁶ Because of this presumption of acceptance, the scrutiny is less intense; a decision does not pass the test only in the event of errors of a particular magnitude or obviousness.¹¹⁷ Yet, in the practice of international adjudicatory bodies, such fine distinctions are rarely made or discussed. Where the notion of standard of review is used at all, reference is made to a generic test of reasonableness, which is applied, for example, in evaluating the propriety of a State's exercise of a discretionary right under a treaty,¹¹⁸ or in determining whether a decision had been rendered through excess of powers.¹¹⁹ In some investment arbitrations, however, reference has been made specifically to the notion of manifest unreasonableness¹²⁰ – even if, as a matter of general practice, standards of review have rarely if ever been articulated.¹²¹

In some domestic legal systems, a distinction is further made according to the component of the reviewed body's decision-making process that is the subject of scrutiny. This can be the first decision-making body's factual determinations, its legal determinations, its application of the law to the facts and legal reasoning in general, or its exercise of discretion. Such distinctions are not always easy to make, since points of law and fact are often intertwined. But the distinction is at least relevant to the extent that it makes possible to distinguish a separate standard of review, which is otherwise difficult to explain simply by reference to the level of deference. This is the

¹¹⁴ In practice, it is possible to discern two ways in which the test of reasonableness can be operationalized. Pursuant to a formal approach, an assessment of reasonableness requires there to be an explanation for the particular option chosen, such explanation needs to be backed by reasons, those reasons need to be capable of intersubjective understanding, free from contradictions, and supported by authorities. Pursuant to a more substantive approach, in order to be reasonable, there needs to be a legitimate objective pursued by the option, there needs to be a causal link between the option and the objective, and this link needs to be a sufficient/adequate one. Omnipresent in the application of both models will be the question of rationality. See O Corten, 'Reasonableness in International Law' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol VIII (OUP 2012), 645-51. See also C Ragni, 'Interpretazione dei trattati e *standard of review* nella giurisprudenza della corte internazionale di giustizia: Riflessioni sull'affare della Caccia alla Balena nell'Antartico' (2014) 97 *Rivista di Diritto Internazionale* 725, at 748-50. In common-law administrative judicial review, for example, the indicia of unreasonableness include illogicality (eg aims chosen to achieve a particular aim are not apt to achieve the aim), disproportionality, inconsistency with applicable law, inexplicable changes in policy, or conflict with judicial precedents. See P Daly, *A Theory of deference in Administrative Law: Basis, Application and Scope* (CUP 2012) at 141-51.

¹¹⁵ See J Wouters and S Duquet, 'Reasonableness as a Standard of Judicial Review: Comparative, European and International Perspectives' (2014) 64(1) *Rivista Trimestrale di Diritto Pubblico* 33, at 37-47, generally distinguishing between a manifest unreasonableness test, a soft-look test, and a hard-look reasonableness test.

¹¹⁶ Under this standard, only in the case of the most extreme or outrageous disconnection between the material background and the outcome will the decision not be acceptable. cf Wouters and Duquet, *ibid* 38.

¹¹⁷ See further Daly (n 114) 166-85. In the German legal system, this comes close to the test of *Evidenzkontrolle* used by the Federal Constitutional Court, under which the Court will strike down legislation only if it evidently clashes with constitutional values. See Burke-White and von Staden (n 96), 321.

¹¹⁸ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Judgment)* [2014] ICJ Rep 226, [67]. For further analysis of the standards applied by the ICJ, see C Ragni, 'Standard of Review and the Margin of Appreciation before the International Court of Justice' in Gruszczynski and Werner (n 95), 319-336.

¹¹⁹ *Abeyi Arbitration* (n 77) [401]-[411]. In the circumstances of that case, the test of reasonableness – as opposed to that of correctness – was held to be particularly appropriate, insofar as 'the reviewing body's methodology differs from that of the original decision-maker.' *Ibid*, [406].

¹²⁰ *Glamis Gold Ltd v US (Award)* UNCITRAL NAFTA (8 June 2009) [803]-[805].

¹²¹ For criticism, see in particular C Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4(1) *Journal of International Dispute Settlement* 197, at 215.

arbitrariness-type of review, which is usually applied when scrutinizing the exercise of discretionary powers.¹²² Under this type of review, the reviewing body relies on the other body's discretion and only reviews whether there has been appropriate procedural compliance. This standard is strongly deferential when it comes to the substantive choices made by the reviewed body, but essentially non-deferential in relation to compliance with procedural rules. The assessment of compliance takes the form of a legality test, which is a form of the correctness test. In the international context, such standard is applied in the context of good faith review.¹²³

In domestic legal systems, the applicable standard of review is sometimes prescribed in instruments that regulate the primary decision-making body's actions, or define the scope of appellate review.¹²⁴ In the international context, on the other hand, provisions specifically prescribing the standard of review that the adjudicatory body ought to apply are the exception rather than the rule.¹²⁵ This is particularly the case with investment treaties that, while creating extensive arbitral powers, do not expressly stipulate how these powers are to be exercised.¹²⁶ However, this is not to say that international treaties themselves do not have an impact on the standard of review. As already explained, the standard of review is closely connected with, and even determined by, the normative content of the international obligation at stake. The use of open-ended provisions, such as those demanding fair and equitable treatment and prohibiting arbitrary or discriminatory measures, or the inclusion of self-judging clauses, necessarily influence the application of a particular standard of review.¹²⁷

1.4.3.2. *The Notion of Deference and Reasons for its Application*

Ideally, any adjudicatory body called to review another body's actions for their conformity with certain standards will also have a general conception of the appropriate standard of review, insofar as such conception is inherent to the reviewing function.¹²⁸ At the end of the day, the intensity of the scrutiny will hence also depend on the appropriateness of the reviewing body's intervention in a particular case. This is, ultimately, a question of deference – i.e., a question as to the respect that should be paid, or weight to be given to another body's decisions.¹²⁹ The degree

¹²² In the German legal system, this is known as the test of *Vertretbarkeitskontrolle* used by the Federal Constitutional Court, which comprises an assessment whether procedural requirements have been observed. See Burke-White and von Staden (n 96), 321.

¹²³ See *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* [2008] ICJ Rep 177, [145], explaining that the exercise of discretion is subject to the obligation of good faith, and A Mamolea, 'Good Faith Review' in Gruszczynski and Werner (n 95), 74, at 75, noting that international courts and tribunals apply *de novo* review to establishing good faith.

¹²⁴ In the US, for instance, the scope of appellate review for trial court decisions in some States is governed by the court rules, whereas in federal courts, it is governed by statute. See Kunsch (n 95), 13.

¹²⁵ For one such exception, see art 17(6)(i) of the Agreement on the Implementation of art VI GATT (Anti-Dumping Agreement), which provides that: 'If [national authorities'] evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.'

¹²⁶ EU Petersmann, 'Judicial Standards of Review and Administration of Justice in Trade and Investment Law and Adjudication' in Gruszczynski and Werner (n 95), 19, at 24.

¹²⁷ See Schill (n 98), 17-20; and Katselas (n 97), 90-91, exploring the possibility that a public law standard of review is to be found in the imprecisely worded guarantees provided for in investment treaties themselves.

¹²⁸ Shany (n 104), 911; A Roberts (n 98), 177.

¹²⁹ One often speaks in this context of 'second-order reasons', a notion that was introduced by Professor Joseph Raz to describe the reasons to refrain from acting on a reason. J Raz, *Practical Reason and Norms* (Hutchinson 1975) 39. See further SR Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 Southern California Law Review 913.

of deference can range between treating that other body's decisions as persuasive, to treating them conclusive.¹³⁰

The factors that normally warrant the exercise of deference are several. Yet, one of the main reasons for a reviewing body to defer to the assessment of the primary decision-maker, and thus not to intervene in the measure that is subject to review, is because that decision-maker possesses certain superior qualities.¹³¹ In the domestic legal context, this may relate to distinctive institutional competences of different governmental branches (e.g. the judiciary defers to the legislature because it lacks (extensive) law-making powers), it may be a matter of legitimacy (e.g. a court defers to the elected branches of government because of their superior democratic legitimacy), but very often it is simply a matter of expertise and knowledge (e.g. a court defers to a governmental agency because the latter may be better situated to make a particular factual determination),¹³² in which case deference is simply a rational response to uncertainty as to what the correct assessment should be.¹³³ Apart from this, however, deference may also relate to practical considerations (e.g. a higher court defers to a lower court's determination because of excessive workload), it may be a matter of inter-institutional comity, and it may even be used for self-interested and prudential reasons.¹³⁴

Many of these reasons are equally valid in the international context, and should ideally be guiding *all* international adjudicatory bodies in deciding on the appropriate amount of deference that they grant to domestic courts and other State authorities.¹³⁵ Nonetheless, in the context of investment arbitration, two considerations have frequently been singled out as the main rationales for according such deference. First, the fact that the domestic authorities are more familiar with the socio-economic and political context of the State whose actions are under review, which makes them better placed, as well as more legitimized to make complex substantive value choices. And second, the fact that State authorities may possess greater expertise on certain matters (particularly on issues of domestic laws), or may be otherwise better placed to make complex factual determinations.¹³⁶ Insofar as the subject of the present inquiry is concerned, it is especially the latter consideration that is relevant when appraising the relationship between international investment tribunals and domestic courts: the superior knowledge of domestic courts with regard to the interpretation and application of domestic law will frequently mitigate in favour of granting them a greater degree of deference by investment tribunals.¹³⁷ Indeed, it is the intention of the present study to pay particular attention to the extent that the argument of "epistemic superiority"¹³⁸ has thus far played a role in the jurisprudence of investment tribunals.

¹³⁰ See C Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4(1) *Journal of International Dispute Settlement* 197, at 201.

¹³¹ Kavanagh (n 105), 187.

¹³² *ibid* 187-203; Gruszczynski and Werner, 'Introduction' (n 95), 2; MJ Beloff, 'The Concept of "Deference in Public Law"' (2006) 11 *Judicial Review* 213, at 217.

¹³³ Kavanagh (n 105), 208.

¹³⁴ *ibid* 188-203.

¹³⁵ Gruszczynski and Werner, 'Introduction' (n 95), 4; Chen (n 96), 28-31.

¹³⁶ See eg Henckels (n 102), at 205-13 (identifying the primary rationales for deference to be the 'regulatory autonomy and proximity' (the fact that domestic authorities are better placed to determine the public interest, and have a better understanding of the local conditions), and 'relative institutional competence and expertise'); and SW Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2012) 3 *Journal of International Dispute Settlement* 577, at 600-06 (identifying the values of voice (ie the democratic/representative mandate of the institution under review), expertise, and rights as the main values justifying the exercise of deference).

¹³⁷ cf Schill, *ibid* 602.

¹³⁸ I borrow this term from Gruszczynski and Werner, 'Introduction' (n 95), at 9.

Eventually, the appropriateness of judicial intervention is also a question of allocation of powers between supervisory bodies and the decision-making bodies under control.¹³⁹ Certainly, there are important differences in the way judicial powers are exercised in the domestic and in the international legal context. Domestically, the scope of the powers that the adjudicatory body exercises over the reviewed body is often formally defined. A competent domestic court may thus have the power to directly intervene in the challenged decision; for example, by way of vacating the ruling of a lower court or quashing the decision of a governmental agency. In the international/transnational legal context, on the other hand, the relationship between the adjudicatory body and the body under review will not be specifically regulated. In most cases, an international adjudicatory body will have the power to pronounce about the State's non-compliance with its obligations under international law, and sometimes the power to award compensation for violations of those obligations, but it will not be able to directly intervene in the domestic legal sphere by way of nullifying the domestic organs' actions or decisions that gave rise to the violation as if sitting as a court of appeal.¹⁴⁰ This does not mean that such an adjudicatory body may not wield a considerable amount of power. As attested to particularly by the example of investment tribunals, precisely because of the prospect that substantial damages will be awarded, such a body may exercise powers over domestic organs despite the absence of formal authority. However, the implication of these differences is that, if in the domestic legal context the applicable standard of review more or less *reflects* the allocation of authority between the different bodies, in the international context, the standard of review to some extent also *defines* such allocation.¹⁴¹

1.5. Organization of the Inquiry

The inquiry is organized in the following way. As a follow up to this introductory chapter, **chapter 2** provides a historical frame of reference, which sets out developments that have arguably shaped and continue to shape investment tribunals' attitude towards domestic courts. Thereafter, the inquiry is divided into three parts. **Part 1** looks at those situations where domestic courts can be seen as *partners* to investment tribunals – namely, in the law ascertainment process. To begin with, **chapter 3** maps out the different circumstances in which investment tribunals will be called to interpret and apply domestic law in the adjudicative process. The two succeeding chapters then proceed to examine how investment tribunals have actually approached the findings and pronouncements of domestic judicial bodies when these were relevant to the issues before them. To that end, **chapter 4** explores the effects that international investment tribunals have traditionally conceded to concrete domestic courts' pronouncements, while **chapter 5** examines the treatment of domestic jurisprudence more generally in the law ascertainment process.

In **Part 2**, the inquiry shifts to those circumstances where investment tribunals approach domestic courts as *suspects* – that is, to situations where the conduct of domestic courts itself becomes the object of investment tribunals' scrutiny by being assessed for its conformity with international law. The inquiry is again divided into three chapters. To begin with, **chapter 6** examines the way in which the obligation not to deny justice – an obligation that is specifically concerned with judicial acts – has been construed and applied in the practice of investment tribunals. Thereafter, **chapter 7** looks at how other standards of treatment guaranteed by

¹³⁹ See Schill, *ibid* 16, arguing that the standard of review can also be thought of in terms of the constitutional law concept of separation of powers.

¹⁴⁰ On the differences in powers between domestic appellate courts and international adjudicatory bodies, see Ahdieh (n 4), at 2046-48.

¹⁴¹ S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart 2012) 15. See also Chen (n 96), 27-28, noting how the standard of review that the arbitrator adopts will determine the role of ICSID arbitrators vis-à-vis the host States and, hence, in fact decides the role of the ICSID arbitrators.

investment treaties have been applied in relation to judicial conduct. **Chapter 8** completes this part of the inquiry by looking into a matter that appears to be of relevance to at least some of the claims predicated on injuries committed by judicial organs: the extent to which procedures before these organs may have to be tested before violations of international law can be proven.

Finally, in **Part 3**, the focus of the inquiry moves on to those aspects of the relationship between domestic courts and investment tribunals where the former can be seen as *competitors* of the latter when it comes to the exercise of adjudicatory authority. For that purpose, **chapter 9** first discusses the various legal techniques employed by arbitrators themselves in dealing with situations of actual or potential jurisdictional competition with domestic courts. Thereafter, **chapter 10** examines the various treaty devices through which States have attempted to regulate jurisdictional interactions, and discusses how these devices have been implemented in practice. Finally, **chapter 11** looks at the role of the investor itself in dealing with instances of jurisdictional competition, by focusing especially on the possibility for the latter to relinquish its right to pursue arbitration with regard to an investment dispute.

Chapter 12 concludes the inquiry by setting out the main findings and providing some points for reflection.

2. THE HISTORICAL FRAME OF REFERENCE

The purpose of this chapter is to set the scene for the analysis of arbitral jurisprudence that will be undertaken in the later parts of this study, by providing a historical frame of reference through which the relationship between investment tribunals and domestic courts can possibly be thought of and conceptualized. The point I intend to make is that the investment tribunals' current attitude towards domestic courts, and the perceptions that they have about domestic courts' role in the settlement of investment disputes, are not the result of recent interactions between both categories of adjudicatory bodies. Rather, they appear to be the consequence of a long line of efforts, from at least the nineteenth century onwards, to exempt foreign investment from constraints posed by local contexts, both procedurally and substantively.¹

The argument that I intend to make is three-fold. *First*, that the investment tribunal's present attitude has much to do with the historical premises under which investor-State arbitration was introduced as a distinct mechanism for adjusting conflicts between foreign investors and host States – namely, as one that allows investors direct recourse to international adjudication without the previous exhaustion of local remedies. For, it is this particular design that eventually enabled investor-State arbitration to progressively establish itself as a fully-fledged alternative to local litigation of investment disputes (a development which I term as the *functional* shift), leading in turn to a perception of redundancy of local courts. *Second*, that such perception of redundancy has been further underpinned by the gradual emergence of international law as the body of law prescribing the standards through which the propriety of host States' dealings with foreign investors is now predominantly measured. For, once domestic law had ceased to provide the relevant normative benchmarks (a development which I term as the *substantive* shift), domestic courts were further deprived of the possibility to claim epistemic priority over other adjudicatory bodies.² And *third*, that this procedural and substantive internationalization of investor-State relations can actually be linked to the long prevailing distrust among capital-exporting/Western States towards the ability of foreign, non-Western courts to adequately adjust controversies between foreign investors and the host States of their investments. For, it was this lack of trust that had historically been advanced in justification for investor-State arbitration (the problem of *distrust*). The ensuing parts of this chapter are devoted to elaborating upon these three themes, by discussing the historical antecedents pertaining to the functional shift (2.1.), to the substantive shift (2.2.), and to the problem of distrust (2.3.), respectively.

2.1. The Functional Shift: Investor-State Arbitration Establishes Itself as Procedural Alternative to Domestic Litigation

The emergence of investor-State arbitration as a specialized dispute resolution mechanism has certainly been an important reason for the declining relevance of domestic courts in the resolution of investment disputes. The growth in its use today is largely attributable to the proliferation of international investment treaties which, in addition to providing foreign investors with certain substantive guarantees concerning the treatment that they can expect to receive from the host State of their investment, grant them the procedural capacity to directly enforce those

¹ For this claim, see M Koskeniemi, 'It's not the Cases, It's the System' (2017) 18 Journal of World Investment & Trade 343 at 344.

² Arguably, this perception of redundancy may in some cases be further reinforced by the fact that, in view of the constitutional limitations in some countries, domestic courts may also not necessarily be capable of adjudicating investment disputes by reference to these international standards.

guarantees before arbitral tribunals operating independently from the domestic judicial system of the host State. Yet, the fact that investor-State arbitration has established itself as a mechanism allowing foreign investors to bypass domestic courts is not the result of treaty developments that occurred in the last few decades. It is the product of a longer process of legalization and internationalization of investment dispute settlement, of its ostensible de-politicization through the granting of direct remedial procedures, and of its gradual entrenchment as an independent mechanism that is capable of being employed in lieu of domestic judicial procedures.

2.1.1. The “Legalization” of Dispute Settlement and the Emergence of the Law of International Claims

The emergence of investor-State arbitration in the later part of the twentieth century forms part of the much longer process of “legalization” of international economic disputes that has been going on since the end of the eighteenth century. Traditionally, there were two ways³ in which controversies over the treatment of property of nationals abroad could be resolved. In the more extreme form, redress was obtained through the (threat of) use of force, either by means of armed interventions on the part of the foreigner’s State of nationality (a phenomenon often described also as “gunboat diplomacy”, in view of the recurrent practice of capital-exporting States that dispatched naval vessels to secure the protection of their nationals’ property),⁴ or through the use of privateers authorized by governmental letters of marque. The alternative, less violent way of dealing with controversies was through diplomatic interposition. The matter was brought to the attention of the foreign government and a complaint was formally pressed through diplomatic channels, coupled with the demand that the injury be remedied. The procedural device, through which a State espoused a claim on behalf of the injured national, came to be known as diplomatic protection.⁵ Pursuit of the latter was premised on the principle that, through the bond of nationality, the State was entitled to claim an interest in the treatment of its nationals abroad, and to demand their protection in the event of an injury.⁶

Initially, demands for redress were presented on the basis of international comity. But as a body of law governing the treatment of aliens gradually developed through treaty practice,⁷ governments increasingly began to frame their demands under a claim of right, flowing from a breach of international law.⁸ By the nineteenth century, the protection of nationals abroad came thus to be treated as a legal question, which justified interposition by appeal to principles of international law. By that time, however, their adjustment, too, became subject of legal methods. Beginning with the Jay Treaty of 1794, controversies concerning the mistreatment of foreign nationals began increasingly to be put to international adjudication. Particularly in the second half

³ Up until the twentieth century, suits by aggrieved investors in the courts of their home State did not provide an effective or viable remedy. In the first place, States have not held much sovereign assets abroad that could be subject to attachment (in practice, the vast majority of the cases involving States’ foreign property were thus also suits in admiralty). Furthermore, following the US Supreme Court’s judgment in *The Schooner Exchange v McFadden* (1812), 11 US 116 (1812), the doctrine of absolute immunity was accepted in many States, which thus prevented States from being sued in another State’s courts and their assets being seized to enforce a court judgment.

⁴ Some of the more conspicuous examples are described in C Dugan et al, *Investor-State Arbitration* (OUP 2008) 26-27.

⁵ For the classical treatment of the subject, see EM Borchard, *Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915). A modern restatement can be found in CF Amerasinghe, *Diplomatic Protection* (OUP 2008). The substantive basis of the doctrine of diplomatic protection was the thesis advanced by Emmerich de Vattel that an injury to an individual is an injury to the state. E Vattel, *The Law of Nations*, bk II (1758) ch v. But it was only in the course of the nineteenth century that through the practice of diplomatic interpositions the doctrine fully developed. See F Dunn, *Protection of Nationals Abroad* (1932) 46ff.

⁶ Borchard, *ibid* 25-30, 351.

⁷ See (n 3).

⁸ FG Dawson and IL Head, *International Law, National Tribunals and the Rights of Aliens* (Syracuse 1971) 9.

of the nineteenth century, the practice would thus become formalized of appointing ad-hoc tribunals (or umpires) to decide particular controversies, or else of establishing semi-permanent claims commissions to resolve a broader set of disputes which frequently followed from periods of protracted civil unrest, or in the aftermath of a war.⁹ Though the establishment of these special-purpose dispute settlement bodies often still occurred under pressure by political, economic, or military threats, in the long run, the practice transformed the nature of alien protection from one determined by the vicissitudes of politics, to one that would increasingly be resolved according to the regularity of law.¹⁰

Apart from entailing the application of legal methodology to the determination of economic claims, these early means for adjudicating investment controversies had not much in common with investor-State arbitration as we know it today. Of course, both represented a form of consensual, third-party adjudication. Yet, the early forms of international adjudication mostly operated *ex post facto*, and often without a specific procedural framework governing such issues as the organization of proceedings, rules of evidence, or even the scope of jurisdiction.¹¹ Crucially, these early forms of international adjudication were still premised upon what was essentially an inter-State framework. Thus, if aggrieved by the actions of the host State, the foreign investor was not in a position to directly resort to dispute settlement on the international level. The investor's cause had to be formally espoused by his State of nationality, which then presented the claim for adjudication in the exercise of diplomatic protection. In accordance with long-established custom, however, such a claim was only admissible if the aggrieved investor first exhausted all available judicial or administrative remedies.¹² This meant that, though constituting an *international* mechanism for the adjudication of investment disputes, the use of ad hoc tribunals and international claims commissions did not yet provide a substitute of domestic judicial processes. On the contrary, it was a system where domestic courts retained a fundamental role in disputes over foreign investment.¹³ The investor was bound to first seek redress for its grievances before host State's courts, so that the offending government was given an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international confrontation between States.¹⁴ In theory, therefore, the cases brought to international adjudication were initially treated as domestic conflicts.¹⁵

⁹ See generally BJ Bederman, 'The glorious past and uncertain future of international claims tribunals' in MW Janis (ed), *International Courts for the Twenty-First Century* (Martinus Nijhoff 1992) 161-93.

¹⁰ On this, see further TA Nissel, *A History of State Responsibility: The Struggle for International Standards (1870-1960)* (Dissertation submitted to Helsinki University in satisfaction of LLD degree, 2016), 131.

¹¹ Dugan et al (n 4), 35.

¹² See eg Borchard (n 5), at 818, explaining in a footnote that the requirement 'is so thoroughly established that the detailed citation of authorities seems hardly necessary'.

¹³ See P Muchlinski, 'The Diplomatic Protection of Foreign Investors: a Tale of Judicial Caution', in C Binder et al. (ed), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 341-362, at 343, noting the contingent nature of diplomatic protection and the supplementary role that international law plays under such system in the regulation of disputes between investors and host States: 'In all cases the local law is the first point of redress for the foreign entity'.

¹⁴ See *Interhandel Case (Switzerland v US) (Judgment)* [1959] ICJ Rep 6, at 27 ('Before resort may be had to an international court in such a situation [ie, when a State adopts the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law], it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.') There were also other, more practical rationales of the rule. See further Borchard (n 5), 817-18; AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green and Company 1970), at 416-17; and CF Amerasinghe, *Local Remedies in International Law* (CUP 2004), 56-64.

¹⁵ See S Puig, 'No Right Without a Remedy: Foundations of Investor-State Arbitration,' in Z Douglas, J Pauwelyn and JE Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (OUP, 2014), 235, at 241.

Albeit deemed to be a significant improvement from the forceful means for securing redress, the early legalized forms of investment protection had several shortcomings. One of them was certainly the absence of any permanent machinery to administer the adjudication of such disputes; a problem that would partly be addressed with the adoption of the 1899 Hague Convention and the establishment of the Permanent Court of Arbitration (PCA),¹⁶ and later with the creation in 1922 of the Permanent Court of International Justice (PCIJ).¹⁷ Another was the celerity with which property-related disputes were actually addressed by the various claims commissions and tribunals. Proceedings before these frequently suffered from considerable delays, while many of them were also prevented from properly completing their work.¹⁸ In addition to this, the mechanism of diplomatic protection itself increasingly began to prove unsatisfactory as a device for the adjustment of investment disputes. For the state of nationality, the practice was seen as problematic because the espousal of claims inevitably led to confrontation and conflicts with the government of the host State. For the investor, reliance on diplomatic protection did not provide for sufficient security, as there was no guarantee that his State of nationality will be willing to espouse the claim, or even to submit it for adjudication before a competent international tribunal. In accordance with the traditional law of international claims, the right of diplomatic protection was namely one belonging to the State, meaning that the latter enjoys discretion as to whether or not it will take up the claim on behalf of its injured national, and how it will exercise it.¹⁹ This even besides the more practical question, whether the home State was actually equipped with sufficient legal and factual knowledge to pursue claims in relation to what – certainly in the context of modern foreign investment operations – would usually turn out to be very complex problems.

2.1.2. The Rise of Individuals' Private Right of Action and the Advent of Contract-Based Arbitrations

The right of diplomatic protection was premised on the Vatelian fiction, famously endorsed by the PCIJ in the *Mavrommatis* case (1924), that “[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law”.²⁰ Reliance on this fiction was necessary since, since in accordance with traditional international law, private persons did not have standing to bring claims directly against States. Up until the twentieth century, international law was still considered primarily as the law which governed the relations among States, and which did not recognize private parties as its

¹⁶ *Convention for the Pacific Settlement of International Disputes*, 29 July 1899, 1 Bevans 230 (entered into force 4 September 1900). The Convention provided a structure for the arbitration of inter-State disputes.

¹⁷ *Statute of the Permanent Court of International Justice*, 16 December 1920 (entered into force on 20 August 1921), 6 LNTS 379, 390; (1923) 17 AJIL Supp. 115.

¹⁸ See Bederman (n 9), 166ff and MO Hudson, *International Tribunals: Past and Future* (1944) 195-98. Admittedly, the delays were partly explicable by the substantial dockets of many of these commissions.

¹⁹ On these limitations, see Borchard (n 5), 356, 363-80. See also *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase Judgment)* [1970] ICJ Rep 3 [78]-[79] (“...within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. [...] The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action...”). The discretionary nature of diplomatic protection continues to be seen as the main reason for its ineffectiveness in the context of investment dispute settlement. See eg Muchlinski (n 13), 342-344.

²⁰ *Mavrommatis Palestine Concessions (Jurisdiction) (Judgment)* PCIJ (ser A) No 2 (30 August 1924) 12. cf A Pellet ‘The Second Death of Euripides Mavrommatis’ (2008) 7 LPICT 33.

proper subjects.²¹ Such was the general position in international law; undoubtedly, there were certain limited instances of individuals having been granted the right of direct action on the international plane already in the nineteenth century, but these were essentially exceptions confirming the rule.²²

This situation began to change in the course of the twentieth century, as the practice gradually became more common of conferring *locus standi* upon private persons in proceedings before international (adjudicatory) bodies,²³ including for the purpose of bringing claims²⁴ against States with respect to measures affecting the individuals' economic interests. Mention could be made here of the International Prize Court envisioned by The Hague Convention (1907), which – though never established – foresaw in the possibility for individuals from neutral or enemy powers to bring an appeal before such Court in the event that “the judgment of a national court injuriously affects his property”.²⁵ But even more so of the Central American Court of Justice, which actually operated from 1907 to 1917 and which had competence to deal with questions that individuals of the five Central American States “may raise against any of the other contracting Governments, because of the violation of treaties or conventions, and other cases of an international character”.²⁶ Specific mention should further be made of various arrangements for post-conflict reparations, such as the various Mixed Arbitral Tribunals established in the aftermath of WWI to decide claims for war-related losses that nationals of the Allied Powers could bring against the governments of enemy states;²⁷ the Arbitral Tribunal of Upper Silesia created to decide claims arising out of the “suppression or diminution of vested rights” resulting

²¹ cf *SS Lotus (France v Turkey) (Judgment)* PCIJ (ser A) No 10 (7 September 1927) 18 (‘International law governs relations between independent States’). For a general discussion, see K Parlett, *Individual in the international legal system: Continuity and Change in International Law* (CUP 2011).

²² cf Court belonging to the Commission for the Navigation of the Rhine. On this, see HAM Klemann, ‘The Central Commission for Navigation on the Rhine, 1815-1914. Nineteenth Century European Integration’ in B Wubs & R Banken (eds), *The Rhine: A Transnational Economic History* (Nomos, 2017), 1-26.

²³ The trend was noticeable in different areas of international law and part of it was also the growing practice of affording private persons the capacity to institute proceedings before international adjudicatory bodies in relation to disputes between them and international organizations. Mention can be made eg of the Administrative Tribunal of the League of Nations established in 1927 to hear complaints against the Secretariat of the League of Nations and against the International Labour Office; the United Nations Administrative Tribunal established in 1949 for the purpose of resolving disputes between UN staff members and the UN organization; or the Court of Justice created by the Treaty Establishing the European Coal and Steel Community of 1951, before which private industrial enterprises or associations of enterprises could appeal against acts of the Community's organs.

²⁴ Increasingly, private parties have also been given standing to complain before international bodies about a State's purported non-observance of specific obligations in non-contentious procedures. Mention could be made of the right of individual ‘representations’ to the International Labour Office by an industrial association of employers or of workers (cf art 409 of the Treaty of Versailles); the right of individual ‘communications’ to the Council of the League of Nations in the context of the Minority Protection system; or the right of petition granted to communities or sections of the populations of mandated territories under the League of Nations' mandates system (cf *International status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128, at 137-38).

²⁵ Convention (XII) relative to the Creation of an International Prize Court, signed in The Hague on 18 October 1907 (reproduced in *The Hague Conventions and Declarations of 1899 and 1907* (OUP 1915) 189-90), arts 4(2) and (3). None of the signatories ever ratified the Convention. The Court's failure was primarily attributable to the uncertainty as to the law that it was supposed to apply. Hudson (n 18), 166.

²⁶ Convention between Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador for the Establishment of a Central American Court of Justice, signed at Washington on 20 December 1907, 206 CTS 78 (reproduced in (1908) 2 AJIL Supp 231), art 2.

²⁷ See eg *Treaty of Peace with Germany (Treaty of Versailles)*, signed 28 June 1919, 225 CTS 188 (entered into force 10 January 1920) art 304(b). Similar provisions could be found in the peace treaties with Austria, Hungary, and Bulgaria. For their text and analysis, see PF Simonson, *Private Property and Rights in Enemy Countries* (E Wilson 1921) 281-87.

from the passing of sovereignty over Upper Silesia from Germany to Poland;²⁸ or the special Arbitral Commission on Property Rights and Interests established after WWII to decide on property-related and other matters arising out of the WWII and the occupation of Germany.²⁹ Last but not least, reference must be made to the various mechanisms that would eventually become increasingly common in the post-WWII era and which would allow private parties to bring claims against their own States of nationality in respect of alleged breaches of their human rights – starting with the possibility of individual petition under the European Convention of Human Rights (1950) that has allowed parties to bring claims before the European Commission on Human Rights with respect to *inter alia* the right to peaceful enjoyment of property.³⁰

Thus, what in the nineteenth century still appeared an inconceivable proposition – that a State would permit itself to be sued before an international court by a private party – significantly changed in the course of the twentieth century. The bringing of claims by private persons in their own name, and without the interposition of the State of nationality, became an option contingent upon a State’s consent. In most cases, though, the granting of individual *locus standi* on the international plane did not entail a full internationalization of dispute settlement procedures. Access to these remained often conditioned upon some form of initial recourse to domestic (judicial) remedies. In the context of some of the postwar arrangements discussed above (including with regard to the proposed International Prize Court), access to international adjudication was open only by way of appeal from domestic courts.³¹ While access to the Central American Court of Justice³² and the European Commission for Human Rights³³ was even conditioned with the strict exhaustion of local remedies.

The transition in international adjudication from a predominantly inter-State model, to one that increasingly accommodated “mixity”, began to be noticeable also in relation to the settlement of investment disputes. At least initially, however, changes were not brought about through international law. The suggestion to extend the competence of the PCIJ to disputes based on economic relations between a State and an individual failed to attract proper support,³⁴

²⁸ See chiefly Convention between Germany and Poland relating to Upper Silesia, 15 May 1922, entered into force 3 June 1922, 9 LNTS 465, art 5. The Tribunal had competence over other matters. See further, G Kaeckenbeeck, ‘The Character and Work of the Arbitral Tribunal of Upper Silesia’ (1935) 21 Transactions of the Grotius Society 27.

²⁹ Convention on the Settlement of Matters Arising out of the War and the Occupation Between the UK, France, US, and Germany (FRG), signed at Bonn 26 May 1952, entered into force 5 May 1955, 332 UNTS 3, art 7 of ch 5, art 12 of ch 10, and art 6 of Annex.

³⁰ *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, signed at Rome 4 November 1950, ETS 5 (entered into force 3 September 1953) art 25. See <www.echr.coe.int/Documents/Collection_Convention_1950_ENG.pdf> accessed 14 June 2018.

³¹ cf Convention (XII) relative to the Creation of an International Prize Court (n 25), art 4(2) and (3); or Convention on the Settlement of Matters Arising out of the War and the Occupation Between the UK, France, US, and Germany (n 29), art 7(2). However, German-Polish Convention regarding Upper Silesia (n 28), art 5, where direct recourse was allowed. See also Treaty of Versailles (n 27), art 297(e).

³² See *Convention for the Establishment of a Central American Court of Justice* (n 26), art 2 (‘... provided that the remedies which laws of the respective country provide against such violation shall have been exhausted or that denial of justice shall have been shown’). All of the five cases that were brought before the Court by individuals were dismissed or declared to be inadmissible, in part on account of the failure to exhaust local remedies. See MO Hudson, ‘The Central American Court of Justice’ (1932) 26 AJIL 759.

³³ See ECHR (n 30), art 26. (‘The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law...’).

³⁴ See Permanent Court of International Justice: Advisory Committee of Jurists, 9th Meeting (Private) of 25 June 1920, *Procès-verbaux of the Proceedings of the Committee* (1920), at 205-15. On the drafts presented to the Committee of Jurists, see further LB Sohn, ‘Proposals for the Establishment of a System of International Tribunals’ in M Domke (ed), *International trade arbitration: a road to world-wide cooperation* (American Arbitration Association 1958) 63, at 67ff. Later proposals to permit private persons, including corporate ones, to appear before the International Court of Justice similarly failed to attract support. See SM Schwebel, Judge Sir Hersch Lauterpacht’s Report on the Revision of the Statute of the International

while the proposals to establish, on a conventional basis, a special machinery dedicated to the adjustment of investment dispute were not put forward until after WWII.³⁵ In the early part of the twentieth century, provisions for the direct adjustment of investment-related disputes began to appear, instead, first in contracts that foreign investors directly negotiated with host State governments.³⁶ These provisions mostly took the form of arbitration clauses providing for either *ad hoc* or institutional arbitration, generally with some form of third party designation of a neutral arbitrator.³⁷ A notable element in these contractual arrangements was the absence of the usual requirement of submission to local courts, which the host State governments were apparently prepared to waive in their desire to attract foreign capital.³⁸ This appeared as a departure from the practice generally established under international law, but was of course fully in conformity with then emerging system of “private” international arbitration, which was conceived precisely as an alternative to litigation in any particular State judicial system.³⁹

In the early part of the twentieth century, contract-based arbitration progressively began to establish itself as a viable,⁴⁰ even if not widely available, nor entirely effective mechanism for the settlement of investment disputes. In practice, it was mostly the larger investors, such as oil producing companies, that actually possessed sufficient bargaining power to succeed with the inclusion of arbitration clauses in their concession contracts. Even where such procedures were available, investors often experienced difficulties in their operation. Some of the shortcomings of such a contract-based system became manifest as early as with the seminal *Lena Goldfields* arbitration of 1930, one of the first instances of direct arbitration of a dispute between a host State and a foreign investor,⁴¹ where the company never succeeded in enforcing the massive

Court of Justice’ in DD Caron, SW Schill, A Cohen Smutny & EE Triantafyllou, *Practising virtue: inside international arbitration* (OUP, 2015), 158, at 164-165.

³⁵ See *infra* 2.1.3.

³⁶ Arrangements of this type occasionally gave rise to further litigation before the PCIJ. See eg *Losinger (Switzerland v Yugoslavia) (Order of 27 June 1936) (Preliminary Objection)* [1936] PCIJ (ser A/B) No 67, case concerning the non-observance of the arbitration clause contained in a contract between the Yugoslav Government and the firm of Losinger & Co; or *Société Commerciale de Belgique (Belgium v Greece) (Judgment)* PCIJ (ser A/B) No 78 (15 June 1939), concerning two awards rendered in an arbitration between the Government of Greece and the Societe commerciale de Belgique based on the arbitration clause provided for under a 1925 contract concerning the construction of railway lines.

³⁷ For examples, see FV Garcia-Amador, Special Rapporteur, *Fifth Report on International Responsibility* UN Doc A/CN.4/125 and Corr 1 (in (1960) II Ybk ILC), at paras 50-53.

³⁸ See on this O Schachter, ‘Private Foreign Investment and International Organization’ (1960) 45 Cornell L Q 415, at 427.

³⁹ Two important developments in this field were the adoption under the League of Nations of the 1923 Geneva Protocol on Arbitration Clauses, which effectively eliminated difficulties in regard to the non-recognition of non-domestic arbitration agreements, and of the 1927 *Geneva Convention for the Execution of Foreign Arbitral Awards*, which resolved difficulties in regard to the recognition and enforcement of foreign arbitral awards. In 1922, the International Chamber of Commerce also adopted its first rules of arbitration and in 1923 established the Court of Arbitration (EcoSoc Council Res 708 (XXVII) (April 17 1959)).

⁴⁰ One must bear in mind that the alternative to litigation before the courts of the host State, or the submission of investment disputes to international adjudication, was to seek relief in the courts of the investor’s home State or some third-State where host States’ assets were present. Before WWII, however, the plea of sovereign immunity generally prevented litigants from suing foreign governments or government agencies. See eg *Von Hellfeld v Russian Government (Anhalt Case)*, Decision of the Royal Prussian Court for the Determination of Jurisdictional Conflicts of 25 June 1910 (reproduced in (1911) 5 Am J Int’l L 490, at 497) (‘the property of a sovereign state in another state is not subject to the writs of execution of the law courts of the latter state because that property is not subject to the political power of the harboring state’). After WWII, the doctrine of absolute immunity gradually gave way to the restrictive theory of sovereign immunity, pursuant to which States could be sued for acts performed in a commercial capacity. In the United States, this policy changed was introduced in 1952. See WW Bishop, ‘New United States Policy Limiting Sovereign Immunity’ (1953) 47 Am J Int’l L 93.

⁴¹ The *Suez Canal Company* case, decided by the French Emperor as early as in 1864, is considered by some as the earliest instance of a direct investor-State arbitration. On this episode, see J Webb Yackee, ‘The First Investor-State Arbitration: The *Suez Canal Company v Egypt* (1864)’ (2016) 17 The Journal of World Investment & Trade 401.

monetary award which it had obtained in its favor on account of the repudiation of its mining concession.⁴² But it was particularly the recurring problem of host States denying the validity of arbitration agreements or otherwise attempting to repudiate them that would soon begin to undermine the effectiveness of contract-based system of investor-State arbitration. Facing such problems, foreign investors were, once again, left to rely on the protection of their own governments,⁴³ which might have been neither able, nor willing to provide. Indeed, unlike in the past, with the advent of the UN Charter, military interventions to compel the enforcement of awards, or the submission to further adjudication, became outlawed.⁴⁴

Last but not least, there were also impediments arising from the absence of adequate facilities that could administer such arbitration. Arbitral institutions established by private organizations, such as the Court of Arbitration of the International Chambers of Commerce, were frequently not acceptable to governments of capital-importing States, in view of the private, commercial orientation of such institutions.⁴⁵ On the other hand, the Permanent Court of Arbitration, the only permanent arbitral institution then organized under international law, was essentially not open to private claimants, nor commanding large membership of capital-importing States.⁴⁶

2.1.3. The Establishment of ICSID as a Decisive Step in the De-Politicization of Investment Disputes

A decisive step in improving the access of foreign investors to international dispute settlement mechanisms and overcoming the limitations imposed by the mechanism of diplomatic protection was taken with the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) in 1965.⁴⁷ The push for its creation did not come directly from States, as in the case of the arbitration mechanism envisioned under the 1962 OECD Draft Convention on the

⁴² See on this episode VV Veeder, 'The *Lena Goldfields* Arbitration: The Historical Roots of 'Three Ideas' (1998) 47 ICLQ 747.

⁴³ A well-known example were the proceedings brought before the ICJ by the United Kingdom on behalf of the Anglo-Iranian Oil Company, following the nationalization of the Iranian oil industry. The submission to the Court was the consequence of the refusal, by Iran, to submit to arbitration, as provided for in the concession contract entered into between the Company and Iran. See Application Instituting Proceedings, reproduced in *Anglo-Iranian Oil Co Case (United Kingdom v Iran)* ICJ Pleadings, 12, available at <<https://www.icj-cij.org/files/case-related/16/016-19510526-APP-1-00-EN.pdf>>.

⁴⁴ cf O Schachter, 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54 AJIL 1, 14ff.

⁴⁵ PC Szasz, 'Using the New International Centre for Settlement of Investment Disputes' (1971) 7 E Afr LJ 128, at 128-29. This is not to say that these private institutions have not been administering arbitrations involving States and foreign private enterprises. Such mixed disputes have been submitted to the ICC since 1922. But these were largely disputes arising out of various supply / sale contracts. See further, KH Böckstiegel, 'Arbitration of Disputes between States and Private Enterprises in the International Chamber of Commerce' (1965) 59 AJIL 579.

⁴⁶ Szasz, *ibid* at 128-29. Admittedly, the PCA's founding Conventions authorized the Bureau to place its offices and staff at the disposal of the Contracting Parties 'for the use of any special Board of Arbitration' (*Convention for the Pacific Settlement of International Disputes* (n 16), art 47). As early as in the 1930s, the PCA provided services under this provision in a dispute between a US private company and China, concerning a contractual claim relating to the provision of radio services. See *Radio Corporation of America v Republic of China* (III UNRIIAA 1621, 13 April 1935). But this arrangement was made pursuant to personal request of the umpire to the Secretary General of the PCA, and PCA's Administrative Council expressly agreed to art 47 being applied to the case. See 'Permanent Court of Arbitration. Circular Noted on the Secretary General' (1960) 54 AJIL 933, 937. In 1962, PCA's normal inter-governmental jurisdiction was formally extended through the adoption of the Rules of arbitration and conciliation for settlement of international disputes between two parties of which only one is a state. Until 1970, only a single attempt was made to use this procedure. See *Government of Sudan v Turrif Construction (Sudan), Limited* (reproduced in (1970) 16 *Nederlands Tijdschrift voor Internationaal Recht* 200).

⁴⁷ Convention on the settlement of investment disputes between States and nationals of other States (ICSID Convention), 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

Protection of Foreign Property.⁴⁸ Nor as a result of private initiatives,⁴⁹ such as the Draft Statutes of the Arbitral Tribunal for Foreign Investment proposed by the International Law Association in 1948,⁵⁰ or the arbitration mechanisms proposed under the 1959 Abs-Shawcross Draft Convention on Investments Abroad.⁵¹ Instead, the founding of the ICSID Centre occurred on the initiative of the World Bank, which – being at the same time a financing as well as a developmental institution – explored ways to stimulate the flow of private foreign capital to developing countries so as to supplement the limited volume of public development finance otherwise provided for by the Bank. As Aron Broches, the then General Counsel of the Bank and intellectual father of the ICSID Convention, would later explain, the Bank considered it necessary to contribute to the improvement in the investment climate “by reducing the likelihood of unresolved conflicts between host countries and investors, and in particular by doing so in a manner which would eliminate the risk of a confrontation of the host country and the national State of the investor”.⁵² The ICSID Convention, concluded after only some three years of drafting in 1965, succeeded on both counts.⁵³

With a view to reducing the likelihood of unresolved conflicts, the Convention provided an effective machinery dedicated to the resolution of investment disputes, based on either conciliation or arbitration. This entailed not only the provision of detailed rules pertaining to the selection of arbitrators and to the conduct of arbitral proceedings. The Convention also directly addressed two of the most fundamental weaknesses that, at that time, were considered to undermine the effectiveness of concession-based arbitrations. First, it provided the necessary treaty basis for ensuring that arbitration agreements voluntarily entered into between private investors and host States would ultimately be implemented (Article 25(1) ICSID). And second, it provided the necessary framework to enable that the resulting arbitral decisions could be enforced in the national legal systems without any further review by domestic courts (Article 54 ICSID Convention).

Equally important, by granting private investors direct access to the Centre, the ICSID Convention succeeded in introducing a treaty-based mechanism through which direct confrontations between the host State and the investor’s national State could be avoided. The foreign investor has been granted the ability to directly proceed against the host State in an international forum, in its own name, without having to call upon the power of its home State for protection. Indeed, the Convention went as far as expressly prohibiting interventions on the part of the home State in circumstances where an investor and the host State have consented to submit an investment dispute to arbitration before the ICSID Centre.⁵⁴ Procedurally, the Convention was thus a major improvement from the traditional remedial procedures, as the investor could now itself remain in charge of the process. At the broader level, however, the Convention was also claimed to be a significant step in the “de-politicization” of investment

⁴⁸ Reprinted in (1963) 2 ILM 241. Art 7(b) of the Draft Convention envisioned the possibility that nationals of the Parties submit disputes to an Arbitral Tribunal in the event that they have been injured by measures in breach of the Convention.

⁴⁹ For a survey of the principal proposals, see Hudson (n 18), 213-19; and Sohn (n 34) 68-75.

⁵⁰ Reproduced in UNCTAD International Investment Instruments: A Compendium vol III (2003) 259.

⁵¹ ‘The Proposed Convention to Protect Private Foreign Investment’, (1960) 9 *J Pub L* 115. Art 7(2) of the Draft Convention envisioned the possibility for an investor ‘injured by measures in breach of this Convention’ to institute proceedings ‘against the Party responsible for such measures’ before an Arbitral Tribunal.

⁵² A Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, (1972/II) 136 *Recueil des cours*, 331, at 343.

⁵³ For an extensive account of this history, see AR Parra, *The History of ICSID* (OUP 2012).

⁵⁴ The exercise of diplomatic protection with respect to a dispute is solely permitted if the host State fails to comply with an award rendered in such dispute (ICSID Convention, art 27).

disputes, insofar as it purported to create conditions that ought to prevent an investment dispute from escalating into a direct confrontation between the home State and the host State.⁵⁵

There is little doubt that, as originally conceived, ICSID was not itself intended to operate as an alternative to, but only as a *complement* of, domestic judicial procedures. As Broches would emphasize on several occasions throughout the Convention's drafting process, the proposed machinery was not intended as a substitute for local courts and local law, nor was it to be seen as "a one-sided attempt to create a new sort of extra-territoriality for foreign private investment."⁵⁶ Rather, the machinery

"became important in the abnormal case, where the normal ways of dealing with disputes proved unsatisfactory, perhaps because of a lack of governmental or judicial stability; perhaps because new legal relationships were being created for which there was as yet no appropriate or competent local forum. Implicit in the convention was the thought that it would be used only in these and other 'appropriate cases'."⁵⁷

This idea is ultimately also reflected in the Convention's preamble, which recognizes that disputes arising in connection with an investment "would usually be subject to national legal processes", though adding that "international methods of settlement may be appropriate in certain cases". In accordance with the drafter's intentions, those cases were supposed to constitute the exception, rather than the rule.

2.1.4. Investor-State Arbitration as an Exclusive Remedy

Nevertheless, by setting out a procedural and institutional machinery anchored in international law, the ICSID Convention ended up providing precisely such kind of mechanism for the settlement of investment disputes that, in practice, was effectively capable of providing a viable alternative to domestic courts. Inadvertently, the ICSID Convention itself offered the conjecture that investor-State arbitration could operate as a substitute of other dispute settlement mechanisms, by expressly stipulating in Article 26 that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy" (even if nonetheless adding that "[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention"). Included already in the first drafts of the Convention,⁵⁸ this

⁵⁵ See eg DA Soley, 'ICSID Implementation: An Effective Alternative to International Conflict' (1985) 19 Int'l L 521, at 543; or IFI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Review - Foreign Investment Law Journal 1, 3-4. Most textbooks on investment law adhere to this canon of 'depoliticization'. But for a realistic assessment of the depoliticization argument, see M Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2010) 3 Select Proceedings of the European Society of International Law 271.

⁵⁶ 'Memorandum of the meeting of the Committee of the Whole, December 18, 1962' reproduced in ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (vol 2, pt 1, Washington, ICSID, 1968), at 58.

⁵⁷ *ibid.*

⁵⁸ In the first draft of the Convention – prepared by Broches and intended to provide a basis for discussion among the Executive Directors of the Bank – one can find language to the effect that "[e]xcept as otherwise stated therein, an undertaking to have recourse to arbitration shall be deemed to be an undertaking to have recourse to arbitration in lieu of any other remedy." (Art II, Section 4, Working Paper of 5 June 1962, reproduced in *History* (vol 1) (n 56), 123). The provision was reformulated several times in the course of the subsequent negotiations. Following the initial round of discussions among the Bank's Executive Directors, the text was first changed to: 'Consent to have recourse to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to have recourse to such proceedings in lieu of any other remedy.' (Art IV, Section 16, Preliminary Draft Convention of 15 October 1963, reproduced in *History* (vol 2-1) (n 56), 219). The provision again underwent modifications after the regional consultative meetings; the text subsequently presented to the Legal Committee provided: 'Consent to have recourse to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to have recourse to such proceedings to the exclusion of any other remedy.'

stipulation had a two-fold purpose – to remove doubts that States or investors could generally have (1) as to whether the parties to a dispute intended to reserve the right to pursue other remedies, and (2) as to whether they intended to require that other remedies be exhausted prior to recourse to arbitration.⁵⁹ The latter aspect ended up generating most discussion in the Convention’s drafting process.

Most questions in this respect were raised by the implication that an undertaking to arbitrate disputes between the ICSID Centre would automatically be regarded as dispensing with the need of exhausting local remedies. This proposition was one that was not lightly accepted and thus generated much opposition throughout the drafting process. Already during the initial discussions on the proposed Convention by the World Bank’s Executive Directors, apprehensions were expressed about the way this presumption was formulated. Several Executive Directors considered it namely to derogate from the established principle of international law which conditioned the admissibility of an international claim with the exhaustion of local remedies, or deemed it to be generally impertinent to national judicial procedures which were thought to be the normal avenue for resolving investment disputes.⁶⁰ Similar objections were later raised at the various regional consultative meetings that were held with national legal experts (but were particularly pronounced at the meeting in Latin America),⁶¹ and in the formal observations submitted by some States on the proposed draft.⁶² They eventually resurfaced during the final

(Art 27(1) of Draft Convention of 11 September 1964, reproduced in *ibid*, 622). The text further redrafted in the course of the discussions by the Legal Committee into: ‘Consent of the parties to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to such proceedings to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration pursuant to this Convention.’ (Art 27(1) of ‘Summary proceedings of the Legal Committee Meeting of 28 December 1964’, reproduced in *History* (vol 2-2) (n 56), 792). Before being submitted back to the Executive Directors for adoption, the text underwent some final modifications, so that it then read: ‘Consent of the parties to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration pursuant to this Convention.’ (Art 26(1), Revised Draft of the Convention, 11 December 1964, reproduced in *History* (vol 2-2) (n 56), 919).

⁵⁹ *History* (vol 2-1) (n 56), 23.

⁶⁰ See eg statement of CS Krishna-Moorthi (Executive Director for India) at the meeting of 18 December 1962, noting how it was ‘extremely important ... that the convention and the Center not appear to derogate from the respect owed to national laws and national courts’ and thus observing how the provision on the exclusiveness of arbitration as a remedy reinforced his argument for the need to define the actual ambit of operation of the center (reproduced in *History* (vol 2-1) (n 56), 58); statement of F Illanes (Executive Director for Argentina, Chile, Bolivia, Uruguay and Paraguay) at the meeting of 27 December 1962, noting that ‘[n]ormally, disputes between a government and a foreign investor were dealt with first in the national courts’ and suggesting that the presumption be therefore redrafted to the effect that the national of the other contracting party would have ‘the right to present a claim according to international law’ (*ibid*, 62); or similar statements by the same Illanes, by L Mejia-Palacio (Executive Director for Brazil, the Philippines, Columbia, Ecuador, and the Dominican Republic), by RC Chen (Executive Director from China), by AK Ghosh (Alternative Director from India), by M Mirza (Executive Director from Pakistan), and by I Khelil (Alternative Director from Tunisia) at the meeting of 28 May 1963 (reproduced in *ibid*, 86-97).

⁶¹ Opposition to the proposed provision was particularly strong among the experts of the Latin American States. See eg the general statements made at the Consultative Meeting of 3-7 February 1964 at Santiago by F da Cunha Ribeiro (Brazil), J Barboza (Argentina), J Escobar (Bolivia), A Espinosa (Venezuela), T Bustamante (Ecuador), or A del Castillo (Colombia), who were more or less all critical about the curtailment of the authority of their national courts that was considered to necessarily follow from the use of the proposed Centre, and about the privileged position in which the foreign investors would be placed if they could avoid recourse to domestic judicial systems (reproduced in *History* (vol 2-1) (n 56), 306-26). Nonetheless, similar reservations were also expressed at other regional meetings. See eg statement of S Bilgen (Turkey) at the Consultative Meeting in Geneva on 20 February 1964 (reproduced in *ibid*, 431), or the statements of Ghanem (Lebanon), Dajani (Jordan), Wanasundera (Ceylon), Heth (Israel), as well as Pant (Nepal) at the Consultative Meeting in Bangkok in April 1964 (reproduced in *ibid*, 524-26, and 543 respectively).

⁶² See observations by Turkey (suggesting that the presumption be inverted, so that consent to arbitration would not be deemed to exclude the necessity of prior exhaustion of local remedies), or Austria (wondering whether it would not be

discussions on the Convention's text by the Bank's Legal Committee, where several legal experts insisted that the provision be inverted, so that an express agreement would rather be required to rule out the requirement of exhaustion of local remedies. The argument was namely made that, since the usual method for the settlement of investment disputes was through national legal processes, the proposed provision "expressed a presumption of the unusual".⁶³

Throughout these discussions, Broches defended the presumption by arguing that the provision was "not intended to elevate arbitration procedures over local law", but was solely designed "to avoid any question whether, once there was an agreement to arbitrate, that avenue was immediately available or whether it was necessary to pursue other remedies first."⁶⁴ As Broches would often emphasize throughout the preparatory works, the presumption was thus not stating a rule of "substance", but represented merely a "rule of interpretation".⁶⁵ In Broches' view, such rule of interpretation "would seem to be in accordance with the *most likely intention of the parties* in cases where they have entered into an agreement containing an arbitration clause",⁶⁶ it "reflected the *position of most modern jurists* on the problem of waiving the competence of local courts where a dispute between a private individual and a State was referred by agreement to an international tribunal",⁶⁷ and at the same time also "reflected the position *supported by State practice*"⁶⁸ – a proposition eventually shared by legal experts from several capital-exporting states.⁶⁹ In short, the presumption was merely meant to represent "what was the *normal* interpretation of consent to arbitration".⁷⁰

Broches' arguments certainly had merit. In doctrinal writings, the proposition was well-accepted that, whenever contracts or concessions provided for international jurisdiction without reference to the exhaustion of local remedies, this could be construed as a tacit waiver, by the State making the contract with the alien, of the right to require the exhaustion of local remedies.⁷¹ The same presumption seemingly did not apply, however, in the situation where States themselves created some arbitration machinery for the settlement of disputes concerning private claims. In such cases, the conclusion of a convention providing for adjudication of individual claims was not, in itself, deemed to involve an abandonment of the claim to exhaust local remedies.⁷² Indeed, Broches conceded that what he considered to be the "the normal

more practical to submit an investment dispute before local courts). Reproduced in *History* (vol 2-2) (n 56), at 663 and 670-71, respectively.

⁶³ See statement by the legal expert of Philippines, in *History* (vol 2-2) (n 56), 756. The legal experts of Turkey, Panama, Israel, as well as Ghana, associated themselves with these objections, *ibid* 756-57, 761.

⁶⁴ *History* (vol 2-1) (n 56), 59.

⁶⁵ See 'Paper prepared by the General Counsel and transmitted to the members of the Committee of the Whole' (reproduced in *History* (vol 2-1) (n 56), 84); Comment on Section 16 in Preliminary Draft (*ibid*, 220); Comment on Article 26(1) in 'Report of the Chairman of the Legal Committee on Settlement of Investment Disputes' (23 December 1964) (*ibid* (vol 2-2), 936; or 'Memorandum from the General Counsel and Draft Report of the Executive Directors to accompany the Convention' (19 January 1965) (*ibid* (vol 2-2), 952, 958-959).

⁶⁶ *History* (vol 2-1) (n 56), 84-85.

⁶⁷ *ibid* (vol 2-2), 756.

⁶⁸ *ibid* (vol 2-2), 973.

⁶⁹ See statements of legal experts of the Netherlands, United States, United Kingdom, Germany, and Spain, at Legal Committee Meeting of 28 December 1964, which considered that the language of the proposed provision was declaratory of existing practice. *ibid* (vol 2-2), 758-61.

⁷⁰ *ibid* (vol 2-1), 431.

⁷¹ See Garcia-Amador (n 37) 57, para 64. See further SM Schwebel and JG Wetter, 'Arbitration and the Exhaustion of Local Remedies' (1966) 60 AJIL 484 (confirming the practice under contracts between states and investors to treat arbitral remedies provided under such contracts as exclusive).

⁷² See *Salem Case (Egypt, USA)* (8 June 1932) II UNRIIAA 1161, at 1189. A waiver of the local remedies requirement was possible, though, but had to be made expressly. See eg *US-Mexico General Claims Convention*, signed on 8 September 1923, 68 LNTS 459, art 5.

interpretation” of consent to arbitration may not be applicable outside the context of contractual arbitration clauses. In the paper he prepared in 1963 for the Executive Directors, Broches took the view that

“[t]he situation would be different if a government made a unilateral declaration... by which it gave aggrieved investors the right to have recourse against it before an arbitral tribunal under the auspices of the Centre. In such a case the government might be willing to waive the local remedies requirement, or it might regard the arbitration procedure as an appellate procedure to be resorted to only after the exhaustion of local remedies.”⁷³

At a later meeting with the Committee of the Whole, Broches again reiterated that

“The only exceptional case might arise where a government, by statute or proclamation, undertook unilaterally to place disputes before the Center. In that case the intention might well be to have recourse to the Center only if all other means to settlement, including local remedies, had failed.”⁷⁴

As a matter of “normal interpretation”, the proposition that arbitration dispensed with the requirement of exhausting local remedies was thus not automatically applicable to the situation where consent to arbitration was expressed through unilateral provisions included in investment legislation. In fact, as Broches would end up admitting in the later course of negotiations, it was “for this reason chiefly” that the interpretative presumption was expressly included in the proposed Convention.⁷⁵

Insofar as it merely set out an interpretative presumption, the proposed provision was not supposed to have any bearing on the local remedies rule. As claimed by Broches, in fact, the provision “was emphatically not designed to introduce any change in accepted rules of international law.”⁷⁶ The presumption was namely intended to apply “*not* to the case of a private investor approaching a government with a claim that he had a moral right to ask it to resort to arbitration, but to that where consent to arbitration had already been given, and the only question at issue was to determine whether that consent had been tacitly qualified by requiring the prior exhaustion of local remedies”; in the view of Broches, “[i]t seemed wise to assume that such a reservation did not exist unless expressly stated.”⁷⁷ In Broches’ understanding, the interpretative presumption therefore in no way prevented the host State from demanding the exhaustion of local remedies as a condition precedent for bringing a case before an arbitral tribunal. Nonetheless, with a view not to casting any doubt on the right of States to require such exhaustion, the second sentence was eventually added to the provision, stipulating that “[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”⁷⁸

2.1.5. The Onset of Bilateral Investment Treaties and the Entrenching of Direct Recourse to Treaty-Based Investment Arbitration

Article 26 of the ICSID may not have been meant to introduce any change into the traditional law applicable to the presentation of international claims. It did, however, depart from the approach adopted in some of the other contemporaneous proposals that likewise envisioned the

⁷³ *History* (vol 2-1) (n 56), 85.

⁷⁴ cf ‘Memorandum of the meeting of the Committee of the Whole, May 28, 1963’ reproduced in *ibid*, 97.

⁷⁵ *History* (vol 2-2) (n 56), 758.

⁷⁶ *History* (vol 2-1) (n 56), 431.

⁷⁷ *ibid*.

⁷⁸ See *History* (vol 2-2) (n 56), 973.

creation of some arbitration machinery for the settlement of investment disputes between States and private individuals. Both the ILA Draft Statutes of the Arbitral Tribunal for Foreign Investment (1948) and the OECD Draft Convention on the Protection of Foreign Property (1962), for example, envisioned that the presentation of claims by injured nationals would be subject to the normal operation of the local remedies rule.⁷⁹

Nor was Article 26 ICSID purportedly intended – at least in Broches’ view – to “express any view with regard to the desirability or undesirability of exhausting local remedies.”⁸⁰ But by laying down a *general* presumption against the requirement of exhaustion of local remedies (a presumption which was thus to apply not only to typical situation of a contractual undertaking to arbitrate, but also to situations where consent to arbitration is expressed unilaterally), Article 26 ICSID provided the basis on which investment arbitration would later effectively establish itself as a powerful and preferred *alternative* to domestic courts. Article 26 ICSID namely deferred the question of local remedies to the will of the parties and Broches was in effect convinced that the host States would have sufficient leeway to insist on the exhaustion of local remedies.

At the time of the adoption of the ICSID Convention, the expectation was that consent to arbitration before the Centre would normally be express by means of a contractual undertaking entered into directly between the foreign investor and the respondent State (including “any constituent subdivision or agency of a Contracting State designated to the Centre by that State” (Article 25, ICSID Convention) – even if the drafters did not consider it unconceivable that such consent could also be based on a unilateral offer to arbitrate expressed in domestic investment promotion code that would eventually be simply accepted by the investor in writing.⁸¹ Either of those options seemingly left open the possibility to condition consent to the jurisdiction of the Centre with the exhaustion of local remedies if the parties so desired. As Broches would explain, “[t]he parties, *principally the host government*, had to decide whether they were willing to permit recourse to the facilities of the Center immediately and in lieu of local remedies, or whether those facilities were to be used only as an appellate Court.”⁸² This was not only possible in the context of contractual arbitration clauses, but the option could conceivably be exercised also in circumstances where consent to arbitrate before the ICSID Centre were to be expressed by means of a unilateral declaration; in Broches’ view, “all that would be necessary under the Convention would be for the government to state the local remedies requirement in its unilateral declaration.”⁸³

Since the 1990s, however, the predominant method by which investment disputes have been brought before the Centre was not by means of contractual arbitration clauses, but on the

⁷⁹ See art 4b, ILA Draft (“Access to the tribunal presupposes the exhaustion of local remedies except where other rules of international law or an agreement between the Parties provides otherwise”); and Commentary to art 7 of the *OECD Draft Convention* (“Nothing in the Convention, whether in this or any other Article, affects the normal operation of the Local Remedies rule. The rule implies that all appropriate legal remedies short of the process provided for in the Convention must be exhausted – local remedies or others”) (1963) 2 ILM 241 at 261. However, see Council of Europe, Consultative Assembly, Opinion No 39 (1963) on the OECD Draft Convention on the Protection of Foreign Property (1964) 3 ILM 133, para 15, suggesting that such prerequisite of the exhaustion of local remedies be rather considered to be waived, unless a Party has made an express declaration to the contrary. See further art 18(1) of the Revised Draft on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, proposed by the Special Rapporteur to the ILC, García Amador (“An international claim brought for the purpose of obtaining reparation for injuries sustained by an alien [...] shall not be admissible until, in respect of each one of the grounds of the said claim, all the remedies and proceedings established by municipal law have been exhausted.”) FV García Amador, Special Rapporteur *Sixth Report on International Responsibility* UN Doc A/CN.4/134 and Add.1 (in (1961) II Ybk ILC) at 48.

⁸⁰ *History* (vol 2-2) (n 56), 756-757.

⁸¹ IBRD, ‘Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (18 March 1965) [24].

⁸² *History* (vol 2-1) (n 56), 97; emphasis mine.

⁸³ *ibid*, 85.

basis of mutually reciprocated offers to arbitrate expressed in dispute settlement provisions of bilateral investment treaties (BITs).⁸⁴ The beginnings of such treaties can be traced back to the 1960s; though, it was predominantly in the 1990s that they would become the primary vehicle through which capital-exporting States have sought to protect the investments of their nationals abroad. Unlike the earlier Friendship, Commerce, and Navigation treaties that dealt with the protection of investments in addition to other commercial matters, the BITs were concluded with a single objective in mind: the promotion and protection of foreign investment. To that end, the BITs not only set out standards of treatment that investors were expected to enjoy as a matter of international law, but at the same time also allowed aggrieved investors to invoke international arbitration when a host State has failed to respect its treaty obligations. In the course of the years, this procedural innovation eventually resulted in an “epochal extension of compulsory arbitral jurisdiction over States, at the behest of private litigants”,⁸⁵ and gradually lead the ICSID to become a principal institution for the resolution of international investment disputes.

To be sure, in terms of procedure, expressing consent to ICSID arbitration through a dispute settlement clause in a BIT is not fundamentally different from it being expressed through domestic investment legislation. In both cases, the State offers to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, which can then be accepted by potentially any number of qualifying (existing or future) investors. Both options provide for a system of arbitration where the claimant need not have a direct contractual relationship with the defendant State, nor in fact any pre-existing undertaking to arbitrate until the dispute has arisen. Instead, the required consent to arbitration is established through a multi-stepped process, whereby the arbitration agreement is perfected only once the investor announces its intention to avail itself of the State’s offer to arbitrate.⁸⁶ Where both options differ, however, is in the nature of the instrument in which the offer to arbitrate is embodied. Unlike domestic foreign investment codes, which are solely the product of the host State legislative will, investment treaties are the outcome of negotiations between sovereign States, meaning that their contents depend on the agreement of the contracting State parties. Nominally, of course, the parties to such treaties are equally sovereign States. In practice, however, these treaties have typically been concluded between countries with such different levels of outward foreign investment that the bargaining power of the two sides has in reality been markedly unequal.⁸⁷ Eager to attract foreign investments, the capital-importing States have mostly not been in a position to dictate the terms of the treaty and rarely have they been successful in demanding the exhaustion of local remedies as condition to investor-State arbitration.⁸⁸ Gradually but steadily, the onset of investment treaties

⁸⁴ cf *Asian Agricultural Products Ltd. v. Republic of Sri Lanka (Final Award)* (ICSID Case No ARB/87/3, 27 June 1990), the first case in which the Centre has been seized by an arbitration request exclusively based on a dispute settlement provision of a treaty.

⁸⁵ J Paulsson, ‘Arbitration Without Privity’ 10 ICSID Rev–Foreign Investment LJ 232, at 256.

⁸⁶ The system has been described by some as ‘arbitration without privity’; see Paulsson (n 85). But such description is somewhat inaccurate: while the investor is not privy to the investment treaty containing the offer to arbitrate, it becomes privy to an agreement to arbitrate by accepting the State’s offer.

⁸⁷ On this, see AT Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1997-1998) 38 Va J Int’l L 639, at 680 (‘Without a BIT, a particular developing country will have a much lower level of investment than otherwise. Investment in a developed country, on the other hand, is much less likely to be sensitive to the presence of such treaties. Developing countries, therefore, are more eager than developed countries to reach an agreement on investment with a major capital-exporting country and the capital-exporting countries can, in turn, demand strong protections for their foreign investors.’ Footnotes omitted).

⁸⁸ cf P Peters, ‘Exhaustion of Local Remedies: ignored in most bilateral investment treaties’ (1997) 44 Netherlands International Law Review 233.

has thus led to the entrenchment of investor-State arbitration as a proper alternative to litigation before domestic courts.⁸⁹

* * *

As I intend to demonstrate in the subsequent chapters of this book, the functional shift that occurred with the advent of investor-State arbitration and its establishment as an alternative to domestic litigation continues to inform investment tribunals' attitude towards domestic courts. Particularly on issues pertaining to jurisdictional matters, the presumption that investor-State arbitration dispenses with the local remedies requirement is recurrently invoked as a reason for not according deference to domestic judicial procedures, and as a general argument for downplaying the relevance of domestic courts.

2.2. The Substantive Shift: The Rise of International Standards of Treatment and Domestic Law's Declining Importance to the Adjustment of Investment Disputes

The onset of international investment arbitration has not, in itself, been determinative to the declining significance of domestic courts as a means for resolving investment disputes, however. Such a development also precipitated from the development of substantive rules of international law pertaining to the treatment of foreigner subjects. These rules have provided an alternative set of standards by which the propriety of the conduct of State authorities could now be appraised – standards independent from those set out in domestic law. Once this appraisal was no longer dependent on domestic standards, domestic courts effectively lost then their claim to exclusivity in resolving investment disputes. For, unlike in relation to domestic law, with regard to which domestic courts could traditionally claim epistemic superiority, the same is not the case with standards based on international law. It is worth examining, therefore, the process through which these international standards of treatment began to take shape, and their progressive development, which ensued in a full-fledged internationalization of investor-State relations by the end of the twentieth century.

2.2.1. Initial Standard-Setting through Early Treaties of Commerce

Prior to the sixteenth century, the situation of the foreigner who acquired legal interests in the territory of a foreign state, as resident or only as merchant, very much depended on local idiosyncrasies. By the general rules of the law of nations, the government of the host state was essentially entitled to treat the foreigner and his property with unimpeded discretion, and whatever substantive rights the foreigner enjoyed abroad, these existed solely by virtue of national regulations.⁹⁰ The only duty incumbent upon the host state by the law of nations was to accord justice to the foreigner on an equal footing with the nationals in the local courts; a duty

⁸⁹ For a recent restatement of this view, see U Kriebaum, 'Local Remedies and the Standards for the Protection of Foreign Investment', in C Binder et al. (ed), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 417-462, at 460, explaining how '[t]he ICSID Convention was intended to replace the vagaries of adjudication of investment claims against States by their own courts' and how '[t]he dispute settlement system provided for in the ICSID Convention is designed as an alternative to litigation in domestic courts, not as a subsidiary remedy'. See also A Ehsassi, 'Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle' in S Schill (eds), *International Investment Law and Comparative Public Law* (2010), 213, at 241, noting how ICSID tribunals provide an 'alternative' mechanism for obtaining remedies available in the domestic legal system, as opposed to international human rights courts which represent a 'subsidiary system' to domestic remedies.

⁹⁰ Freeman (n 14), 500-501; H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815): A Contribution to the History of the Law of Nations* (Sijthoff 1971) 94-95; also RB Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester, 1984) 5-7.

which, if failed to be respected, amounted to a denial of justice, which provided then grounds for the exercise of reprisals.⁹¹ Essentially, however, the standard of treatment was one contingent upon the local situation, and the legal condition of the foreigner therefore varied widely as between different communities and during different periods.

This began to change from the sixteenth century onwards when conventional rules pertaining to the treatment of aliens gradually began to emerge from the practice of the major European powers of that period.⁹² It was thus particularly Britain, France, Holland, and Spain – and to a lesser extent the German Empire, Sweden, and Russia – that proceeded to gradually secure, on a reciprocal basis, particular rights for their subjects abroad.⁹³ Most of these treaties would contain stipulations pertaining to the freedom and security of the foreigner's person and property, as well as to the freedom of trade (in some cases already based on most-favoured-nations basis⁹⁴), further supplemented by stipulations recognizing foreigners' rights of access to the local courts.⁹⁵ The latter stipulations were premised on three essential principles: (1) the foreigner had the right of access to court (and was thus entitled to pursue his rights as plaintiff or defendant in the ordinary way of procedure and to use all remedies available under municipal law), (2) on equal footing with the host country's own nationals (which meant that justice was to be administered to him in a non-discriminatory way), and (3) where he was to be assured the application of national laws in a just way.⁹⁶ The relevant treaties of the period did not otherwise postulate that the legal system of the foreign State had to adhere to any particular standard. Some of them, however, did supply certain safeguards against shortcomings of the judiciary.⁹⁷

In the course of the eighteenth century, some of the protections originally conceded to each other's nationals by the European Powers began gradually to be employed in other contexts. Important in this respect is especially the practice of the United States, which soon upon its independence embarked upon securing protection to its commercial interests abroad – first, through treaties of amity and commerce with the European Powers,⁹⁸ followed by treaties with the countries of Latin America, and later with other states. Although their primary purpose was

⁹¹ The 'commission of injustice or the denial of justice' have been recognized as conditions justifying reprisals as early as in the work of G da Legnano, *Tractatus De Bello, De Reprisaliis et De Duello* (1383), Ch CLVI, 326. cf HW Spiegel, 'Origin and Development of Denial of Justice' (1938) 32 AJIL 63, 63-66.

⁹² Characteristic of this practice was the conclusion of commercial treaties, usually in tandem with peace treaties, which were aimed at the resumption of economic relations after periods of war. The practice became so ubiquitous that these treaties came to be in virtually standard form. SC Neff, 'Peace and Prosperity: Commercial Aspects of Peacemaking' (CUP 2004) 365, 367-70.

⁹³ See C Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press, 1985), 12, explaining that it was essentially the benefits of continuous international commercial intercourse that provided a powerful incentive for observation of these rules.

⁹⁴ See further on this SW Schill, *The Multilateralization of International Investment Law* (CUP 2009) 129ff.

⁹⁵ Neufeld (n 90), 94-100.

⁹⁶ See eg Art VIII of the *Peace Treaty of Utrecht between Britain and France* (1713), which stipulated '[t]hat the ordinary distribution of justice be revived, and open again, through the kingdoms and dominions of each of their Royal Majesties, so that it may be free for all the subjects on both sides to sue for and obtain their rights, pretentions, and actions, according to the laws, constitutions, and statutes of each kingdom'; reproduced in G Chalmers, *A Collection of Treaties Between Great Britain and Other Powers* (1790) at 378. Similar stipulations can be found in Article VII of the *Peace Treaty between Britain and Spain*, art XXX of the *1725 Peace Treaty between France and Holland, and Spain and the German Emperor* (Tr, Tm art XXX).

⁹⁷ First, some of the treaties contained detailed rules for securing the foreigner's position in court proceedings, relating to *inter alia* the engagement of attorneys, the conduct or duration of proceedings, or even in relation to the enforcement of the thus obtained judgments. Second, some of the treaties provided for the referral of disputes connected with commerce to special commissions, allowed for the exercise of consular jurisdiction, or provided for the institution of special judges. Finally, many of the treaties expressly permitted the issuing of letters of marque or reprisals in the event that justice was denied to the foreigner. Neufeld (n 90), 103-09.

⁹⁸ Soon after its declaration of independence, the US concluded a Treaty of Amity and Commerce with France (1778), which was then followed by similar treaties with the Netherlands (1782), Sweden (1783), and Prussia (1785).

to facilitate trade and navigation (usually on the basis of MFN treatment and mutual guarantees against discrimination), these treaties often contained provisions that were also relevant to the protection of investments.⁹⁹ Most significant among these were general provisions governing the treatment of persons and property of the other contracting party, which in most cases had to be accorded “special protection” or “full and perfect protection”, frequently in combination with the requirement of national and/or MFN treatment.¹⁰⁰ Many of these treaties would further contain provisions against seizures or detentions, and, from the mid-nineteenth century onwards, also specific stipulations concerning the payment of compensation in the event of expropriation. Last but not least, in most of these treaties, stipulations were made with regard to the foreigner’s access to courts – initially only in relation to suits against foreigners for debt, but later in the form of general access-to-courts provisions.¹⁰¹

A different kind of commercial treaties were, in the meanwhile, employed in other parts of the globe. From the sixteenth century onwards, the European Powers, acting initially through chartered companies such as the British or Dutch East India Companies, increasingly expanded their economic interests in Asia and Africa. The primary vehicle for this expansion were the numerous commercial treaties that the trading companies would have the habit of concluding with the local rulers.¹⁰² These commercial treaties significantly differed from those concluded among the Western States. For one, the privileges granted in them did not require national treatment, but were premised on the principle of extraterritoriality: foreign traders were granted exemptions from customs duties, freedom from the jurisdiction of local courts, as well as the general right to be governed by the law of their country of origin, under the jurisdiction of their own consuls. Furthermore, the exercise of free trade was not conceded on the basis of most-favoured-nations treatment, but of preferential (or even exclusive) treatment. While formally concluded on a footing of equality and mutuality, these commercial treaties therefore soon digressed into instruments of economic domination, as the ones favouring from them were solely the European nationals.¹⁰³ Before long, the extensive privileges granted by these treaties degenerated into situations derogatory to the sovereignty of the non-European contract party, establishing either suzerain-vassal relations that, by the end of the eighteenth century, would ultimately give way to colonial administrations.¹⁰⁴

By the end of the nineteenth century, the treaty practice therefore developed in two directions. On the one hand, the commercial treaties of the kind concluded by the European Powers *inter se*, or by the United States in general, led to the formation of certain basic standards of treatment, which, though initially devised to protect primarily merchants and long-distance trade, would later provide an effective framework for the global expansion of industrial and financial capital,¹⁰⁵ and ultimately provide the basis for the development of contemporary rules of investment protection. The commercial treaties of the kind underpinning the European colonial expansion, on the other hand, had lesser of a role in the development of such standards. Implicitly, of course, such treaties were essential to the protection of foreign investment, which in the eighteenth and nineteenth centuries was mostly occurring in the context of colonial

⁹⁹ On the content of these treaties, see RR Wilson, ‘Property-Protection Provisions in United States Commercial Treaties’ (1951) 45 Am J Int’l L 83, 90-97; and KJ Vandeveld, ‘The Bilateral Investment Treaty Program of the United States’ (1988) 21 Cornell Int’l LJ 201, 203-06.

¹⁰⁰ *ibid* 94-96.

¹⁰¹ On this issue specifically, see RR Wilson, ‘Access-to-Courts Provisions in United States Commercial Treaties’ (1953) 47 AJIL 20, at 33-43.

¹⁰² On content of the commercial treaties thus concluded in Asia and Africa, see CH Alexandrowicz, ‘The Afro-Asian World and the Law of Nations (Historical Aspects)’ (1968) 123 Recueil des Cours 121, 152-57, and 172-88.

¹⁰³ Lillich (n 90), 18.

¹⁰⁴ See *infra* 2.3.2.

¹⁰⁵ Lipson (n 93), at 9.

expansion. This protection, however, was not one flowing from the standards of treatment prescribed by these treaties but from the powers derived from these treaties by the European imperial powers, which allowed them to effectively control the actions of their colonies and protectorates.¹⁰⁶

2.2.2. The Emergence of Minimum Standard(s) of Treatment under Customary International Law

By the middle of the eighteenth century, some of the rights that had recurrently been granted in the commercial treaty practice of the European powers became so well entrenched that legal publicists considered them binding as a matter of general obligation under the law of nations.¹⁰⁷ Chief among these was the duty to protect foreigners and their property against injuries ensuing from either the State's own authorities or its inhabitants.¹⁰⁸ This was a duty that did not extend solely to the provision of physical safety.¹⁰⁹ Since, by then, the principle found recognition that foreigners were subject to laws of the local sovereign, it was also through the application of this law that the local sovereign was to guarantee the required protection to the foreigner, including by way of granting the latter access to justice.¹¹⁰ Though complementary to the duty of protection and security, the administration of justice in relation to the foreigner was also a separate duty incumbent upon the sovereign according to custom. By then, the duty extended beyond the mere granting of access to justice, as the courts were required to treat the foreigner on equal footing with the nationals and to apply justice in treating the foreigner's case.¹¹¹ The following needs to be kept in mind, however. While being the necessary, national treatment was also the sufficient condition for compliance with the obligations under the law of nations, meaning that a State could still excuse itself by stating that its own nationals were subject to the same deficient standard of judicature. Furthermore, the justice to which the foreigner was entitled was not a promise of an abstract conception of justice, but justice in accordance with municipal law, meaning that there was no rule requiring the courts to administer in the case of the foreigner domestic law differently from the law of the land of the court.¹¹² The right of judicial access

¹⁰⁶ See M Sornarajah, *The International Law on Foreign Investment* (CUP 2010) 19-20. See also the outcome in PCIJ, *Oscar Chinn (United Kingdom v Belgium) (Judgment)* PCIJ (ser A/B) No 63 (12 December 1934), attesting to the absence of any concrete duties relating to the treatment of aliens in colonies beyond a general prohibition of discrimination and respect for acquired rights.

¹⁰⁷ cf G Schwarzenberger, 'The Province and Standards of International Economic Law' (1948) 2 Int'l L Q 402, 407.

¹⁰⁸ See E de Vattel, *Droit des Gens ou Principes de la Loi Naturelle*, bk II (1758, English translation 1916), ch VIII, s 104 ('A sovereign may not allow the right of entrance into his territory granted to foreigners to prove detrimental to them; in receiving them he agrees to protect them as his own subjects and to see that they enjoy, as far as depends on him, perfect security.').; or C Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764, English translation 1934), ch IX, s 1063 ('Foreigners, as long as they live in alien territory, ought to be safe from every injury, and the ruler of the state is bound to defend them against it, that is, security is to be assured to foreigners living in alien territory.'). See Neufeld (n 90), 48.

¹⁰⁹ See T Weiler, *The Interpretation of International Investment Law* (2013) 103ff.

¹¹⁰ See de Vattel (n 108), ch VIII, ss 102-03 ('Being thus subject to the laws, foreigners who violate them should be punished accordingly. [...] For the same reason, any disputes which may arise between foreigners, or between a foreigner and a citizen, should be settled by the local judge and according to the local laws').

¹¹¹ See eg A Gentili, *De Jure Belli Libri Tres*, vol I (1612, edn 1933) ch XXI, 101 (referring to 'refusal to do justice'); de Vattel (n 108), ch VII, s 84 (a State was entitled to interfere in the causes of its subjects in foreign countries and to grant them protection 'in the cases of a refusal of justice, palpable and evident injustice, a manifest violation of rules and forms; or, in short, an odious distinction made to the prejudice of his subjects, or of foreigners in general.').; or C van Bynkershoek, *Quaestionum Juris Publici Libri Duo*, vol 1 (1737, edn 1930), ch 24, 135-36 ('The law uses the phrase "by an unjust judgement", so that it does not suffice merely to pronounce judgement, it must also be just').

¹¹² See eg H Grotius, *De Jure Belli ac Pacis*, bk III (1625, edn 1925) ch II, V, 627 (referring to the situation where 'judgement has been rendered in a way manifestly contrary to law'); or Wolff (n 108), s 587 ('the right is denied [...] also if in a matter not doubtful a decision has been made plainly contrary to law, which is assumed to be clear of itself'). See generally Neufeld (n 90), 102-03.

protected investment only to the extent that local law provided the investor with a remedy for injury to its investment.

Perceptions began to change in the course of the nineteenth century, when the rules pertaining to the treatment of aliens began gradually to be imposed on a global basis from China to Latin America. Rudimentary as they were, the rules at once operated as an element of the “standard of civilization” – the primary legal mechanism through which polities in that period had been admitted into, or barred from, the international society of States – and concurrently as positive obligations, for the breach of which the State incurred responsibility under international law.¹¹³ When used in this latter sense, the obligations were commonly presented as the “standard of justice” under international law,¹¹⁴ or simply the “minimum standard” of international law.¹¹⁵ The standard at that stage was still not concerned specifically with the protection of investments, but was supposed to govern a broad range of relations arising from the status of aliens in foreign states, relating, both, to their personal security and the protection of their property. Though representing a normative floor against which any State purportedly had to measure up, the exact content of this standard was never a settled one.¹¹⁶

The starting point was the existence of the obligation – by then considered universal – that required States to accord protection and security for the person and property of aliens. The exact scope of that obligation was subject to differing interpretations, however. Probably the least contested components of the minimum standard were the duty to provide equal protection of the law to foreigners and citizens alike, and the duty to afford aliens adequate means for vindicating their rights and redressing their wrongs.¹¹⁷ What was contested, however, was the operationalization of these duties. Equality of treatment was now claimed to be only the starting point – for, the treatment also had to satisfy the international standard.¹¹⁸ Where the system of law and administration did not conform to this standard, the foreigner was entitled to rights and remedies that the State otherwise did not accord to its own citizens.¹¹⁹ The same applied to the administration

¹¹³ See on this M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 20.

¹¹⁴ In the seminal exposé given by then US Secretary of State Elihu Root in 1910, “[t]here is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country’s system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.” E Root, ‘The Basis of Protection to Citizens Residing Abroad’ (1910) 4 AJIL 517, 521-22.

¹¹⁵ See eg E Borchard, ‘The “Minimum Standard” of the Treatment of Aliens’ (1940) 38 Mich L Rev 445.

¹¹⁶ In fact, its content was never considered capable of precise definition. cf C Eagleton, *The Responsibility of States in International Law* (NYU Press 1928), at 86, claiming that ‘[a]s a matter of fact, the standard is not susceptible of complete and definitive statement’; or Borchard, *ibid* 458, pointing to the ‘erroneous inference that it is definite and definable’; or Freeman (n 14), 568, explaining that ‘the content of the international standard is not fixed with anything like mathematical precision.’

¹¹⁷ See Paparinskis (n 113), 46-54.

¹¹⁸ As Root would explain: ‘Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.’ E Root, ‘The Basis of Protection of Citizens Residing Abroad’ (1910) 4 ASIL Proceedings 16, 20. See also *Harry Roberts (USA) v United Mexican States* (IV UNRIAA 77, 2 November 1926) 80 (‘equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.’). Freeman (n 14), 504-07.

¹¹⁹ Root, *ibid*, 21: ‘any country’s system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it’.

See eg *George W Hopkins (USA) v United Mexican States* (IV UNRIAA 41, 31 March 1926) at 47 (‘it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws.’).

of justice. The adequacy of the host State's judicial system was not determined by reference to the treatment accorded to the nationals of the host State, but was supposed to be adjudged against the ideals of justice as hypothetically available in the more "civilized" Western countries.¹²⁰

The exact scope of the general duty of protection and security was not clearly spelled out in relation to other activities in which an alien could be engaged – in spite of the fact that the minimum standard of treatment was intended to encompass every facet of the official exercise of State authority.¹²¹ As to the police protection that the State was expected to ensure to the person and property of aliens, for example, this was supposed to be an "effective" one,¹²² or of a "certain level" that was not an "illusory" one.¹²³ Perhaps the most controversial aspect of the minimum standard, however, was the extent to which international law accorded protection to acquired proprietary interests of aliens additional to those that would normally be accorded to citizens under domestic law. The question, specifically, was whether international law proscribed the taking of foreign property without the payment of some form of compensation.¹²⁴ Up until the end of the nineteenth century, this aspect of the standard did not attract much discussion. In the course of the twentieth century, and particularly after the events such as the Soviet Revolution, the Eastern European agrarian reforms, and the Mexican expropriations of 1938, however, the conditions under which the right of property could be withdrawn from aliens would become fraught with disagreement, with capital-exporting States insisting on the existence of an obligation to provide "prompt, adequate, and effective" compensation (the Hull formula), and capital-importing States insisting that the maximum it could be expected was the treatment on equal footing with the nationals of the host State.¹²⁵

¹²⁰ Root, *ibid*, at 25. Weiler (n 109), 117

¹²¹ cf FS Dunn, *The Diplomatic Protection of Americans in Mexico* (Columbia University Press 1933) 3-4. The case of *LFH Neer and Pauline Neer (USA) v United Mexican States* (IV UNRIAA 60, 15 October 1926) where treatment falling below the minimum standard was described as that which amounts to 'an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency' (61-62), is frequently taken as setting out a standard pertaining to the general treatment to which the alien was purportedly entitled from governmental authorities. See eg I Brownlie, *System of the Law of Nations: State Responsibility* (OUP 1983) pt I, 74, describing *Neer* as a 'useful and classical' formulation of a minimum standard of treatment, or Paparinskis (n 113), 53-54 considering *Neer* to operate as the 'default rule'. But as the case was one arising out of the failure to prevent the occurrence of injury caused by private actors, it has been doubted whether that precedent really set forth a standard universally applicable to all types of state conduct, and not merely restated the standard of due diligence required in providing the degree of police protection under international law. See generally, J Paulsson and G Petrochilos, 'Neer-ly Misled' (2007) 22(1) ICSID Rev-Foreign Investment LJ 242.

¹²² See eg *Montijo Case (US v Colombia)* (26 July 1875) 2 Moore's Arbitrations 1421, 1444 ('The first duty of every government is to make itself respected both at home and abroad. Protection is promised to those whom the Government has consented to admit to its territory, and means must be found to render said protection effective.').

¹²³ See eg *Affaire des biens britanniques au Maroc espagnol (Spain v Great Britain)* (II UNRIAA 615, 1 May 1925) 642 ('présuppose que la sécurité générale dans les pays de résidence de ceux-ci ne tombe pas au-dessous d'un certain niveau, et qu'au moins leur protection par la justice ne devienne pas purement illusoire.').

¹²⁴ See generally Paparinskis (n 113), 54-63.

¹²⁵ Illustrative in this respect is, for example, the correspondence between the then Minister of Foreign Affairs of Mexico, Eduardo Hay, and the US Secretary of State, Cordell Hull, reprinted in (1938) 32 Am J Int'l L Sup 181. The former maintained that 'there does not exist, in international law, any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character', and though acknowledging that Mexico may have an obligation to indemnify under its own laws, he insisted that 'the time and manner of such payment must be determined by her own laws' (*ibid* 187). The latter adverted, in turn, to 'a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.' (*ibid* 193).

The legal source of the international minimum standard was never clearly stated.¹²⁶ In their relations with capital-importing States, the Western States typically presented it as a matter of settled practice.¹²⁷ Particularly in the course of the twentieth century, the content of the standard therefore became subject of major contestation between capital-exporting and capital-importing States, and its precise contours remain unsettled even in the jurisprudence of today. Nonetheless, the emergence itself of an international minimum standard has brought about an important shift in the development of investor-State relations. Not in that it provided an external measure for determining the propriety of State actions, but because it purported to furnish a measure that operated independently from domestic standards (and therefore from domestic law).¹²⁸ In spite of its indefinite nature, crucial in the emergence of the international minimum standard was its non-contingent nature.

2.2.3. The Challenges to International Standards: From Calvo to CERDS

The attempts to internationalize investor-State relations were not met without resistance on the part of the capital-importing States. Most vocal in this respect were initially the Latin American States, which – finding themselves as respondents in many of the international arbitrations of the late nineteenth and early twentieth century – considered the purported minimum standard of treatment, as well as its intrusive enforcement through the institution of diplomatic protection, to be nothing but tools of economic or political imperialism. Unable to resist this by force, the Latin American States mounted resistance primary through the writings of their publicists, whose arguments would then be adopted as a matter of policy, and – with varying degrees of success – eventually translated into legislative, contract-drafting, and treaty-making practice.

The person that would be eventually credited for having articulated the most famed critique of the capital-exporting States' claim that international law required a minimum, substantive duty of protection was the Argentinean jurist, Carlos Calvo (1822-1906).¹²⁹ The doctrine that Calvo developed in his attempt to narrow (if not altogether abolish) the institution of diplomatic protection was premised on two cardinal principles.¹³⁰ The first was that sovereign States, being equal in their legal rights under international law, necessarily enjoyed the right to be free from “interference of any sort” by other States. The second, which followed from the same principle of sovereign equality of nations, was that foreign nationals were not entitled to rights and privileges more extended than those accorded to the nationals of the State where they

¹²⁶ In his famous speech, Elihu Root simply presented the standard as a premise of international intercourse. Borchard (n 115), 458, in turn, claimed the standard to be ‘compounded of general principles recognized by the domestic law of practically every civilized country’.

¹²⁷ See eg Dunn (n 121), 3-4, claiming the existence of ‘certain generally accepted standards of conduct, ascertainable by reference to past practice and applicable to new cases by logical processes.’

¹²⁸ See Borchard (n 115), 39 (‘International law is concerned not with the specific provisions of the municipal legislation of states in the matter of aliens, but with the establishment of a somewhat indefinite standard of treatment which the state cannot violate without incurring international responsibility.’)

¹²⁹ Influential among the Latin American publicists was also the Argentinean foreign minister Luis Drago (1859-1921), who developed the doctrine that the public debts cannot occasion armed intervention, nor occupation of territory on the part of Western Powers. See LM Drago, ‘State Loans in their Relation to International Policy’ (1907) 1 AJIL 692. The ideas advanced in his writings would later lead to the adoption of the Drago-Porter Convention at the Hague Peace Conference of 1907, which prohibited the use of force for the collection of any contract debt (at least as long as the debtor state did not refuse or otherwise resist an offer to arbitrate the dispute). Yet, concerned primarily with the question of armed intervention, the Drago Doctrine was of limited import to the broader problem of diplomatic protection, or to the issue of the minimum standard of treatment as such.

¹³⁰ Calvo’s doctrine was set out in his celebrated treatise, *Le Droit International Theorique et Pratique*, vol 3 (5th edn, 1896) s 1276. See generally DR Shea, *The Calvo clause: a problem of inter-American and international law and diplomacy* (University of Minnesota Press, 1955), 16-20.

reside.¹³¹ The necessary implication of both these principles was that any pecuniary claims that the foreigner might have had against the State had to be submitted to the local courts, to be settled in accordance with local law, and only in the event of denial of justice could such claims become the subject of diplomatic interposition. At no rate was the foreigner otherwise entitled to complain to his State of nationality if accorded the application of the same conditions as the nationals of the receiving State. Rather, in entering and taking up the residence abroad, the foreigner was bound to accept the legal conditions that prevailed in the host State.¹³²

By presenting national treatment as the maximum of good treatment any foreigner could ask for, Calvo attempted to restrict the influence of international law in the sphere of the State's domestic jurisdiction. For, according to his doctrine, the international obligations of the State were discharged from the moment that the foreigner has been put on a footing of complete equality with the nationals of the state. This, in turn, removed the legal grounds on which diplomatic interferences on the part of the foreigner's State of nationality could be possibly justified – save for those pertaining to a possible denial of justice that the foreigner may have experienced in pursuing her or his claims before local courts. Such grounds were, however, limited ones, particularly as Calvo – as well as other Latin American scholars – construed the doctrine of denial of justice narrowly and, at any rate, considered that any defects in domestic remedial processes had to be measured by local criteria, and not in light of an international standard.¹³³ Pursuant to Calvo's doctrine, domestic courts were thus expected to be the final forum to which foreigners would turn to vindicate their rights. In fact, the idea that controversies between foreigners and host States should primarily be resolved through local means of dispute settlement – and only exceptionally through international adjudication – remains associated with Calvo's doctrine until present-day.¹³⁴

Calvo's concepts of non-intervention and foreigners' absolute equality with a State's nationals were derived from principles of international law that had long been supported by publicists and the practice of European states among themselves. These were the principle of independence of sovereign states, and the ensuing right to complete territorial jurisdiction and related right to establish the conditions under which foreigners may enter and reside in the country. Calvo considered that these should apply to Latin American States just as they did to European States in their reciprocal relations.¹³⁵ Not surprisingly, the precepts of the Calvo doctrine were never accepted by the capital-exporting States, nor by international lawyers outside Latin America, who ridiculed Calvo's theory on the ground that it ultimately signified the abolition of all state responsibility for injuries to foreigners,¹³⁶ or at least replaced international law with domestic law as the final test for establishing such responsibility.¹³⁷ Conversely, Calvo's writings did have a major impact on the practice of Latin American States, which implemented

¹³¹ The claim that the foreigner should be placed on a footing of civil equality with the national did not originate with Calvo, but was made already earlier by the Venezuelan jurist Andrés Bello (1781-1865). cf Borchard (n 115), 450.

¹³² Shea (n 130), 16-20.

¹³³ Dawson and Head (n 8), 21. Denial of justice was thus claimed to arise only when a State denied access to courts. cf 'The report to the League of Nation's Sub-Committee of Experts for the Progressive Codification of International Law' (Guerrero Report), reproduced in 'Questionnaire No 4: Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners' (1926) 20(3) AJIL Supp 176, ch 6.

¹³⁴ See C Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4(1) LPICT 1.

¹³⁵ On this, see AB Lorca, *Mestizo international Law: A Global Intellectual History 1843-1933* (CUP 2014) 62-64.

¹³⁶ See AV Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 40 Am J Int'l L 121, 133; AH Feller, 'Some Observations on the Calvo Clause' (1933) 27 *ibid* 461; AS Hershey, 'The Calvo and Drago Doctrines' (1907) 1 *ibid* 26.

¹³⁷ Borchard (n 115), 452.

his principles into their common international policies and reciprocal treaty relations,¹³⁸ as well as, individually, at the level of their domestic constitutions,¹³⁹ and contractual relations with foreign investors. In the case of the latter, the doctrine manifested itself in the form of the Calvo Clause – a contractual stipulation entailing an undertaking on the part of the foreign investor to resort to local remedies, as well as to waive any right that the latter may have to the diplomatic protection of his government in connection with matters arising under the contract. Insofar as such clauses attempted to vitiate the State’s own right of protection, their validity has generally been disputed; but there were nonetheless cases where such clauses were found to bar international claims.¹⁴⁰

Resistance against the international minimum standard never withered away, and got a renewed impetus with the process of decolonization in the second part of the twentieth century. The newly independent States that emerged from colonial rule in Africa and Asia increasingly began to question whether the customary international law rules of State responsibility towards foreign investors could bind nations that have not partaken in their creation.¹⁴¹ This took place alongside the broader discussions on the rules of State succession, as part of which the newly independent States also disputed the continuity of obligations arising out of concession contracts previously granted by the colonial powers, challenging thereby the “traditional” doctrine of “acquired” rights.¹⁴² While the conceptual problems pertaining to State succession remained primarily the subject of discussions in the International Law Commission, it was chiefly through the newly-provided forum of the General Assembly (GA) of the United Nations that newly independent States began to formally challenge the various rules of international law that they deemed prejudicial to their own economic interests.¹⁴³

This began with the inception of the principle of permanent sovereignty over natural wealth and resources (PSNR), which was gradually asserted through a string of GA resolutions, and officially proclaimed in the 1962 Declaration on Permanent Sovereignty over Natural Resources.¹⁴⁴ Declared to be “a basic constituent” of the right to self-determination, the principle was to provide a legal basis for the newly-independent States to reclaim control over natural resources that at that time continued to be exploited by Western companies pursuant to oil and mineral concessions acquired in the colonial era – even if, in its initial formulation, not necessarily intended to undo the traditional rules of international law applicable to the protection of foreign

¹³⁸ See eg Convention relative to the Rights of Aliens, 29 January 1902, reproduced in J Brown Scott, *The International Conferences of American States, 1889–1928* (OUP, 1931), 91, arts 2 and 3; or Montevideo Convention on Rights and Duties of States, 26 December 1933, (1936) 165 LNTS 19 (entered into force on 26 December 1934), arts 8 and 9. These instruments were not widely ratified, and to the extent that the US participated in them, were subject to reservations. See Freeman (n 136), 139ff.

¹³⁹ See generally MR Garcia-Mora, ‘The Calvo Clause in Latin American Constitutions and International Law’ (1950) 33 *Marquette Law Review* 205.

¹⁴⁰ See eg *North American Dredging Company of Texas (USA) v United Mexican States* (4 UNRIAA 26, 31 March 1926).

¹⁴¹ For example of this critique, see eg SN Guha Roy, ‘Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?’ (1961) 55 *Am J Int’l L* 863; or G Abi-Saab, ‘The Newly Independent States and the Rules of International Law’ (1962) 8 *Howard Law Journal* 95, at 113-16. For an overview, see further P Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016) 70-77.

¹⁴² An exposition of this critique can be found in M Bedjaoui, ‘Second report on succession of States in respect of matters other than treaties by Mr. Mohammed Bedjaoui, Special Rapporteur – Economic and financial acquired rights and State succession’ UN Doc A/CN.4/216/Rev.1 (in ILC Ybk 1969, vol II). On the conceptual struggles in this field of law, see generally M Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (OUP 2007) 80-90.

¹⁴³ On this, see especially M Bedjaoui, *Towards a New International Economic Order* (Unesco, 1979) 123ff; and further A Anghe, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 196-244.

¹⁴⁴ *Permanent Sovereignty over Natural Resources*, UN GA Res 1803 (XVII) (14 December 1962). For a detailed account on the ‘birth’ of the PSNR principle, see N Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (CUP 1997) 33-164.

economic interests.¹⁴⁵ However, a new bid to denounce the international minimum standard was made in the following decade already, as part of the effort to inaugurate a New International Economic Order (NIEO). Using their majority in the General Assembly, the developing countries eventually succeeded in the adoption of the 1974 Charter of Economic Rights and Duties of States (CERDS), which asserted each State's "right" to nationalize foreign property subject to the payment of compensation that was to be determined, not by reference to international law, but to each State's own domestic law.¹⁴⁶ In a classic restatement of the Calvo doctrine, the CERDS further resolved that controversies concerning the question of compensation "shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."¹⁴⁷

Less than a year later, the legal significance of the CERDS would be considered in the seminal *Texaco v. Libya* arbitration, with sole Arbitrator Dupuy finding it a "political rather than a legal declaration", and not one that could be binding on the capital-exporting States, which opposed it.¹⁴⁸ It soon became clear that the CERDS would be unable to achieve the desired effect of subjecting foreign investors exclusively to the domestic law and the jurisdiction of the courts of the host State. Indeed, it soon became clear that even the concerted opposition of developing States to the international standards of treatment could not end up loosening core aspects of the established rules. On the contrary, it eventually led to their further strengthening through the conclusion of numerous bilateral investment treaties in the second part of the twentieth century. Before discussing that process, however, it is necessary to briefly touch on another aspect of the internationalization of investment protection standards that was in the meantime unfolding in the context of investment contracts.

2.2.4. The Move Towards the Internationalization of Investment Contracts

Efforts to internationalize Investor-State relations were not only pursued through international law instruments. Before present-day treaty-based protections would become widely available to investors, a trend had already been set in motion in international arbitral practice which had as its object a partial (if not complete) emancipation of investor-State contracts from the ambit of the host State's domestic law. In the *Serbian Loans* case (1929), the Permanent Court of International Justice may still have taken the principled view – in what was nominally an inter-State dispute – that "[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country".¹⁴⁹ But already a year later, the arbitrators deciding the dispute between a British corporation and the government of the Soviet Union in the *Lena Goldfields* arbitration (1930) accepted the possibility that "general principles of

¹⁴⁵ For example, the UN GA Res 1803 stipulated that, in the event of expropriation, 'appropriate compensation' were to be paid 'in accordance with international law' (para 4), and further recognized that '[f]oreign investment agreements freely entered into by or between sovereign States shall be observed in good faith' (para 8). On this aspect of the Resolution, see Schrijver, *ibid* 66-68, 180.

¹⁴⁶ 'Charter of Economic Rights and Duties of States' UN GA Res 3281 (XXIX) (12 December 1974), art 2(2) ('Each State has the right: [...] (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent').

¹⁴⁷ *ibid*.

¹⁴⁸ *Texaco Overseas Petroleum Co (Topco) & California Asiatic Oil Co (Calasiatic) v Government of the Libyan Arab Republic* (Award) (1978) 17 ILM 1 (19 January 1977), [88].

¹⁴⁹ Case Concerning the Payment of Various Serbian Loans Issued in France (*France v Yugoslavia*) (Judgment) PCIJ (ser A) No 14 (12 July 1929), 41.

law recognized by civilized nations” could be regarded as the proper law of the contract.¹⁵⁰ In spite of the absence of an express provision on applicable law in the concession agreement, the arbitrators applied the principle of “unjust enrichment” in awarding compensation for the Soviet Union’s breaches of Lena’s mining concession.¹⁵¹

This move was one that would later be heralded as a “gigantic first step for international commercial arbitration, almost equivalent to the caveman’s discovery of fire.”¹⁵² Not only because it has significantly influenced the drafting of choice-of-law provisions in concession agreements,¹⁵³ but also in view of the precedential effect it had on subsequent practice. In several important arbitrations concerning concession contracts, arbitral tribunals would later have no hesitation accepting the possibility of a choice for the application of general principles of international law— such as those requiring the observance of commitments in good faith (*pacta sunt servanda*) and respect for acquired rights, or that prohibiting unjust enrichment – to a concession contract entered into between a State and an investor. This process of “internationalization” took place in various ways. In many of the earlier cases, it was essentially the outcome of interpretative technique.¹⁵⁴ Despite the absence of an explicit choice-of-law provision, tribunals would namely see fit to apply general principles of law by way of implication. Support for such an approach would usually be found in the circumstances of a contract’s conclusion, in specific terms of the contract (such as the presence of a stabilization clause, or of a clause referring disputes to international arbitration), or simply in the “special nature” of the contract in question (i.e. being a contract concluded between a sovereign State and private party).¹⁵⁵ Concurrently, however, the process of internationalization found underpinning in the drafting practice, as choice-of-law clauses would be inserted in concession contracts explicitly providing for the application of (general) principles of (international) law in addition to the domestic law of the host State.¹⁵⁶

Initially, the move towards introducing an international element into investor-State contracts was seemingly based on the perception that the domestic legal system of the host State was simply inadequate, if not outright deficient, to deal with such type of agreements. Particularly Islamic law was frequently considered to lack sophistication purportedly required to deal with the complex matters regulated by the concession contract in question.¹⁵⁷ In later cases, the need to

¹⁵⁰ *Lena Goldfields Arbitration, Lena Goldfields Ltd v USSR (Award)* (1936) ILR 3 (3 September 1930), [22]. The text of the Award is reproduced as an annex to the award’s commentary by A Nussbaum, ‘The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government’ (1950-1951) 36 Cornell Law Quarterly 31.

¹⁵¹ *ibid* [23]-[25].

¹⁵² Veeder (n 42), 772.

¹⁵³ cf FA Mann, ‘The Proper Law of Contracts Concluded by International Persons’ (1959) 35 BYIL 34, at 51ff.

¹⁵⁴ The basis for such an approach was usually found in the general principles governing the conflict of laws in private international law, pursuant to which the proper law of the contract was that by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed. cf A McNair, ‘The General Principles of Law Recognized by Civilized Nations’ (1957) 33 BYIL 1, 4-6.

¹⁵⁵ For an overview, see H Kjos, *Applicable Law in Investor-State Arbitration* (OUP 2013), 217-21.

¹⁵⁶ The validity of such clauses was upheld in the three Libyan oil arbitrations of the 1970s. See *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* (Awards of 10 October 1973 and 1 August 1974) 53 ILR 297; *Topco/Calasiatic v Libya* (n 148), [25]-[35]; and *Libyan American Oil Co (LLAMCO) v Libya (Award)* (1981) 20 ILM 1 (12 April 1988), 63-66.

¹⁵⁷ See eg the remarks of Lord Asquith of Bishopstone, as umpire, in *Petroleum Development Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144, 149 (‘If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.’); or that of Sir Alfred Bucknill, as referee, in *Ruler of Qatar v International Marine Oil Company Ltd* (1953) 20 ILR 534, at 545 (‘I am satisfied that Qatari law does not contain any principles which would be sufficient to interpret this particular contract.’); or that of the Tribunal in *Saudi Arabia v. Arabian American Oil Company (Aramco)* (1958) 27 ILR 117, at 169 (‘The regime of mining concessions and consequently also of oil

insulate the contract from the application of domestic law was chiefly justified by reference to the special position of the host State as both contractor and legislator. Removing certain core contractual provisions from the ambit of domestic law and subjecting interferences with the contractual relationship to the international legal order provided an expedient way to protect the investor against potential legislative abuses by the host State.¹⁵⁸

The concept of “internationalization”, as developed in various nuances in arbitral practice, was not seen as unproblematic in international legal doctrine. The applicability of international law to State contracts has long remained and still remains a contested proposition.¹⁵⁹ Nonetheless, the conceptual device was one necessary to achieve a degree of protection for investment contracts at a time when investors could not yet rely upon conventional instruments. The acceptance, in practice, of the possibility that a contract be withdrawn from the municipal law of the host State concerned found ultimately underpinning in Article 42 of the ICSID Convention, which makes express provision for the applicability of international law to individual investor-State disputes. With the growth of investment treaties, however, the problem of contract internationalization would eventually lose its significance. As a result of the “treatification”¹⁶⁰ of investment law, contractual relationships between the investor and the host State enjoy the protection of investment treaties, under which investors’ contractual rights are invariably treated as one of the many types of protected assets.

2.2.5. The “Treatification” of Investment Law in the Twentieth century

In the meantime, the practice of guaranteeing protection to nationals and their interests abroad by means of conventional instruments continued apace, and eventually intensified in the second part of the twentieth century. As in the previous centuries, investment rule-making continued to be pursued primarily at the bilateral level. Due to continuous disagreements between the capital-exporting and capital-importing States on the appropriate level of investment protection, several attempts at multilateral rule-making – beginning with the efforts at codification of rules pertaining to the treatment of aliens under the auspices of the League of Nations in the late 1920s, and continuing with the subsequent attempts at regulating investment in the framework of the Havana Charter for an International Trade Organization (1948), and the various post-WWII proposals for a multilateral code on foreign investment, such as the ICC’s International Code of Fair Treatment of Foreign Investment (1949), the Abs-Shawcross International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (1957), and the OECD Draft Convention on Foreign Property (1963/1967) – ultimately failed to receive the required support.¹⁶¹

In the earlier part of the twentieth century, the primary driver behind bilateral rule-making remained the United States, as the European investment still favoured their colonial and

concessions has remained embryonic in Muslim law and it is not the same in the different schools ... *Hanbali* law contains no precise rule about mining concessions and is silent a fortiori about oil concessions”).

¹⁵⁸ See eg *Sapphire International Petroleum Co v National Iranian Oil Company (Arbitral Award)* (1967) 35 ILR 136 (15 March 1963), 171 (finding that the substantive law applicable to the interpretation and performance of the concession agreement had to be the principles of law generally recognized by civilized nations, *inter alia* because the legal security of the investor’s interests ‘could not be guaranteed ... by the outright application of Iranian law, which it is within the power of the Iranian state to change.’); or *Topco/Calasiatic v Libya* (n 156), [42] (“The recourse to general principles is to be explained not only by the lack of adequate legislation in the State considered [...]. It is also justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State: it plays, therefore, an important role in the contractual equilibrium intended by the parties.”)

¹⁵⁹ For an exhaustive overview of the various doctrinal positions, as well as their critique, see I Alvik, *Contracting with Sovereignty* (Hart Publishing 2011) 47-58.

¹⁶⁰ The notion of ‘treatification’ has been applied to describe the enormous growth of investment treaties by JW Salacuse, *The Law of Investment Treaties* (OUP 2010) 78.

¹⁶¹ cf Schill (n 94), 31-40.

dependant territories, which obviated the need for treaty protection. Until WWII, the FCN treaties concluded by the US were still commercial treaties in the broadest sense, dealing with matters pertaining to trade and shipping, but also consular relations, and the treatment of nationals in general (including, for instance, matters pertaining to the freedom of worship and travel within the host State). Novel, however, was a uniform provision on property protection, which guaranteed “the most constant protection and security” and protection “required by international law”, and prohibited the taking of property “without due process of law and without payment of just compensation.” Moreover, the nationals of the other contracting party were guaranteed national and MFN treatment with respect to commercial work and other listed activities.¹⁶² In the post-WWII era, however, the US FCN treaties became increasingly investment-oriented (even if their provisions were still phrased to cover protection of property in general, rather than investment *per se*), with their benefits now extended to corporate activities, including those of local subsidiaries.¹⁶³ The guarantees concerning the treatment of foreign property expanded, as the parties were required to afford “equitable” or “fair and equitable” treatment and “most constant protection and security”, and, in the event of expropriation, “prompt, adequate and effective compensation” was to be provided. Furthermore, these treaties prohibited “unreasonable or discriminatory measures” that would impair the property rights, and guaranteed nationals national and MFN treatment with regard to commercial and non-commercial activities, as well as limited the rights of parties to restrict the repatriation of earnings.¹⁶⁴ Significantly, these US FCN treaties provided for mandatory State-to-State dispute resolution, guaranteeing to each party the right of adjudication before the ICJ of any dispute concerning its interpretation or application.¹⁶⁵

From the 1960s onwards, the European capital-exporting States, too, embarked upon creating their own networks of bilateral instruments aimed at securing the protection of investments in the developing world. Unlike the US treaty instruments, which were directed towards developed States, the European BITs targeted primarily developing countries. Taking the lead on this was Germany, which concluded the first modern bilateral investment treaty (BIT) with Pakistan in 1959,¹⁶⁶ with other European capital-exporting states soon following suit. While in the case of Germany, the move towards bilateral treaty-making was largely informed by the still fresh recollection of private property confiscation in the context of post-WWII reparations, several of the former European colonial empires, such as the United Kingdom, Belgium, France, and the Netherlands, originally pursued their BIT programmes primarily with a view to safeguarding the existing investments of their nationals in the newly independent States. Not before long, however, other capital-exporters from Europe (e.g. Austria, Switzerland, and Italy), as well as from other parts of the world would be joining the BIT movement as well.

¹⁶² KJ Vandeveld, *Bilateral Investment Treaties* (OUP 2010), 22.

¹⁶³ Traditionally, FCN treaties were commercial in the broadest sense of the word, as they applied not only to investors, but also to merchants. In their origins, they were essentially market access instruments, through which both foreign investment and trade were bargained for. Yet, from the 1940s onwards, a paradigm shift occurred as a result of the GATT (1947). As trade regulation increasingly took place on a multilateral basis, FCN treaties began to be more narrowly oriented towards the protection of investments. On this development, see ME Footer, ‘International Investment Law and Trade: the Relationship That Never Went Away’ in F Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (CUP 2013), 259-297, 264ff.

¹⁶⁴ *ibid* 23-24. A Benton, ‘The Protection of Property Rights in Commercial Treaties of the US’ (1965) 25 ZaORV 50, 60ff.

¹⁶⁵ These frequently became subject of litigation before the ICJ. See eg United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3 (24 May 1980); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment) [1986] ICJ Rep 14 (27 June 1986); Elettronica Sicula SpA (ELSI) (United States of America v Italy) (Judgment) [1989] ICJ Rep 15 (20 July 1989); or Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment) [2003] ICJ Rep 161 (6 November 2003).

¹⁶⁶ C Brown, *Commentaries on Selected Model Investment Treaties* (OUP 2013) 293.

Differently from the US FCN treaties, the European BITs focused exclusively on the protection of foreign investment, which was usually broadly defined as comprising not only tangible property, contractual rights, and shareholding interests, but also rights granted under public law and intellectual property rights. Though concluded by different States, many BITs happened to be very similar in nature, content and structure.¹⁶⁷ Building on the principles and rules developed in the context of the earlier unsuccessful attempts at multilateral rule-making, and particularly on the clauses devised in the 1959 Abs-Shawcross Draft and the 1967 OECD Draft Convention, most BITs provided investors with the guarantees of fair and equitable treatment, full protection and security, and national and/or MFN treatment, coupled with provisions proscribing expropriations others than those that were non-discriminatory, for a public purpose, against payment of prompt, adequate and effective compensation, and with respect for the due process of law. Often, the BITs would also contain stipulations concerning damage in times of war and civil disturbance, the free transfer of funds, and not infrequently a stipulations concerning the observance of commitments. The most important innovation introduced by BITs, however, was the granting of concomitant procedural means for the enforcement of the prescribed standards of treatment in the form of provisions allowing aggrieved investors to bring claims directly against the host State in international arbitration. Facilitating this development, of course, was the establishment in 1965 of the ICSID, which provided the appropriate forum for hearing such claims.

Within a few decades, the number of such BITs has grown exponentially. If there were reportedly 385 BITs concluded by 1990, their numbers reached already 1,857 by 2000, and 2,750 by 2010.¹⁶⁸ While the sudden surge in treaty-making coincided with the end of communism and the new era of globalization, the initial impetus for the conclusion of BITs were chiefly the uncertainties pertaining to the rules of customary international law in the field of investment protection. Not only did the BIT, as a conventional instrument, provide the means for reaffirming some of the norms that the developed states long advanced as being part of customary international law, but at the same time also offered the opportunity for the further development of the customary international law standards which in many ways have been falling short of providing adequate protection to modern business practices, and especially the growing role of the corporation in investment making.¹⁶⁹ It is, of course, ironical that prompting this further internationalization of investment rules through this process of “treatification” were precisely the challenges mounted against traditional investment protection standards by developing countries in the context of their quest for a New International Economic Order. Paradoxical, thereby, is the fact that the same States that purported to reject those standards have later accepted them in conventional form, not only in their relations with the capital-exporting States, but also in the treaties that they concluded among themselves.¹⁷⁰

* * *

The argument that I intend to defend in this study is that the ascendance of international rules pertaining to the protection of foreign investors significantly weakened the position of domestic courts. If the availability of direct investor-State arbitration provided a functional alternative to dispute resolution before domestic courts, the process of internationalization of the

¹⁶⁷ On the content, see UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007) (UNCTAD/ITE/IIA/2006/5).

¹⁶⁸ For these figures, see UNCTAD, *Bilateral Investment Treaties: 1959-1999* (2000) (UNCTAD/ITE/IIA/2); UNCTAD, *Investment Policy Monitor* (No 1, 4 December 2009) <www.unctad.org/en/docs/webdiaeia200911_en.pdf> accessed 14 June 2018.

¹⁶⁹ *Barcelona Traction* (n 19), 46-47.

¹⁷⁰ On the treaty-making practice up until the 1990s, see P Peters, ‘Dispute Settlement Arrangements in Investment Treaties’ (1991) *Netherlands Yearbook of International Law* 150ff.

applicable standards of treatment disposed, at the same time, of any material need for investment disputes to be dealt with at the level of the domestic legal system. Once it was international law that supplied the standards necessary for assessing the propriety of conduct of host State's organs, domestic law – and domestic courts applying it – lost in relevance. In fact, as I intend to show in the present study, this substantive shift has provided international adjudicatory bodies with both a sword and a shield. By relying on the principle of supremacy of international law, it has now become not only possible for investment tribunals to leave aside any unfavourable domestic judicial pronouncements in determining the State's liability for damages incurred by the investor. But inasmuch as they were applying a materially different standard, investment tribunals could conceive themselves as operating in a different legal sphere than domestic courts, and thereby resolving the instances of jurisdictional competition in their favour.

2.3. Reasons for Avoiding Domestic Courts: From the Standard of Civilization to the Problem of Impartiality and Efficiency of Domestic Procedures

This leads to the more fundamental question, as to why capital-exporting States historically deemed it necessary to provide foreign investors with the power to sue and have a choice with regard not only as to the forum but also as to the applicable law. It has not been uncommon to explain the rise of investment arbitration as the necessary, functional complement to the substantive standards of treatment (the “no rights without remedies” argument).¹⁷¹ I argue, however, that the functional and substantive shifts described above cannot be seen in isolation from each other. They are part of one and the same process of de-localization and internationalization of investor-State relations that has been going on, at least intensively, since the nineteenth century.

The premise of my inquiry is that this process is ultimately driven by a deep-rooted skepticism, as well as a fundamental lack of trust and confidence on the part of the capital-exporting States towards the legal systems of States of non-European origin. As I intend to demonstrate in the following parts, one of the key rationales for the introduction of investor-State arbitration was the perception that the capital-importing States possessed weak judicial systems that did not match up to that of developed states, and therefore could not administer justice in an adequate way. What I also intend to show, however, is that such a perception is not of recent vintage, but that is one that developed, capital-exporting States have traditionally nurtured about the legal systems of countries of non-European origin ever since the beginning of the colonial expansion.

2.3.1. Measuring Legal Systems through the Lens of Civilization

The colonial expansion had brought European nations, invariably sharing a common Christian tradition, in contact with peoples and societies whose social and cultural (and therefore also legal) practices were largely at variance with those of their own.¹⁷² The Europeans did not embrace these cultural differences as a *fact*, as a necessary consequence of differing beliefs and values that different peoples in different parts of the world may hold. They rather considered them as backward, primitive, and generally aberrant – as opposed to their own social and cultural

¹⁷¹ On this, see generally Puig (n 15).

¹⁷² See eg D Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850-2000’ in DM Trubek and A Santos (ed) *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 193 at 29-30, explaining that ‘[i]n the Ottoman lands and across Asia, there were highly developed preexisting modes of legal consciousness (Islamic, Hindu, Confucian, Shinto) that had at least a chance of resisting or transforming themselves into local competitors [of Western Classical Legal Thought]’.

practices, which they believed to be universal.¹⁷³ Not only – Europeans came to regard themselves as uniquely “civilized”, as opposed to the “barbaric”, “savage”, and “uncivilized” peoples that occupied most of the non-European world.¹⁷⁴ The practice of distinguishing societies along “civilizational” lines was not without significance. In the course of the nineteenth century, Western jurists began to advance the proposition that international law was a product of the special civilization of modern Europe and remained as such only the province of civilized states. Demoted to the “uncivilized”, non-European people were hence debarred from the realm of international law. Of the many legal (and political) implications that this has had, the most important was certainly the fact their sovereignty could not be recognized under international law, which meant that they became suitable objects of conquest by the Western Powers, in their pursuit of the “civilizing mission”.¹⁷⁵

The legal mechanism through which peoples had accordingly been admitted into (though, more frequently been barred from) the universal civilization of Europe was that of the “standard of civilization”.¹⁷⁶ This was a set of requirements that, though never clearly defined, were deemed to include the following. First, a “civilized” State was taken to be one that was capable of guaranteeing certain basic rights (essentially, those relating to dignity, to the protection of life and property, and to freedom of travel, commerce and religion), and such rights were in principle to be guaranteed to all peoples within its jurisdiction, though in particular to foreigners, which invariably meant the citizens of “civilized states”.¹⁷⁷ Second, a “civilized” State was one that possessed an effective government and maintained a State machinery that operated with a certain degree of efficiency. Third, it was one that adhered to the precepts of law, not only in the sense of compliance with international law, but also in relation to the capacity to guarantee legal justice to all within the domestic jurisdiction, foreigners and natives alike. Fourth, a “civilized” State maintained permanent diplomatic relations with other States. Whereas fifth, and finally, a State meeting the “standard of civilization” was one that generally adhered to cultural practices that were deemed “acceptable” to European views (e.g. monogamy).¹⁷⁸ In practice, of course, the standards to which non-European peoples were expected to conform were nothing but idealized European standards, for only States meeting such standards, as the nineteenth century lawyer John Westlake explained, would have enabled “people of a European race” to “carry on the complex life to which they have been accustomed in their homes”.¹⁷⁹

The maintenance of an adequate legal system – one that not only substantively recognizes certain basic rights, but also procedurally guarantees such rights through a functioning judicial system – was thus an important element of the “standard of civilization”. In practice, however, it was also an element that was habitually difficult to meet by non-European States. As between civilized states, Westlake wrote in his treatise, there may be “differences of detail, but no one who has had a liberal education feels himself a stranger in [...] law courts [...] of another country” and

¹⁷³ This notwithstanding the fact that eg up until 1850, the family law of Western States still looked quite similar to the then existing regimes of Muslim, Hindu, or Confucian family law. *ibid* at 33.

¹⁷⁴ J Lorimer, *Institutes of International Law: A Treatise of the Jural Relations of Separate Political Communities* (1883) 101-3.

¹⁷⁵ See G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004) 227ff; and Anghie (n 143), 32-114.

¹⁷⁶ See generally B Bowden, ‘The Colonial Origins of International Law, European Expansion and the Classical Standard of Civilization’ (2005) 7 *Journal of the History of International Law* 1.

¹⁷⁷ cf G Schwarzenberger, ‘The Standard of Civilisation in International Law’ (1955) 8(1) *Current Legal*

Problems 212, 220, observing many years later that the test of the standard of civilization was ‘as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners.’

¹⁷⁸ GW Gong, *The Standard of ‘Civilization’ in International Society* (Clarendon 1984) 14-21.

¹⁷⁹ J Westlake, *Chapters on the Principles of International Law* (CUP 1894) 141.

“the native subjects of one state travelling or resident in another [...] usually feel themselves safe under the local administration of justice.”¹⁸⁰ In countries having “civilizations differing from the European”, in contrast, Western nationals “would not feel safe under the local administration of justice which, even were they assured of its integrity, could not have the machinery necessary for giving adequate protection to the unfamiliar interests arising out of a foreign civilisation.”¹⁸¹ There were a number of reasons why local legal systems were deemed unsuitable for extension to Europeans. For one, concerns were raised about the local law itself which, to the extent that it was actually contained in written codes, was often considered to be contradictory, harsh, and still resting on doctrines long eliminated from Western legal thought (such as the application of the law of retaliation or the principle of collective responsibility). With equal apprehension, though, Western commentators took issue with the abuses in the way that the laws were administered, with the inadequacies of local procedures as such (such as the fact that torture would normally be resorted to in order to secure confessions, or the idiosyncratic treatment of evidence), and with the apparent lack of independent judiciaries (where these were considered to exist at all), which were notoriously prone to bribery and corruption.¹⁸²

The “standard of civilization” was not only determinative of whether non-European states as such would obtain equal recognition under international law, but also of whether their domestic legal systems were to obtain such recognition. As between “civilized” states, the question of mutual acceptance and recognition of domestic legal systems was never an issue. As Westlake explained:

“The common civilisation then [...] contains the principle that the institutions, whether of government or of justice, which the inhabitants of a state find suitable to themselves, must normally be accepted as sufficient for the protection of foreigners among them. Those foreigners are subject to the local courts and authorities, and not to separate jurisdictions, and their own governments will not, normally, interfere for their protection so long as they enjoy equal treatment with natives.”¹⁸³

Indeed, this principle of mutual acceptance was well-reflected in the practice of Western states in relation to the commercial treaties that they had been concluding *inter se* from the sixteenth century onwards. As discussed above, in most of these treaties, the granting of access to domestic courts on equal footing with the state’s nationals and the nondiscriminatory and fair application of the national laws were considered sufficient to ensure protection to the life and property of foreigners. Significantly, these treaties did not postulate that the legal system of the

¹⁸⁰ *ibid* 101-02.

¹⁸¹ *ibid* 102.

¹⁸² See eg the analysis of the Chinese law in GW Keeton, *The Development of Extraterritoriality in China* (Longmans 1928) 96-136. Of particular interest is Keeton’s assessment of the Chinese judicial system, of which he noted as follows: ‘It must be remembered, moreover, that China until 1911 had no judges in the Western sense of the word at all. Her magistrates were appointed in the first place, as a result of successful competition in the state examinations, for proficiency in the classics. They exercised at once legislative, administrative, and judicial functions. They were not bound by the provisions of the code, for they had the power at all times of creating new offences and punishing for their breach. There was no regular legal procedure, and the magistrate adopted whatever methods seemed to him best fitted for ascertaining the truth. Furthermore, there was no legal profession in China, trained to watch over the interests of its clients. The person accused of an offence was entirely at the mercy of the examining magistrate, who might even detain him for years without deigning to investigate the nature of his offence. It should not be forgotten, moreover, that until the compilation of the new Chinese codes at the beginning of the present century Chinese law designated many things as penal which in Western systems are either civil offences or no wrong at all in law. Lastly, the meagre salaries paid to even the highest magistrates rendered them an easy prey to wealthy and unscrupulous law-breakers, and encouraged irregular taxation.’ *ibid* 99-100.

¹⁸³ Westlake (n 179), 103.

foreign state would have to adhere to any supposed minimum standards accepted by civilized nations.¹⁸⁴

In relation to legal systems of non-European states, in contrast, no such principle of unconditional mutual acceptance was applied. Instead, three different strategies were pursued by the Western states in dealing with those legal systems. Two of them effectively entailed the expansion of the jurisdiction of Western legal systems at the cost of the native ones. In the more brutal form, such expansion resulted in the displacement of native (legal) institutions, and their replacement with legal and judicial systems that resembled those of the European states. In the less brutal, though, not any less condescending form, the expansion materialized through the imposition of regimes of extraterritoriality that resulted in the removal of European residents from the jurisdiction of local courts and their submission to the authority of their own consuls. The third strategy pursued, in turn, ensued in the acceptance of local forms of administration of justice; but unlike the case of intra-European regimes, this acceptance was not an unconditional one, but one that was subject to the meeting by the state in question of minimum standards deemed prescribed by international law, and which also resulted in frequent interventions – not only by means of diplomatic interposition but even by (threats of) use of force – as soon as the local administration of justice did not appear to accord with those standards. It is worth examining these strategies in greater detail now.

2.3.2. Colonial Rule and the Introduction of Western Systems of Administration of Justice

The imposition of colonial rule,¹⁸⁵ to which great parts of Africa and Asia were subjected, invariably led to the introduction of new structures of governance. The techniques of administration varied, depending on the colonial power involved. While some of the territories were ruled directly by the colonial offices; in others, the administration was exercised indirectly through local rulers. What colonial expansion invariably led to, however, was the introduction of new systems of laws and courts, invariably modeled upon the metropolitan legal systems of the European Powers, though rarely representing their precise replications. Namely, when Europeans conquered Africa and parts of Asia, they frequently encountered populations with well-established indigenous and Islamic systems of law. But instead of displacing these systems, they rather subordinated them to metropolitan legal traditions, creating thus a form of hybrid, *sui generis* colonial legal system.¹⁸⁶ Many of the colonial powers had thus the habit of retaining native

¹⁸⁴ Neufeld (n 90), 103.

¹⁸⁵ The methods used to bring non-European societies under colonial rule differed in time and per region. In some cases, subjugation resulted from outright occupation of what was perceived and claimed to be *terrae nullius*. A case at hand is Australia, which had been found to consist 'of a tract of territory practically unoccupied without settled inhabitants or settled law' that could thus be lawfully occupied and annexed to the British Dominions. See *Cooper v Stenart* (1889) 14 AC 291 (Judicial Committee of the Privy Council). Another way was through the institution of 'colonial' protectorates, by which the European Powers obtained initially the possibility to interfere with internal sovereignty rights of the protected entities, and later to acquire full and comprehensive sovereignty over the territory and the native peoples. These protectorates were typically established by means of transactions with the native rulers and chiefs, through which the latter surrendered to the protecting power so much sovereignty as it was necessary for giving effect to the protection granted. Such practice was one that was frequently employed in Africa and in some parts of Asia, where the European Powers encountered native communities permanently occupying defined tracts of land and displaying some form of political organization. On colonial protectorates, see further Alexandrowicz (n 102), 189ff.

¹⁸⁶ See R Roberts and K Mann, 'Law in Colonial Africa' in K Mann and R Roberts (eds), *Law in Colonial Africa* (James Currey 1991) 3, 8-9. As Benton explains: 'Colonialism shaped a framework for the politics of legal pluralism, though particular patterns and outcomes varied. Wherever a group imposed law on newly acquired territories and subordinate peoples, strategic decisions were made about the extent and nature of legal control. The strategies of rule included aggressive attempts to impose legal systems intact. More common, though, were conscious efforts to retain elements of existing institutions and limit legal change as a way of sustaining social order.' L Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (CUP 2001) 2-3.

law and custom for decision of disputes in which natives were involved (although, only to the extent that those native rules could “be tolerated by a civilized power”¹⁸⁷). To administer this native law, they also found it opportune to establish special “native courts”, which operated with various degree of integration with the “regular”, European-type colonial courts.¹⁸⁸ These native courts, however, were designed to deal with cases between natives only and their jurisdiction did not extend to the Western subjects.

The introduction of colonial legal systems formed one of the essential elements in the European efforts to establish and maintain colonial domination. Quite conveniently, however, their putting into place also obviated the need for recourse to international legal processes to protect the flows of foreign investment into the colonies. Through the introduction of their own laws and courts, and backed their own police and prisons, European Powers were now themselves capable of guaranteeing in their colonial possession respect for certain basic rights and the orderly administration of justice to their own subjects, as well as to the subjects of other European Powers. So much so that, where a European Power assumed jurisdiction over territories that had previously been subject to capitulatory regimes, other Powers gradually gave up their claims to extraterritorial rights. With time, the assumption of a protectorate over “uncivilized” people would therefore automatically be deemed to entitle the protecting state to exercise jurisdiction over all subjects in the territory,¹⁸⁹ and in fact, would be held to provide the colonial power with the exclusive right to deal with the colonial possession outside the sphere of international law.¹⁹⁰

2.3.3. Regimes of Extraterritoriality and the Administration of Justice by Means of Consular and Mixed Courts

Not everywhere did the colonial encounter result in complete subjugation of non-European peoples. In contrast to the purportedly “savage” societies that were held to require administration in the hands of one or another European power, there was also a category of entities that displayed sufficient social and political organization to obtain recognition as sovereigns, and to retain thus their nominal independence, whilst at the same time being considered not “civilized” enough to engage in intercourse with the Western powers on the basis of equal footing. These entities, characterized by contemporary lawyers as “semi-civilized” states, were not yet entitled to have their sovereignty fully recognized and were therefore subjected to regimes of extraterritoriality.¹⁹¹ Although not an invention of the colonial era,¹⁹² extraterritoriality acquired

¹⁸⁷ AN Allott, ‘The Extent of the Operation of Native Customary Law: Applicability and Repugnancy’ (1950) 2(3) *Journal of African Administration* 4. In British controlled territories, the applicability of native law usually depended on whether or not the rule in questions was ‘not repugnant to justice and morality.’ *ibid* 8. In some German colonies, in contrast, the natives were only subject to native law, insofar as they were considered to be ‘insufficiently advanced to come under German law’. JP Moffett, ‘Native Courts in Tanganyika’ (1952) 4(1) *Journal of African Administration* 17, 17-18.

¹⁸⁸ See RE Robinson, ‘The Administration of African Customary Law’ (1949) 1(4) *Journal of African Administration* 158.

¹⁸⁹ At one point, a difference of opinion existed between European Powers as to the jurisdictional rights that the protecting powers enjoyed over subjects of other powers. In particular, the British maintained the view that international law did not permit them to exercise criminal and civil jurisdiction over subjects of foreign powers in the territory, except with the consent of these powers. Subsequently, however, the British assimilated its position with that of the other European governments, such as France and Germany, that such jurisdiction extended to all subjects. See on this, J Mugambwa, ‘Treaties or Scraps of Paper – A Second Look at the Legal Character of the Nineteenth century British/African Colonial Agreements’ (1987) 20 *Comparative and International Law Journal of Southern Africa* 79, 85-86.

¹⁹⁰ Alexandrowicz (n 102) 194.

¹⁹¹ cf Keeton (n 182), 100.

¹⁹² As a legal institution, regimes of extraterritoriality stretch back to much earlier periods, when legal systems were dominated by the principle of the personality of the law. The latter dictated that the law applicable to particular individuals be determined on the basis of their origin or ethnical/tribal affiliation. Hence, it was normal for foreigners to be exempted from local jurisdiction and being granted the right to live according to their own laws. See HJ Liebesny, ‘The Development

new meaning during the colonial expansion of the nineteenth century, as it provided a convenient tool for the commercial penetration of economically (and militarily) weaker States, without the assumption of colonial administration. This was a tool, of course, that was firmly grounded in international law. By the nineteenth century, extraterritorial regimes were invariably imposed by what were commonly known as treaties of “capitulation”,¹⁹³ sometimes also referred to as “unequal treaties”,¹⁹⁴ which were particularly ubiquitous in the Western relations with the States of the Middle East (Turkey, Egypt) and Asia (China, Japan, Korea).

By virtue of such regimes, the Western residents in those countries were not only granted far-reaching privileges, such as the right to trade and establish residence, or the exemption from the payment local taxes and customs duties (privileges which could even be further extended pursuant to MFN clauses). Most significantly, perhaps, they were entitled to remain under the jurisdiction of their own State of nationality. In practice, this meant that they continued to be governed by their own law and judged by their own courts, instead of having to subject themselves to the “less civilized” local systems of law, which were considered inadequate in the eyes of the Western powers. This obviously provided an important mechanism for securing also the protection of investment flows. The security of investments did not depend on particular guarantees applicable as a matter of international law, but was effectively guaranteed by the extraterritorial application of the laws of Western powers.¹⁹⁵ In some cases, for example, foreign companies were even entitled to establish themselves and organize according to the laws of their own countries, and freely transact and conduct business in the host State, without being subject to the authority of the local government.¹⁹⁶

Of great significance in this respect was also the possibility for foreign subjects to be administrated justice in accordance with Western standards, by courts that operated almost in isolation of the local judicial systems. Local variations notwithstanding, such extraterritorial administration of justice was generally performed by two types of institutions. In case of differences between subjects of different foreign nationalities, the case was always tried before a

of Western Judicial Privileges’ in M Khadduri and HJ Liebesny (eds), *Law in the Middle East: Origin and Development of Islamic Law*, vol I (Middle East Institute 1955) 309, 309. Historically, the granting of extraterritorial rights was already widely practiced in the Mediterranean basin prior to the conquest of Constantinople by the Ottomans in 1453. Some consider the earliest example of such practice to be found in the treaty concluded in 911 between the Varangians and Emperor Leo VI of the Byzantine Empire. See G Bie Ravndal, ‘Capitulations’ in EG Mears (ed), *Modern Turkey* (Macmillan 1924) 430, at 435-36. But the practice found its full development and systematization in the intercourse between Christian nations and the Ottoman Empire, where the granting of extraterritorial rights to foreign, predominantly European merchants has since the Middle Ages been a practical solution to the problem of jurisdiction over non-believers, as well as a convenient way to obtain scarce goods and win political allies in Christendom. For similar reasons, extraterritorial arrangements were brought in existence between the European States and other Islamic nations, such as the ‘Barbary Powers’ of Algiers, Tunis, and Tripolis. See JM Mössner, ‘The Barbary Powers in International Law (Doctrinal and Practical Aspects)’ in *Grotian Society Papers* (Brill 1972) 197, 214-215. Reportedly, the tradition of granting extraterritorial privileges was also customary between the rulers of Asia. See Alexandrowicz (n 102), 151-52.

¹⁹³ So named after a category of instruments, subdivided into chapters (*capitula*), through which early Ottomans had granted extraterritorial privileges to subjects of non-Muslim nations. In those times, however, such privileges were granted on the footing of equality, or had even been conceded unilaterally by Ottoman rules. In the nineteenth century, in contrast, the earlier capitulatory arrangements were replaced by new treaty arrangements, which compelled much further reaching privileges from the then weakening Ottoman Empire, so as to enable the opening up of the latter to Western foreign capital.

¹⁹⁴ The notion refers to treaties such as those imposed upon China, Japan, or Korea, following their military defeat at the hand of Western powers, or else obtained through threat of military action on account of those countries’ refusal to open to foreign capital and commerce. The lack of reciprocity in such arrangements has usually warranted the description of ‘unequal treaties’.

¹⁹⁵ The state of exemption from local laws meant that foreign nationals were effectively immunized from regulatory measures adopted by the local sovereigns, obviating the need to have special procedures put in place for investor-State disputes. In case disputes of that kind nonetheless emerged, the matter would be resolved through diplomatic means.

¹⁹⁶ Ravndal (n 192), 431.

consular court instituted in each consulate, which usually happened to be the court of the defendant. In case of differences between foreign and local subjects, on the other hand, the trial was conducted instead before *mixed courts*, composed of local judges and foreign delegates, usually accompanied by translators (*dragomen*) from the consulate of the foreigner. In the latter courts, an official delegate from the consulate of the nationality of the foreign subject or firm had always to be present, for the court proceedings were not considered valid unless ultimately approved by the said delegate. The latter could namely refuse to approve the proceedings if these were not deemed consistent with legality. The ensuing sentences were then executed by the local competent authorities under the supervision of the respective consulates.¹⁹⁷ The system of mixed courts was developed most fully in the arrangements between the Western Powers and the countries of the Far East.

By the end of the nineteenth century, expectedly, the countries that were subject to regimes of extraterritoriality began to resent Western Powers' interference with their domestic legal systems. Restrictions on their exercise of jurisdiction over foreign residents were increasingly found as humiliating, as they were derogatory to the sovereignty of the territorial ruler.¹⁹⁸ Besides, given that the privileges enjoyed by the foreigners were denied to their own nationals, they also considered them hurtful to their own subjects. Yet, the various extraterritorial regimes could not be abrogated unilaterally, for even where these were initially conceded on a unilateral basis (such as in the case of the Ottoman Empire), they had by then been gradually formalized and entrenched in treaties. This, notwithstanding the fact that, as a legal institution, extraterritoriality has grown into an anomaly that was opposed to the modern conception of territorial sovereignty, and was also at variance with the practice of Western states that had already restricted the exercise of extraterritorial jurisdiction among themselves. Expectedly, states subject to extraterritorial regimes claimed these to be contrary to the principle of sovereign equality of states. But Western lawyers defended extraterritoriality with the proposition that the "semi-civilized" states had lower "standards" of justice than the "fully civilized" states of Europe, which arguably prevented foreigners with an allegedly superior civilization from being subjected to the local systems of law. As maintained by Keeton, for example, extraterritoriality was thus "...not an exception to the general principles of international law, but a condition of intercourse [...] between states of different degrees of civilisation, where that difference is clearly and fundamentally reflected in the legal institutions of the states concerned."¹⁹⁹

Given that the Western Powers were only ready to give up extraterritorial arrangements if states subject to them could provide Western subjects with the same treatment that they would expect to receive in their home states, many of the purportedly "semi-civilized" States embarked upon judicial reforms, in order to prove that such arrangements were no longer necessary to protect Western residents. Yet, apart from the case of Japan, which modernized its government and reformed its judicial system to the extent that the capitulatory regime had definitely been abolished in 1899, legal reform projects in most other states were frequently deemed insufficient.²⁰⁰ After all, meeting the "standards of civilization" entailed complying with the

¹⁹⁷ This is how the system operated in Turkey, *ibid* 431-32.

¹⁹⁸ Anghie (n 143), 85.

¹⁹⁹ Keeton (n 182), 104.

²⁰⁰ The Ottoman Empire, for example, had been attempting to obtain abolition of the capitulations since the Congress of Paris of 1956. But it was only by the terms of the 1923 Treaty of Lausanne that foreigners became for the first time subject to Turkish law. Even then, some Western commentators expressed doubts as to the appropriateness of such a move. See eg Ravndal, writing that 'If we judge the future by the past, the outlook is not encouraging. The personnel of the judicial system has been woefully lacking in training, the judges underpaid, and the courts notoriously corrupt. The judicial system, in spite of many reforms, is an almost hopeless jumble of several coexisting systems of jurisprudence. Moreover, there is great confusion between so-called religious and civil law court procedure, although by the reform movements of 1908, this confusion was supposed to have been removed. The Ottoman civil code has its foundation in the religious law and is therefore inadequate for modern social and commercial usages.' Ravndal (n 192), 434.

idealized European standards, which presupposed the execution of wide ranging judicial reforms. In the case of the Ottoman Empire, for example, the extinction of capitulatory regimes was held to be possible “only through the complete secularization and nationalization of the Islamic law and through the further habilitation of the Ottoman courts”.²⁰¹ It is not surprising, therefore, that Western Powers continued to insist on extraterritorial regimes until well into the twentieth century, sometimes relinquishing them for reason of strategic calculations other than those related to the administration of justice.²⁰²

2.3.4. Governance through International Law: Minimum Standards of Administration of Justice and the Doctrine of Denial of Justice

Western economic expansion resulted in a different type of confrontation in Latin America. Contrary to the situation in other parts of the world, in the first part of the nineteenth century, and after almost three centuries of colonial rule, most of the region achieved political independence. The newly independent States, of course, did not revert to the systems of political and legal organization existing prior to their subjugation by the Spanish and Portuguese empires. Instead, the forms of government they adopted were largely borrowed from European sources, and so were the legal systems they introduced, which largely embodied the Western notions of individual liberty, the sacredness of private property, and the sanctity of contracts.²⁰³ This notwithstanding, in many of those countries, the conditions of order and stability otherwise necessary to make the European system work had not yet been fully established – a problem which manifested itself, among others, in the frequent outbreaks of disorder (taking the form of mob violence and civil strife), as well as recurrent changes of government.²⁰⁴ This did not leave unaffected the many foreigners that were present in those countries. Dissatisfied with the local means available for redressing the injuries sustained during many of the Latin American revolutions, they recurrently called upon the assistance of their own governments to secure reclamation.

Unlike in the case of non-European societies in other parts of the world, the ensuing confrontations between capital-export States and the countries of Latin America did not result in the imposition of extraterritorial regimes. After all, the legal and political systems of Latin America were of European origin so that in accordance with the legal doctrines of the nineteenth century, they could hardly be considered as inferior in civilization.²⁰⁵ Instead, the protection of the life and property of the foreign nationals was increasingly pursued through the utilization of international law and diplomacy. If, procedurally, the mechanism employed for that purpose was that of diplomatic protection, substantively, it was the doctrine of denial of justice that now provided the essential legal basis for diplomatic interposition.

The doctrine has been premised on the assumption that international law requires each State to provide a system of justice that treats aliens fairly and impartially, and that generally affords adequate judicial protection to their rights.²⁰⁶ Not only was the availability of such a system one of the defining characteristics of the “civilized” state, but – as already mentioned above – at the same time a concrete obligation comprised under the minimum standard of

²⁰¹ *ibid* 445.

²⁰² In the case of China, for example, the United States and Great Britain were only willing to relinquish extraterritorial privileges once it appeared advantageous to securing China as an ally during WWII.

²⁰³ Dawson and Head (n 8), 5-7.

²⁰⁴ Dunn (n 5), 53-54; Lipson (n 93), 17; Borchard (n 5), 836-837.

²⁰⁵ Shea (n 130), 5, argues that this was not the only reason why extraterritoriality was not imposed. Of relevance was, purportedly, also the sensitiveness of those States to the prerogatives of sovereignty, as well as the better bargaining position of those states as a result of the United States Monroe doctrine.

²⁰⁶ See *infra* 6.1.

treatment under customary international law. Hence, even where unable to directly secure the operation of a judicial system that would fully cater to the needs of their citizens abroad, the capital-exporting States could at least ensure that their nationals could be indemnified where the judicial system would not appear to perform according to the desired standard. This was possible since, in view of the non-exacting nature of the standard of denial of justice, the capital-exporting States often reserved for themselves the right to determine whether justice had been denied to their nationals. The operation of the system was aptly explained by Borchard in the following way:

“The attitude of the exploiting countries in the matter embodies the view that the political organization of many Latin-American countries is so weak, that judges depend so thoroughly upon executive favor, that, in the light of their experience, they must conclude that their citizens cannot secure from the courts that impartiality to which they are entitled, and that they cannot leave the rights of their citizens unreservedly to the determination of the local courts. Even where the South American states have succeeded by treaty and diplomacy in securing a recognition of the principle that claims of foreigners can only be diplomatically pressed where, after an exhaustion of local remedies, there has been a denial of justice, the exploiting countries undertake to judge for themselves what they will consider a denial of justice, so that the principle, while in conformity with the international law applied among the European states themselves, is, in its application to Latin-America, extremely flexible. A judgment, they say, may in spite of the observance of forms be nevertheless prejudicial to the interests of their citizens and they reserve the right to determine whether in each particular case justice has been in any degree denied.”²⁰⁷

Expectedly, many of the capital-importing States considered the rules and practices thus imposed on them as constituting non-colonial forms of imperialism, and thus insisted on a narrow construction of the doctrine of denial of justice.²⁰⁸

2.3.5. From the Problem of Civilization to the Quest for a Neutral and Efficient Forum

Towards the middle of the twentieth century, the test of “civilization” gradually fell into disfavor, and with the commitment to formal equality of States following the adoption of the UN Charter, also definitely ceased to be used as a criterion for assessing the suitability of domestic legal systems.²⁰⁹ By then, of course, any arguments pertaining to the purported inadequacy of domestic legal systems would have been difficult to sustain along “civilizational” lines, as many of the newly independent states that emerged from the process of decolonization possessed judicial systems that were modelled upon those of their former colonial powers.²¹⁰ But this did not imply that domestic judicial systems other than those of the developed world had become any less an object of distrust than they were before. What changed was only the language through which the opposition to the use of host States’ judicial systems was now presented. Whereas an early report prepared by the UN Secretariat for the ECOSOC in 1960 would still associate the investors’ reservations towards reliance on host State courts with their “foreign” nature and the resulting

²⁰⁷ Borchard (n 5), 837.

²⁰⁸ See *infra* 6.1.

²⁰⁹ cf Simpson (n 175), 256ff.

²¹⁰ See Dawson and Head (n 8), 306, noting for example how ‘most Commonwealth countries include in their laws a procedural system almost identical to the English mode, a model which is as fair as any in the world’ and how therefore ‘[t]he courts in these countries can be criticized for much the same reasons all courts are criticized, i.e., it is their inefficiency, not their unfairness, which is of concern’.

investors' "unfamiliarity" therewith,²¹¹ the argumentation in the academic literature of the 1950s and 1960s progressively got enveloped in a more technical narrative: the purported lack of independence and efficiency of domestic courts were now identified as the main shortcomings of local litigation of investment disputes, and as the key factors justifying the introduction of direct investor-State arbitration.²¹²

In the literature of the time, it was primarily the *independence* of domestic courts that was seriously questioned. This was presented either as a problem of integrity of domestic judicial procedures, or as a problem of the courts' non-independence from the host State itself. In the former case, what was called into question was the ability of the local judiciary to deliver justice impartially. Domestic courts were presented as being biased against the foreign investor, whereby the risk of governmental interference in judicial procedures and the presence of local prejudice were generally mentioned as the main obstacles for the foreign investor to securing impartial justice through local litigation.²¹³ This was, of course, a continuation of the arguments that had traditionally been raised in the nineteenth century in support of the claim that non-European judiciaries failed to meet the required "standard of civilization". What was further doubted, on the other hand, was the courts capacity to provide effective relief to the investor in vindicating its rights. This was not so much a question of the courts' actual bias, as it was one of systemic bias, associated with the domestic courts' embeddedness within the host State's legal order.²¹⁴ Given that courts, as organs of that order, were bound to apply the host State's legislation, and given that the host State could freely interfere with such legislation through executive or legislative action, domestic litigation of investment disputes was claimed to be potentially futile even where the integrity of the judiciary was not questionable.²¹⁵ More often than not, however, the claims of

²¹¹ ECOSOC *The Promotion of the International Flow of Private Capital: Progress Report by the Secretary-General* UN Doc E/3325 (26 February 1960), para 200 ('it is widely felt that what is lacking is [...] an effective forum in which to enforce them [i.e. the investor's rights]. This lack springs chiefly from the reservations which the investor might feel toward reliance *either on foreign courts and agencies with which he is not familiar*, or on the support of his government...') (emphasis added)).

²¹² Resort to such technical narratives has also been a common way for propagating the use of international commercial arbitration to resolve trade/commercial disputes. See on this, AA Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism' (2000) 41 Harv Int'l LJ 419, 434ff.

²¹³ See eg M Domke, 'The Settlement of International Investment Disputes' (1957) 12 Bus Law 264, 265, arguing how the 'investor, dissatisfied with an investment situation in a foreign country, will not be inclined to go before the courts of that country. He will be fearful of the nationalistic trend in those courts, especially when a vital question of the country's interest is involved. Rightly or wrongly, the mere suspicion is enough to make one look for other means of relief'; or WE Albrecht, 'Some Legal Questions Concerning the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1968) 12 St Louis U LJ 679, 682, describing domestic courts as 'too often prejudiced and susceptible to executive and legislative influence.' See also See eg ILA, *Report of the 40th Conference* (1938) 174-75: 'Experience has taught that . . . the indispensable objectivity and impartiality [of national courts] are sometimes jeopardized by considerations of national interest; this occurs especially in cases in which considerable interests are at stake.'

²¹⁴ The argument at that time had much to do with the changed nature of host States' interferences with the investors' property, which by the mid-twentieth century began to take less the form of individual instances of mistreatment, but more the shape of impersonal takings effected through legislative decrees that, as such, had to be given effect by domestic courts. On this shift, see Dawson and Head (n 8), 51ff.

²¹⁵ See eg A Broches, 'The Convention on the Settlement of Investment Disputes' (1965) 9 Sec Int'l & Comp L Bull 11, at 14 claiming that '[i]f there is a lack of confidence among investors it is not a lack of confidence in the integrity of the national courts but a fear that the executive and legislative branches will take politically motivated actions which the courts are powerless to deal with. This is a fact that has to be faced and one, moreover, that is not surprising in a world that is in political ferment'; or MM Moore, 'International Arbitration between States and Foreign Investors-The World Bank Convention' (1966) 18 Stan L Rev 1359, 1368, noting how '[t]he municipal courts may be hampered by the executive and legislative powers in that country, [...] making an impartial decision unlikely.' See also O Schachter, 'Private Foreign Investment and International Organization' (1959-1960) 45 Cornell L Q 415, 427-28, observing that 'While it cannot be demonstrated that the absence of arbitration procedures constitutes a decisive obstacle to the flow of investment generally, there is reason to believe that many enterprises, especially those operating on a large scale, will be concerned about the risk of a government relying on its 'sovereign' power to over-ride or cancel contractual arrangements. For such firms, the

non-impartiality were not even concretized. The mere fact that redress would have to be sought before the courts of the same State whose actions formed the object of the investor's challenge was seen as sufficient reason to doubt about the impartiality of domestic litigation.²¹⁶ Indeed, investor-State arbitration was simply presumed to provide the "impartial" and "neutral" forum,²¹⁷ or even – as argued by some – to be "practically the only forum available for litigating with a foreign government."²¹⁸ Ultimately, such claims were then coupled with arguments pertaining to the purported *inefficiency* domestic judicial procedures. As opposed to the pursuit of local remedies, international arbitration supposedly provided the possibility for investment disputes to be heard rapidly, expeditiously, with dispatch.²¹⁹

The arguments against domestic litigation of investment disputes were rarely, if ever based on empirical evidence demonstrating bias on the part of domestic courts.²²⁰ Most of the evidence was anecdotal.²²¹ In fact, a study published 1971, which surveyed the legal systems of 25

willingness of a government to contract for neutral arbitration in case of dispute is itself a significant symptom that the investment climate is favorable, and may be an important element in deciding to proceed with the investment.'

²¹⁶ See eg E Snyder, 'Foreign Investment Protection: The Dispute Solving Aspect' (1964) 3 Colum J Transnat'l L 127, 131, claiming that '[i]t does not appear realistic to expect a foreign investor to allow adjudication of his grievance before a tribunal of the nation in which the grievance arises, or before a tribunal of a nation allegedly causing the grievance. The reasons for this commend themselves without elaboration'; PC Szasz, 'A Practical Guide to the Convention on Settlement of Investment Disputes' (1968) 1 Cornell Int'l LJ 1, 9-10, noting 'the understandable suspicion of a foreign investor when asked to leave the final definition of his rights and obligations to the courts of the very government with which he is proposing to litigate'; or PK O'Hare, 'The Convention on the Settlement of Investment Disputes' (1971) 6 Stan J Int'l Stud 146, 146, finding that 'investors have been understandably diffident about their chances in the courts of a nation whose policy they are resisting.' See also DM Sassoon, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1966) 1 Isr L Rev 27, 27.

²¹⁷ See eg the Commentary to the 1959 Abs-Shawcross Draft Convention on Investments Abroad, in 'The Proposed Convention to Protect Private Foreign Investment' (1960) 9 J Pub L 115, 123, stating that '[t]here must, at the heart of any instrument dedicated to the creation of an atmosphere of confidence, always lie a provision for the effective adjudication by *an impartial body* of all disputes which may arise' (emphasis added); E Snyder, 'Protection of Private Foreign Investment: Examination and Appraisal' (1961) 10 Int'l & Comp LQ 469, 491, underlying the importance of the 'certainty that disputes involving foreign investments will be submitted to *impartial* arbitration' (emphasis added); CM Spofford, 'Third party judgement and international economic transactions' (1964) 113 Recueil des Cours 117, 148, speaking of the 'natural apprehension on the part of all parties that in transactions which may have a great impact on the national economy, municipal courts of one party could not be perfectly *impartial*' (emphasis added); P Szasz, 'Arbitration under the Auspices of the World Bank' (1969) 3 Int'l Lawyer 312, 312-13, speaking of the problem of attracting 'investors otherwise fearful of entering a foreign jurisdiction without having access to an *impartial*, assured forum to settle any disputes that might arise with the host Government' (emphasis added); or C Yun, 'The Convention on the Settlement of Investment Disputes - Commentary and Forecast' (1969) 11 Malaya L Rev 287, 292 noting how '[o]ne of the main factors influencing foreign investment decisions is the sense of assured security that in the case of disputes arising out of the investment the investor would be able to seek redress from an *impartial* neutral body.' (Emphasis added).

²¹⁸ Szasz (n 45), 140.

²¹⁹ See eg M Brandon, 'Recent Measures to Improve the International Investment Climate' (1960) 9 J Pub L 125, 128, speaking of the essentiality of establishing 'a system of international arbitration which would ensure the *rapid and final settlement* of disputes between sovereign states and private parties' (emphasis added); or AN Farley, 'Commentary: The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1966) 5 Duq U L Rev 19, 26, noting how the ICSID Convention 'meets the characteristics traditionally propounded in favor of conciliation and arbitration: international investment disputes may be *heard with dispatch* by impartial or disinterested parties in accordance with a prior defined procedure.' (Emphasis added). See also C Hurst, 'Wanted! An International Court of Piepowder' (1925) 6 Brit. YB Int'l L 61, complaining on the 'evil consequences' resulting from delay in the settlement of international claims on behalf of individuals, and propounding the creation of some form of international jurisdiction which could expeditiously hear claims for injuries suffered by individuals at the hands of foreign governments.

²²⁰ An exception is Snyder (n 216), 131, citing several judicial decisions purportedly biased against the investor. Interestingly, most of them, were decisions of courts from developed countries, where an attempt was made to recover damages from the host State that adversely affected the investor's interests.

²²¹ See eg 'Foreign Seizure of Investments Remedies and Protection' (1960) 12 Stan L Rev 606, 616-17, discussing the limited possibilities of judicial redress with respect to injuries sustained by foreign property on account of Mexican nationalizations, the Cuban agrarian reform of 1959, and the Indonesian nationalizations of 1958. See also IBRD, 'Report

jurisdictions, including those of many Latin American, African, and Asian countries, concluded that, in spite of areas where formal procedural inadequacies were found to exist, “the evidence indicates that, in the main, aliens’ fears of foreign legal systems are groundless and founded more upon ignorance than on fact”.²²² This notwithstanding, the study concluded that due to “post-World War II events which undermined faith in [...] the Local Remedies Rule”, the ICSID system “may be, at least for the time being, the most effective device for obtaining prompt, impartial decisions politically more acceptable to both host and protecting States.”²²³ In much the same way, the argument of inefficiency of domestic litigation usually did not rest on much factual substantiation. The fact that arbitration could be conducted directly between the investor and the host State was in itself deemed to provide an advantage over domestic litigation.

Today, the argumentation has not changed much. The narratives of neutrality of arbitration and local judicial bias continue to dominate contemporary writings, supported by claims pertaining to investment arbitration’s technical superiority over domestic litigation. While local judicial bias continues to be more or less presumed,²²⁴ reference is nonetheless made to certain concrete shortcomings of local litigation, such as to domestic constitutional limitations preventing direct application of international law within the host State’s legal order, or conversely, treaty limitations precluding local claims that are based on the treaty;²²⁵ to statutory immunities preventing suits against State organs or governmental agencies;²²⁶ but also to the purportedly weak judicial organization causing excessive delays in many countries, and/or the lack of technical expertise on the part of domestic courts.²²⁷

It is not the intention here to further explore the validity of such claims. There is little doubt that considerable differences may exist in relation to the independence and/or effectiveness of domestic judiciaries around the world.²²⁸ What is curious, however, is that the discussion has usually been framed in the most generic of terms – i.e., the problems of independence and ineffectiveness are presented as issues of purported concern to just *any* investor seeking redress in the courts of the State recipient of its investment – whereas in reality,

of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (18 March 1965) [10] (mentioning that ‘experience shows’ that disputes may arise which the parties wish to settle by other methods than through domestic judicial procedures).

²²² Dawson and Head (n 8), 311.

²²³ *ibid* 245.

²²⁴ See eg C Schreuer (et al), *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 5 (‘Rightly or wrongly, the national courts of one of the disputing parties are not perceived as sufficiently impartial.’); M Sornarajah, *The International Law on Foreign Investment* (CUP 2010) 217 (‘[a] foreign investor, justifiably in many instances, will not have confidence in the impartiality of local tribunals and courts [...] Arbitration, in a neutral state before a neutral tribunal, has traditionally been seen as the best method of securing impartial justice for him’); or JE Alvarez, *The Public International Law Regime Governing International Investment* (Martinus Nijhoff 2011) 68-69 (speaking of the ‘risk of biased local courts’ and ‘the deep suspicion – often justified – of local courts’). But see SW Schill, ‘Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement’ in M Waibel et al (eds), *The Backlash against Investment Arbitration* (Kluwer 2010) 29, 33-36, identifying a number of causes that may prevent domestic judges from adjudicating investment disputes independently.

²²⁵ See M Bronckers, ‘Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements’, (2015) 18 *Journal of International Economic Law* 655, 660ff; and also European Commission, ‘Investment in TTIP and Beyond - the Path for Reform,’ Concept Paper, 2015, <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>, last accessed on 18 February 2019, at 9-10. For a contrary view, see T Jardim, ‘The Authority of Domestic Courts in Investment Disputes: Beyond the Distinction Between Treaty and Contract Claims’ (2013) 4(1) *JIDS* 175.

²²⁶ See eg Dugan et al (n 4), 14-15; R Dolzer and C Schreuer *Principles of International Investment Law* (OUP 2008) 214-15; or Schreuer (n 224), 5.

²²⁷ See eg Schreuer (n 224), 5; Bronckers (n 225), 671-672.

²²⁸ See eg World Justice Project, *Rule of Law Index 2016* (2016) <https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf> accessed 14 June 2018.

the faith in the prospect of local litigation has essentially been one concerning the operation of the legal systems of developing countries.²²⁹ Attesting to this most clearly is the fact that up until recently, there were practically no bilateral investment treaties providing for direct investor-States arbitration in existence between capital-exporting States. Admittedly, this situation began to change in recent years, as advanced economies have started to conclude, or are in the process of concluding investment protection treaties *inter se*; treaties which now also provide for investor-State arbitration. But as the discussions attending the negotiations of these treaties have shown – especially those concerning the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership (TTIP) with the US – the question of trust more than ever continues to play a role. On the one hand, with the many voices now questioning the actual need for investor-State arbitration in these treaties,²³⁰ the impression gets confirmed that the current mechanism may never have been intended to operate on a truly reciprocal basis, as a means for avoiding the legal systems of developed and developing States alike. On the other hand, it is precisely by reference to trust (or lack thereof) that arguments for retaining the current mechanism are being articulated. Whereas in the context of intra-EU BITs, the existence of investor-State arbitration is seen as unjustified because of the “existence of mutual trust between the Member States” that the common values on which the EU is founded will be recognized and that the law that implements them will be respected,²³¹ in the context of treaties between EU Members and Third States, the system must arguably be retained precisely because the relations between these States are “*not* based on mutual trust”.²³² As ECJ Advocate General Bot recently observed:

“It is *clear* that an investor from a third State who wishes to invest in a Member State will have at his disposal a body of law protecting that investment as well as legal remedies to assert his claims. Without preaching to or making groundless accusations about the commercial partners of the European Union, it cannot however be *taken for granted* that, in the third States with which the European Union wishes to develop relations in terms of investment, EU investors will enjoy an equivalent level of protection from a substantive and procedural point of view.”²³³

* * *

As I intend to show in the present study, the problem of distrust in domestic judicial procedures continues to inform the present-day approach of investment tribunals in their dealing with domestic courts. Not only are arguments pertaining to the futility of domestic judicial procedures, and conversely, to the technical superiority of investment-arbitration, continuously invoked and relied upon in dealing with jurisdictional conflicts. But so is also the acceptance of domestic judicial pronouncements frequently called into question on account of the courts’ embeddedness in the legal systems of the respondent States.

²²⁹ On this, see further M Sattorova, ‘Return to the Local Remedies Rule in European BITs? Power (In)equalities, Dispute Settlement, and Change in Investment Treaty Law’, (2012) 39 *Legal Issues of Economic Integration* 223

²³⁰ For general discussion, see A de Mestral (ed), *Second Thoughts: Investor State Arbitration between Developed Democracies* (McGill-Queen’s University Press 2017); for an example from policy circles, see European Parliament, ‘Report containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)’, A8-0175/2015 (1 June 2015), at 74, 84, suggesting that domestic judicial procedures are the most appropriate tools for addressing investment disputes in TTIP.

²³¹ ECJ, *Slovakische Republik (Slovak Republic) v. Achmea BV*, C-284/16, Judgment of 6 March 2018, [34] and [58]. The ECJ thus endorsed the arguments previously advanced by the European Commission, which consistently claimed that resort to outside dispute settlement mechanisms by EU subjects revealed a ‘mistrust in the courts of EU Member States’ which had ‘no place’ in the European legal order. See *Achmea BV v The Slovak Republic (Award on Jurisdiction, Arbitrability and Suspension)* (UNCITRAL, PCA Case No 2008-13, 26 October 2010) (formerly *Eureka BV v The Slovak Republic*) [185].

²³² See ECJ, *Opinion 1/17 (on CETA)*, Opinion of Advocate General Bot of 29 January 2019, [81]; emphasis mine.

²³³ *Ibid.*, [73]; emphasis mine.

2.4. Conclusions

To recapitulate, what I suggest in this study is that the investment tribunals' present attitude towards domestic courts has been shaped by three factors. First, the fact that investor-State arbitration has succeeded to progressively establish itself as a fully-fledged alternative to local litigation of investment disputes, which led to a perception of functional redundancy of local courts (a development which I call the *functional* shift). Second, the fact that the standards by which the propriety of host States' dealings with foreign investors is measured are now predominantly provided by international law, as a result of which domestic courts have also become substantively redundant (a development which I call the *substantive* shift). Third, and finally, that at the end of the day, both of these developments are nothing but the consequence of the long prevailing distrust among capital-exporting/Western States towards the ability of foreign, non-Western courts to adequately adjust controversies between foreign investors and the host States of their investments (the problem of *distrust*). The following chapters shall demonstrate how these three factors continuously find their way into present day jurisprudence.

PART I

Domestic Courts as Partners:

The Role of Domestic Courts and their Judgments in the Decision-Making Process of Investment Tribunals

I. INTRODUCTION INTO PART I

The focus of the next three chapters is on the circumstances where domestic courts can be seen as partners to investment tribunals. The notion of partnership is not used here to refer to some sort of cooperative arrangement that the two types of adjudicatory bodies might have entered into to advance their mutual interests. Instead, it denotes, on the one hand, the attitude of *openness* that investment tribunals exhibit in specific circumstances towards domestic judicial pronouncements in their own decision-making process.¹ On the other hand, however, it also attempts to describe the actual *reliance* of investment tribunals on domestic judicial decisions with a view to resolving the legal and factual issues that are relevant to deciding disputes between investors and host States.²

The inquiry proceeds on the premise that this reliance on domestic judicial organs is not incidental, but can be viewed as part of the specific roles that domestic courts perform in the context of investment arbitration.³ Some of these roles are of a *formal* character, in the sense that they are expressly designed and thus also outlined in specific legal instruments, such as domestic statutes, (international) arbitration rules, and treaties.⁴ One can speak of such formal functions predominantly in the case of investment arbitrations conducted outside the context of the ICSID Convention, which today account for about a third of all investor-State disputes submitted to arbitration. Modeled on international commercial arbitration, these investment arbitrations are not fully-internationalized, but are envisioned to operate within the domestic legal system of some state, in the context of which domestic courts then formally perform certain auxiliary and supervisory functions. On the other hand, it is possible to say that domestic courts perform also certain *informal* roles; that is, roles that are not the product of intentional institutional design and which lack an explicit legal basis. In a given social context, such informal roles can be said to emerge through the process of interaction between different social actors, or otherwise result from expectations attributed to an actor's particular societal position, and the specific

¹ This attitude can be contrasted with an attitude of antagonism or even hostility that can occasionally be exhibited by investment tribunals towards domestic courts when the conduct of the latter appears not to be in conformity with international standards (the focus of Part II) or when the latter engage with tribunals in some sort of jurisdictional competition (the focus of Part III).

² Reliance has deliberately been chosen here to distinguish the relationship from one of actual *dependence*, which is not the case in the relation between domestic courts and investment tribunals, but also to distinguish it from the notion of *assistance*, to the extent that the latter may imply some sort of a formal arrangement. As further explained in the ensuing introduction, the inquiry is not limited to the study of formal functions.

³ The inquiry here is not focused on the political functions or roles that courts perform in any given legal system, namely conflict resolution, social control, and lawmaking. On these, see generally M Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1983). The inquiry concentrates on the specific functions performed by domestic courts in the context of investment arbitration as a system of dispute settlement. For another example of such a narrower inquiry, see A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 9-10, who concentrates on the functions that domestic courts perform in the protection of the international rule of law.

⁴ The distinction between formal and informal is based here on the dichotomy legal/non-legal, explicit/tacit, or designed/spontaneous, as used, for example, in the context of institutional theory to define informal institutions. See eg GM Hodgson, 'What Are Institutions?' (2006) 15(1) *Journal of Economic Issues* 1, 11. The same dichotomies are also commonly understood and applied in international legal scholarship. See eg A Aust 'The Theory and Practice of Informal International Instruments' (1986) 35 *ICLQ* 787-812, 787, defining an informal international instrument as 'an instrument which is not a treaty because the parties to it do not intend it to be legally binding'. See, however, J Pauwelyn, R Wessel, and J Wouters, *Informal International Lawmaking* (OUP 2012), 15-19, defining 'informal' as an opposition to 'traditional' lawmaking.

characteristics and qualities recognized to pertain to that specific position.⁵ An example of the former is perhaps the sort of indirect review that domestic courts have come to perform in the context of certain international legal regimes, where by virtue of their ability to influence the way particular decisions of international courts are implemented domestically, they regularly interact, through dialectical engagement and critique, with their international counterparts.⁶ In the context of investment arbitration, which is predominantly *ad hoc*, and thus less amenable to give rise to repeated-game type interactions, the domestic courts' informal functions are not directly the product of such interactions, but seem to be associated with certain inherent qualities that domestic courts are deemed to possess by virtue of them being fully-fledged judicial organs; namely, their independence vis-à-vis the other organs of the State, and their particular knowledge and expertise on domestic law. Due to these qualities, domestic courts can now best be seen as performing specific informal roles in the fact- and the law-ascertainment process.

The focus of the ensuing chapters is primarily on these informal roles, and not on the formal roles performed by domestic courts in certain instances. The reason for directing the inquiry in such way lies in the simple fact that domestic courts possess and perform certain formal functions only in some types of arbitral proceedings, whereas instances of them performing functions of informal nature can actually be found across the field of investment arbitration. Nonetheless, for the sake of completeness, these formal roles will briefly be discussed in the following section (I.1.),⁷ before the introduction proceeds further with explaining the informal functions that will be the actual subject of the present inquiry (I.2), and the problems relating to the study of such functions (I.3).

I.1. Formal Functions pertaining to the Assistance in, and Supervision of, the Arbitral Process and its Outcome

As discussed in the previous Chapter, the *raison d'être* of investment arbitration might be precisely to avoid the use of domestic courts to resolve disputes between investors and the host States of their investment. So much that the arbitration mechanisms under investment treaties and the ICSID Convention deliberately absolve the investor from having to pursue its case before those courts.⁸ Yet, despite allowing the investor to escape the judicial system of the host State, investment arbitration, just as any other form of arbitration, ultimately cannot successfully

⁵ In role theory in sociology, the former aspect has found elaboration in the symbolic interactionist role theory, which sees role not as fixed or prescribed but something that is constantly negotiated between individuals in their social interaction. The latter aspect has been the focus of functionalist, structuralist, as well as organizational role theories, which perceive role as the set of expectations that society places on an actor and assume them to be associated with identified social positions. See generally BJ Biddle, 'Recent Development in Role Theory' (1986) 12 Annual Review of Sociology 67.

⁶ An example is the practice of the German Constitutional Court, enunciated in the famous *Solange I* decision, not to accord EC law priority over German law, until the protection of fundamental rights within Community law would be equivalent to that constitutionally required by the Federal Republic of Germany. For an account of this practice, see JA Frowein, 'Recent Case' (1988) 25 CMLR 201, 205. Another example is the Decision No 238/2014 of the Italian Constitutional Court, declaring as unconstitutional the legislative measures through which the Italian government sought to implement the decision rendered against Italy by the ICJ in the *Immunities* case (2012), because of the Constitutional Court's disagreement with the ICJ's rejection of an exception to State immunity from the civil jurisdiction of other States for acts *in re imperii* committed in gross violation of international law. On this, see D Tega 'Sovereignty of Rights vs "Global Constitutional" Law: The Italian Constitutional Court Decision No. 238/2014', < www.icconnectblog.com/2015/04/sovereignty-of-rights-vs-global-constitutional-law-the-italian-constitutional-court-decision-no-2382014/ > accessed 14 June 2018.

⁷ The ensuing discussion is not more than a sketch. For a more extensive overview, the reader is referred to practitioners guides and handbooks on international commercial arbitration, such as N Blackaby et al, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 415-40.

⁸ See *supra* Section 2.1; and *infra* Section III.1.

function without the assistance of some domestic judicial system – even if this be only at the very last stage of enforcement.⁹

The degree of domestic courts' formal involvement in investment arbitration depends on the rules according to which the arbitral process is conducted.¹⁰ This involvement can potentially be most far reaching in investment arbitrations conducted outside the context of the ICSID Convention – that is, arbitrations based on UNCITRAL or other arbitral rules, and administered by institutions such as the PCA, LCIA, SCC, ICC, or even the ICSID Additional Facility. In the context of such arbitrations,¹¹ a number of residual functions are performed in the first place by *the courts of the seat of arbitration*, which can play a critical role both in the pre- and in the post-award phase of the arbitration. Some of the functions performed by these courts are *auxiliary* in nature. Depending on the jurisdiction where the arbitration is conducted, for example, courts may be entrusted with providing support to arbitral tribunals or a party to the proceedings in the taking of evidence.¹² Furthermore, courts will often have the power of prescribing interim or conservatory measures in relation to arbitration proceedings,¹³ or else assist in the enforcement of interim measure prescribed by investment tribunals themselves.¹⁴ On the other hand, the courts of the seat of arbitration will typically perform also a number of *supervisory* functions. In some jurisdictions, for example, the courts may thus have the competence to decide on challenges concerning the scope and validity of the arbitration clause,¹⁵ or on challenges pertaining to specific arbitrators,¹⁶ already before an award is rendered. More commonly, once the award has been rendered, the courts will generally have the power to review and eventually set aside awards rendered in their country. In most jurisdictions, such review normally does not entail a full revision of the award on the merits, but is limited in scope to matters such as excess of powers, irregularities in the constitution of the arbitral tribunal or the conduct of the procedure, as well as the failure to comply with mandatory rules of the *lex fori* (such as those concerning the non-arbitrability of disputes and the State's public policy).¹⁷ Apart from the courts of the seat of arbitration, some of supervisory tasks will also be performed by *the courts of the state where enforcement of the award is sought*. The enforcement of non-ICSID awards is namely subject to the national law of the place of enforcement and to the provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The latter sets out a number of

⁹ But then again, the role of domestic courts in such cases must also not be overstated, given that their functions sometimes do not entail more than rubberstamping the outcome of the arbitral process.

¹⁰ See generally Kerr, M, 'Arbitration and the Courts: The UNCITRAL Model Law' (1985) 34 ICLQ 1.

¹¹ For a general overview of these functions, see W Ben Hamida, 'Investment Treaties and Domestic Courts: a Transnational Mosaic Reviving Thomas Wälde's Legacy' in J Werner et al (eds), *A Liber Amicorum Thomas Wälde: law beyond conventional thought* (Cameron May, 2009), 69-85, 77ff.

¹² See art 27 of UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (UN 2008) (UNCITRAL Model Law).

¹³ See UNCITRAL Arbitration Rules (2013), art 26(9); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), art 32(5); International Chamber of Commerce Arbitration Rules (2017), arts 28(2) and 29(7); and London Court of International Arbitration (2014), arts 25.3 and 9.12. Under most of these rules, such requests to domestic courts are considered not to be incompatible with the arbitration agreement. Under the LCIA Rules, the prescription of interim measures is limited to the period before the arbitral tribunal is formed; thereafter, it can only be exercised with the tribunal's authorization. See also UNCITRAL Model Law, art 17j.

¹⁴ See UNCITRAL Model Law, arts 17H and 17I.

¹⁵ See UNCITRAL Model Law, art 16(3); and UNCITRAL Arbitration Rules, art 23(3).

¹⁶ While the competence to decide on such challenges lies primarily with the institution under which the arbitration is conducted, a disputing party that is dissatisfied with the institution's decision is not prevented under most national arbitration laws from resorting to the competent national court to obtain a new decision. See UNCITRAL Model Law, arts 13 and 14. See also *Telekom Malaysia Berhad v Republic of Ghana* Case No HA/RK 2004, 667 (District Court of The Hague, 18 October 2004).

¹⁷ See UNCITRAL Model Law, art 34. A great deal of States adopted the UNCITRAL Model Law or arbitration legislation that is in line with that law.

grounds on which recognition and enforcement of awards may be refused and therefore provides domestic courts with some limited powers of review.¹⁸

The involvement of domestic courts is, in contrast, a much more limited one in the case of investment arbitrations conducted in accordance with the ICSID Arbitration Rules. The ICSID Convention provides for an autonomous and self-contained system of arbitration, which is based on the principle of exclusivity of ICSID proceedings: consent to ICSID arbitration operates at “the exclusion of any other remedy”.¹⁹ As a consequence, domestic courts essentially have no role to play in the conduct of arbitration proceedings – save for the possibility of prescribing interim measures of protection in certain exceptional case.²⁰ Most significantly, domestic courts do not exercise supervisory jurisdiction over ICSID arbitrations. Matters pertaining to the challenges of arbitrators or to the validity of the arbitration agreement fall exclusively within the jurisdiction of ICSID Tribunals. Furthermore, insofar as the Convention provides for its own system of review of awards (which includes the possibility of annulment and revision), a party to ICSID proceedings may not initiate action before a domestic court to seek the annulment or another form of review of an ICSID award. Finally, domestic courts have also a limited role to play when it comes to the enforcement of ICSID awards. All States parties to the Convention are to recognize awards as binding and enforce their pecuniary obligations “as if” they were final judgments of a court.²¹ While the procedure for their enforcement is governed by the law on the execution of judgments in each country,²² the authority of domestic courts is restricted to verifying the authenticity of the award. Specifically, domestic courts in the jurisdiction where enforcement is sought cannot engage in either substantive or procedural review of the relevant ICSID award, given the express language of the ICSID Convention excluding such awards from any appeal or remedy other than those provided for under the Convention itself.²³

The conclusions that follow from this brief overview can quickly be drawn. In non-ICSID investment arbitrations, domestic courts are endowed with important formal functions that can put them in the shoes of assistants – or as some would have put it, in the role of “executive partners”²⁴ – of investment tribunals: the disputing parties or even the investment arbitral tribunals themselves can seek the support of domestic courts to remove procedural obstacles in the arbitration process; the disputing parties can also seek the assistance of local courts where the arbitral process itself has gone awry. In ICSID investment arbitrations, however, the functions formally envisioned to be performed to local courts are practically negligible. Against this backdrop, were the inquiry to limit itself to the courts’ formal functions, this would lead to the exclusion of about two thirds of investment arbitration cases. Even more significantly, neglect would be made of the many instances where investment tribunals have actually resorted to domestic courts primarily by virtue of their informal authority – namely, because their decisions were capable of assisting them in the ascertainment of domestic law, or else in the ascertainment of facts.

¹⁸ *ibid* art V.

¹⁹ ICSID Convention, art 26. In the context of the Convention, domestic courts are thus considered to be under a duty to abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration. See further GR Delaume, ‘ICSID Arbitration and the Courts’ (1983) 77 *AJIL* 784, at 785.

²⁰ In accordance with ICSID Arbitration Rules, rule 39(6), when consenting to ICSID arbitration, the parties may agree that such measures may be requested from any judicial or other authority prior to or after the institution of the proceeding.

²¹ ICSID Convention, art 54(1). For the purposes of recognition and enforcement, each State party shall designate one or more competent courts. See ICSID Convention, art 54(2).

²² ICSID Convention, art 54(3).

²³ ICSID Convention, art 53(1). The remedies are limited to those provided for under arts 50 to 52.

²⁴ Kerr (n 10), at 2.

I.2. Informal Roles in the Law- and Fact-Ascertainment Process

As the following chapters intend to demonstrate more extensively, investment tribunals quite commonly turn to domestic judicial decisions because of particular pronouncements on points of law or fact that are relevant to their decision. The most important reason for investment tribunals to attribute a certain degree of informal authority to such pronouncements appears to relate to the epistemic superiority that domestic courts are deemed to possess in relation to questions of domestic law. Though often established on the basis of international investment treaties and mandated to decide claims based on international law, investment arbitral tribunals are bound to pronounce upon claims that are intrinsically related to host states' domestic law. Surely, it is international law – in the BIT era, predominantly the investment treaty – that provides the minimum standards of protection to the foreign investor. Yet, investments are not made in a vacuum, but within the legal system of the host state, which provides the parameters within which foreign investors operate. At the most fundamental level, it is the domestic law of the host state that determines the content of interests that will eventually attract the protection of international law. Furthermore, as Chapter 3 will demonstrate, domestic law remains relevant in several other ways in investment treaty arbitration. Given that the interpretation and application of domestic law remains largely within the purview of domestic judicial organs, which are more likely to possess greater expertise on such matters than investment tribunals, it is not surprising that domestic judgments have often played a prominent role in the law-ascertainment process.

This is not to say that other factors cannot explain the investment tribunal's reliance on domestic judgments. First, the epistemic superiority of domestic courts may not necessarily be limited to questions of domestic law. Domestic judicial organs often have access to factual records that are beyond the remit of investment tribunals, or are generally in a better position to establish certain points of fact. This might, for example, explain the tribunal's occasional reliance on domestic judicial determinations of facts. Furthermore, the perceived independent nature of the judiciary explains why judicial determinations are sometimes treated as carrying greater weight than that of other domestic organs and considered as "authoritative".²⁵ Last but not least, reliance on existing judicial pronouncements may under circumstances simply be a question of convenience.²⁶ The variety of possible rationales notwithstanding, the fact remains that domestic courts do play distinct roles in the law- and the fact-ascertainment process of investment tribunals, which cannot otherwise be considered to form part of their formally-designated functions. It is primarily to the study of these distinct roles that the following three chapters are thus devoted.

I.3. The Dual Effects of Domestic Judicial Pronouncements

In studying the role of domestic judicial pronouncements and the attitude of investment tribunals towards them, one is soon faced with the fact that domestic judgments – just like the decisions of most other adjudicatory bodies – generate two types of effects, each of which not necessarily co-existing in an easy balance. At the *concrete* level, each specific judgment determines the controversy between the litigating parties by authoritatively establishing the facts and the legal consequences ensuing from them in relation to the litigating parties. In other words, the most immediate effect of each judgment is the determination of the parties' specific legal relationship, in terms of rights and duties. At the *abstract* level, on the other hand, each individual judgment also incrementally contributes to law-clarification (or, in some legal systems, even law-making), by setting out legal

²⁵ See eg *The Rompetrol Group NV v Romania (Award)* (ICSID Case No ARB/06/3, 6 May 2013) [256] (referring to the 'authoritative determination by the Romanian High Court of Cassation and Justice').

²⁶ See *infra* Chapter 5.

propositions – i.e., the abstract conclusions that can be drawn from the statement of reasons that the judicial body advanced in justification of its decision – on the basis of which other judicial bodies can resolve other controversies in future decisions.²⁷ In this sense, the concrete and the abstract effects of judicial decisions reflect the double function of litigation: the private, retrospective, and the public, prospective one.²⁸

These distinct effects give rise to different questions in practice. At the concrete level, the question most often arises as to the normative effects of the judgment itself; that is, as to the consequences that a definitive judicial disposition of a specific dispute between the litigating parties will have in subsequent proceedings before other adjudicating bodies. This question can best be studied through the prism of the principle of *res judicata*. At the abstract level, instead, questions more often arise in relation to the normativity of the process through which legally-relevant propositions are extracted from a judicial decision and taken into account in the law ascertainment process. These questions are best studied from the perspective of rights and duties that the litigating parties (for example, from the perspective of tendering expert reports and evidence) and the adjudicatory body itself (for instance, through the prism of the principle of *jura novit curia*) might have in the ascertainment of the law. It must also be admitted, however, that the different perspectives cannot always easily be disentangled in practice (given that each concrete judicial determination sets out certain abstract propositions, while each abstract proposition always relates to a concrete, underlying situation).²⁹ Yet, these distinctions are not irrelevant to the present inquiry. As the present inquiry intends to show, investment tribunals have often reverted to the jurisprudence of domestic courts as a general aid to the construction of domestic law provisions, but have generally shown much more reservations towards judicial decisions that involved or relating to the claimant's investment.

To take account of the aforesaid, the inquiry in Part I will be divided in the following way. To provide the necessary background, Chapter 3 will first proceed to map the instances where domestic judicial decisions have played a role in the ascertainment of the law and the facts by investment tribunals. Chapter 4 will then discuss the role of domestic judicial decisions from the perspective of their concrete effects, by exploring whether such decisions could actually be binding on investment tribunals. Thereafter, Chapter 5 will discuss the role of domestic judicial decisions from the perspective of their abstract effects, by exploring the duties of investment tribunals with regard to the use of domestic jurisprudence in the law ascertainment process, and related problems.

²⁷ On these distinct effects of judicial decisions, see eg A Lincoln, 'The Relation of Judicial Decisions to the Law' (1907) 21 Harvard Law Review 120, 125.

²⁸ See V Lowe, 'The Function of Litigation in International Society' (2012) 61 ICLQ 209, at 212-14, distinguishing between the retrospective function of litigation, which has as its aim the settlement of the particular dispute between the parties, and the broader prospective function, which seeks to articulate legal principles applicable in like situations in the future, pursuant to the idea that justice requires like cases to be treated alike.

²⁹ Precisely because of this dual function of judgments, some have accurately pointed to the less than water-tight division between the doctrines of *res judicata* and precedent, or perhaps a fluidity about the boundary between the two in practice. See particularly I Scobbie 'Res Judicata, Precedent and the International Court: A Preliminary Sketch' (1999) 20 Aust YBIL 299, 303.

3. THE ROLE OF DOMESTIC JUDICIAL DECISIONS IN THE ASCERTAINMENT OF LAW AND FACTS BEFORE INVESTMENT TRIBUNALS

The purpose of the present chapter is to set out the instances where domestic judicial decisions have played a role in the law- or fact-ascertainment process of investment tribunals. The largest part of this exercise is devoted to mapping those circumstances where domestic judicial pronouncements have been resorted to with a view to clarifying issues of domestic law that were relevant to investment tribunals' decisions (3.2). The relatively few situations where investment tribunals relied upon domestic judgments in view of their factual relevance are nevertheless briefly discussed, too (3.3). In order to understand the relatively great significance of domestic judgments in the law-ascertainment process before investment tribunals, this chapter begins by explaining why international law cannot be expected to provide a self-sufficient set of rules that would govern all matters before investment tribunals, thus obviating the need to interpret and apply domestic law altogether (3.1). Indeed, what the present chapter intends to demonstrate is that, in spite of the ascendancy of international law as the primary body of law prescribing the standards through which the propriety of host States' dealings with foreign investors is now predominantly measured (a development that I described in chapter 2 as the *substantive* shift), domestic law remains relevant to a number of issues before investment tribunals – and thus also domestic courts that interpret and apply that law.

3.1. The Unremitting Relevance of Domestic Law in Investment Arbitration

In most cases, the immediate reason for investment tribunals to show an interest in domestic judicial decisions is in their need to interpret, apply, or otherwise consider domestic law. Evidently, there are many ways in which domestic law can be of significance in investment arbitration: it can govern the arbitration agreement (including the parties' capacity to enter into an arbitration) or that agreement's performance; it can govern the existence and proceedings of the arbitral tribunal (as the *lex arbitri*); it can be relevant to the substantive issues in dispute; and in practically all cases, it plays a role in the recognition and enforcement of the award.¹ However, in not all of these cases will domestic law actually have to be considered by the investment tribunal itself. In general, it is primarily in relation to the law applicable to the substance of the dispute (the *lex causae*) and the law applicable to jurisdiction that domestic law issues arise in proceedings before an investment tribunal.²

The applicability of domestic law is essentially a *choice-of-law* question.³ In the context of present day investment arbitration, however, this question is complicated in two ways. On the one hand, the choice of law is affected by the particular way in which domestic law and international

¹ cf N Blackaby et al, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 3.07, identifying the several different systems of law that may have a bearing on an international arbitration in general.

² Questions of recognition and enforcement of the award will rarely, if ever, even require consideration by an investment tribunal, as these questions typically arise only after the investment tribunal had already concluded its task. Furthermore, questions of procedure less often turn on domestic law, given that the latter regulates the arbitration process solely in the event of non-ICSID arbitrations.

³ As noted by McLachlan, the question entails a two-fold process: '(a) the identification, as a matter of choice of law, of the legal system or systems applicable to the issues before the tribunal; and (b) the determination, within any such system so designated as applicable, of the relevant rules necessary to decide the issue.' C McLachlan, 'Investment Treaty Arbitration: The Legal Framework' in AJ van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 95, 107.

law interact with each other in investment arbitration in general. Unlike in the context of commercial (private) international arbitration, where the choice of law essentially arises between domestic legal systems that are in a horizontal relationship with each other, the same choice arises in investment arbitration in the context of a relationship that is not only vertical (with the consequence that each of the two legal systems can therefore apply concurrently in the context of the same dispute), but also one in which international law conventionally claims primacy.⁴ On the other hand, the choice of law is also affected by the particular form in which modern investment arbitration predominantly takes place; namely, on the basis of an investment treaty. In the early days of investment arbitration, when the dominant paradigm for investment arbitration was a claim based in a concession contract, it was primarily domestic law that was applied to the merits of a dispute, while international law was eventually accepted to play a “supplementary” or “corrective” role.⁵ The roles are nowadays inverted. As a result of the substantive shift described in chapter 2, it is primarily international law that has come to provide the standard against which the lawfulness of a particular conduct is measured, with the consequence that domestic law – if still considered to be of some relevance at all⁶ – has been relegated to a secondary role.⁷ Yet, this is not to say that domestic law has presently little or no role to play in investment arbitration. Investment treaties were never intended to operate as a self-contained regime,⁸ but in a complex relationship with other sources of law, and in particular with domestic law.⁹ In general, however, the relationship between international and domestic law continues to be considered an “unsettled” one,¹⁰ and surprisingly little attention is paid to identifying the precise legal issues whose determination requires the application of domestic law.¹¹ This is so not only the case with academic writings.¹² Many arbitral

⁴ *ibid* 113-14.

⁵ See *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (Ad hoc Committee Decision on Annulment) (ICSID Case No ARB/81/2, 3 May 1985), [60]; or *Amco Asia Corporation and others v. Republic of Indonesia* (Ad hoc Committee Decision on the Application for Annulment) (ICSID Case No ARB/81/1, 16 May 1986), [20].

⁶ See eg JE Alvarez, ‘The Public International Law Regime Governing International Investment’ (2009) 344 *Recueil des cours* 193, 259ff, considering the contemporary regime governing international investment primarily through the prism of public international law.

⁷ See CF Dugan et al, *Investor-State Arbitration* (OUP 2008) 201, observing that ‘[a]s the investment treaty regime has developed over the last few decades, tribunals have turned ever more frequently to investment treaty texts and evolving norms of international law. Meanwhile, in many cases national law norms have come to occupy a subsidiary position in the hierarchy of legal sources.’

⁸ As appositely noted in this regard already by the first investment tribunal established pursuant to an investment treaty, ‘the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.’ *Asian Agricultural Products Limited (AAPL) v Democratic Socialist Republic of Sri Lanka (Award of the Tribunal)* (ICSID Case No ARB/87/3, 27 June 1990) [21]. See also *Antoine Goetz et consorts v République du Burundi (Award of)* (ICSID Case No ARB/95/3, 10 February 1999) [69], noting how the internationalization of investment relationships ‘has certainly not lead to a radical “denationalisation” of the legal relations springing from international investment, to the point that the domestic law of the host State would be deprived of all relevance or application in the interests of an exclusive role for international law...’ (English translation borrowed from HE Kjos, *Applicable Law in Investor-State Arbitration* (OUP 2013) 5).

⁹ As a consequence, the law applicable in modern investment arbitrations has quite accurately been described as a hybrid one. On this, see particularly Z Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 *The British Year Book of International Law* 151-289.

¹⁰ See M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship of International Law and Municipal Law* (Kluwer, 2010).

¹¹ A relatively recent exception is J Hepburn, *Domestic Law in International Investment Arbitration* (OUP, 2017).

¹² See eg Dolzer and Schreuer, *Principles of International Investment Law* (OUP 2008), 265-71, or Dugan et al (n 7), 209-13, focusing predominantly on the hierarchical interplay between domestic and international law in investment treaty arbitration, without identifying specific issues where domestic law will be applied. cf C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2009) para 3.79-3.82 and 6.67-6.70 (discussing the

decisions, too, – apart from acknowledging the simultaneous relevance of both national and international law for deciding the treaty-claims before them – typically do not elaborate on the exact delineation of the matters that are governed by each of the two bodies of law.¹³

3.2. The Relevance of Domestic Judicial Determinations in the Law-Ascertainment Process

Given the unremitting relevance of domestic law in present day investment arbitration, the simplest way to map the different contexts in which domestic judicial determinations will have the propensity to play a role in the law-ascertainment process is simply by way of identifying the particular issues for which domestic law will be of relevance to the adjudication of claims before the investment tribunals. An efficient¹⁴ and methodical way to accomplish this is to structure the analysis by reference to the ground on which domestic law is *considered* by an investment tribunal (as opposed to solely those grounds on which it is actually applied).¹⁵ In this way, a distinction can be made between four different grounds on which domestic law might have to be applied in investment arbitration and by reason of which domestic judicial determinations might play a role in the law ascertainment process (both, in the *abstract* sense, as domestic jurisprudence can often aid the construction of domestic legal provisions, and in the *concrete* sense, as specific determinations might already exist in relation to the specific investor or its investment). These are: circumstances where domestic law will govern, or otherwise be relevant to, the arbitration agreement (3.2.1); circumstances where domestic law will have to be considered as the law applicable to the cause of action (3.2.2); circumstances where another body of law will make *renvoi* to domestic law (3.2.3.);

application of domestic law in the context of determining the existence of an investment). Contrast with A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009) 91-98, where the role of domestic law is discussed extensively.

¹³ See eg *Wena Hotels Ltd v Arab Republic of Egypt (Decision of the Annulment Committee)* (ICSID Case No ARB/98/4, 5 February 2002) [40] (noting that both legal orders ‘have a role’ and further unhelpfully explaining that ‘[t]he law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.’); *CMS Gas Transmission Company v The Republic of Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 12 May 2005) [116]-[117] (noting that both sources of law ‘have a role to play’, that there is ‘a close interaction’ between the rules of Argentinean law and the rules of international law, but also considering all of those rules as ‘inseparable’); *Enron Corporation and Ponderosa Assets, L P v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007) (also known as: *Enron Creditors Recovery Corp and Ponderosa Assets, LP v The Argentine Republic*) [206] (considering expressing the view that ‘domestic law is not confined to the determination of factual questions’, but ‘has indeed a broader role’); or *Sempra Energy International v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007) [235] (noting that the two sources of law ‘play simultaneous roles’ and similarly holding that domestic law was ‘not confined in scope of application to the determination of factual questions’ but had ‘a broader role’, yet also failing to precisely explain what that broader role was).

¹⁴ There are obviously other ways in which the analysis could be organized. For example, a distinction could be made by reference to stage in the arbitration process in which domestic law issues arise, given that domestic law can be of relevance to determining the existence or scope of the tribunal’s adjudicatory powers, to ascertaining whether host State’s conduct was in conformity with the prescribed standards of conduct, or to establishing the legal consequences that will follow from conduct eventually found not to be in conformity with those standards. Such distinctions are not entirely adequate, however, given that domestic law can be applied at each stage for a variety of different reasons. Another way of studying the phenomenon is through the prism of applicable law. Investment arbitration, just as other types of arbitration, generally grants litigating parties a great degree of freedom to determine the law applicable to the different aspects of the arbitration process. The problem, however, is that the application of domestic law is not always the consequence of a direct choice or clearly identifiable intention of the litigating parties, but often the result of implied incorporation methods.

¹⁵ The reason for expanding the scope of the inquiry in this direction is to properly appreciate the distinction between the cases where domestic law is applied as *rules of decision* – that is, as the rules on which the cause of action is based – and the cases where it is merely used as *interpretative aids* – that is, where it merely provides judicial guidance, but is not actually applied. On this distinction, see A Bjorklund, ‘Applicable Law in International Investment Disputes’ in C Giorgetti (ed), *Litigating International Investment Arbitration Disputes: A Practitioner’s Guide* (Brill, 2014), 261-286, at 275-77.

and circumstances where domestic law will simply be relevant as a factual predicate of a claim based on another body of law (3.2.4).

3.2.1. Reliance on Domestic Judgments to Ascertain the Law Applicable to the Arbitration Agreement

Like other international adjudicatory bodies, investment tribunals are creatures of consent; their adjudicatory powers are not only based on, but also limited by, the consent of the parties to the arbitration. As to the way that this consent is expressed, investment arbitration is known for leaving the parties considerable latitude in that regard – as long as it is manifested “in writing”.¹⁶ The traditional means for expressing consent has been by way of a direct agreement between the parties, typically in the form of a compromissory clause in an investment contract between the host State and the foreign investor providing for the submission of future disputes arising from the investment operation to arbitration. In the last few decades, however, contract-based arbitration has largely given way to a system of arbitration based on host State’s unilateral offers to arbitrate investment disputes with a defined class of investors, which in the event that such dispute arises can then be accepted on the part of a concrete investor, most frequently through the simple act of instituting proceedings. Host States are taken to have expressed such offers through investment treaties to which they are parties, or even through provisions in their own domestic legislation, most commonly in their domestic investment codes.¹⁷ This form of investment arbitration has famously been described as “arbitration without privity”, in light of the fact that the investor is not privy to the treaty or other instrument containing the State’s unilateral offer to arbitrate.¹⁸ Such label, however, is not entirely appropriate. Unlike in the case of compromissory clauses inserted in investment contracts, there might, indeed, not be any prior contractual relationship between the State and the foreign investor. Yet, this does not mean that such arbitrations are not based on a valid arbitration agreement between the investor and the host State;¹⁹ rather, the agreement comes only into existence at the moment that the particular investor accepts the offer to arbitrate.

In the practice of investment arbitration, it is not particularly common for the litigating parties to specifically agree on the law that will be applied to the arbitration agreement as such.²⁰ This does not mean, however, that there is no law to govern such agreement. What law that is essentially depends on the type of investment arbitration and the way through which consent to arbitrate is expressed.

3.2.1.1. Law Governing the Agreement to Arbitrate before the ICSID Centre

In the context of ICSID arbitrations, it seems to be accepted that, insofar as the jurisdiction of the Centre is governed by Articles 25 and 26 of the ICSID Convention, the law governing an

¹⁶ As per ICSID Convention, art 25(1); and *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), art 2 (New York Convention).

¹⁷ This is typically done through various Foreign Investment Codes which, besides providing certain guarantees to foreign investors, sometimes offer the possibility of resort to investor-State arbitration. See ICSID, *Investment Laws of the World* (OUP, 1973-).

¹⁸ J Paulsson, ‘Arbitration Without Privity’ 10 ICSID Rev–Foreign Investment LJ 232, at 234. The possibility of consent to arbitration being expressed in such way was already envisaged at the time of the drafting of the ICSID Convention. See IBRD, ‘Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (18 March 1965) [24].

¹⁹ cf *American Manufacturing & Trading, Incorporated v Zaire (Award)* (ICSID Case No ARB/93/1, 21 February 1997) [5.23] (recalling that it is not sufficient that there be a pre-existing agreement between the State contracting parties to the investment treaty, but that it is ‘necessary to show’ that there is also an arbitration agreement between the litigating parties, the investor and the Respondent State.)

²⁰ As opposed to the law that is applied to the merits of the claim; see *infra* 3.2.2.

ICSID Arbitration agreement must, by necessary implication, be international law.²¹ But even in such arbitrations, domestic law may nonetheless remain relevant to the arbitration agreement, even if its role may be more of a residual one. First, when consent to ICSID arbitration will be expressed through a contractual stipulation, domestic law may be applicable to determining the validity of the underlying contract, or to determining whether particular contractual operations will be deemed to constitute an investment.²² Second, domestic law will play an important role in circumstances where consent to ICSID arbitration will be expressed through provisions in host States' national legislation. In such cases, domestic law will remain relevant to determining the validity of the domestic instrument containing the offer to arbitrate,²³ and thus the validity of the offer itself, given that the latter can only be accepted when the instrument is in effect.²⁴ It will also be determinative as to the existence and scope of the arbitration agreement thus emerging on the basis of the offer expressed in the domestic instrument,²⁵ insofar as it can for example be relevant to establishing whether the claimant qualifies as a protected investor,²⁶ whether the economic activities and resulting rights qualify as a protected investment,²⁷ whether such investment has legally been made,²⁸ or whether procedural requirements have been complied with.²⁹ Third, and finally, domestic law will remain of significance even in circumstances where

²¹ L. Reed, J. Paulsson, N. Blackaby, *Guide to ICSID Arbitration* (2nd edn, Kluwer Law International 2010) 46.

²² See eg *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru (Decision on Jurisdiction)* (ICSID Case No ARB/03/28, 1 February 2006) [92]-[97] (reverting to the requirement under Peruvian law that an operation must contribute to economically productive activity to be considered an investment in determining which of the investor's contractual operations were to constitute an investment for the purposes of art 25 of the ICSID Convention).

²³ *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, et al v The Bolivarian Republic of Venezuela (Decision on Jurisdiction)* (ICSID Case No ARB/10/5, 8 February 2013) [102(6)].

²⁴ See eg *ABCI Investments NV v Republic of Tunisia (Decision on Jurisdiction)* (ICSID Case No ARB/04/12, 18 February 2011) [93]-[99] (determining whether the offer to arbitrate expressed in a 1969 Tunisian statute could have survived the abrogation of that statute in 1993).

²⁵ In many cases, the inquiry might not extend beyond the application of the relevant domestic legal instrument to the facts of the case, and require further analysis of domestic law. See eg *Tradex Hellas SA v Republic of Albania (Decision on Jurisdiction of 24 December 1996 and Award of 29 April 1999)* (ICSID Case No ARB/94/2); *Getma International, NCT Necotrans, Getma International Investissements & NCT Infrastructure & Logistique v Republic of Guinea (Decision on Jurisdiction)* (ICSID Case No ARB/11/29, 29 December 2012); or *Interocean Oil Development Company and Intercocean Oil Exploration Company v Federal Republic of Nigeria (Decision on Preliminary Objections)* (ICSID Case No ARB/13/20, 29 October 2014).

²⁶ *Société Civile Immobilière de Gaëta v Republic of Guinea (Award)* (ICSID Case No ARB/12/36, 21 December 2015) [137]-[180] (applying French private international law as the law governing the Claimant's nationality to determine whether the Claimant was foreign national for the purposes of the Guinean Foreign Investment Code.)

²⁷ See eg *Zhimvali Development Ltd v Republic of Georgia (Award)* (ICSID Case No ARB/00/1, 24 January 2003) [383]-[388] (contemplating the possibility whether a right of recovery of development costs in a failed transaction, not specifically listed among the expenditures qualifying as an investment under the 1996 Georgia Investment Law, could nonetheless have qualified for protection under that law by being considered as a form of intellectual property right under Georgia's law); or *Antoine Abou Laboud and Leila Bounafeh-Abou Laboud v Democratic Republic of the Congo (Award)* (ICSID Case No ARB/10/4, 7 February 2014) [222]-[310] (finding that only a part of Claimants' business activities qualified as investment within the sense of the Congolese Foreign Investment code). See also *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Decision on Jurisdiction)* (ICSID Case No ARB/84/3, 27 November 1985) [15]-[17], rejecting the argument that the Foreign Investment Code would not have been applicable because the approval of Claimant's project had been withdrawn by Egypt's General Organization for Investment, on the ground that under Egyptian law, the said Organization did not have competence to reconsider a previous approval of a project.

²⁸ See eg *Inceysa Vallisoletana SL v Republic of El Salvador (Award)* (ICSID Case No ARB/03/26, 2 August 2006) [258]-[262] (denying jurisdiction based on the offer to ICSID arbitration expressed in the Salvadoran Investment Law on account of the illegality of the investment); *Laboud v Democratic Republic of the Congo* *ibid* [327]-[345] (considering and rejecting the Respondent's illegality objection grounded on the Claimant's company allegedly acting beyond the scope of the corporate purposes and failing to obtain necessary authorizations and permits); or *Société Civile Immobilière de Gaëta v Republic of Guinea* *ibid* [232]-[241] (considering and rejecting the argument that Claimant's investment was illegal).

²⁹ See eg *Interocean Oil Development Company and Intercocean Oil Exploration Company v Federal Republic of Nigeria (Decision on Preliminary Objections)* (ICSID Case No ARB/13/20, 29 October 2014) [122]-[123] (considering whether there was a statute of limitations applicable to the claims brought pursuant to the Nigerian foreign investment code).

consent to ICSID arbitration is expressed through a treaty. In the latter cases, this is not because domestic law would in any effect be relevant to the validity of the treaty containing such offer, but because the treaty itself usually makes *renvoi* to domestic law with regard to several threshold issues that are of significance to the existence and scope of the arbitration agreement – an issue that will be discussed more extensively in section 3.3.

3.2.1.2. *Law Governing the Agreement to Arbitrate in non-ICSID Arbitrations*

A much greater role will, of course, be played by domestic law in non-ICSID investment arbitrations, particularly those based on compromissory clauses in contracts, or those grounded upon unilateral offers to arbitrate investment disputes expressed in host State's domestic legislation. In contract-based arbitrations, domestic law will typically be taken to govern questions relating to the formation, validity, enforcement, and termination of the arbitration agreement – even though the parties remain in principle free to adopt other rules of law as the applicable law.³⁰ In arbitrations based on domestic instruments, it will again be domestic law that will regulate the validity of the offer to arbitrate the disputes, as well as the existence and scope of the arbitration agreement thus emerging on the basis of such offer.³¹ While in treaty-based arbitrations, where by virtue of the international nature of the instrument through which the host State's offer to arbitrate is expressed, the agreement to arbitrate will otherwise be governed by international law,³² domestic law will nonetheless remain of residual importance, to the extent that the treaty itself will usually make *renvoi* to domestic law with regard to several threshold issues that are of significance to the existence and scope of the arbitration agreement.

3.2.1.3. *Ascertainment of the Law Governing the Agreement to Arbitrate*

Domestic courts will often play an important role with regard to many of the issues just discussed, either directly or indirectly. In non-ICSID investment arbitrations, their involvement may be more direct, given that such arbitrations remain under the control of the courts of the seat. In contrast, agreements to arbitrate before the ICSID Centre remain generally beyond the purview of domestic courts, given that pursuant to Article 25 of the ICSID Convention, an ICSID arbitration agreement, once perfected, cannot unilaterally be withdrawn. This is not to say, however, that domestic judicial decisions cannot be indirectly of relevance to the arbitration agreement. Given the importance that such decisions have in the ascertainment of the content of domestic legal rules, it has not been uncommon for investment tribunals, for example, to seek guidance in domestic jurisprudence as to the proper interpretation and application of domestic

³⁰ cf New York Convention, art V.1; or UNCITRAL Model Law, art 36(1)(a)(i). In practice, however, it is generally required that the chosen law have some connection with the legal transaction or the controversy. See eg *Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v The Government of Mongolia (Decision on Jurisdiction)* (UNCITRAL, 25 July 2012) [329]–[330] (the Tribunal applying to the arbitration agreement both Mongolian law (as the law governing the contract) and French law (as the law of the seat of arbitration), without definitely settling the question of applicable law).

³¹ For example, domestic law may be relevant to establishing whether the economic activities and resulting rights qualify as a protected investment. See *Petrobart Limited v Kyrgyz Republic (Award)* (UNCITRAL, 13 February 2003) 48–49 (considering the Kyrgyz Civil Code and the Law on Business Partnerships and Companies in interpreting the term 'contribution used in the definition of investment under the Kyrgyz Foreign Investment Law'); or *Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v The Government of Mongolia (Award)* (UNCITRAL, 2 March 2015) [297ff] (considering whether rights under mining and exploration licenses constituted intangible property under Mongolian law and could thereby be considered as foreign investments protected by Mongolia's Foreign Investment Law).

³² cf Occidental Exploration & Production Company v The Republic of Ecuador [2005] EWCA Civ 1116 (9 September 2005), [33].

investment codes.³³ In fact, the interpretation of such codes has often created some of the sharpest and most direct juxtapositions between domestic courts and investment tribunals, particularly in relation to the question whether a host State had effectively expressed through such laws its consent to arbitrate disputes with the foreign investor. Investment tribunals have thus been confronted, for example, with prior domestic judicial determinations stipulating that the specific investor was not a qualified investor within the meaning of the instrument in question or did not make a qualifying investment,³⁴ or that the relevant instrument did not contain a valid expression of consent to investment arbitration.³⁵ This kind of competing judicial determinations are of course attributable to the fact that a State, as a sovereign, can determine the content of its laws, and can thereby decisively influence how its laws are interpreted and applied, including by adopting interpretative legislation to such effect. In view of the possibility that a State's sovereign powers could be misused to such ends, many investment tribunals refused to accept the proposition that consent expressed through domestic legislation would be subject to the ultimate control of domestic law, and in interpreting the relevant pieces of legislation did not solely apply principles and rules of domestic statutory interpretation, but also international law rules applicable to the interpretation of treaties and/or unilateral declarations.³⁶ This matter will further be discussed in Chapter 4.

³³ See eg *Khan Resources Inc (Award)* (n 31), [303]-[308] (relying on domestic jurisprudence to determine whether rights under mining and exploration licenses constituted intangible property under Mongolian law and could thereby be considered as foreign investments protected by Mongolia's Foreign Investment Law); *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea (Award)* (ICSID Case No ARB/13/33, 5 May 2015) [316] (citing domestic jurisprudence to support the conclusion that the law of Papua New Guinea recognized a principle of statutory interpretation analogous to that of *effet utile*); or *Société Civile Immobilière de Gaïta v Republic of Guinea (Award)* (ICSID Case No ARB/12/36, 21 December 2015) [142], [144]-[145] (relying on French jurisprudence to determine the circumstances under which a company could be deemed to possess French corporate nationality). See also *Tradex v Albania (Merits)* (ICSID Case No ARB/94/2, 29 April 1999) [75], for the general proposition that, in interpreting the provisions of Albanian foreign investment law, 'it could be found useful' to take into account also 'decisions of national courts'.

³⁴ See eg *Petrobart Limited v Kyrgyz Republic* (n 31), 40-41 (Respondent relying on rulings of the Bishkek City Court that found Claimant not to have made a foreign investment within the meaning of the Foreign Investment Law of the Kyrgyz Republic and not to satisfy the definition of foreign investor under the same Law).

³⁵ See eg the several arbitrations brought against Venezuela pursuant to its investment law, where the tribunals were faced with the question as to what weight, if any, should have been given to a prior decision by the Supreme Court of Venezuela that interpreted the said law as not providing for such consent. See *Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana De Petroleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana De Petroleos, Inc v Bolivarian Republic of Venezuela (Decision on Jurisdiction)* (ICSID Case No ARB/07/27, 10 June 2010); *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela (Decision on Jurisdiction)* (ICSID Case No ARB/08/15, 30 December 2010); *Brundes Investment Partners, LP v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB/08/3, 2 August 2011); *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, et al v The Bolivarian Republic of Venezuela (Decision on Jurisdiction)* (ICSID Case No ARB/10/5, 8 February 2013); *OPIC Karimum Corporation v The Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB/10/14, 28 May 2013); *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela (Decision on Jurisdiction and Merits)* (ICSID Case No ARB/07/30, 3 September 2013); and *Highbury International AVV and Ramstein Trading Inc v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB/11/1, 26 September 2013).

³⁶ Eg in *SPP v Egypt* (n 27), [61], the Tribunal considered that the jurisdictional issue involved 'more than interpretation of municipal legislation', the issue being whether 'certain unilaterally enacted legislation has created an international obligation under a multilateral treaty', and therefore applied general principles of statutory interpretation while taking into consideration, where appropriate, relevant rules of treaty interpretation, as well as principles of international law applicable to unilateral declarations. In *Zhinvali Development Limited*, (n 27), [339], on the other hand, the Tribunal considered that 'if the national law of Georgia addresses this question of "consent" ... then the Tribunal must follow that national law guidance but always subject to ultimate governance by international law'.

3.2.2. Reliance on Domestic Judgments to Ascertain the Law Applicable to the Cause of Action

The second reason why investment tribunals will have to apply domestic law is because the latter will be the law governing the substance of the dispute (*lex causae*). The reason for domestic law being applicable in such case can either be the consequence of the parties' deliberate choice of that law, or in the absence of such choice, because of the nature of the claim itself. Insofar as the parties' *deliberate choice of law* is concerned, arbitration rules invariably accord primacy to the freedom of the parties to choose the law to govern the substance of their dispute.³⁷ The choice may be exercised in a variety of ways.³⁸ In the context of contractual relationships, the parties to the contract will often expressly agree on the applicable law in a separate choice-of-law clause in the contract,³⁹ or another provision stipulating the applicable law.⁴⁰ In arbitrations brought pursuant to a State's offer to arbitrate expressed in an investment treaty or domestic legislation, the choice of law will instead be effected by means of implied incorporation of any available provisions on applicable law provided for under the instrument in question, as these will presumably be accepted by the investor by taking up the offer of consent.⁴¹ Finally, a choice of law could even be taken to have been made subsequent to the institution of proceeding, as a result of the parties agreement in the course of the arbitration proceedings,⁴² or possibly as a result of the conduct of the litigating parties.⁴³ The law thus chosen by the parties will usually depend on the type of investment arbitration. In the context of arbitrations arising out of a contractual relationship, tribunals will usually be instructed to apply the contract, mostly together with the law of the host State⁴⁴ (or less commonly, the law of a third State⁴⁵), often in combination with the relevant rules of international law.⁴⁶ In arbitrations brought pursuant to domestic investment codes, the applicable law, to the extent that it is specified, can be

³⁷ ICSID Convention, art 42(1); UNCITRAL Arbitration Rules, art 33(1); SCC Arbitration Rules, art 22(1); LCIA Arbitration Rules, art 22(3) ('The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.')

³⁸ See *Compañía del Desarrollo de Santa Elena S.A v Republic of Costa Rica (Award)* (ICSID Case No ARB/96/1, 17 February 2000) [63] (confirming that parties agreement as to the applicable law needs not be in writing or even stated expressly, provided that such agreement is clear).

³⁹ For example, see Clause 10 of the ICSID Model Clauses.

⁴⁰ See eg *Liberian Eastern Timber Corporation v Republic of Liberia (Award)* (ICSID Case No ARB/83/2, 31 March 1986) [18] (where the choice of law was inferred from the opening paragraph of the concession contract stipulating that the latter was made under Liberian general business law).

⁴¹ See *Antoine Goetz et consorts v République du Burundi (Award)* (ICSID Case No ARB/95/3, 10 February 1999) [94].

⁴² *SARL Benvenuti & Bonfant v People's Republic of the Congo (Award)* (ICSID Case No ARB/77/2, 8 August 1980) [1.22].

⁴³ *APPL v Sri Lanka* (n 8), [19]-[20].

⁴⁴ See eg *Atlantic Triton Company Limited v People's Revolutionary Republic of Guinea (Award)* (ICSID Case No ARB/84/1, 21 April 1986); *Maritime International Nominees Establishment v Republic of Guinea (Decision of the Ad hoc Annulment Committee)* (ICSID Case No ARB/84/4, 22 December 1989) [6.31]; or more recently *Pluspetrol Perú Corporation and others v Perupetro SA (Award)* (ICSID Case No ARB/12/28, 21 May 2015) [114]. The applicable law could be limited to specific rules of domestic law, as opposed to the national legal system as a whole. See eg *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB/00/5, 23 September 2003) [94]-[100]. In the context of ICSID arbitrations, this possibility is expressly stipulated through the use of the phrase 'rules of law' in art 42(1).

⁴⁵ See eg *SPP v Egypt (Award)* (ICSID Case No ARB/84/3, 20 May 1992) [225]; or *World Duty Free Company Limited v Republic of Kenya (Award)* (ICSID Case No ARB/00/7, 4 October 2006) [158]-[159].

⁴⁶ See eg *AGIP SpA v People's Republic of the Congo (Award)* (ICSID Case No ARB/77/1, 30 November 1979) [18]; *Kaiser Bauxite Company v Jamaica (Decision on Jurisdiction)* (ICSID Case No ARB/74/3, 6 July 1975) [12]; or more recently, *Elsamex, SA v Republic of Honduras (Award)* (ICSID Case No ARB/09/4, 16 November 2011) [311]-[317].

the law of the host State, potentially combined with international law.⁴⁷ In arbitrations commenced on the basis of investment treaties, in contrast, tribunals are normally directed to apply the provisions of the treaty itself, in conjunction with other rules of international law, and/or the law of the host State.⁴⁸

In the *absence of an express choice of applicable law*, the law to be applied by an investment tribunal will generally depend on the arbitration rules governing the dispute in question. Tribunals established in accordance with the UNCITRAL Rules, the rules of the SCC, ICC, or the LCIA enjoy greater latitude in this respect, since they are free to apply the rules of law that they consider “appropriate”.⁴⁹ ICSID tribunals, in contrast, are bound to apply “the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”⁵⁰ The law that investment tribunal will consider “appropriate” to apply will generally depend on the legal basis of the claim. In arbitrations based on a contract, investment tribunals have frequently deemed appropriate to apply – in addition to the contract itself – the law of the State contracting party, with international law possibly serving a gap-filling and corrective role.⁵¹ In arbitrations based on domestic investment codes, the law that was normally applied was the law of the host State,⁵² often in combination with international law.⁵³ Conversely, in the context of treaty-based arbitrations, the law primarily deemed applicable was the investment treaty and international law, in addition to the law of the host State.

With the large majority of investment arbitrations today being treaty-based, the impression can easily be conveyed that domestic law may have a lesser role to play in cases where the responsibility of the host State is invoked for alleged violations of the standards prescribed by the treaty.⁵⁴ Even though it is primarily in relation to contractual claims⁵⁵ (and counter-claims)⁵⁶ as typically asserted in contract-based arbitrations, or claims based on violations of domestic foreign

⁴⁷ Express choice of law clauses in domestic investment codes are rare, however. cf C Schreuer (et al), *The ICSID Convention: A Commentary* (2nd edn, CUP 2009), 570.

⁴⁸ See further Y Banifatemi, ‘The Law Applicable in Investment Treaty Arbitration’ in K Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (OUP, 2010, 197-210).

⁴⁹ ICC, art 21(1), LCIA, art 22(3).

⁵⁰ ICSID, art 42(1).

⁵¹ Cf. *Klöckner* (n 5), [60]; *Amco (Annulment)* (n 5), [20]; or more recently, *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru (Decision on Jurisdiction)* (ICSID Case No ARB/03/28, 1 February 2006) [162].

⁵² See eg *Tradex Hellas SA v Republic of Albania (Award)* (ICSID Case No ARB/94/2, 29 April 1999) [69] (applying solely the Albanian Foreign Investment Code, but relying on sources of international law insofar as that seemed appropriate for the interpretation of terms of art in the Code, such as ‘expropriation’).

⁵³ See *SPP v Egypt* (n 45), [78]-[80] (applying Egyptian and international law); or *Antoine Abou Laboud and Leila Bounafab-Abou Laboud v Democratic Republic of the Congo* (n 27), [358]-[365] (in the absence of a provision on applicable law in the domestic statute applying the law of Congo and the principles of international law. In the circumstances of that case, international law was relevant because the statute itself guaranteed fair and equitable treatment and the parties had not submitted any element on Congolese law that would throw light on the meaning of that phrase, nor did they submit other information on Congolese law that would throw light on the meaning of the expropriation, apart from general provisions on expropriation of the Congolese Constitution).

⁵⁴ Some have also contended that international law takes precedence in relation to ICSID arbitrations, considering such law as the *lex fori* of ICSID tribunals, by virtue of them being creatures of an international treaty and their procedures being substantially delocalized. See eg J Cherian, *Investment Contracts and Arbitration: The World Bank Convention on the Settlement of Investment Disputes* (Sijthoff 1975) 89. For criticism, see Chukwumerije (n 53), 80-82.

⁵⁵ See eg *Elsamex, SA v Republic of Honduras* (n 46), [304], [311]-[317], applying the law of Honduras to contractual claims and counter-claims, to the extent that the law did not otherwise contravene the Credit Agreements signed between the Republic of Honduras and the Government of Spain.

⁵⁶ See eg *Maritime International Nominees Establishment (MINE) v Republic of Guinea (Award)* (ICSID Case No ARB/84/4); or *Zeevi Holdings v The Republic of Bulgaria and the Privatization Agency of Bulgaria (Final Award)* (UNCITRAL Case UNC 93/DK, 25 October 2006).

investment codes⁵⁷ where domestic law is of importance, domestic law continues to perform a number of roles also in treaty-based arbitrations. First, even though it is the investment treaty that represents the primary cause of action in treaty-based arbitrations, a treaty tribunal might still have to consider domestic law as a factual predicate of such claims (see *infra* 3.4), or else apply it by virtue of a *renvoi* that the treaty itself might make to domestic law in relation to some standards of treatment such as the umbrella clause (see *infra* 3.3). Second, subject to the scope of the dispute settlement clause in the treaty,⁵⁸ a treaty-based investment tribunal might be requested to pronounce, concurrently with the investor's treaty claims, with claims based on a contract⁵⁹ or the domestic law of the host State,⁶⁰ or even exclusively to pronounce upon claims grounded in domestic law.⁶¹ In all such cases, domestic law would have to be interpreted and applied to determine the merits of such claims. Third, and finally, a treaty-tribunal could eventually have to decide counter-claims presented by the host State, which in the absence of obligations directly imposed upon foreign investors under investment treaties, will mostly be based on an underlying contractual relationship or the host State's own domestic law.⁶²

In applying domestic law as the law applicable to the cause of action, investment tribunals frequently relied on domestic jurisprudence in interpreting and applying the relevant legal rules, be it to decide the primary claims, the counter-claims,⁶³ or even in calculating the damages that would eventually have to be awarded.⁶⁴ And as in other contexts, investment tribunals occasionally faced specific domestic courts' pronouncements relating to the pertinent investor or its investment that were – or appeared to be – of relevance to the claim.⁶⁵

3.2.3. Reliance on Domestic Judgments to Ascertain the Law Applicable by Virtue of *Renvoi*

Apart from the more straightforward possibility of domestic law being applicable (as the law governing the arbitration agreement or as the law governing the substance of their dispute) by

⁵⁷ See eg *Trudex* (n52).

⁵⁸ A great deal of investment treaties contain broadly formulated dispute settlement clauses, vesting tribunals with jurisdiction over any or all disputes concerning, relating to, arising out of, or being in connection with an investment (see eg France-Egypt BIT (1974), art 7; UK-Egypt BIT (1975), art 8(1); or Egypt-Germany BIT (2005), art 9(1)), or simply to any dispute between an investor and a host State (see eg Pakistan-Egypt BIT (2000), art 8(1)). Some investment treaties expressly extend the scope of the dispute settlement clause to disputes arising out of contracts (see eg US-Egypt (1986), art VII(1)).

⁵⁹ For a recent example, see *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (Decision on Jurisdiction of 30 June 2011, and Decision on Remaining Issues of Jurisdiction and on Liability of 12 September 2014) (ICSID Case No ARB/08/6).

⁶⁰ See eg *Alpha Projektholding GmbH v. Ukraine (Award)* (ICSID Case No. ARB/07/16, 8 November 2010) [348], [432]-[436] (deciding alleged breaches of Ukraine's Foreign Investment Law in addition to treaty breaches); or *Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v The Government of Mongolia (Decision on Jurisdiction)* (UNCITRAL, 25 July 2012) (accepting jurisdiction over claims based on contract, Mongolia's Foreign Investment Law, and the ECT).

⁶¹ See in particular *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova (Award)* (SCC, 22 September 2005) 4 (where the only legal ground pleaded was the violation of the principle of non-retroactivity in relation to the Moldovan Foreign Investment Act and another domestic regulation).

⁶² See further *infra* 9.1.2.

⁶³ *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (Interim Decision on the Environmental Counterclaim) (ICSID Case No ARB/08/6, 11 August 2015).

⁶⁴ See eg *LETCO* (n 40), [40]-[41] (reverting to Liberian law to determine whether punitive damages could be awarded with respect to the breaches of the concession contract and whether lost profits should be included in the final compensation), or *Autopista Concesionada* (n 44) (reverting to Venezuelan law to determine the standards applicable to determining the lost profits under the concession contract).

⁶⁵ See eg *Amco Asia Corporation and others v Republic of Indonesia (Award)* (ICSID Case No ARB/81/1, 20 November 1984).

virtue of an express choice on the part of the disputing parties, or by virtue of such law being implicitly applicable in view of the legal nature of the arbitration agreement or the nature of the claims, there is also the possibility that domestic law may have to be applied *indirectly*, because the governing legal instrument makes reference to such law in determining the content of its own rules. The application of domestic law in such cases results from the operation of *renvoi* – the legal technique whereby an element of a rule is defined by reference to another set of rules.⁶⁶

The use of *renvoi* is not an unusual occurrence in international law. From a functional perspective, the technique's application is but the necessary consequence of the fact that the purpose of international law is not to provide for substantive rules regulating just each and every aspect of any given issue area, but to bring about (partial) regulation in fields that have typically already been the subject of detailed regulation at the domestic level.⁶⁷ Just as in other areas of international regulation,⁶⁸ so is *renvoi* also a common phenomenon in the investment treaty context. Neither the thousands of investment treaties, nor the ICSID Convention itself, have ever been intended to create self-contained legal systems that would provide for substantive rules exhaustively regulating all matters falling within their scope of application, but – as appositely noted by the *AAPL* tribunal, the first arbitral body ever established on the basis of such an investment treaty – had to be “envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.”⁶⁹ This, after all, is the logical consequence of the fact that the *raison d'être* of investment treaties has been to provide foreign investors with protections *additional* to those already provided for under the domestic legal system of the State in which their investment is situated, which necessarily presupposes the existence of certain interests that already found some form of recognition in that same legal system.⁷⁰

The operation of *renvoi* is premised on the very content of the primary rule that is applied.⁷¹ Reference may – and in practice often will – *expressly* be made in a particular investment

⁶⁶ The notion of ‘*renvoi*’ is used here in a narrow sense and must be contrasted with the doctrine of *renvoi* that is used in private international law to describe the conflict of law problem that arises where the forum applies the conflicts of laws rules of the law chose by the parties to eventually select a law different from that designated by the parties. On the doctrine of *renvoi* generally, see K Roosevelt, ‘Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language’ (2004) 80 Notre Dame Law Review 1821. Sometimes, tribunals preferred to use the term ‘*demarche*’ instead. cf *BG Group Plc. v. The Republic of Argentina (Final Award)* (UNCITRAL, 24 December 2007), [117].

⁶⁷ At the most fundamental level, the use of *renvoi* is dictated by the principles of sovereign equality and self-determination. By virtue of the latter, States have the right to freely determine their political status and freely pursue their economic, social and cultural development (art 1(1) ICCPR/ICESCR). The State’s freedom to design and develop a legal system of its own choosing is a necessary condition for the exercise of this right – subject, of course, to specific requirements prescribed in relation to such legal system by international law itself.

⁶⁸ For examples outside the investment treaty context, see eg 1999 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Croatia on International Road Transport (TS No 27(2001), Cm 8139), art 1(1).

⁶⁹ *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka (Award of the Tribunal)* (ICSID Case No ARB/87/3, 27 June 1990) [21].

⁷⁰ In that respect, the protection afforded to investors under investment treaties does not considerably differ from the protection generally granted to the interests of aliens under general international law, which is also auxiliary in nature. On this, see in particular *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 222, Separate Opinion of Judge Morelli, at 233, explaining how some of the international rules regarding the treatment of foreigners ‘[postulate] a certain attitude on the part of the State legal order, inasmuch as [they have] regard solely to interests which, within that legal order, have already received some degree of protection through the attribution of rights or other advantageous personal legal situations (faculties, legal powers or expectations).’

⁷¹ *ibid* 233, where Judge Morelli noted that ‘the fact that the rules of international law in question envisage solely such interests of foreigners as already constitute rights in the municipal order is but the necessary consequence of the very content of the obligations imposed by those rules; obligations which, precisely, presuppose rights conferred on foreigners by the legal order of the State in question.’

instrument (e.g. a treaty) to a different set of rules (*viz.* domestic law) for the purpose of determining a matter that is relevant to the application of such instrument. Yet, *renvoi* can also be effected by *necessary implication*, because the instrument in question (or international law in general) presupposes⁷² that the matter is determined by the other set of rules.⁷³ This means that *renvoi* operates independently of express choice-of-law provisions, in the sense that an investment treaty tribunal may, for example, have to apply domestic law even where the applicable law clauses in the investment treaty may not otherwise envisage the application of domestic law.⁷⁴ Nonetheless, as the following sections will demonstrate, the operation of *renvoi* has often been resisted in the practice of investment arbitration. Some have doubted whether recourse indeed would have to be made to domestic law in determining the content of certain rules;⁷⁵ others have resisted the full application of domestic law to the determination of certain matters.⁷⁶ In most cases, the main reason for the objections seem to lie in the fact that, if applied to its fullest extent, *renvoi* could result in international law becoming subordinate to rules of municipal law, which would run afoul of the principle, expressed among others in Article 27 VCLT and Article 3 ILC Draft Articles, that a State cannot plead that its conduct conforms to its internal law to justify it at the level of international law. In itself, the technique of *renvoi* does not directly make the international responsibility of a state dependent upon categories of domestic law;⁷⁷ in the end, its application is ultimately subject to the control of international law. Yet, it is precisely in relation to the situations where domestic law has to be applied by virtue of *renvoi* that some of the sharpest and most direct juxtapositions between domestic courts and investment tribunals have emerged in the practice of investment arbitration.

Though, in view of the design of investment treaties, investment treaty tribunals will seemingly have to apply domestic law in all matters where the treaty and international law do not

⁷² See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment) (Second Phase)* [1970] ICJ Rep 3 (5 February 1970) 38, where the ICJ argued that ‘whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.’

⁷³ See PCIJ, *Exchange of Greek and Turkish Populations* [1925] PCIJ Rep Ser B No 10, 19 (a Convention may contain an ‘express or implicit reference to national legislation’); or *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (Award)* (ICSID Case No. ARB/11/12, 10 December 2014) [298] (‘the Tribunal shall apply provisions of Philippine law to the extent the latter establishes conditions that are relevant for determining its jurisdiction, whether or not the BIT makes reference to such provisions.’)

⁷⁴ See eg *Ioannis Kardassopoulos v The Republic of Georgia (Decision on Jurisdiction)* (ICSID Case No ARB/05/18, 6 July 2007), [145] (noting that ‘[w]hile this Tribunal is not authorized to apply Georgian law, it is well established that there are provisions of international agreements that can only be given meaning by reference to municipal law.’). For a general endorsement of the principle, see VC Igboke, ‘Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations’ (2006) 23 *Journal of international arbitration* 267, at 287; and Newcombe and Paradell (n12), 86, 94. See also *Azurix Corp v The Argentine Republic (Decision on the Application for Annulment)* (ICSID Case No ARB/01/12, 1 September 2009) [151], suggesting that, if it were necessary for the Tribunal to apply Argentine municipal law in determining whether there was a breach of obligations under municipal law for the purpose of establishing a breach of the umbrella clause, municipal law would not thereby become part of the applicable law under art 42 of the ICSID Convention.

⁷⁵ See eg *EnCana Corporation v. Republic of Ecuador (Dissenting Opinion of Arbitrator Grigera Naon)* (LCIA Case No. UN3481, UNCITRAL, 30 December 2005), [9]-[16], challenging the idea that all rights of proprietary character would necessarily have to be determined by domestic law, arguing that *renvoi* to such law essentially only makes sense in relation to rights *in rem*, and even suggesting that some form of ownership could be directly arising under the treaty.

⁷⁶ *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Decision on Jurisdiction)* (ICSID Case No ARB/05/15, 11 April 2007, Partial Dissenting Opinion of Professor Francisco Orrego Vicuña) 68, arguing that ‘[i]n leaving the determination of nationality to the State in question, international law is only concerned with the substance of the law, not the procedure’.

⁷⁷ cf Separate Opinion of Judge Morelli in *Barcelona Traction* (n 70), 234, explaining that ‘[i]n reality, no subordination of international responsibility, as such, to the provisions of municipal law is involved; the point is rather that the very existence of the international obligation depends on a state of affairs created in municipal law, though this is so not by virtue of municipal law but, on the contrary, by virtue of the international rule itself, which to that end refers to the law of the State.’

provide for their own rules, there are essentially five issue areas where *renvoi* is typically made to domestic law – either by virtue of express treaty provisions, or by reason of necessary implication: the nationality of individual investors (3.3.1.), the nationality of corporate entities (3.3.2.), attribution of conduct of entities’ conduct to the state (3.3.3.), existence of an investment (3.3.4.) and its validity (3.3.5.), and the existence of obligations capable of falling within the scope of protection under an umbrella clause (3.3.6.). For the purpose of completeness, however, other matters potentially regulated by domestic law by virtue of *renvoi* are also discussed (3.3.7.).

3.2.3.1. *The Nationality of Natural Persons*

For an investor to come within the scope of protection of an investment treaty and be able to invoke the latter’s dispute settlement procedures, there needs to be a link to one of the contracting parties to the treaty. In case of natural persons investing abroad, this link is typically based on the individual’s “nationality”,⁷⁸ which in this sense becomes the key variable for delimiting the class of valid claimants with access to investor-state arbitration under the relevant treaty.⁷⁹ In the same way, nationality represents one of the variables determining access to the ICSID Centre, given that the latter’s jurisdiction extends to disputes between a Contracting State and a “national of another Contracting State”.⁸⁰ Neither investment treaties, nor the ICSID Convention itself, however, lay down their own substantive rules to determine the nationality of natural persons. In the case of the ICSID Convention, such a determination is taken to occur, by necessary implication, by reference to the law of the State whose nationality is claimed.⁸¹ In the context of investment treaties, *renvoi* is sometimes explicitly made to domestic nationality legislation,⁸² but often times, it is equally implicit.⁸³ The approach, in both cases, is but the consequence of the fact that under general international law, it is up to each State to determine who its nationals are in accordance with its domestic laws.⁸⁴

⁷⁸ The notion of ‘nationality’ is often used interchangeably with that of ‘citizenship’. Sometimes, however, citizenship is used to denote those nationals that also permanently reside in the country (see eg art 1(b)(i) of the *Netherlands-Albania BIT* (1994)). In the alternative, some investment treaties provide protection to natural persons that are merely domiciled or resident in the relevant State contracting party. See eg art 1(7)(a)(i) of the *Energy Charter Treaty* (1994); or art 201 of the *NAFTA*.

⁷⁹ The concept of “nationality” is thus considered to differ from the concept of nationality as it developed under the customary international law rules on international claims, in the context of which nationality defines the circumstances under which a State may espouse a claim on behalf of an individual by way of diplomatic protection. This is at least why investment tribunals consistently rejected attempts to import into investment treaty arbitration requirements that have sometimes been applied in the context of diplomatic protection, such as the effective nationality test. cf *Saba Fakes v Republic of Turkey (Award)* (ICSID Case No ARB/07/20, 14 July 2010) [60]-[64]; *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania (Decision on Jurisdiction and Admissibility)* (ICSID Case No ARB/05/20, 24 September 2008) [100]-[105]; *Victor Pey Casado and President Allende Foundation v Republic of Chile (Award)* (ICSID Case No ARB/98/2, 8 May 2008) [241], [415]; *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Decision on Jurisdiction)* (ICSID Case No ARB/05/15, 11 April 2007) [198]; *Champion Trading Company, Ameritrade International, Inc, James T Wabba, John B Wabba, Timothy T Wabba v Egypt (Award)* (ICSID Case No ARB/02/9, 27 October 2006) 16-17; *Eudoro Armando Olguin v Republic of Paraguay (Final Award)* (ICSID Case No ARB/98/5, 26 July 2001) [62].

⁸⁰ ICSID Convention, art 25(1).

⁸¹ Schreuer (n 47224), 265, paras 641ff.

⁸² Most explicit in this respect are the US Model BIT (2004), which defines ‘national’ as ‘for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act’ (art 1), and the German Model BIT (2005), which refers to ‘Germans within the meaning of the Basic Law of the Federal Republic of Germany’ (art 1(3)(a)(i)). (Emphasis added)

⁸³ See eg the Netherlands Model BIT (2004), which simply refers to ‘natural persons having the nationality of that Contracting Party’ (art 1(b)(i)); or the French Model BIT (2006), which similarly defines the term ‘nationaux’ as to apply to ‘les personnes physiques possédant la nationalité de l’une des Parties contractantes’ (art 1(2)). (Emphasis added)

⁸⁴ See eg *Exchange of Greek and Turkish Populations (Advisory Opinion)* PCIJ (ser B) No 10 (21 February 1925) 19 (noting that ‘the national status of a person belonging to a State can only be based on the law of that State’ and that ‘therefore, any convention dealing with this status must implicitly refer to the national legislation’); or *Nottebohm Case (Second Phase)*

Determining the nationality of natural persons has mostly not given rise to problems in practice. Issues of contention have usually only arisen in cases involving dual nationals where the validity of a particular nationality was either disputed by the Respondent State (on the ground that it was based on a tenuous connection with the State whose nationality it had been claimed),⁸⁵ or by the Claimant itself (in circumstances where Respondent maintained that Claimant (still) possessed the nationality of the host State and was thus allegedly precluded from bringing a claim by virtue of Article 25(2)(a) of the ICSID Convention).⁸⁶ In this respect, investment tribunals have generally not regarded themselves prevented from considering whether a particular nationality has been granted or forfeited in accordance with the requirements of domestic law – which, depending on the circumstances of the case, could either have been the law of the investor’s State of nationality, or the law of the host State. Though avoiding to make pronouncements as to the domestic validity of such nationality, following the practice of other international courts and tribunals,⁸⁷ tribunals considered themselves competent to determine the effectiveness of such nationality at the international level, which in turn required them to actually interpret and apply provisions of the relevant nationality law. Though not yet faced with a situation of a domestic judgment being relied upon by reason of particular determinations said to be recognizing the investor’s nationality, tribunals often sought support in domestic judicial decisions in the construction of such nationality laws.⁸⁸

3.2.3.2. *The Nationality of Corporate Entities*

In case of legal persons acting as investors, the link to the relevant investment treaty is established on the basis of corporate nationality, which can be determined in one of several ways. In most cases, the nationality of a corporate entity is attributed to either the State of its incorporation⁸⁹ or the State of the company seat (*siège social*);⁹⁰ although, sometimes, it might also be attributed to the State of the entity’s ownership or control.⁹¹ In this sense, investment treaties do not significantly depart from the tests that are used for the purpose of determining the

(*Liechtenstein v Guatemala*) (Judgment) [1955] ICJ Rep 4 (6 April 1955), 20 (recognizing it ‘is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation’). See also art 1, *Convention on Certain Questions relating to the Conflict of Nationality Laws*, The Hague 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937), confirming that ‘[i]t is for each State to determine under its own law who are its nationals’.

⁸⁵ See eg. *Soufraki v The United Arab Emirates (Award)* (ICSID Case No ARB/02/7, 7 July 2004).

⁸⁶ See eg. *Pey Casado* (n 79); or *Siag & Vecchi* (n 79).

⁸⁷ See in particular *Nottebohm Case (Second Phase)* (n 84), 20, 22-26 (the ICJ refusing to accord international recognition to Nottebohm’s nationality due to the lack of a sufficient bond of attachment with Liechtenstein, without otherwise delving into the question whether Nottebohm’s nationality was validly acquired according to the applicable domestic law); and *Flegenheimer Case* (Decision No 182, 20 September 1958), reproduced in (1959) 53 AJIL 944 and XIV UNRIIA 327, [24]-[25] (the Italian-US Conciliation Commission concluding that it must ‘freely examine’ whether the granting of nationality was of such a nature as to be convincing at the international level). For earlier precedents, see *Case of Medina* (31 December 1862), reproduced in JB Moore, *History and Digest of the International Arbitration to which the United States Has Been a Party*, vol. III (Govt Printing Office 1898) 2587; *Flutie cases (USA v Venezuela)* (IX UNRIIA 148, 1903) 151; *Georges Pinson case (France v United Mexican States)* (V UNRIIA 327, 19 October 1928) 371; *Halton case* (IV UNRIIA 329, 26 September 1928) 331; *Salem case* (II UNRIIA 1161, 8 June 1932) 1184.

⁸⁸ See eg. *Soufraki* (n 85); *Pey Casado* (n 79); or *Siag & Vecchi* (n 79);

⁸⁹ Eg art 1(b)(ii) of the Netherlands Model Text (2004) defines an investor as ‘legal persons constituted under the law of that Contracting Party’; art 1(7)(a)(ii) of the Energy Charter Treaty defines ‘investor’ to include ‘a company or other organization organized in accordance with the law applicable in that Contracting Party’.

⁹⁰ Eg art 1(3)(a) of the German Model BIT (2005) defines ‘company’ to include in respect of Germany ‘any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany’.

⁹¹ Eg art 1(b)(iii) of the Netherlands Model BIT (2004) includes in the definition of nationals also ‘legal persons not constituted under the law of that Contracting Party but *controlled, directly or indirectly*, by natural persons ... or by legal persons ... [of the other Party]’, (emphasis added).

nationality of corporate entities in the context of diplomatic protection⁹² and in private international law.⁹³ The ICSID Convention, on its part, aside from requiring that the entity appearing as claimant must be a “juridical person which had the nationality of a Contracting State”,⁹⁴ does not set forth criteria as to how its nationality should be established, except in relation to entities having the nationality of the host State which are treated as nationals of another Contracting State “because of foreign control”.⁹⁵ Nonetheless, there seems to be consensus that such nationality be established by reference to the criteria that are traditionally applied in international law to determining the nationality of juridical persons – namely, by reference to the State of its seat or that of its incorporation.⁹⁶

Given that corporations are creatures of the legal system which created it, and that neither general international law nor investment treaties provide for specific rules regulating the establishment of corporate bodies,⁹⁷ the question of corporate nationality is again one of those where *renvoi* must necessarily be made to domestic law – which, depending on the circumstances of the case, might either be that of the investor’s home State, that of the host State, or even that of some third-State. Where investment treaties use the formal test of incorporation,⁹⁸ it is usually the law of the investor’s home state that is primarily of significance, in view of it being the legal system under which incorporation took place.⁹⁹ In fact, in applying the incorporation test it has

⁹² Under the rules of customary international law of diplomatic protection, the traditional rule is still to regard the state of incorporation as the state whose nationality the company has, although the place of effective seat may occasionally also be decisive. See art 9 of the ILC Draft Articles on Diplomatic Protection.

⁹³ Incorporation and seat are widely used as tests applicable the recognition of foreign legal persons under private international law. See eg Arts 1 and 2 of the Convention of 1 June 1956 concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions (not yet in force). See generally S Rammeloo, *Corporations in Private International Law* (OUP 2001), 9-85.

⁹⁴ ICSID Convention, art 25(2)(b).

⁹⁵ ICSID Convention, art 25(2)(b), second prong. Even then, however, the Convention is silent as to how the nationality of the controlling entity is to be determined.

⁹⁶ See *Société Ouest Africaine des Bétons Industriels v Senegal* (Decision on Jurisdiction) ICSID Case No ARB/82/1, 1 August 1984 [29]; or *Amco Asia Corporation and others v Republic of Indonesia* (Decision on Jurisdiction) (ICSID Case No ARB/81/1, 25 September 1983) (87 ILR 379), 387. cf also Schreuer (n 47), 281, noting that ICSID Tribunals have consistently applied a test of incorporation or seat for the purpose of determining the nationality of a corporate person under the ICSID Convention.

⁹⁷ See *Barcelona Traction* (n 72), 38 (holding that ‘international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.’). See also *Perenco (Liability)* (n 59), [519]-[20].

⁹⁸ Eg the US Model BIT (2004) defines an ‘enterprise’ as ‘any entity constituted or organized under applicable law...’ and ‘enterprise of a Party’ as ‘an enterprise constituted or organized under the law of a Party’ (art 1); the China Model BIT (1997) defines corporate investors as ‘legal entities...incorporated or constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party’ (art 1(2)(b)); the French Model BIT (2006) defines ‘sociétés’ as ‘toute personne morale constituée sur le territoire de l’une des Parties contractantes, conformément à la législation de celle-ci et y possédant son siège social, ou contrôlée directement ou indirectement par des nationaux de l’une des Parties contractantes, ou par des personnes morales possédant leur siège social sur le territoire de l’une des Parties contractantes et constituées conformément à la législation de celle-ci.’ (art 1(3)); the Germany Model BIT (2005) defines a corporate investor as ‘any juridical person and any commercial or other company or association with or without legal personality which is founded pursuant to the law of the Federal Republic of Germany or the law of a Member State of the European Union or the European Economic Area and is organized pursuant to the law of the Federal Republic of Germany, registered in a public register in the Federal Republic of Germany or enjoys freedom of establishment as an agency or permanent establishment in Germany pursuant to Articles 43 and 48 of the EC Treaty’ (art 1(3)(a)); and the Netherlands Model BIT (2004) defines a ‘national’ as ‘legal persons constituted under the law of that Contracting Party’ (art 1(b)(ii)).

⁹⁹ See eg *AES Corporation v The Argentine Republic* (Decision on Jurisdiction) (ICSID Case No ARB/02/17, 26 April 2005) [75]-[78] (rejecting the Argentina’s objection that the determination of the foreign investor’s nationality under the US-Argentina

not been uncommon for investment tribunals to consider intricate questions of corporate law of the investor's home State, such as whether an otherwise dissolved US company has remained a juridical entity for the purposes of an still-ongoing ICSID arbitration,¹⁰⁰ whether an incorporated Italian consortium could claim on its own behalf with respect to a concession contract entered into jointly by its two constituent companies,¹⁰¹ whether an unincorporated Swiss joint venture possessed legal personality in order to be considered a "juridical person" within the meaning of the ICSID Convention,¹⁰² whether an Italian company could claim under a contract entered into by another company that the former had taken over,¹⁰³ or whether a company originally incorporated in the Cayman islands validly migrated by changing its place of incorporation to that of Luxembourg.¹⁰⁴

Renvoi to domestic law might furthermore have to be made to determine the existence of control necessary to attribute a legal entity the nationality of a particular State, given that the question of control is often determined by actual ownership.¹⁰⁵ Hence, it has not been uncommon for investment tribunals to be asked to scrutinize transactions relating to the transfer of ownership of shareholding interests to determine, for example, whether a shareholding interest in a company was acquired on behalf of a foreign company and was thus foreign control, and not in the name of a national of the host State himself,¹⁰⁶ whether a subsidiary was indirectly controlled through a corporate chain where one of the intermediary companies merely held certain shares in trust, whereas the beneficial owner otherwise fell outside the corporate chain as such;¹⁰⁷ whether the heirs of a French magnate were deemed to control a particular corporate

BIT would be governed by Argentine international private law, which would have required the Claimant to prove its lawful creation, in circumstances where the BIT treated as a US national any kind of corporate body that was 'legally constituted under the laws and regulations' of the US, and Claimant had convincingly proven that it had been incorporated in the State of Delaware with headquarters in Arlington, Virginia).

¹⁰⁰ See *Amco Asia Corporation and others v Republic of Indonesia (Decision on Jurisdiction (Resubmission Proceeding))* (ICSID Case No ARB/81/1, 10 May 1988) [99]-[109] (the Tribunal applying the law of Delaware to determine the legal status and capacity of the Claimant to continue to pursue arbitration proceedings).

¹⁰¹ See *Consortium Groupement LESI-DIPENTA v Algeria (Award)* (ICSID Case No ARB/03/08, 10 January 2005) [37]-[41] (the Tribunal applying the relevant rules of Italian law to determine whether an incorporated consortium, as a legal entity independent of its two constituent companies, could benefited from the rights under a concession contract entered into by the latter).

¹⁰² See *Impregilo SpA v Islamic Republic of Pakistan (Decision on Jurisdiction)* (ICSID Case No ARB/03/3, 22 April 2005) [119]-[134], where *renvoi* was made to the Swiss *Code des Obligations* to determine the legal status of an unincorporated joint venture, on whose behalf Claimant purportedly pursued treaty claims.

¹⁰³ See *LESI SpA and ASTALDI SpA v Algeria (Decision on Jurisdiction)* (ICSID Case No ARB/05/3, 12 July 2006) [92]-[94] (with the Tribunal holding that a corporate takeover entailed the change of identity of one of the contracting parties to the contract, which was governed in that case by the rules of Italian law relating to the status of legal persons).

¹⁰⁴ See *Aguas del Tunari S.A v Republic of Bolivia (Decision on Respondent's Objections to Jurisdiction)* (ICSID Case No ARB/02/3, 21 October 2005) [160]-[178] (the Tribunal considering whether the laws of the Cayman islands and Luxembourg allowed a corporation to migrate from one jurisdiction to another, while rejecting the application of Bolivian law as relevant to the issue).

¹⁰⁵ Ownership is sometimes used as a term of art in the treaty.

¹⁰⁶ See eg *Burimi SRL and Eagle Games SH.A v Republic of Albania (Award)* (ICSID Case No ARB/11/18, 29 May 2013) [117] (the Tribunal inquiring whether or not a shareholding interest in an Albanian company was acquired on behalf of an Italian company, with the consequence that such Albanian company could be considered under foreign control for the purposes of art 25 ICSID; the Tribunal instead concluded that the shares were purchased in the name of an Albanian national, basing such conclusion on the Share Sale Contract and an attestation of an Albanian judge concerning that sale.)

¹⁰⁷ See eg *Guardian Fiduciary Trust, Ltd, f/ k/ a Capital Conservator Savings & Loan, Ltd v Macedonia, former Yugoslav Republic of (Award)* (ICSID Case No ARB/12/31, 22 September 2015) [133]-[134] (the Tribunal considering whether a corporate entity organized under the law of New Zealand could claim the nationality of the Netherlands by being indirectly controlled by a Dutch foundation, in circumstances where the ownership of that entity's immediate holding company was divided between another New Zealand company as the legal owner, and a Marshall Islands company as the beneficial owner, whereby the latter fell outside the corporate chain of which the Dutch foundation formed part; the Tribunal turned

entity in circumstances where French law recognized their legal ownership of the entity's shares, but Bahamian law, in which the entity was incorporated, had not yet recognized their legal title in those shares in the absence of a formal transfer of the shares and their registration in the corporate registry;¹⁰⁸ or whether a transfer of shares was effective in circumstances where an amendment of the company's statutes allowing for such a transfer had not been properly registered.¹⁰⁹ In the absence of decisive foreign ownership, investment tribunals could furthermore be required to look into domestic law to determine whether foreign control could nonetheless be exercised through rights pertaining to managerial functions,¹¹⁰ or arrangements pertaining to the exercise of voting rights.¹¹¹

Last but not least, recourse to domestic law may even be necessary in applying the test of *siège social*; for, even though the latter might primarily entail a factual inquiry into the place where the effective management of the corporate body takes place, reference might still be necessary to determine whether a corporation validly exists under some legal system and what the rules of that particular legal system there are for determining the *siège social*.¹¹²

All in all, considering the importance of domestic law to these matters, it is not surprising that domestic judicial decisions have sometimes played a role in determining questions of corporate nationality – either by being used for the purpose of clarifying uncertainties about specific points of law, or because of particular determinations made by domestic judicial organs with respect to the investor in question.

3.2.3.3. *Attribution of Corporate or other Entities' Conduct to the State*

Domestic law might not only be of relevance to the attribution of nationality to a corporation, but possibly also to the attribution of an entity's conduct to the host State as such, with the consequence that the latter could then incur responsibility under international law for any internationally wrongful acts committed by such entity. The question of attribution often arises in circumstances where acts or omissions claimed to be violating investment protection standards are not committed by the host State acting through its typical state organs, such as police or judiciary, but by various entities having a legal personality separate from that of the State, with which investors often make dealings, of contractual or other kind. Though some investment treaties provide for their own specific rules on attribution,¹¹³ the majority of such instruments do not, which prompted tribunals to resort to the general rules regulating the attribution of conduct

to New Zealand law in considering the legal relationship existing between the trustee and the beneficiary to determine whether it was the former or the latter that had the power or capacity to control the holding company and its subsidiary.)

¹⁰⁸ *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (Decision on Remaining Issues of Jurisdiction and on Liability) (ICSID Case No ARB/08/6, 12 September 2014) [514]-[530].

¹⁰⁹ See eg *Renée Rose Levy and Gremicel SA v Republic of Peru (Award)* (ICSID Case No ARB/11/17, 9 January 2015) [152]-[153], [169]-[170] (the Tribunal finding the acquisition of Claimant's shareholding interests in a Grenadian company to have been ineffective according to Grenadian law due to failure to register an amendment of that company's Articles of Association enabling such a transfer of shares; as a result, a Peruvian-incorporated company owned by the Grenadian intermediary lacked standing to claim on its own behalf, as it was not indirectly owned by the Claimant).

¹¹⁰ See *Société Industrielle des Boissons de Guinée v Republic of Guinea (Award)* (ICSID Case No ARB/12/8, 21 May 2014) [108] (the Tribunal considering the possibility of control being exercised by the foreign president/general director of a company, by virtue of specific rights that such director might have enjoyed pursuant to the law of Guinea vis-à-vis the shareholders of the company).

¹¹¹ See eg *Vacuum Salt Products Ltd v Republic of Ghana (Award)* (ICSID Case No ARB/92/1, 16 February 1994) [43]-[44].

¹¹² See eg *Société Civile Immobilière de Gaëta v Republic of Guinea (Award)* (ICSID Case No ARB/12/36, 21 December 2015) [142], [144]-[145] (considering the circumstances under which a company could be deemed to possess French corporate nationality).

¹¹³ For such exceptions, see *United Parcel Service of America Inc. v. Government of Canada* (Award on the Merits) (ICSID Case No. UNCT/02/1, 24 May 2007) [57-62]; or *Adel a Hamadi al Tamimi v Sultanate of Oman* (Award) (ICSID Case No ARB/11/33, 3 November 2015) [314]ff.

to a State under international law, as codified in the 2001 ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). For the purpose of establishing whether the conduct of a particular entity was attributable to a State, tribunals have thus commonly inquired whether such entity was an organ forming part of a State's internal organization (within the meaning of Article 4 ARSIWA), whether it was otherwise empowered to exercise elements of governmental authority (in the sense of Article 5 ARSIWA), or even whether it was acting under the effective control of the State (as provided for under Article 8 ARSIWA). Such determinations often raise mixed questions of law and fact which will vary from case to case according to the circumstances. Yet, in view of the importance that these rules themselves ascribe to the State's domestic law in determining questions of attribution,¹¹⁴ investment tribunals recurrently looked into the provisions of domestic law to establish whether an entity was either a State organ, or else exercising governmental prerogatives,¹¹⁵ or even to determine whether such entity was acting on the instruction or direction of another State organ.¹¹⁶ There have so far been no cases of investment tribunals being faced with a concrete judicial determination that a particular entity was an organ of a State, just as in relation to other questions where the interpretation or application of domestic law is involved, investment tribunals occasionally found it useful to turn to domestic jurisprudence in determining questions of domestic law that were relevant to the issue of attribution.

3.2.3.4. *The Existence of a Protected Investment*

For an asset to fall under the protection of an investment treaty, it must constitute an "investment".¹¹⁷ Most modern investment treaties define investments by way of broad, asset-based definitions (frequently referring to "every kind of asset") that are typically complemented with a list of generic categories of investments. Interestingly, these latter do not describe investments in their economic form (by distinguishing, for example, between foreign direct investments and portfolio investments; or between greenfield investments and mergers &

¹¹⁴ See eg art 4(2) ARSIWA providing that '(a)n organ includes any person or entity which has that status in accordance with the internal law of the State'; and Article 5 ARSIWA stipulating that '[t]he conduct of a person or entity [...] which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'

¹¹⁵ See eg *Maffezini v Spain* (Jurisdiction) (ICSID Case No ARB/97/7, 25 January 2000) [83]-[86]; *Salini Costruttori SpA and Italstrade SpA v Morocco* (Decision on Jurisdiction) (ICSID Case No ARB/00/4, 31 July 2001) [30]-[35]; *Eureko BV v Poland* (Partial Award) (ICSID19 August 2005) [191]-[121]; *Noble Ventures, Inc v Romania* (Award) (ICSID Case No ARB/01/11, 12 October 2005) [70]-[79]; *EnCana Corporation v Republic of Ecuador* (Award) (LCIA Case No UN 3481, 3 February 2006) [154], [184]; *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago* (Award) (ICSID Case No ARB/01/14, 3 March 2006) [203]-[204]; *Jan De Nul NV and Dredging International NV v Arab Republic of Egypt* (Award) (ICSID Case No ARB/04/13, 6 November 2008) [160]-[162], [164]-[166]; *Limited Liability Company AMTO v Ukraine* (Final Award) (SCC Case No 080/2005, 26 March 2008) [101]-[102]; *EDF v Romania* (Award) (ICSID Case No ARB/05/13, 8 October 2009) [190]-[198]; *Hamester v Ghana* (Award) (ICSID Case No ARB/07/24, 18 June 2010) [183]-[190]; *Bosch v Ukraine* (Award) (ICSID Case No ARB/08/11, 25 October 2012) [164]-[174], [177]; *Ulyseas v Ecuador* (Final Award) (UNCITRAL, 12 June 2012), [126]-[143]; *InterTrade Holding GmbH v The Czech Republic* (Final Award) (UNCITRAL, PCA Case No 2009-12, 29 May 2012) [169]-[177]; *Tulip Inn v Turkey* (Award) (ICSID Case No ARB/11/28, 10 March 2014) [285]-[288]; [292]-[295].

¹¹⁶ *EDF v Romania*, *ibid*, 203-05.

¹¹⁷ Though central to the system of investment protection, the concept of investment has deliberately not been defined in the ICSID Convention in spite of the latter confining in Article 25(1) the jurisdiction of the Centre to 'any legal dispute arising directly out of an investment'. The 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (18 March 1965) [27], somewhat inaccurately mentions that '[n]o attempt was made to define the term "investment"', whereas in fact, several attempts were made but all eventually failed. In the absence of agreement as to what an appropriate definition would be, and whether or not such definition would actually be desirable, the Convention's drafters found it more opportune to remit that question to the consent of the parties. For a summary of the negotiating history on this matter, see Schreuer (n 47), [114]-[21].

acquisitions), but by reference to the *legal form* in which investments materialize.¹¹⁸ Reference is thus made in such definitions to (1) movable and immovable property and any related property rights, (2) various forms of participation in companies, such as shareholding rights (3) claims to money and other kinds of performance having an economic value, (4) various categories of intellectual property rights, and (5) various forms of public law concessions, either conferred by administrative acts or under contracts.¹¹⁹ In terms of accuracy, modern investment treaties thus tend to be more exacting than some of the early international legal instruments which still referred to the “property” of aliens as being the subject of protection under international law.¹²⁰ However, they do not differ from the latter in their mode of regulation: while defining the *scope* of interests which qualify for protection under international law, they do not themselves determine the *content* of those interests.¹²¹ The latter is left to the relevant rules of domestic law, sometimes explicitly,¹²² though most often implicitly, given that international law does not itself provide substantive rules applicable to determining the existence and scope of proprietary rights or in whom these rights might be vested.¹²³ At the end of the day, the possession of a valid domestic law right on the part of the investor becomes thus a necessary,¹²⁴ even if not sufficient

¹¹⁸ The fact that investments are defined by reference to their legal materialization, and not by reference to economic aspects, has given rise to several problems in practice, particularly in relation to the extension of treaty protection to services contracts. In response, a number of ICSID tribunals began to apply several criteria to ascertain whether the transaction in question constitutes an investment in the economic sense. According to these, commonly-known as the ‘Salini’ criteria, an investment will usually be characterized by (i) a certain duration, (ii) a regularity of profit and return, (iii) an assumption of risk by both parties, (iv) a significant financial commitment by the investor, and (v) a contribution to the development of the host state. See *Salini v Morocco* (n 115). Though discussion still persists in the jurisprudence and academic writings as to the number and scope of the criteria, as well as to their legal significance, their application has not remained limited to arbitrations conducted under the ICSID Convention, but also other treaty-based arbitrations, suggesting that some of these criteria must nowadays be understood as being inherent to the ordinary meaning of an investment.

¹¹⁹ See on this UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (UN 2007) 8. A typical example is Article 1(a) of the Netherlands Model BIT.

¹²⁰ See eg the 1959 Abs-Shawcross Draft Convention on Foreign Investments or the 1967 OECD Draft Convention on the Protection of Foreign Property.

¹²¹ This distinction is an important one as it delineates the fields of application of international and domestic law in the determination as to whether an asset constitutes an investment. While it is for the treaty, and thus for international law, to determine whether the investor’s proprietary rights constitute a protected investment, it is for domestic law to determine whether those rights exist, what their scope is, whether they are vested in the investor in question. Investment tribunals have not always properly taken account of this distinction. See eg *Saipem v Bangladesh (Decision on Jurisdiction)* (ICSID Case No ARB/05/07, 21 March 2007) [120] (considering it not necessary to refer to the law of Bangladesh in determining whether Saipem made an investment within the meaning of the BIT). This is not to say that the investment treaty cannot make *renvoi* to domestic law also in defining the categories of investment falling within the protection of the treaty. See eg *Philippe Gruslin v Malaysia (Award)* (ICSID Case No ARB/99/3, 27 November 2000) [25.5]-[25.7] (the Tribunal declining jurisdiction because the applicable BIT defined investment as an asset ‘invested in a project classified as an “approved project” by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon’ and the Claimant had not been granted such approval).

¹²² See eg art 1(a) UK-Argentina BIT (defining investment as ‘every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made...’); or art 1(2) Argentina-Spain BIT (stipulating that ‘El contenido y alcance de los derechos correspondientes a las diversas categorías de haberes estarán determinados por las leyes y reglamentaciones de la Parte en cuyo territorio esté situada la inversión’).

¹²³ See eg *Panevezys-Saldutiskis Railway (Judgment)* PCIJ ser A/B, No 76 (28 February 1938) 18 (noting that ‘the property rights and the contractual rights of individuals depend in every State on municipal law’). Generally on this issue, see C Staker, ‘Public International Law and *lex situs* rule in property conflicts and foreign expropriations’ (1987) 58 *The British Yearbook of International Law*, 151-252; and Z Douglas, ‘Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 *BYBIL* 152.

¹²⁴ See eg *International Thunderbird Gaming Corporation v. The United Mexican States (Award)* (UNCITRAL, 26 January 2006), [208] (‘compensation is not owed ... where ... investor or investment never enjoyed a vested right in the business activity’); *EnCana v Ecuador* (n 115) [184] (noting that ‘for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.’); *FW-Oil v Trinidad & Tobago* (n 115) [125] (unable to

condition,¹²⁵ for there to be an investment that is deemed to be protected by the treaty. Which is why an investor's putative entitlements under the legal system in which the investment was made have often been treated as a threshold jurisdictional question,¹²⁶ or at least as a matter on which a preliminary determination had to be made before an examination could take place as to whether prejudice had been caused to those rights by the acts or omissions on the part of the host State.¹²⁷

Just as other international courts and tribunals have turned to domestic law in determining the existence and scope of proprietary rights when these were relevant to the international claim,¹²⁸ so have investment tribunals often had to examine domestic law in determining whether the putative investor possessed a right of a proprietary character that was capable of constituting a protected investment.¹²⁹ Sometimes, the inquiry focused on the actual possession of a particular right – such as to whether the investor possessed a public law right to a VAT refund,¹³⁰ a contractual right pertaining to the granting of a new radio broadcasting license,¹³¹ a contractual right to a particular procedure through which a concession contract was to be negotiated,¹³² or a valid shareholding interest in a company.¹³³ Other times, the more fundamental question arose as to whether the right in question – such as an unpatented mining claim¹³⁴ or the filing for an Abbreviated New Drug Application submitted to the US Food and Drugs Administration¹³⁵ – could actually be deemed to be proprietary in character. In many of

conclude that ‘the intention can have been to bring within the scope of the term [investment] claims other than those based on proprietary or contractual rights’; *Apotex Inc v The Government of the United States of America (Award on Jurisdiction and Admissibility)* (UNCITRAL, 14 June 2013), FN 78 to [207] (‘U.S. law is informative in defining “property”, because it is the law of the host State.’); *Emmis v Hungary (Award)* (ICSID Case No ARB/12/2, 16 April 2014) [162] (‘In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.’); or *Accession Mezzanine v Hungary (Award)* (ICSID Case No ARB/12/3, 17 April 2015) 75 (‘The question of whether the Claimants had any right to broadcast over a radio frequency in Hungary [...] can only be answered by reference to Hungarian law. [...] Upon the ascertainment of the existence of such rights under Hungarian law as well as their nature and scope, it then falls to consider whether they are capable of constituting a protected investment for the purposes of Article 1 of the BIT and Article 25 of the ICSID Convention.’).

¹²⁵ The existence of a right is separate from the question whether such right has economic value. See *Nagel v Czech Republic (Final Award)* (SCC Case No 049/2002, 9 September 2003) [164]; *FW-Oil v Trinidad & Tobago* (n 115) [183] (expressing doubts as to whether a contract stipulating only the method in which the final contract should have been negotiated could rank as an ‘investment’).

¹²⁶ *Emmis v Hungary* (ibid) or *Accession Mezzanine v Hungary* (ibid), both dismissed on jurisdictional grounds, since the scope of disputes capable of submission to arbitration under the applicable treaties was limited to expropriation claims only and claimants were found not to have possessed contractual rights that have allegedly been expropriated.

¹²⁷ See eg *En Cana v Ecuador* (n 115), [188] (considering that only if the right existed under domestic law would the Tribunal examine whether that right was actually expropriated by the host State).

¹²⁸ See eg *Case concerning Certain German Interests in Polish Upper Silesia (Merits)* PCIJ (ser A) No 7 (1926), 35ff (the PCIJ recognizing that it was German domestic law that determined the right of ownership in the Chorzow factory); *Mavrommatis Jerusalem Concessions (Greece v UK) (Judgment)* PCIJ (ser A) No 5 (26 March 1925) 29-31 (determining the validity of Mavrommatis’ concessions by reference to Ottoman law); or *Abmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections, Judgment)* ICJ Rep 582 (24 May 2007) [64] (confirming that the direct rights of *associés* or shareholders in relation to a legal person are defined by the domestic law of that State).

¹²⁹ See also *Total SA v The Argentine Republic (Decision on Liability)* (ICSID Case No ARB/04/01, 27 December 2010) [39], for the general recognition that Argentina’s domestic legal principles and provisions were applicable to determine ‘the content and the scope’ of Claimant’s economic rights.

¹³⁰ *Occidental* (n 32), *En Cana v Ecuador* (n 115); or *Marrin Feldman v Mexico (Award)* (ICSID Case No ARB(AF)/99/1, 16 December 2002), [119]-[122].

¹³¹ *Emmis v Hungary* (n 124), *Accession Mezzanine v Hungary* (n 124).

¹³² *FW-Oil v Trinidad & Tobago* (n 115).

¹³³ See eg *Pey Casado* (n 79) [226]-[27]; *Investment v Czech Republic (Award)* (UNCITRAL, 26 June 2009) [191]-[92]; *Saba Fakes* (n 79) [127]-[29].

¹³⁴ *Glamis Gold Ltd v US (Award)* (UNCITRAL NAFTA, 8 June 2009), [37].

¹³⁵ *Apotex* (n 124).

these cases, domestic jurisprudence has readily been resorted to with a view to clarifying contested points of domestic law;¹³⁶ sometimes, investment tribunals even had to consider specific judicial determinations where the putative rights at stake have been subject of adjudication in the courts of the host State or elsewhere.¹³⁷

3.2.3.5. *The Legality of an Investment*

There may be situations when an asset, albeit validly existing under the law of the State recipient of the investment, may nonetheless fail to qualify for protection under the applicable instrument. This may be because the investment fails to satisfy a particular requirement imposed by the instrument itself, or because the manner in which the investment had been *obtained by the foreign investor* is illegal in the more general sense.¹³⁸ The requirements thus imposed may sometimes be considered as mere formalities, such as that an investment be officially registered with, or approved by the host State,¹³⁹ and failure to satisfy them may be fatal to a claim.¹⁴⁰ More commonly, however, investment protection instruments expressly require that an investment be made “in accordance with,” “in compliance with,” or “within the framework of” the laws and regulations of the host State.¹⁴¹ The effect of such provisions is to exclude investments “that should not be protected [...] because they would be illegal”.¹⁴² Legality in this sense refers not to the question whether the investor possessed legal rights relating to the assets in question, but to the validity of the investment as such under international law.¹⁴³

¹³⁶ *Occidental* (n 32), *FW-Oil v Trinidad & Tobago* (n 115); *Pey Casado* (n 79); *Emmis v Hungary* (n 124), *Accession Mezzanine v Hungary* (n 124).

¹³⁷ *Feldman* (n 130), *Investmart* (n 133).

¹³⁸ The question of legality is considered solely to concern the process through which an investor has obtained its investment in the host State, and not the potential illegality of the investor’s conduct in the course of its investment. The latter is expected to be dealt with by means of sanctions available under local law. See *Khan Resources* (n 60) [384]. Furthermore, the question of legality concerns solely the actions of the investor. Failure on the part of the host State’s own organs to comply with domestic law cannot preclude an investor from seeking protection under an investment treaty. See *Ioannis Kardasopoulos v The Republic of Georgia (Decision on Jurisdiction)* (ICSID Case No ARB/05/18, 6 July 2007) [174]-[184] (upholding jurisdiction over treaty claims in spite of the fact that State-owned enterprises had violated Georgian law by exceeding their authority, thus rendering void *ab initio* the joint-venture agreement and the concession that they had entered into with the investor).

¹³⁹ See eg *SPP v Egypt* (n 27) considering the applicability of Egypt’s Foreign Investment Code in light of the withdrawal of approval of the Claimant’s project; or *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria (Decision on Preliminary Objections)* (ICSID Case No ARB/13/20, 29 October 2014) [97]-[104], considering whether registration of an investment with the Investment Promotion Commission was a precondition to arbitral authority under the Nigerian Investment Promotion Commission Act.

¹⁴⁰ See eg *Philippe Gruslin v Malaysia (Award)* (ICSID Case No ARB/99/3, 27 November 2000) where jurisdiction was denied because Claimant’s investment in securities listed on the Kuala Lumpur Stock Exchange did not constitute an approved project as is required by the terms of the applicable BIT; or *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar (Award)* (ASEAN Case No ARB /01/ 1, 31 March 2003), where jurisdiction was denied because Claimant failed to obtain registration of its investment, as required by the ASEAN Investment Agreement.

¹⁴¹ Provisions to such effect can be worded in several different ways and be found in different parts of a treaty or other instrument: in clauses defining the scope of protected investments, in clauses dealing with the promotion and admission of investments, in more general clauses stipulating the scope of an instrument’s application, or even in provisions relating to the standards of protection. See generally, SW Schill, ‘Illegal Investments in Investment Treaty Arbitration’ (2012) 11 *LIPICT* 281, 283ff. See also *Laboud v Congo* (n 27), [327]-[345], where the Tribunal considered the legality of the investment activities in question under Congolese law with a view to ascertaining whether the investment fell within the scope of the Foreign Investment Code, which was applicable to ‘investisseurs nationaux et étrangers exerçant une activité licite’.

¹⁴² *Salini Costruttori S.p.A. and Italstrade SpA v. Morocco (Jurisdiction)* (ICSID Case No ARB/00/4, 31 July 2001) [46].

¹⁴³ See on this *Fraport AG Frankfurt Airport Services Worldwide v Philippines (Award)* (ICSID Case No ARB/03/25, 16 August 2007) [394], rejecting the Claimant’s argument that compliance with host state’s laws would only be of municipal, and not international legal significance: ‘A failure to comply with the national law to which a treaty refers will have an international legal effect.’

Allegations that a foreign investor has not complied with domestic laws of the host state when making its investment have become an important ground on which the jurisdiction of investment tribunals has been challenged. In a handful of investment disputes, tribunals thus also declined jurisdiction over claims because the underlying investments were found not to have been legally made – for example, because of the claimant’s fraudulent misrepresentations in the making of the investment,¹⁴⁴ the claimant’s dissimulation of true ownership,¹⁴⁵ or simply because the transaction by which the claimants obtained ownership of their assets did not comply with domestic law.¹⁴⁶ So far, the scope of the inquiry into investor’s compliance with domestic laws is not yet completely settled. Some investment tribunals have suggested that the inquiry should be limited to violations of certain fundamental principles of law, such as fraud and corruption, which would also amount to violations of international public policy.¹⁴⁷ Others have taken the view that the inquiry should include other violations of the host State’s legal order, although differences have appeared as to whether the subject-matter of the test should be limited solely to laws governing the admission of foreign investments, or whether it entails the assessment of substantive compliance with the totality of host state laws.¹⁴⁸ While the scope of the inquiry has sometimes been based on the particular provisions of the investment instrument in question,¹⁴⁹ the lack of an explicit provision imposing compliance with domestic laws has, on the other hand, not precluded arbitral tribunals from considering such compliance be implicitly required even if not expressly stated in the relevant IIA.¹⁵⁰ Differences of approach have also existed in relation to the standard of review. On the one hand, compliance with domestic laws has been said to constitute an objective requirement that has to be met by each investor, regardless its knowledge of the law or its intention to follow it.¹⁵¹ On the other hand, it has also been suggested that, in case the violation of host state’s laws has been inadvertent and irrelevant to the investment, there were certain presumptions that might ordinarily operate in favor of the investor, especially in circumstances where the local law in question is not entirely clear and mistakes have been made in good faith.¹⁵² In practice, tribunals have often overlooked minor and trivial violations of domestic laws, such as failure to comply with administrative formalities.¹⁵³

¹⁴⁴ For example, *Inceysa Vallisoletana SL v Republic of El Salvador (Award)* (ICSID Case No ARB/03/26, 2 August 2006), [45]-[61], [263]-[264]; or *Plama Consortium Limited v Republic of Bulgaria (Award)* (ICSID Case No ARB/03/24, 27 August 2008) [143].

¹⁴⁵ For example, *Fraport v Philippines* (n 143) [4], [287], [323].

¹⁴⁶ Alasdair Ross Anderson et al v Republic of Costa Rica (Award) (ICSID Case No ARB(AF)/07/3, May 19 2010) [55]-[57].

¹⁴⁷ *LESI v Algeria* (n 103), [83]; *Desert Line Projects LLC v The Republic of Yemen (Award)* (ICSID Case No ARB/05/17, 6 February 2008) [104]; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan (Award)* (ICSID Case No ARB/05/16, 29 July 2008) [319].

¹⁴⁸ See J Hepburn, ‘In Accordance with Which Host State Laws? Restoring the ‘Defence’ of Investor Illegality in Investment Arbitration’ (2014) 5 JIDS 531, suggesting that investors must comply with all host state laws, regardless of importance or subject-matter.

¹⁴⁹ See, eg, *Mr Saba Fakes v Republic of Turkey (Award)* (ICSID Case No ARB/07/20, July 14 2010) 119, where the tribunal considered that, insofar as the legality requirement in that case was contained in the BIT’s admissions clause, it only concerned the question of the compliance with the host state’s domestic laws governing the admission of investments in the host state. See also *Gustav F W Hamster GmbH & Co KG v Republic of Ghana (Award)* (ICSID Case No ARB/07/24, June 18 2010) [127]; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplin v Plurinational State of Bolivia (Decision on Jurisdiction)* (ICSID Case No ARB/06/2, September 27 2012) [263], both confirming the importance of the actual language of the IIA in question.

¹⁵⁰ See *Plama* (n 144), [138]-[139]; *Phoenix Action, Ltd. v. The Czech Republic (Award)* (ICSID Case No. ARB/06/5, 15 April 2009), [101]; *Jan Oostergetel and Theodora Laurentius v The Slovak Republic (Decision on Jurisdiction)* (UNCITRAL, 30 April 2010) [178]; and *Hamster ibid*, [123]-[124].

¹⁵¹ *Alasdair v Costa Rica* (n 146), [52].

¹⁵² *Fraport v Philippines* (n 143), [397].

¹⁵³ See eg *Tokios Tokelés v Ukraine (Decision on Jurisdiction)* (ICSID Case No ARB/02/18, 29 April 2004) [86] (rejecting the illegality objection grounded on Claimant’s purported use of an improper legal title when registering its Ukrainian subsidiary and absence of necessary signatures or notarizations in documents relating to asset procurement and transfer);

The question of an investment's legality is again one of those areas where international legal instruments make *renvoi* to the rules of the domestic legal order, with the consequence that such rules become determinative as to whether an investment will attain the protection of the rules of international law.¹⁵⁴ Considering the central role played by domestic law the appraisal of the legality of an investment, it has not been unusual for the tribunal or one of the disputing parties to resort to domestic judicial decisions either for the purpose of clarifying points of the applicable domestic law, or with a view to rely on particular determinations that appeared to be relevant to the question before the investment tribunal. While investment tribunals have generally had little reservations to looking into domestic jurisprudence to find out how particular statutory provisions have been interpreted and/or applied,¹⁵⁵ they have generally been less forthcoming in accepting any findings and determinations of domestic judicial organs that were invoked as purportedly proving or disproving the legality of a particular investment.¹⁵⁶ Just as they have not been prepared to accept that it would have been exclusively for domestic courts to determine whether the legality requirement has been met.¹⁵⁷

3.2.3.6. Existence of Obligations (for the Purposes of Umbrella Clauses)

Most of the issues discussed above where *renvoi* is made to domestic law essentially fall to be considered as threshold jurisdictional questions. In at least one situation, such *renvoi* is also necessary to determine questions of liability. Today, a considerable number of investment treaties contain provisions demanding that each State party observes any obligations it may have entered into, or otherwise assumed, with regard to investments of the other State party's investors. This type of provisions have been known under a variety of designations, such as "observance of obligations clauses" or "elevators clauses", although the term which has gained most currency is that of "umbrella clauses" given that their primary purpose is to bring obligations that a host State has assumed vis-à-vis a foreign investor under the protective "umbrella" of an investment treaty, by turning their observance into an obligation under international law.¹⁵⁸

Metalpar SA and Buen Aire SA v The Argentine Republic (ICSID Case No. ARB/03/5, Decision on Jurisdiction of 27 April 2006, paras. 72-85 (rejecting objections grounded on Claimants' alleged failure of register their corporate vehicles with the Public Registry of Commerce); *Desert Line Projects LLC v Yemen* (n 147) [104]–[122] (rejecting the objection pertaining to Claimant's alleged failure to formally register its investment and obtain a certificate to that effect from Yemen's General Investment Authority); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award of 8 November 2010, para. 297 (rejecting objections based on the alleged defects in Claimant's paperwork relating to the registration of its investments); or *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplin v. Plurinational State of Bolivia (Decision on Jurisdiction)* ICSID Case No ARB/06/2, 27 September 2012) [280]–[281] (rejecting objections of illegality relating to alleged mistakes in a company's yearly financial statements and the absence of chairman's signatures from a company's shareholders' registry).

¹⁵⁴ cf *Fraport v Philippines* (n 143), [394].

¹⁵⁵ *Fraport v Philippines*, II (Resubmitted) (ICSID Case No ARB/11/12, 10 December 2014); *World Duty Free v Kenya* (n 45), *Niko Resources v Bangladesh Petroleum Exploration and Production Company Ltd and Bangladesh Oil and Gas Mineral Corp* (Decision on Jurisdiction) (ICSID Case No ARB/10/18, 19 August 2013); indirectly also *Metal-Tech v Uzbekistan* (Award) (ICSID Case No ARB/10/3, 4 October 2013).

¹⁵⁶ *Inceysa v Salvador* (n 144); *Fraport v Philippines I* (n 143); but contrast with *Rumeli v Kazakhstan* (n 147); *TSA Spectrum v Argentina (Award)* (ICSID Case No ARB/05/5, 19 December 2008); *Niko Resources v Bangladesh* *ibid*.

¹⁵⁷ See on this also *Quiborax* (n 153), [262] (rejecting the Claimant's assertion that only a Bolivian court could declare that their investment had breached the local law).

¹⁵⁸ The idea of providing an independent, treaty-based protection to contractual and other undertakings entered into by the host State is not of recent vintage. Clauses to such effect are already present in some early investment protection treaties, such as in Article 7 of the Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (signed 25 November 1959, 457 UNTS 21 (entered into force 28 April 1962)). On the historic background of umbrella clauses, see particularly AC Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20(4) *Arbitration International* 411-34.

The protection of the umbrella clause can only be triggered if an obligation exists independently of the investment treaty itself that falls within the ambit of the clause. The type of such obligations depends essentially on the language used in the umbrella clause itself – this can vary from “undertakings given” to “commitments [...] undertaken” or “obligations [...] assumed” in relation to either investors or more broadly investments.¹⁵⁹ The language of the umbrella clause is thus determinative as to whether the clause, for example, applies to rights granted under general legislative instruments, as opposed to solely obligations of a consensual nature, such as contractual ones.¹⁶⁰ But it is not determinative of the existence and scope of the obligation in question, given that the investment treaty in question does not define the content of the relevant “undertaking”, “obligation” or “commitment”.¹⁶¹ Although the idea has sometimes been advanced that the effect of umbrella clauses is to transform contractual obligations into treaty ones,¹⁶² the view seems now to have prevailed that such clauses do not affect the content of the obligation, and neither its proper law.¹⁶³ Rather, the umbrella clause is merely another instance where international law makes *renvoi* to some other law¹⁶⁴ – namely, the law applicable to the obligation in question. Though this could potentially be international law,¹⁶⁵ it is most often the law of the host State as the law applicable to legislative and administrative undertakings, or as the law applicable to the contract. Given the role that domestic law will thus frequently play in relation to the question whether a State was bound, in the first place, by an obligation purportedly falling within the scope of an umbrella clause, it is not surprising that, as in other circumstances described in this chapter, investment tribunals have occasionally had recourse to domestic jurisprudence in determining the existence and scope of particular commitments.¹⁶⁶ Furthermore, domestic judicial decisions have in several cases had a direct bearing on claims

¹⁵⁹ See eg art II(2)(c), Argentina-US BIT (1991) (“Each Party shall observe any obligation it may have entered into with regard to investments”); or art X(2), Philippines-Switzerland BIT (1997) (“Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party”).

¹⁶⁰ See *CMS Gas Transmission Company v. The Republic of Argentina (Decision of the ad hoc Committee on the Application for Annulment)* (ICSID Case No ARB/01/8, 25 September 2007) [95(a)]; or *Tulip Inn (n 115) 448*, expressing reservations about the possibility that general legislative instruments were capable of falling within the scope of obligations envisaged by the umbrella clause.

¹⁶¹ For confirmation of this principle, see eg *Burlington Resources Inc v Republic of Ecuador (Decision on Liability)* (ICSID Case No ARB/08/5, 14 December 2012) [214]; or *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/05/20, 11 December 2013) [417].

¹⁶² See eg *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/01/13, 6 August 2003) [172].

¹⁶³ See *SGS v Philippines (Jurisdiction)* (ICSID Case No ARB/02/6, 29 January 2004) [126] (the clause ‘does not change the proper law of the CISS Agreement from the law of the Philippines to international law’ and ‘addresses not the scope of the commitments entered into with regard to specific investments but the performance of these obligations, once they are ascertained’); and *CMS Gas Transmission Company v The Republic of Argentina (Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic)* (ICSID Case No ARB/01/8, 25 September 2007) [95(c)] (“The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law.”)

¹⁶⁴ *Burlington Resources Inc v Republic of Ecuador (Decision on Liability)* (ICSID Case No ARB/08/5, 14 December 2012) [214] (“an obligation does not exist in a vacuum. It is subject to a governing law. Although the notion of obligation is used in an international treaty, the court or tribunal interpreting the treaty may have to look to municipal law to give it content. This is not peculiar to “obligation” [i.e. as the term is used in the umbrella clause]; it applies to other notions found in investment treaties, e.g. nationality, property, exhaustion of local remedies to name just these.”).

¹⁶⁵ In principle, this can also be international law. See eg *CMS (Annulment)* (n 160) [95(a)].

¹⁶⁶ *Micula* (n 161).

under the umbrella clause since the judgments in questions extinguished or otherwise directly affected the rights purportedly falling within the protection of the clause.¹⁶⁷

3.2.3.7. Other Potential Instances of Renvoi

In light of the principle that resort must be made to the relevant rules of municipal law whenever legal issues arise as to which rights international law has not established its own rules,¹⁶⁸ investment tribunals could arguable make reference to domestic law on all issues not otherwise regulated by the investment treaty itself, or international law in general. One such issue concerns perhaps the interest that investment tribunals are to award as part of compensation. Although the question might be asked whether rules regulating interest actually belong to the category of those where domestic law is applicable by reason of *renvoi*,¹⁶⁹ some investment tribunals pronouncing on claims based on international law nonetheless found it appropriate to revert to the law of the host State in deciding matters such as the type of interest to be awarded, or the period from which interest should accrue, precisely by reference to the absence of detailed rules on such matters in international law.¹⁷⁰ In thus applying domestic law, domestic jurisprudence was sometimes also used as an aid to the proper construction of domestic legal provisions.¹⁷¹

3.2.4. Reliance on Domestic Judgments to Ascertain the Law Relevant to Determining the Factual Predicate of the Claim

Apart from the possibility of an investment tribunal being directed by the parties to apply domestic law, the latter's application may also be necessary to the extent that a particular legal situation under domestic law can be relevant as a *factual predicate* of a treaty claim.¹⁷² Contrary to what the notion of “factual” might suggest in this context, the process of considering domestic law for the purpose of establishing the facts of a breach of international law does not necessarily entail treating domestic law *itself* as mere *fact* – with the consequence that the latter would be

¹⁶⁷ *Liman v Kazakhstan (Award)* (ICSID Case No ARB/07/14, 22 June 2010), *Bosh v Ukraine (Award)* (ICSID Case No ARB/08/11), *Swisslion v Macedonia (Award)* (ICSID Case No ARB/09/16, 6 July 2012), *Arif v Moldova (Award)* (ICSID Case No ARB/11/23).

¹⁶⁸ See *supra* (n 72).

¹⁶⁹ At least with respect to the question of compound interest, the argument may also be made that the matter is nowadays partly regulated by customary international law which permits the awarding of such interest in certain cases. Resort to domestic legal rules in this context could thus be warranted as part of the analysis of relevant State practice. See SM Schwebel, ‘Compound Interest in International’ (2005) 2(5) TDM 1. This is not to deny, of course, that *renvoi* to domestic law on matters of compensation could be effected by the applicable treaty expressly. See eg *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary (Award)* (ICSID Case No ARB/03/16, 2 October 2006) [292], applying Article 4(3) of the Cyprus-Hungary BIT which provides that ‘[t]he amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made.’

¹⁷⁰ cf *SPP v Egypt* (n 45), [222]–[236] (finding no rule of international law that would fix the rate of interest or proscribe limitations on compound interest, and thus applying Egyptian law to determine the rate of interest, the type of interest, and the date from which such interest shall run); *CME v Czech Republic (Final Award)* (UNCITRAL, 14 March 2003), [627]–[642] (finding that neither the applicable treaty nor international law provide for an interest rate to be applied, and thus applying the law of the Czech Republic to determine the period of interest, interest rate, and compound interest).

¹⁷¹ See eg *CME* *ibid*, [631]–[632] (relying on a decision of the Czech Supreme Court in determining the period when interest applies in respect of tort claims in accordance with the Czech Civil Code).

¹⁷² For a restatement at the level of principle, see particularly *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Decision on Annulment)* (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*) (ICSID Case No ARB/97/3, 3 July 2002) [101] (noting that ‘municipal law will often be relevant [...] in assessing whether there has been a breach of the treaty.’); and *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile (Award)* (ICSID Case No ARB/01/7, 25 May 2004) [204] (noting that ‘[t]he breach of an international obligation will need, by definition, to be judged in terms of international law. To establish the facts of the breach, it may be necessary to take into account municipal law.’).

denied its normative character.¹⁷³ Granted, a certain amount of confusion has arisen as to the precise normative function of domestic law in this respect. Some tribunals were adamant in pointing out that it should be applied as law,¹⁷⁴ others treated it as facts,¹⁷⁵ yet others sidestepped the question by claiming they should focus on the conduct itself of domestic organs (without any analysis into the domestic legal framework within which such conduct has occurred).¹⁷⁶ The most convincing approach seems to be to treat the *breach* of domestic law as a fact, but not to consider as such also the law itself that is applied to determine such breach.¹⁷⁷ For, it is difficult to see how domestic law can be taken into account otherwise than being considered as *legal* rules proper. Indeed, even the investment tribunals that otherwise qualified contractual provisions or domestic laws as facts, eventually interpreted and applied them as law (i.e., by referring to them in terms of obligations or by considering the possibility of them being void).¹⁷⁸

The function of domestic law in this respect is *not* that of a norm that determines the propriety of a particular conduct and any ensuing liability; that is left to the standards of treatment prescribed by the investment treaty. The mere fact that domestic law is interpreted and applied as a factual predicate of a treaty breach therefore also cannot be viewed as an excess of a tribunal's powers, for the basis of the claim remains unaltered – that is the treaty.¹⁷⁹ The function

¹⁷³ At a practical level, the treatment of domestic law as facts possibly gives rise to evidentiary issues, for it presupposes that litigating parties would have to prove domestic law as any other facts and that investment tribunals would not have autonomous law-ascertainment duties (in the sense of *iura novit curia*). See *infra* 5.2.3.

¹⁷⁴ *National Grid Plc v The Argentine Republic (Award)* (UNCITRAL, 3 November 2008) [84] (noting that it 'relied upon and applied Argentine law in support of its finding that commitments were made to the investor under Argentine law that gave rise to a claim under the Treaty' and that in doing so, the Tribunal 'dealt with the law of the host State as a matter of law, dispelling the notion that Argentine law may be considered a mere matter of fact').

¹⁷⁵ See eg *Noble Ventures, Inc v Romania (Award)* (ICSID Case No ARB/01/11, 12 October 2005) [53]; *Ioannis Kardassopoulos v The Republic of Georgia (Decision on Jurisdiction)* (ICSID Case No ARB/05/18, 6 July 2007) [146]; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan (Award)* (ICSID Case No ARB/03/29, 27 August 2009) [135]; *Alpha Projektholding GmbH v Ukraine (Award)* (ICSID Case No ARB/07/16, 8 November 2010) [233]; *Valeri Belokon v. Kyrgyz Republic (Award)* (UNCITRAL, 24 October 2014), [195]; or *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro (Award)* (ICSID Case No. ARB(AF)/12/8, 4 May 2016), [159].

¹⁷⁶ See eg *Thunderbird* (n 124), [127] (deciding to examine national conduct as fact, without making pronouncements on the legality of such conduct); *Siemens AG v The Argentine Republic (Award)* (ICSID Case No ARB/02/8, 17 January 2007) [78] ('Argentina's domestic law constitutes evidence of the measures taken by Argentina and of Argentina's conduct in relation to its commitments under the Treaty'); or *Bivater Gauff v Tanzania (Award)* (ICSID Case No ARB/05/22, 24 July 2008) [472] (drawing a distinction between deciding issues relating to the conclusion, performance and termination of a contract and taking into consideration "the facts surrounding" the conclusion, performance and termination of this contract in order to decide the treaty claims).

¹⁷⁷ See *Azurix Corp v The Argentine Republic (Decision on the Application for Annulment)* (ICSID Case No ARB/01/12, 1 September 2009) [151] (considering it necessary 'to apply Argentine municipal law in determining whether there was a breach of obligations under municipal law', but holding that 'any breach of municipal law that might be established would be a fact or element to which the terms of the BIT and international law would be applied'); and in a similar sense also *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile (Decision on Annulment)* (ICSID Case No ARB/01/7, 21 March 2007) [75] ('The meaning of a Chilean contract is a matter of Chilean law; its implications in terms of an international law claim are a matter for international law.')

¹⁷⁸ See *Noble Ventures v Romania* (n 175), [115], [149.5]-[149.6], [153], and [157]-[158] (interpreting and applying the provisions of the relevant contracts as legal provisions); *Kardassopoulos v Georgia* (n 175), [154]-[156] (considering whether the relevant contracts were void *ab initio*); *Bayindir v Pakistan* (n 175), [240]-[243], [251]-[255] (interpreting the contractual provisions as legal rules proper); and *Alpha Projektholding v. Ukraine* (n 175), [362]-[364] (interpreting contractual provisions in a legal sense). See also M Lachs, 'Arbitration and International Adjudication' in Soons et al (eds), *International Arbitration: Past and Prospects* (Martinus Nijhoff 1990) 37, at 50 (for the admonition that, though a Court such as the ICJ will accept the relevant municipal laws and contractual stipulations as facts in the case, it may not be able to avoid constituting and apply them as *law* in reaching its decision).

¹⁷⁹ See *Vivendi (Annulment)* (n 172), [105] ('it is one thing to exercise contractual jurisdiction [...] and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law.');

or *CMS Gas Transmission Company v The Republic of Argentina*, (n 13) [123] (rejecting the proposition that the Tribunal would be exceeding its powers if it were to decide the dispute on the basis of the provisions of the licence, considering that it

of domestic law, rather, is a subsidiary, explanatory one and is simply the consequence of the fact that the conduct that a State undertakes towards an investor arises in the context of legal relationships that are, at the primary level, governed by domestic law. Most typical in this respect are disputes arising out of an underlying contractual relationship, where contractual matters typically have to be taken into account in establishing alleged treaty breaches (3.4.1.). Yet, the need to consider issues of domestic law for the purpose of establishing a violation of international law arises in a great deal of other contexts (3.4.2.). Recourse to domestic law may even be necessary to determine the consequences of an internationally wrongful act (3.4.3.).

3.2.4.1. Contractual Matters relevant to the Treaty Claim

Contracts have always taken an important position in the law on foreign investment. Virtually all international investment transactions are shaped by contracts of some sort. Not to mention that a great deal of foreign investment today still occurs by virtue of State contracts – i.e., contracts that States enter into with foreign investors specifically with a view to attracting private capital and resources in the hope that these will contribute to their economic development.¹⁸⁰ Given the centrality of the contract as a legal instrument through which foreign investment flows are channelled, it is not surprising that contractual rights acquired by foreign investors have long been entitled to protection under international law.¹⁸¹ The protection traditionally afforded to them under customary international law has nowadays been supplemented with more specific guarantees provided for by investment treaties, which invariably treat contractual rights as a form of investment in itself. As a result, it has not been uncommon even for disputes concerning the validity, performance, or termination of investors' contracts – as opposed to disputes arising out of more direct governmental interferences with contractual rights – to eventually become subject of treaty claims.¹⁸² This nexus between contracts and investment treaties notwithstanding, an important characteristic of contracts is that they remain distinct legal instruments subject to their own governing law (the latter is not infrequently the law of the host State as the sole applicable law),¹⁸³ which is why their operation in the investment treaty context gives rise to complex interactions.¹⁸⁴

'must apply the relevant domestic and international law [...], since it has a duty to decide the dispute under Article 42(1) of the [ICSID] Convention'). For the contrary view, see eg *Klöckner* (n 5), [52] (suggesting that the 'application (including the interpretation)' of a contract not otherwise falling within a tribunal's jurisdiction would clearly be outside the scope of the latter's powers).

¹⁸⁰ See JW Salacuse, *The Law of Investment Treaties* (OUP 2010), 164-66; and generally I Alvik, *Contracting with Sovereignty* (Hart Publishing 2011).

¹⁸¹ Contractual rights were either protected as part of the principle of respect for acquired rights, or by virtue of the principle of respect for concluded agreements (*pacta sunt servanda*). Respect of these principles was seen as an essential element of the minimum standard of treatment to which aliens and their property were entitled. Initially, this standard of treatment primarily applied to the physical property of aliens, such as their factories, and related machinery and equipment, but with the increase of foreign investments, it was gradually extended to apply to intangible assets, such as contractual rights. See RY Jennings, *Rules Governing Contracts Between States and Foreign Nationals* (1965) 127-28; and M Sornarajah, *The International Law on Foreign Investment* (CUP 2010) 11. See *Rudloff Case (Interlocutory)* (1903) IX UNRIIA 244, 250, for an early endorsement of the proposition that '[t]he taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property.'

¹⁸² This is not to say that contractual issues could not, under circumstances, have been relied upon to invoke the responsibility of the State under customary international law; though, the availability of investor-State dispute settlement under most investment treaties has increased the chances that contract claims are brought to international arbitration by simply being presented as treaty claims.

¹⁸³ cf *Payment of Various Serbian Loans Issued in France (Judgment)*, PCIJ (ser A) No 20 (12 July 1929) 41 (noting that '[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.')

¹⁸⁴ See *infra* Part 3.

There are several ways in which claims arising out of a contractual relationship can be asserted before an investment treaty tribunal. In the event the applicable investment treaty provides for an umbrella clause, a claim can directly be based on the contract (and, arguably, even concern matters that are fundamentally of a contractual nature, such as those relating to simple non-performance of a contractual obligation). As already discussed in the previous section (3.3.5.), in order to decide such claims, the treaty tribunal will then typically be required to apply domestic law by virtue of the *renvoi* that the treaty's umbrella clause itself makes to the proper law of the contract. The situation is different in the case of treaty claims other than those presented under the scope of an umbrella clause. Just as under general international law, a mere breach of a contract on the part of the State does not *per se* engage the responsibility of the State,¹⁸⁵ so have ordinary contract breaches not been considered sufficient for the showing of violations of, say, the fair and equitable treatment standard, or another treaty obligation. The principle now established in this respect is that only when a State acts *externally* to the contract – usually by undertaking conduct in its sovereign capacity (“*puissance publique*”)¹⁸⁶ – as opposed to acting *internally* to the contract, as a regular, commercial contracting party¹⁸⁷ – a particular breach of contractual obligations can pass the threshold of a treaty violation. Given the capacity of the State to step out of the shoes of a regular contracting party, it has thus been suggested that questions of contractual performance are therefore not relevant to the analysis of treaty claims.¹⁸⁸ In some circumstances, however, the impugned conduct could inseparably be linked to the parties' rights and obligations under the contract. Where a treaty claim is factually grounded on an alleged failure of the host State contracting party to perform its part of the contractual deal, it will be difficult to decide the alleged treaty claims without appreciating the extent of host States obligations and the scope of investor's rights under the contract.¹⁸⁹ Nor will it be possible to ignore the scope and extent of each party's contractual rights where the impugned conduct in question could be justified as a legitimate exercise of a purported contractual right. Indeed, even though the exercise of alleged contractual rights have not been deemed to exclude *per se* the possibility of the conduct in question amounting to a violation of the treaty (considering that a breach of contract is neither a necessary nor a sufficient condition for a breach of treaty),¹⁹⁰ many

¹⁸⁵ For the endorsement of the principle outside the investment treaty context, see eg *Shufeldt Claim (Guatemala/USA) (Award)* (24 July 1930) 2 UNRIAA 1079, 1094-1096, *Jalapa Railroad and Power Co* (1948), reproduced in MM Whiteman, *Digest of International Law*, Vol. 8 (Department of State Publications 1967) 908-09; or *Phillips Petroleum Co v Iran* (Iran-US Claims Tribunal, 21 IUSCTR 79, 29 June 1989) [75]. The principle has generally found support in academic writings. See eg KS Carlston, 'Concession Agreements and Nationalization' (1958) 52 AJIL 260, at 261.

¹⁸⁶ This principle is well-accepted in the jurisprudence of investment tribunals. See eg *Consortium RFCC v Morocco (Award)* (ICSID Case No ARB/00/6, 22 December 2003) [65]; *Joy Mining Machinery Limited v Arab Republic of Egypt (Award on Jurisdiction)* (ICSID Case No ARB/03/11, 6 August 2004) [72], [82]; *Impregilo v Pakistan (Decision on Jurisdiction)* (ICSID Case No ARB/03/3, 22 April 2005) [260], [278]; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan (Award)* (ICSID Case No ARB/02/13, 31 January 2006) [155]; *Siemens v Argentina* (n 176), [248], [254]; *Bivater Gauß* (n 176), [457]-[458]; *Bayindir* (n 175), [444]; *Suez, Sociedad General de Aguas de Barcelona S.A., and Inter-Aguas Servicios Integrales del Agua S.A. v. The Argentine Republic (Decision on Liability)* (ICSID Case No. ARB/03/17, 30 July 2010) [142]; *Azurix Corp v The Argentine Republic (Award)* (ICSID Case No ARB/01/12, 14 July 2006) [53]; *Malicorp Limited v The Arab Republic of Egypt (Award)* (ICSID Case No ARB/08/18, 7 February 2011) [126]; *Vannessa Ventures v Venezuela (Award)* (ICSID Arbitral Tribunal Case No ARB(AF)04/6, 16 January 2013) [209]; or *Vigotop Ltd v Hungary (Award)* (ICSID Case No ARB/11/22, 1 October 2014) [317].

¹⁸⁷ On the distinction between internal and external conduct, see eg *FW-Oil v Trinidad & Tobago* (n 115), [148], [151]. Some authors distinguish instead between commercial and non-commercial acts of a State. See eg S Schwebel, 'On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law' in *Justice in International Law* (CUP 1994), 431-32.

¹⁸⁸ *Vivendi (Annulment)* (n 172), [95] (to the extent that a treaty sets an 'independent standard', a State 'may breach a treaty without breaching a contract, and vice versa').

¹⁸⁹ See thus *MTD* (n 172) [187]-[188]; *Unglaube v Costa Rica (Award)* (ICSID Case No ARB/08/1, 16 May 2012) 187-90.

¹⁹⁰ See generally, *Bayindir v Pakistan* (n 175), [138]-[139]; and particularly *Vigotop* (n 186) [328]-[331] (taking the view that the Respondent could have had public policy reasons to terminate the contract, as well as contractual termination grounds,

investment tribunals proceeded to assess, as a preliminary matter, the conformity of the parties' behavior with the terms of the contract and treated unlawful exercises of contractual remedies as indication of possible treaty breaches.¹⁹¹ Some investment tribunals considered it even unnecessary to examine whether a State took a measure in the exercise of its sovereign powers, if it actually had the right under the contract to act in a certain way.¹⁹² Under any of these approaches, contractual issues had thus been considered and taken into account as *factual predicate* of the treaty claim.¹⁹³ At the end of the day, even the Annulment Committee in *Vivendi* conceded that an investment tribunal will have jurisdiction to base its decision on a contract "at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT,"¹⁹⁴ as it also explained that "it is one thing to exercise contractual jurisdiction [...] and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law."¹⁹⁵

Just as contractual matters remain important to deciding treaty claims, so does domestic law, which is usually the proper law of the contract, remain potentially important to how the contract should be interpreted and applied. And just as in relation to other questions where domestic law issues have had to be considered, so have domestic judicial decisions occasionally played a role in determining contractual matters before treaty tribunals. Thus, it has not been unusual for the latter to turn to domestic jurisprudence with a view to clarifying the scope of

in which case the Tribunal would have had to examine whether the contractual termination was legitimate; for, had the termination constituted an abuse of the contractual right, it would have amounted to a treaty breach).

¹⁹¹ *Bayindir v Pakistan* (n 175), [458] (when determining whether the State had interfered with the investor's contractual rights to an extent amounting to an expropriation, the analysis extended to a review of the 'facts related to contract interpretation and performance', and particularly the exercise of certain contractual remedies); *Suez v Argentina* (n 186), [144]-[145] (noting that 'under certain circumstances, the unlawful exercise of a contractual remedy may support the conclusion that there has been a treaty breach'); *Vigotop* (n 186), [327]-[329] (noting that 'a finding that the termination violated the terms of the Concession Contract or provisions of Hungarian law may be relevant to its expropriation analysis', and particularly that 'a finding that none of the contractual grounds invoked by Respondent were sufficiently well-founded, while not being dispositive of the expropriation question in itself, could indicate that they were merely a pretext designed to conceal a purely expropriatory measure'); *Sergei Panshok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia (Award on Jurisdiction and Liability)* (UNCITRAL, 28 April 2011) [685] ('in analyzing whether Treaty breaches have occurred it may be necessary to analyze whether contractual breaches have occurred and, if so, whether they are of such nature as to come under the ambit of the Treaty provisions.'). cf also *Vanessa Ventures* (n 186), 210 ('Claimant has not shown that Respondent's actions were more than legitimate contractual responses to what the Tribunal considers to be contractual breaches.'). *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II) (Award)* (ICSID Case No. ARB/97/3, 20 August 2007) [7.3.10.] ('it is permissible for the Tribunal to consider such alleged contractual breaches, not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyse and determine whether there has been a breach of the Treaty'). See eg *Swisslion* (n 167), [312]-[314] (placing emphasis on the legality of the termination of a contract between a State entity and an investor in rejecting a claim of expropriation of contractual rights);

¹⁹² *Malicorp* (n 186), [126] (if the State 'had the right to discharge itself from the Contract pursuant to the private law rules governing it, [...] it is unnecessary to examine whether the [State] also took a measure under its public powers (*mesures de puissance publique*), not as a party to the Contract but as a State.').; similarly also *Impregilo SpA v Argentina (Award)* (ICSID Case No ARB/07/17, 21 June 2011) [272]; See, conversely, *Parkerings-Compagniet AS v Lithuania* (ICSID Case No ARB/05/8, 11 September 2007) [445]-[446], where the view was taken that, as there was no evidence of the State having used its sovereign power in terminating the relevant contract, it was 'unnecessary and irrelevant' to ascertain whether the termination breached the contract.

¹⁹³ In addition to precedents noted *supra* fns 174-175, see also *Gemplus S.A., SLP S.A., Gemplus Industrial S.A de CV/Talsud S.A v The United Mexican States (Award)* (ICSID Case No ARB(AF)/04/3, 16 June 2010) [6]-[25] (noting that 'it is clearly necessary for a claimant to recite the factual basis for a treaty breach which may, in appropriate cases, include allegations of fact amounting also to a contractual breach, even if no contractual claim is pursued in the particular BIT arbitration.').; *Vivendi II* (n 191), [7.3.9] (referring to the power of the tribunal to be 'taking the contractual background into account in determining whether or not a breach of the Treaty has occurred.').

¹⁹⁴ *Vivendi (Annulment)* (n 172), [110].

¹⁹⁵ *ibid* [105].

contractual obligations.¹⁹⁶ Even more frequently, perhaps, investment tribunals have been presented with existing determinations on the part of domestic judicial or arbitral organs that had already been called upon to decide certain underlying contractual issues that subsequently seemed of relevance to claims brought pursuant to an investment treaty or concern other violations of international law.¹⁹⁷ Such determinations are often the consequence of contractually prescribed dispute settlement procedures otherwise endowing specific domestic courts with exclusive jurisdiction over contract claims.¹⁹⁸

3.2.4.2. Other Instances where the Domestic Legal Framework is Relevant to the Treaty Claim

Apart from claims arising out of a contractual context, domestic law can be relevant as a factual predicate of treaty claims in many other ways. Suffice it to discuss here the potential role of domestic law in the application of two of the most commonly-invoked standards: the duty to provide fair and equitable treatment (FET) and the prohibition of uncompensated expropriations.

While violations of the FET standard are typically determined through a fact-driven analysis, there are several aspects of the inquiry where consideration of domestic law might be called for. First, an investment tribunal might have to ascertain the general legal framework governing an investment, to the extent that changes to such framework could be considered to frustrate investor's legitimate expectations which are deemed to be protected by this standard.¹⁹⁹ Insofar as an investor's expectations must be predicated on the framework as such to be legitimate, domestic law may also be determinative as to whether expectations of that kind could be deemed to have arisen at all.²⁰⁰ Second, questions of domestic law will typically be considered in determining whether State administrative organs have failed to accord the investor due process in violation of the FET standard,²⁰¹ for example, by using their regulatory powers for improper purposes,²⁰² or otherwise acting arbitrary.²⁰³ Third, some consideration of domestic law will

¹⁹⁶ *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (Arbitral Award) (SCC, 16 December 2003).

¹⁹⁷ See eg *Vigotop* (n 186), *Bivater/Gauff* (n 186), *Malicorp* (n 186), *Swisslion* (n 167), *Liman v Kazakhstan* (n 167), *Bosh v Ukraine* (n 167), or *Arif v Moldova* (n 167).

¹⁹⁸ On the jurisdictional interactions between contractually agreed fora and treaty tribunals, see further *infra* Part 3.

¹⁹⁹ On a narrow approach, legitimate expectations can only be breached in case of changes affecting enforceable legal rights; see eg *LG&E v Argentina (Decision on Liability)* (ICSID Case No ARB/02/1, 3 October 2006) [130]-[134]; or *Suez v Argentina* (n 186), [79]-[80] (finding such breach as a result of legislative changes that had the effect of repudiating rights conferred on the investor through, respectively, a gas distribution license and a water concession). On the broader approach, legitimate expectations can also be breached solely as a result of changes to the general regulatory framework; see eg *Enron v Argentina* (n 13) [262]-[265] (finding a breach of FET as a result of substantial changes to the legal and business framework under which the investment was decided and implemented). For an analysis of different approaches, see J Bonnitich, *Substantive Protection under Investment Treaties* (CUP 2014) 167-94.

²⁰⁰ See eg *Invesmart* (n 133), [348]-[350] (considering that the minister could not have been expected to simply rubberstamp an application for state aid in disregard of the legal framework governing the granting of such aid, and particularly the requirements of EU law).

²⁰¹ See eg *Waste Management, Inc v United Mexican States (II) (Award)* (ICSID Case No ARB(AF)/00/3, 30 April 2004) [98], holding that the minimum standard of treatment of fair and equitable treatment will be infringed by conduct that 'is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety'.

²⁰² See eg *Metalclad v Mexico (Award)* (ICSID Case No ARB(AF)/97/1, 30 August 2000) [79]-[101] (finding a breach of fair and equitable treatment due to the failure to ensure a transparent and predictable framework for the investment, as evidenced by the fact that the Mexican municipality was not justified under Mexican law to deny Claimant the permit for the construction of a hazardous waste landfill); or *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia (Award)* (ICSID Case No ARB99/2, 25 June 2001) [348]-[373] (taking account of the fact that the exercise by the Bank of Estonia of its regulatory powers was in conformity with Estonian law when determining that the revocation of a banking licence did not amount to a denial of due process).

²⁰³ See *Noble Ventures v Romania* (n 175), [178] (the finding that bankruptcy proceedings were initiated and conducted according to domestic law and not against it meant to the Tribunal that arbitrariness had to be excluded).

probably be unavoidable in considering whether a particular judicial decision was so egregiously wrong to amount to a denial of justice and breach the FET standard on that ground.²⁰⁴ This is not to say that domestic illegality is a necessary, let alone sufficient condition for a finding that an investor has not been treated fairly and equitably.²⁰⁵ Still, the fact that an act is at variance with domestic law might be an indication that such act also violated the standard.²⁰⁶

Questions of domestic law can be of no less relevance to determining whether an investment has been expropriated. First, since it is domestic law that governs the creation and extinction of legal rights underlying an investment, the question whether the investor has been deprived of its rights in conformity with domestic law – in circumstances where the law itself and the action implementing it did not fall below international minimum standards – will be determinative as to whether an expropriation occurred. For, where proprietary rights are cancelled in accordance with the applicable rules of domestic law (for example, by decision of a competent court), there are by definition no rights to expropriate.²⁰⁷ Second, domestic law can be relevant to distinguish an indirect expropriation from uncompensable bona fide regulatory action in the public interest or other action falling within the police powers of state, insofar as the exercise of such powers must be conducted in accordance with due process of law.²⁰⁸ Third, to the extent that expropriations are generally permitted under international law if undertaken for a public purpose, in a non-discriminatory way, in accordance with due process and if adequate compensation is paid,²⁰⁹ domestic law can be relevant to distinguishing a lawful expropriation from an unlawful one.

In the analysis of these as well as other standards of treatment, questions of domestic law will not only be of relevance to appraising the conduct of State, but also evaluating the conduct of the investor itself, to the extent that such evaluation might be necessary to ascertain whether the conduct of state organs has been justified.²¹⁰ In some cases, for instance, investor's own

²⁰⁴ See generally chapter 6.

²⁰⁵ cf *ADF Group Inc v United States of America (Award)* (ICSID Case No ARB (AF)/00/10, 9 January 2003) [190] (emphasizing that even if the US agency's measures in that case 'were somehow shown or admitted to be ultra vires under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable [...]. But something more than simple illegality or lack of authority under the domestic law of a State is necessary...'); *Gami Investments, Inc v The Government of the United Mexican States (Final Award)* (UNCITRAL, 15 November 2004) [97]; and *Saluka Investments BV v The Czech Republic (Partial Award)* (UNCITRAL, 17 March 2006) [442].

²⁰⁶ See *Tecmed v The United Mexican States (Final Award)* (ICSID Case No ARB(AF)/00/2, 29 May 2003) [120] ('The Arbitral Tribunal will not review the grounds or motives of the Resolution in order to determine whether it could be or was legally issued. However, it must consider such matters to determine if the Agreement was violated.'). See also *Pantechniki v Albania (Award)* (ICSID Case No ARB/07/2) 94, confirming the general rule that mere error on the part of a court in the interpretation of the national law will not in itself involve responsibility, but that a wrongful application of domestic law may nonetheless provide elements of proof that denial of justice had occurred.

²⁰⁷ See *infra* 7.3.2.4.

²⁰⁸ See generally *Methanex Corporation v United States of America (Final Award on Jurisdiction and Merits)* (UNCITRAL, 3 August 2005) pt IV, ch D, [7] ('as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.'). For an application of the police powers doctrine, see specifically *Saluka* (n 205), [271]-[272] (where Tribunal too into account the legality of the Czech Banking regulator's actions in determining whether the imposition of forced administration of Claimant's bank amounted to an expropriation); and *Chebentura v Canada (Award)* (UNCITRAL, 2 August 2010) [266] (the Tribunal noting that it would find no expropriation *inter alia* because the Canadian Pest Management Regulatory agency acted within its mandate).

²⁰⁹ See eg Article 5, Netherlands-Mongolia BIT (2005).

²¹⁰ See eg *Lauder v Czech Republic (Final Award)* (UNCITRAL, 3 September 2001) [295]-[298], *CMS Gas Transmission Company v The Republic of Argentina* (n 13), [534], or *Tecmed* (n 206), [123]-[124], [162], for instances where account has been taken of the investor's own conduct in considering alleged breaches of investor protection provisions. See generally P Muchlinski, 'Caveat investor? The relevance of the conduct of the investor under the fair

breaches of domestic law seem to have been decisive in leading the tribunal to dismiss alleged violations of the fair and equitable treatment standard.²¹¹ In others, the fact that property was forfeited as a consequence of the investment being engaged in unlawful activities led to the dismissal of an expropriation claim.²¹²

Given the variety of issues where domestic law might be of relevance to pronouncing upon alleged breaches of investment treaty standards, domestic jurisprudence has not seldom been relied upon for the purpose of clarifying the legal framework in which the respondent State's authorities had been operating.²¹³ Furthermore, in many cases where the investor or its investment had already been involved in domestic litigation, consideration had to be given to particular judicial determinations, particularly where these were concerned the scope or existence of domestic legal rights constituting the investor's investment.²¹⁴

3.2.4.3. *Questions of Restitution and Compensation*

Finally, recourse to domestic law as a factual predicate of treaty claims is not only warranted to determining questions of liability, but also to deciding on the appropriate reparation for the injuries caused by conduct not in conformity with host State's obligations under international law. The guiding principle in this regard is that laid down in the *Chorzów Factory* case (1928), which requires that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".²¹⁵ In some cases, reparation can be achieved by eliminating the material consequences of an internationally wrongful act, for example, by way of returning an expropriated property (material restitution); in others, reparation may entail eliminating their juridical consequences, say, through revocation of impugned legislative measures (juridical restitution). Although international law recognizes such forms of restitution as the primary form of reparation, investment tribunals have generally desisted from making awards to such effect,²¹⁶ preferring to award, instead, financial compensation, as the monetary equivalent of restitution. Yet, even in determining the appropriate quantum of such compensation, consideration might have to be given to issues of domestic law, to the extent that compensation will have to reflect

and equitable treatment standard' 55 *International and Comparative Law Quarterly* 527 (2006), 536–56. See also *Oostergetel* (n 150), [176]; and *Hamester* (n 149), [127], confirming that allegations of illegalities in the management and operation of the investment are matters for the merits, as opposed to illegalities allegedly occurring in the making of an investment, which must be considered at the jurisdictional stage.

²¹¹ See eg *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia (Award)* (ICSID Case No ARB/99/2, June 25 2001), [349]–[363]; or *Emilio Agustín Maffezini v The Kingdom of Spain (Award)* (ICSID Case No ARB/97/7, 13 November 2000) [70]–[71].

²¹² See eg *Thunderbird* (n 124), [208] (rejecting an expropriation claim since the investor's gaming facilities constituted illegal gaming equipment under Mexican law).

²¹³ See eg *Occidental* (n 32), or *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (Decision on Track 1B)* (UNCITRAL, PCA Case No 2009-23, 12 March 2015).

²¹⁴ See eg *PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey (Award)* (ICSID Case No ARB/02/5, 19 January 2007), or *Arif v Moldova* (n 167).

²¹⁵ *Factory At Chorzów, Germany v Poland (Claim for Indemnity, Merits, Judgment No 13)* (1928) PCIJ (ser A) No 17, 13 September 1928), 47.

²¹⁶ For rare exceptions, see eg *Antoine Goetz et Consorts v République du Burundi (Award)* (ICSID Case No ARB/95/3, 10 February 1999) (Embodying the Parties' Settlement Agreement) [135] (ordering the repealing of a Ministerial Ordinance and restoration of an Enterprise Certificate as an alternative to the payment of compensation); or *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan (Award)* (ICSID Case No ARB/08/2, 18 May 2010) [121]–[133] (ordering the reinstatement of Claimant's contractual right to arbitrate). See also *Nykomb* (n 196), 39 (considering juridical restitution of repealed provisions of Latvian law ensuring investor the right to the double tariff as a conceivable remedy); or *Ioan Micula* (n 161) [880] (where Claimant initially demanded restitution of the legal framework as in force at the time of the approval of the impugned Romanian regulation; however, the claim for restitution was dropped at the beginning of the merits phase).

the legal position that an investor would have been in “but for” the wrongful act.²¹⁷ Particularly illustrative in this respect is the award in *Chevron v. Ecuador* (2010), where the Tribunal deemed it necessary to step into the shoes of a “competent, fair, and impartial Ecuadorian court” in determining the quantum of damages, inasmuch as such damages corresponded to the amounts of the domestic contractual claims for which Claimants had previously failed to obtain proper consideration by Ecuadorean courts, in violation of the Ecuador-U.S. BIT.²¹⁸

Again, considering the role that domestic law plays in determining the domestic juridical consequences of an internationally wrongful act, there is little doubt that domestic jurisprudence will occasionally be of relevance to ascertaining the content of the applicable legal rules, and that occasionally even particular judgments will have to be considered in view of specific determinations that are relevant to establishing the situation that would have existed “but for” the wrongful act.²¹⁹

3.3. Factual Import of Domestic Judicial Determinations

Apart from the specific functions that judicial decisions play in the process of law ascertainment as such, judgments emanating from domestic courts can also be of interest from a purely *factual* perspective. This can be so, on the one hand, because domestic courts have made specific *determinations of fact* that are relevant to the issues to be decided by the investment tribunal. In this sense, it has not been unusual, for example, for investment tribunals to rely on particular judicial findings in determining whether the conduct of a particular state organ was reasonable or otherwise justified (as opposed to the narrower issue of the conduct’s legality as such).²²⁰ It can also be so because the judgment in question records a particular standpoint taken by one or both of the litigating parties, which standpoint may consequently be of factual interest to the investment tribunal.²²¹ On the other hand, the judgments themselves might give rise to particular *factual consequences* at the international level that will have a bearing on the claim as such.²²² In some cases, for example, the effects of domestic judgments have turned out to be of relevance certain threshold questions of jurisdiction.²²³ In others, the outcome of domestic judicial proceedings was

²¹⁷ See eg *Nykomb* (n 196), 39-40 (where compensation was calculated by reference to the missing payments resulting from the refusal to comply with the contractually established tariff).

²¹⁸ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (Partial Award on the Merits) (UNCITRAL, PCA Case No 34877, 30 March 2010), [375]; also [377], [379].

²¹⁹ *ibid*, [436], [465].

²²⁰ See eg *CME v Czech Republic (Partial Award)* (UNCITRAL, 13 September 2001) [532] (referring to the outcome of domestic judicial proceedings as an illustration that the changes imposed on Claimant’s investment structure by the Czech media regulatory body led to unacceptable legal and commercial risks, thus violating the standards imposed by the applicable BIT); *Teemed* (n 206), [147] (using the fact that the Mexican courts have not identified any social crisis as evidence that the refusal to renew an operating permit could not have been justified as being a legitimate response to an emergency situation); or *Rompotrol v Romania (Final Award)* (ICSID Case No ARB/06/3, 6 May 2013), [256]-[261] (relying on the Romanian Supreme Court’s findings that the interceptions of Claimant’s telephone conversations by intelligence services were not justified by national security considerations in considering whether such interceptions violated investment treaty provisions).

²²¹ See eg *Khan Resources v Mongolia* (n 60), [338], [315], [337], and [355] (the Tribunal relying not only on certain findings of fact made by Mongolian administrative courts in deciding on the legality of the invalidation of Claimant’s licenses, but also on the arguments advanced in proceedings before those courts by certain state agencies, as well as the general attitude adopted by these agencies in relation to the final judicial outcome).

²²² As already noted in the Introduction, this is because domestic judicial decisions can simply be treated as instances of conduct on the part of an organ of the State. See further the discussions in Part 2.

²²³ See eg *Province of East Kalimantan v PT Kaltim Prima Coal et al (Award on Jurisdiction)* (ICSID Case No ARB/07/3, 28 December 2009) [196]-[198] (considering whether a judgment of the Central Jakarta District Court could have amounted to an implied designation of the Indonesian Province of East Kalimantan within the meaning of art 25(1) of the ICSID Convention, which was relevant to the question of Claimant’s standing); or *Empresas Lucchetti, SA and Lucchetti Peru, SA v Peru (Award)* (ICSID Case No ARB/03/4, 7 February 2005) [50]-[57] (considering whether a set of judgments previously

relevant to the issue of liability, particularly where a domestic judgment led to the reversal of the adverse effects that a particular conduct of State organs or agencies might have had on the investor.²²⁴ In other cases again, the outcome of domestic judicial proceedings was relevant to the amount of compensation.²²⁵

3.4. Conclusions

As the present overview more than amply demonstrated, whilst the process of internationalization of the standards of treatment in principle disposed of the material need for investment disputes to be dealt with and resolved at the level of the domestic legal system, it did not dispose entirely of the need to deal with issues of domestic law. International investment law today operates in a complex relationship with other sources of law, including domestic law, with the necessary consequence that investment tribunals are thus not in a position to entirely ignore domestic judicial pronouncements interpreting and applying that law. Indeed, as the preceding overview of the jurisprudence of investment tribunals demonstrates, domestic judicial pronouncements can be of relevance in a variety of contexts, and in relation to a diversity of issues. The next two chapters proceed now to more closely examine how investment tribunals have actually approached the findings and pronouncements of domestic judicial bodies when these were relevant to the issues before them. Building on the idea that judgments generate effects on both the concrete and the abstract level,²²⁶ the next chapter first explores the effects that international investment tribunals have traditionally conceded to concrete domestic courts' pronouncements pertaining to the investor and/or investment in question. Thereafter, Chapter 5 will examine the treatment of domestic jurisprudence more generally in the law ascertainment process.

rendered in Claimant's favour by Peruvian courts had the effect of ending the investor's dispute with the municipality so that a subsequent revocation of the investor's operating licence had to be treated as having generated a new dispute for the purpose of determining whether such dispute arose after the investment treaty's entry into force).

²²⁴ See eg *Saluka* (n 205), [495]-[496] (the successful outcome of domestic judicial proceedings was taken to mean that the investor was no longer aggrieved and thus no treaty breach was found on account of denial of justice); *Eastern Sugar v Czech Republic (Partial Award)* (SSC Case No 088/2004, 27 March 2007) [281]-[287] (the striking down of a regulatory decree by the Czech Constitutional Court meant that the effects of the impugned measure had not lasted long enough to violate the treaty); or *Achmea BV (formerly known as 'Eureko BV') v The Slovak Republic (Final Award)* (PCA Case No 2008-13, 7 December 2012) [288]-[293] (the fact that the imposition of a ban on profits of private health insurance companies was later reversed by Slovakia's Constitutional Court was a reason to find that no expropriation had taken place, since the deprivation of Claimant's investment was only a temporary one). cf also *CME* (n 220) [607] (the fact that a prospective decision of Czech Supreme Court would not have had the effect of reinstating the status quo ante was reason to conclude that the investment was expropriated).

²²⁵ To the extent, for example, that the investor has already received remedies through domestic judicial proceedings, the outcome of the latter might have – in view of the principle of no double recovery – an impact on the quantum of compensation. See *CME* (n 220) [525], but also *CME Czech Republic B.V. v. The Czech Republic (Final Award)* (UNCITRAL, 14 March 2003), [489]; *EDF/Saur v Argentina (Decision on Jurisdiction)* (ICSID Case No ARB/03/23, 5 August 2008) [220]; *Wena v Egypt* (n 13) [49].

²²⁶ See *supra* I.3.

4. THE LEGAL EFFECTS OF SPECIFIC JUDICIAL DETERMINATIONS

The present chapter looks into the concrete consequences that domestic judicial pronouncements may have in subsequent proceedings before international investment tribunals, because they either relate to the particular investor or its investment. The primary purpose is to establish what normative effects, if any, investment tribunals have been prepared to concede to such pronouncements when these appeared to be of relevance to the points of law and/or fact that they were required to decide. To that end, the chapter inquires, not only into whether investment tribunals have considered themselves bound by domestic judicial pronouncements, but – looking beyond the pure question of bindingness – examines also the factors that seemed to have generally affected the tribunals propensity to accept determinations made by domestic judicial organs without wishing to revisit them. Bearing in mind the difficulties pertaining to the application of the principle of *res judicata* in the context of the domestic/international divide,¹ the intention is to establish the extent to which domestic judicial pronouncements may operate at least in the form of issue preclusion (*i.e.*, as preventing a specific issue to be re-litigated before an investment tribunal).²

The chapter begins by taking stock of those circumstances in which investment tribunals decided to ignore existing judicial pronouncements, and those in which they accorded, or were prepared to accord them some weight (4.1.). Thereafter, it explores the arguments advanced by investment tribunals in justifying their refusal to accept the binding effects of domestic judicial determinations (4.2.); or conversely, arguments explaining their propensity to accept such determinations (4.3.). Finally, the chapter attempts to single out certain factors that seemed to have had a bearing on the tribunal's acceptance of specific judicial determinations aside from purely legal considerations as to the binding effects of such determinations (4.4.).

4.1. Relevance of the Context? Mapping the Circumstances in which Weight was (not) Accorded to Domestic Judicial Pronouncements

With a view to determining the extent to which the acceptance of domestic judicial pronouncements may be context-dependent, the chapter begins by mapping the circumstances in which investment tribunals decided to ignore existing judicial pronouncements, and by disaggregating them from those in which they accorded, or were prepared to accord them some weight in deciding the issues before them. For ease of exposition, a distinction will be made between cases where domestic judicial pronouncements were primarily relevant on account of findings of law, and those where domestic judicial processes were primarily of factual relevance. Both categories are understood here broadly, however. In relation to points of law, domestic judgments could namely have been relevant on account of the application of domestic law to the situation of the particular investment/investor, but equally due to specific interpretations of points of domestic law that had previously been made more generally with regard to the measure that was impugned by the investor. On the other hand, domestic judgments could have been of factual relevance because they themselves constituted a relevant fact, because they provided for certain findings of fact that were relevant to the international claim, or because they otherwise

¹ See *supra* 1.4.2.

² The potential of domestic judgments operating in the form of claim preclusion, instead, will more closely be studied in Part III.

attested to the conduct of the parties that possibly had a bearing in the proceedings before the investment tribunal.

4.1.1. Domestic Court's Findings of Domestic Law

Where points of domestic law were at issue in arbitration proceedings, investment tribunals generally differed in the extent to which they were prepared to accept domestic courts' pronouncements on those points. As the following sections will demonstrate, from a comparative perspective, arbitrators have probably had the greatest misgivings about accepting pronouncements that seemed to put into doubt the existence or scope of their adjudicatory powers. Where such pronouncements had a bearing on the merits of the claims that were pending before them, in contrast, the arbitrators approach towards them has somewhat varied.

4.1.1.1. *Judicial Pronouncements Relevant to Determining the Existence or Scope of Tribunal's Jurisdiction*

There are essentially two types of situations where domestic law can have a bearing on the existence or scope of the tribunal's adjudicatory powers: those where such law is directly applicable as the law governing the arbitration agreement, and those where such law finds indirect application by virtue of *renvoi*. In both types of situations, investment tribunals expressed great resistance towards courts' findings of law that, if given effect, would have impinged upon the existence or scope of their adjudicatory powers.

The tribunals' reluctance in this respect can be observed in many of the cases where their jurisdiction was based on domestic foreign investment codes and those instruments happened to already have been the subject of domestic judicial interpretations. Thus, in *Mobil v. Venezuela* (2010) and several other arbitrations brought against Venezuela pursuant to its Law on the Promotion and Protection of Investments, investment tribunals steadfastly refused to take into account a prior decision of Venezuela's Supreme Court, in which the said law had been interpreted as not providing the requisite consent to arbitration within the meaning of Article 25 of the ICSID Convention.³ In *Petrobart v. Kyrgyz Republic* (2003), the Tribunal similarly left aside judgments of the Bishkek City Court which the disputing parties invoked with a view to demonstrating or disproving that Claimant qualified as a foreign investor and made an investment within the meaning of the Kyrgyz Foreign Investment Law, which the Claimant relied on as the jurisdictional basis in the UNCITRAL Arbitration that it had brought against the Kyrgyz Republic.⁴

A similar reluctance could also be observed in relation to other jurisdictional challenges where domestic law had to be considered by virtue of *renvoi*, such as where the investment's legality, the existence of a protected property right, or the investor's nationality had been put into question. Most unwavering in this respect has probably been the tribunals' stance towards prior judicial findings or determinations which either the claimants or the respondents have invoked

³ See *Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana De PetroLeos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana De PetroLeos, Inc v Bolivarian Republic of Venezuela* (Decision of Jurisdiction) (ICSID Case No ARB/07/27, 10 June 2010); *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela* (Decision on Jurisdiction) (ICSID Case No ARB/08/15, 30 December 2010); *Brandes Investment Partners, LP v Bolivarian Republic of Venezuela* (Award) (ICSID Case No ARB/08/3, 2 August 2011); *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, et al v The Bolivarian Republic of Venezuela* (Decision on Jurisdiction) (ICSID Case No ARB/10/5, 8 February 2013); *OPIC Karimum Corporation v The Bolivarian Republic of Venezuela* (Award) (ICSID Case No ARB/10/14, 28 May 2013); *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela* (Decision on Jurisdiction and Merits) (ICSID Case No ARB/07/30, 3 September 2013); and *Highbury International AVV and Ramstein Trading Inc v Bolivarian Republic of Venezuela* (Award) (ICSID Case No ARB/11/1, 26 September 2013).

⁴ *Petrobart Limited v Kyrgyz Republic (Award)* (13 February 2003) Published in 13 ICSID Rep 337 (2008), section 5.3.3.2., 40-41.

with a view to proving or disproving the legality of a particular investment. Thus, in *Inceysa v. El Salvador* (2006), the first case where jurisdiction has actually been declined on account of the illegality of the underlying investment, the Tribunal made clear that it will not accept, without more, the pronouncements of El Salvador's Supreme Court of Justice which Claimant invoked to prove the validity and legality of the bidding process through which it obtained the relevant concession.⁵ In a similar way, the Tribunal in *Fraport v. Philippines* (2007) refused to give weight to the outcome of domestic criminal proceedings in determining whether the Claimant had structured its investment in a way that violated Philippine legislation prohibiting foreign investors from controlling local utilities companies, in spite of the fact that those domestic proceedings actually concerned alleged violations of the same legislation.⁶ And neither did the Tribunal in *Ares v. Georgia* (2008) accept the eventual invalidation of the investor's share purchase agreement by Georgian courts as necessarily conclusive of the question whether the acquisition of Claimants' investment had been effected in accordance with Georgian law.⁷ The fact that it was the investor who invoked a prior domestic judgment to prove the legality of its investment, or that it was the host State who relied on such a judgment in proving the illegality of an investment, did not seem to make much of a difference in these cases.

Furthermore, in several other cases where questions of domestic law had to be considered on account of *renvoi*, tribunals expressed themselves not inclined, as a matter of principle, to obediently accept prior domestic judicial determinations. In relation to the issue of nationality, for example, the Tribunals in *Soufraki v. UAE* (2004), *Siag and Vecchi v. Egypt* (2007), and *Pey Casado v. Chile* (2008) all rejected, in more or less similar terms, the possibility that the decisions of domestic authorities would be binding on them.⁸ Similarly, in a situation where the possession of proprietary rights was disputed, the Tribunal in *Emmis v. Hungary* (2014) took the view that decisions of municipal courts arising directly out of the same set of facts would not be necessarily dispositive of the question before an international tribunal.⁹

This is not to say that there were no cases where investment tribunals, in the context of some jurisdictional challenges, were nonetheless prepared to accord weight to prior pronouncements of domestic courts or other contractually-designated fora. For example, in *Invesmart v. Czech Republic* (2009), where the investor was claimed never to have acquired beneficial ownership of the shares in a Czech banking group as a result of its alleged failure to fulfil commitments that it agreed to in the share purchase agreements, the Tribunal relied on three Czech court decisions – each confirming the share purchase agreements as valid and the claimant's obligations thereunder as enforceable – in concluding that Claimant did appear to have become the legal owner of the shares, and thus possessed an investment qualifying for protection under the applicable BIT.¹⁰ And in *Saluka v. Czech Republic* (2006), the Tribunal had no hesitation to accept prior determinations made in the context of domestic contractual arbitration proceedings when pronouncing itself on the legality of the purchase of shares representing the protected investment in that case. In a few other cases, furthermore, investment tribunals seemed

⁵ *Inceysa Vallisoletana SL v Republic of El Salvador* (Award) (ICSID Case No ARB/03/26, 2 August 2006), [212]-[18].

⁶ *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* (Award) (ICSID Case No ARB/03/25, 16 August 2007) [357]-[92].

⁷ *Ares International Srl and MetaGeo Srl v Georgia* (Award) (ICSID Case No ARB/05/23, 28 February 2008) [5.4.13]-[5.4.38].

⁸ *Soufraki v The United Arab Emirates* (Award) (ICSID Case No ARB/02/7, 7 July 2004) 55; *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* (Jurisdiction) (ICSID Case No ARB /05/15, 11 April 2007) [150]; *Victor Pey Casado and President Allende Foundation v Republic of Chile* (Award) (ICSID Case No ARB/98/2, 8 May 2008) [319].

⁹ *Emmis v Hungary* (Award) (ICSID Case No ARB/12/2, 16 April 2014) [176].

¹⁰ *Invesmart v Czech Republic* (Award) (UNCITRAL, 26 June 2009) [182], [192]-[193].

prepared to accept domestic judicial pronouncements on points of domestic law, had these eventually been made,¹¹ or at the least left such possibility open.¹²

4.1.1.2. *Judicial Pronouncements Relevant to the Determining the Merits of the Claim*

A less clear picture emerges with respect to situations where domestic law issues were relevant to the merits of the claims before investment tribunals. On the one hand, it is possible to submit that, in circumstances where prior judgments involving the investor and/or its investment were relevant in view of specific pronouncements on points of domestic law (i.e., in that they furnished certain interpretations of the applicable rules of domestic law), investment tribunals have largely accepted such pronouncements. In *Feldman v. Mexico* (2002), for example, the Tribunal expressed no reservations as to the pronouncements of Mexico's Supreme Court in an *Amparo* action brought by Claimant's subsidiary with regard to the Mexican Law relating to the excise tax on products and services, and in fact relied on them in determining whether the subsidiary was entitled to tax rebates on exported cigarettes.¹³ Nor was the Tribunal in *Unglaube v. Costa Rica* (2012) willing to set aside or otherwise ignore certain interpretations of the National Park Law that Costa Rica's Supreme Court had advanced in prior proceedings involving the investor, in spite of the fact that such interpretations were criticized for creating uncertainty regarding the legal status of Claimants' properties.¹⁴ And on the level of principle, other tribunals, too, expressed their willingness to give weight to domestic judicial determinations on certain points of law, were that necessary to determining issues before them.¹⁵

A greater divergence of approaches can be observed, however, in cases where the domestic judicial pronouncements in question concerned, not so much specific points of domestic law, but the propriety as such of the conduct of host State authorities. In some cases, investment tribunals completely ignored issues previously decided by domestic courts and determined for themselves the propriety of the host State's conduct. In *AMCO v. Indonesia* (1984), for example, the Tribunal flatly rejected the proposition that it was bound to follow the findings that courts of Jakarta had made in a contract-related suit brought against Amco's local subsidiary, in the context of which the courts also found that Amco's subsidiary breached its investment application and license, and other regulations issued by the Foreign Investment Board. The

¹¹ See eg *Generation Ukraine v. Ukraine (Award)* (ICSID Case No ARB/00/9, 16 September 2003) [9.1]-[9.3] (while the validity of Claimant's shareholding of an Ukrainian corporate vehicle was challenged on the ground that the company's registration was formally defective due to its foundation agreement being improperly signed, the Tribunal concluded that, since under Ukrainian law a legal entity's formal state registration could only be annulled by decision of a competent Ukrainian court, in the absence of such decision, the existence of Claimant's corporate vehicle had to be accepted as effective); or *Alpha Projekt Holding v. Ukraine Alpha (Award)* (ICSID Case No ARB/07/16, 8 November 2010) [294]-[295] (in response to Respondent's challenge that Claimant purportedly failed to re-register certain investments, the Tribunal placed emphasis on the fact that Respondent had not produced any court or administrative decision demonstrating the impropriety of the registration documents that were filed by the Claimant, and hence the illegality of the investment).

¹² See eg *TSA Spectrum v. Argentina (Award)* (ICSID Case No ARB/05/5, 19 December 2008) [16]-[18], and [175]-[76] (The Tribunal explaining that, in the absence of other jurisdictional hurdles that otherwise led to the dismissal of the claim in that case, it would have considered joining the assessment of the investment's legality to the merits of the case, given that at the time of the arbitration, the domestic criminal investigation into the alleged irregularities in the bidding process through which Claimant obtained its concession contract were still ongoing. The Tribunal thus suggested that it might have drawn on domestic judicial proceedings had these ended in convictions.)

¹³ *Marrin Feldman v. Mexico (Award)* (ICSID Case No ARB(AF)/99/1, 16 December 2002), [119]-[122].

¹⁴ *Marion Unglaube v. Republic of Costa Rica (Award)* (ICSID Case No ARB/08/1, 16 May 2012) 251-53.

¹⁵ See eg *Emilio Agustín Maffezini v. The Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/97/7, 25 January 2000) [82], expressing the view that 'a domestic determination, be it legal, judicial or administrative, as to the juridical structure of an entity undertaking functions which may be classified as governmental, [...] it is to be given considerable weight'.

Tribunal proceeded to consider for itself the question of the legality of the license revocation.¹⁶ Similarly, in determining whether certain amendments to the law on health insurance companies amounted to an act of expropriation, the Tribunal in *EURAM v. Slovak Republic* (2012) did not consider itself formally bound by the judgment of Slovakia's Constitutional Court that had previously found those amendments to be unconstitutional, and which the Claimant therefore maintained to have already amounted to a finding that its investment was the subject of an unlawful expropriation.¹⁷

Greater variance can then be found in the treatment of prior domestic pronouncements or determinations in relation to matters that were the subject of contractual arrangements between the investor and the host State or its authorities. In cases such as *Wena v. Egypt* (2000),¹⁸ *Bivater Gauff v. Tanzania* (2008),¹⁹ *Chevron v. Ecuador* (2010),²⁰ or *Malicorp v. Egypt* (2011),²¹ or *EDF/SAUR v. Argentina* (2012),²² for example, investment tribunals entirely ignored the findings of contractually-designated fora or competent courts with respect to contractual issues, or matters relating thereto, when deciding treaty claims arising out of the relevant contractual relationship. In *Helnan v. Egypt* (2008), *MMEA v. Niger* (2013), or *Vigotop v. Hungary* (2014), in contrast, tribunals did consider and take into account such findings when deciding on the respective treaty claims.²³

Finally, investment tribunals have been most receptive of prior judicial findings when these pertained to the existence of particular contractual (and other domestic law) rights. In *Azinian v. Mexico* (1999), the termination of Claimants' concession contract was thus not considered to amount to an expropriation given that three levels of Mexican courts determined that the contract was invalidated in accordance with Mexican law.²⁴ In *Liman v. Kazakhstan* (2010), the claims under the umbrella clause could not be upheld since Claimant could not validly invoke rights from a license contract after the Kazakh courts had lawfully invalidated a previous transfer of the License from another entity to the Claimant.²⁵ Nor could the umbrella clause claims be upheld with respect to alleged breaches of the Kazakh Foreign Investment laws, insofar as the Kazakh courts had already validly decided on the application of those laws.²⁶ Similarly, in *Bosh v. Ukraine* (2012) and *Swisslion v. Macedonia* (2012), the claims under the umbrella clause failed in

¹⁶ *Amco Asia Corporation and others v Republic of Indonesia (Award)* (ICSID Case No ARB/81/1, 20 November 1984) [132]-[139], [141]. This can be contrasted with the Tribunal's approach to the interlocutory decrees issued by the courts of Jakarta that granted permission to the local contractual partner to manage the hotel pending the final outcome of the domestic proceedings, which were actually considered by the Tribunal with a view to establish whether they could have the effect of retroactively legitimizing an otherwise illegal seizure of the hotel (see [173]-[176]).

¹⁷ *European American Investment Bank AG (EURAM) v Slovak Republic (Award on Jurisdiction)* (UNCITRAL, 22 October 2012) [389ff].

¹⁸ *Wena Hotels Ltd v Arab Republic of Egypt (Award)* (ICSID Case No ARB/98/4, 8 December 2000), [60]-[62].

¹⁹ *Bivater Gauff v Tanzania (Award)* (ICSID Case No ARB/05/22, 24 July 2008) [471]-[473].

²⁰ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Partial Award on the Merits)* (UNCITRAL, PCA Case No 34877, 30 March 2010), [376], [377].

²¹ *Malicorp v Egypt (Award)* (ICSID Case No ARB/08/18, 7 February 2011) [103], [130].

²² *EDF/SAUR v. Argentina (Award)* (ICSID Case No ARB/03/23, 11 June 2012) [1130]-[1136].

²³ *Helnan International Hotels A/S v Arab Republic of Egypt (Award)* (ICSID Case No ARB/05/19, 3 July 2008), [108]-[125], [150]ff; *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger (Award)* ICSID Case No ARB/11/11, 15 July 2013) [118]-[127]; *Vigotop Ltd v Hungary (Award)* (ICSID Case No ARB/11/22, 1 October 2014) [509], [534]ff.

²⁴ *Azinian, Davitian and Baca v The United Mexican States (Award)* (ICSID Case No ARB(AF)/97/2, 1 November 1999) [96]-[97].

²⁵ *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan (Award)* (ICSID Case No ARB/07/14, 22 June 2010) [442]-[443].

²⁶ *Ibid.*, [450].

circumstances where the relevant contractual rights were validly terminated by domestic courts.²⁷ In *Arif v. Moldova* (2013), the claims for expropriation and violations of the umbrella clause both failed insofar as the relevant contracts had been irrevocably annulled by the whole of the Moldovan judicial system.²⁸

4.1.2. Domestic Courts' Findings of Fact

From a general perspective, investment tribunals have had fewer misgivings about taking account of domestic judgments from purely a factual perspective. In this respect, domestic judgments were capable of having a factual bearing on the international proceedings in three ways: the judgment as such constituted a relevant fact; the courts' pronouncements on facts were relevant to the international claim; or the conduct of the parties in the domestic litigation had a bearing on the proceedings before the investment tribunal.

4.1.2.1. *Judgments as Relevant Facts*

In several cases, the *judgments as such* were treated as a relevant fact. The tribunals' attitude in this respect has somewhat varied. In *Luchetti v. Peru* (2005/2007), for instance, the ICSID Tribunal and subsequently the Annulment Committee expressed strong reservations as to whether the fact that a Peruvian judgment obtained *res judicata* effect under Peruvian law necessarily implied that such judgment actually resolved a dispute between the investor and the local municipality.²⁹ In contrast, in *East Kalimantan v. Kaltim Prima Coal* (2009), the Tribunal was prepared to accept that a judgment of the Jakarta District Court could have amounted in an implied designation of the Province of East Kalimantan as a constituent subdivision of Indonesia entitled to appear before the ICSID Centre in accordance with Article 25 of the ICSID Convention.³⁰

In other cases, it was the *factual situation resulting from a particular judgment* that was of relevance to the Tribunal. In *CME v. Czech Republic* (2001), for instance, the outcome of domestic civil law court proceedings was taken as an illustration that the changes imposed on Claimant's investment structure by the Czech media regulatory body led to unacceptable legal and commercial risks, thus violating the standards imposed by the applicable BIT.³¹ Then again in other cases, it was the *attitude of other host State's authorities towards a domestic judgment* that was taken into account in deciding an international claim. In *PSEG v. Turkey* (2007), for instance, the Tribunal put emphasis on the fact that, on the one hand, Turkey's Constitutional Court upheld the Claimants' contractually acquired rights as lawful, while on the other hand, the Ministry of Energy and Natural Resources simply ignored them, in concluding that the inconsistent conduct on the part of various Turkish organs breached the standard of fair and equitable treatment.³² In *Siag v. Egypt* (2009), on the other hand, the fact that the Ministerial resolution effecting the formal transfer of ownership of the investors' land was subsequently quashed by Egypt's administrative courts was reason for the Tribunal to conclude that the expropriation had not followed proper

²⁷ Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine (Award) (ICSID Case No ARB/08/11, 25 October 2012) [258]-[259]; and Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia (Award) (ICSID Case No ARB/09/16, 6 July 2012) [265]-[275], and [323]-[325].

²⁸ Mr Franck Charles Arif v Republic of Moldova (Award) (ICSID Case No ARB/11/23, 8 April 2013) [398].

²⁹ *Empresas Lucchetti, SA and Lucchetti Peru, SA v Peru* (Award) (ICSID Case No ARB/03/4, 7 February 2005) [50]-[56]; *Empresas Lucchetti, SA and Lucchetti Peru, SA v Peru* (Decision on Annulment and Dissenting Opinion) (ICSID Case No ARB/03/4, 5 September 2007) [87]-[88].

³⁰ *East Kalimantan v. Kaltim Prima Coal* (Award on Jurisdiction) (ICSID Case No ARB/07/3, 28 December 2009), 196-198.

³¹ *CME v Czech Republic (Partial Award)* (UNCITRAL, 13 September 2001) [532].

³² *PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey* (Award) (ICSID Case No ARB/02/5, 19 January 2007) [249].

legal procedures.³³ Furthermore, the conclusions arrived at in those proceedings by the Egypt's Supreme Administrative Court supported the view that Claimants had not been afforded due process.³⁴ Both determinations were relevant to the Tribunal's conclusion that Respondent failed to meet the cumulative conditions required for lawful expropriation under the applicable BIT.

4.1.2.2. *Judicial Findings of Fact*

In several cases, investment tribunals have proceeded to accept particular *findings of fact* that domestic courts had made in domestic judicial procedures. Thus, certain findings of fact have often been relied upon to determining whether the conduct of other state organs was reasonable or otherwise justified (as opposed to the narrower question whether it was legal as such). In *Tecmed v. Mexico* (2003), the fact that the Mexican courts have not identified any social crisis was relevant to the conclusion that the refusal to renew an operating permit could not have been justified as being a legitimate response to an emergency situation.³⁵ In *Rompetrol v. Romania* (2013), where the question arose whether intelligence services violated investment treaty provisions by intercepting Claimant's telephone conversations, the Tribunal relied on the "authoritative determination" by the Romanian Supreme Court which previously found that such interceptions could not have been justified by national security. Yet, the findings by the same Court that Claimant's business activities had not been affected by such interceptions at the same time led the Tribunal to conclude that they did not breach the BIT.³⁶ Similarly, in *Khan Resources v. Mongolia* (2015), the Tribunal relied in its inquiry into the legality of the invalidation of Claimants' licenses on certain findings of fact made by Mongolian administrative courts before which claimants had previously challenged the invalidation of their licenses.³⁷

In some cases, the relevant findings of fact were those made by courts of third-states and investment tribunals likewise expressed no reservations from taking these into account. In *Rumeli v. Kazakhstan* (2008), for instance, the Tribunal did not deem itself in any way precluded from considering the findings of fact made by the United States District Court in a judgment rendered against the Turkish family that previously controlled the Claimant companies and from which the Respondent sought to draw several inferences in its attempt to demonstrate that Claimants' investments in Kazakhstan were fraudulent or illegal as such. While Claimants disputed the legal value of a judicial decision delivered in a foreign state for an arbitral tribunal dealing with claims under international law, the Tribunal dismissed those findings solely for lack of relevance.³⁸ The Tribunal in *Niko Resources v. Bangladesh* (2013), conversely, was actually able to draw on domestic criminal proceedings conducted against Claimant both in its home state, Canada, and the host State. It was, in fact, pursuant to Claimant's conviction in Canadian courts, rendered on the basis of the latter's guilty plea, that the Tribunal found corruption had taken place, although it was also on the same basis, as well as on the basis of exculpatory findings of Bangladeshi courts that the Tribunal concluded that the acts of corruption had no influence in the conclusion or the content of the contracts that Claimant concluded with Bangladeshi state entities, which also led it to reject the jurisdictional challenge pertaining to the investment's illegality.³⁹

³³ Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (Award) (ICSID Case No. ARB/05/15, 1 June 2009), [436-437].

³⁴ *ibid* [442-443].

³⁵ *Tecmed v. The United Mexican States (Final Award)* (ICSID Case No ARB(AF)/00/2, 29 May 2003), 147.

³⁶ *Rompetrol v. Romania (Award)* (ICSID Case No ARB/06/3, 6 May 2013) 256-261.

³⁷ See *Khan Resources v. Mongolia (Decision on Jurisdiction)* (UNCITRAL, 25 July 2012) [338], [315], [337], and [355], respectively.

³⁸ *Rumeli Telekom AS v. Kazakhstan (Award)* (ICSID Case No ARB/05/16, 29 July 2008) [172], [228]-[230], [320].

³⁹ *Niko Resources v. Bangladesh (Decision on Jurisdiction)* (ICSID Case No ARB/10/18, 19 August 2013), [423]-[429].

4.1.2.3. Conduct of Parties in Domestic Litigation

Finally, in some of the cases, domestic judicial proceedings were relevant to the extent that they furnished factual evidence as to the *conduct of the litigating parties*, particularly where particular factual details of such conduct were recorded in the domestic judgment.

In some cases, domestic judgments recorded certain statements that pertained to issues of domestic law that were pending before the tribunals. In *Opic v. Venezuela* (2013), the Tribunal examined whether the submissions made by Venezuela's Attorney General in proceedings before the Supreme Court could be understood as suggesting that the relevant domestic statute provided for consent to the jurisdiction of the ICSID Centre. The submissions, which the Tribunal considered together with several other statements of State officials, were eventually not found to be materially relevant to the question before the Tribunal.⁴⁰ In *Khan Resources* (2015), in contrast, the Tribunal could instead rely on the arguments advanced by certain state agencies in proceedings before domestic administrative courts, as well as the general attitude adopted by these agencies in relation to the final judicial outcome, when determining the legality of the invalidation of Claimants' licenses.⁴¹

In other cases, the parties' conduct in domestic litigation was considered relevant, and thus examined, with a view to determining whether their inconsistent attitude might have given rise to estoppel. In *Invesmart v. Czech Republic* (2009), the Tribunal was not willing to attach consequences to the fact that the Claimant allegedly adopted fundamentally inconsistent positions in the Czech court proceedings and in the treaty arbitration as to whether its acquisition of the shareholding was valid and thus capable of constituting a protected investment. The reason was apparently in the fact that the local court proceedings involved third persons who were not parties to the arbitration.⁴² Neither did the Tribunal in *East Kalimantan v. Kaltim Prima Coal* (2009) accept the argument of the Respondents being estopped from objecting to the jurisdiction of the ICSID tribunal because of the position they took in the proceedings before the Central Jakarta District Court. The Tribunal considered that the Respondents' statements as to whether the Province had the capacity to act independently of the central government and whether it was bound by the contractual arbitration clause were not entirely clear and unambiguous. Nor could Claimants prove that they occurred damage by relying on those statements.⁴³ The findings in *Invesmart* and *East Kalimantan* can be contrasted with those in *Middle East Cement Shipping v. Egypt* (2002), however, where the Tribunal held that the Respondent was "barred" from disputing the Claimant's ownership of a vessel under the BIT, after the Respondent's authorities, including the Suez Court, treated the Claimant as the vessel's owner in domestic judicial proceedings.⁴⁴

4.1.3. Is the Context thus Relevant?

The preceding analysis of the practice presents a rather mixed picture as to the acceptance on the part of investment tribunals of domestic judicial determinations. One could, perhaps, tentatively conclude that investment tribunals have been least prepared to take account of domestic judicial pronouncements where these have put to doubt the existence or scope of their adjudicatory powers. One could also conclude that tribunals have actually had less misgivings about accepting

⁴⁰ *Opic Karimum Corp v The Bolivarian Republic of Venezuela* (Award) (ICSID Case No ARB/10/14, 28 May 2013), [132]-[133].

⁴¹ See *Khan Resources* (n 37) [338], [315], [337], and [355], respectively.

⁴² *Invesmart v Czech Republic* (n 10), [191]-[192].

⁴³ *East Kalimantan v Kaltim Prima Coal* (n 30) [203]-[206], [212]-[215].

⁴⁴ *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (Award) (ICSID Case No ARB/99/6, 12 April 2002) [135].

judicial findings of fact, than they had about findings of law. This begs the question as to what is there that makes investment tribunals follow specific judicial determinations – apart from the sheer question of their relevance – and ignore others. Before delving into the factors that seemed to have influenced the reception of judicial decision on the part of tribunals, the following two sections intend to demonstrate that investment tribunals have held conflicting views as to whether they were bound to follow domestic judicial pronouncements on points that are relevant to the issues in the arbitration proceedings – at least, in the sense of some *legal obligation* that would compel them to do so.

4.2. Arguments for Denying Effect to Domestic Judicial Determinations

A large number of investment tribunals rejected the idea that they would be formally required to follow the pronouncements or determinations of domestic courts and advanced to that effect a diversity of legal arguments. Some of those arguments appeared to be premised, directly or indirectly, on the principle of supremacy of international law (4.2.1.). Others appeared to be building on the separation between the domestic and the international legal orders and the resulting qualitative differences between international and domestic adjudicatory bodies (4.2.2.). Again others were enveloped in more technical narratives, such as where reference has been made to specific powers or obligations (4.2.3.), or where the formal conditions governing the application of *res judicata* have been relied upon (4.2.4.). The different types of arguments were frequently used in conjunction with one another, in addition to other argumentative techniques that had the effect of demoting the role of domestic law from a primary to a secondary one, and which therefore warrant separate consideration (4.2.5.).

4.2.1. Arguments based on, or building on the Idea of Supremacy of International Law

Some of the arguments advanced in favour of not according *res judicata* effects to domestic judicial pronouncements appeared to have been postulated on the principle of supremacy of international law, or otherwise grounded on some of the ideas underpinning the principle.

4.2.1.1. Superiority of International Adjudicatory Bodies over Domestic Judicial Organs

In some cases, the justification advanced was one in the form of categorical claims to hierarchical superiority that international adjudicatory bodies traditionally advance in relation to domestic judicial organs.⁴⁵ Such arguments were employed in relation to questions of both jurisdiction and liability. In *East Kalimantan v. Pt Kaltim Prima Coal et al.* (2009), where consent to the jurisdiction of the ICSID Centre was included in a contract governed by Indonesian law, with the consequence that the latter might thus have been applicable to determining the scope of such consent, the Tribunal took the principled view that “decisions of national courts have no *res judicata* effect on international arbitral tribunals”.⁴⁶ In *Amco v. Indonesia* (1984), the Tribunal took the view that, in determining the legality of Respondent’s conduct, it was not bound to follow the result of domestic judicial proceedings involving Amco’s Indonesian subsidiary on the ground that “no matter how the legal position of a party is described in a national judgment, an international arbitral tribunal enjoys the right to evaluate and examine this position without accepting any *res judicata* effect of a national court.”⁴⁷ The decision not to grant legal effect to domestic judgments was further justified in that case by the importance of safeguarding the effectiveness of

⁴⁵ cf *supra* 1.4.1.2.

⁴⁶ *East Kalimantan v PT Kaltim Prima Coal* (n 30), 169.

⁴⁷ *Amco v Indonesia* (n 16), 177.

international arbitration as a dispute settlement mechanism. According to the *Amco* Tribunal, “[o]ne of the reasons for instituting an international arbitration procedure is precisely that parties – rightly or wrongly – feel often more confident with a legal institution which is not entirely related to one of the parties” and “[i]f a national judgment was binding on an international tribunal such a procedure could be rendered meaningless.”⁴⁸

4.2.1.2. Preventing Abuse of Domestic Law and the Principle Against Self-Judging

Most often, however, it was by reference to the principles underlying the claim of supremacy of international law that no *res judicata* effect was recognized in relation to domestic judicial pronouncements: the principle that the State cannot validly invoke the provisions of its domestic law to justify the legality of its conduct under international law, and the general principle against self-judging (*nemo iudex in causa sua*). Just as defences grounded in domestic law are generally irrelevant in the context of international legal proceedings,⁴⁹ so have domestic court judgments been generally considered incapable of having the effect of precluding an investment tribunal from exercising its international jurisdiction over the investment dispute and from determining the responsibility of the State under international law. In practice, though, investment tribunals most often expressed concerns about the possibility of the domestic judicial process being subverted with a view to strip an international tribunal of its competence to consider a claim. A typical illustration is the award in *Inceysa v. El Salvador* (2006), where the Tribunal refused to give effect to two decisions of El Salvador’s Supreme Court of Justice on the ground that “[t]he determination of the legality of the investment cannot be left up to the Courts of the host State, because this would give the State the possibility to redefine the scope and content of its own consent to the jurisdiction of the Centre unilaterally and at its complete discretion.”⁵⁰ In the view of the Tribunal, any resolutions or decisions made by the State parties to the BIT concerning the legality or illegality of the investment were thus “not valid or important” for deciding whether or not the Tribunal was competent to hear the dispute.⁵¹ The principle enunciated in *Inceysa* was subsequently relied upon in other cases. Referring to *Inceysa*, the Tribunal in *Fraport v. Philippines* (2007) held that, for the purpose of assessing the legality of the Claimant’s investment, the “holdings of municipal legal institutions cannot be binding with respect to matters properly within the jurisdiction of this Tribunal”.⁵² Interestingly, the *Fraport* Tribunal even went as far as suggesting that it was “doubtful whether the Philippines could have lawfully undertaken an action which usurped a matter within the jurisdiction of the Tribunal”.⁵³ In *Ares v. Georgia* (2008), the arbitrators likewise quoted *Inceysa* in support for their proposition that, while they were “free to take into consideration” the Georgian courts’ analyses of the issues pertaining to whether the investment was validly acquired, they were “not bound by any other determination that may have been made as to the ‘legality’ of Claimants’ investments.”⁵⁴

Similarly formulated arguments can be found in other cases where domestic judgments impinged, or could have the potential to impinge, the existence and scope of the tribunals’ adjudicatory powers. The language has differed, but the logic has remained the same. In *Soufraki v.*

⁴⁸ *ibid.*

⁴⁹ cf ARSIWA, art 4; or VCLT, art 27.

⁵⁰ *Inceysa* (n 5), [213].

⁵¹ *ibid* [210].

⁵² *Fraport I* (n 6), [391].

⁵³ *ibid* [389]. This statement was obviously a far-fetched one. Criminal proceedings legitimately pursued by the host State’s authorities can hardly be seen as an usurpation of an investment tribunal’s jurisdiction. For criticism of the award on this point, see G Bottini, ‘Legality of Investments under ICSID Jurisprudence’ in M Waibel et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010), 303.

⁵⁴ *Ares v Georgia (Award)* (n 7) [5.4.13]-[5.4.14].

UAE (2007), for example, an ICSID Annulment Committee confirmed the propriety of the initial Tribunal assumption of a power to make an independent determination of the investor's nationality by reference to the "general principle that a State does not have the last word when a question is raised before an international tribunal concerning the interpretation of its national law, *when it comes to a question on which the jurisdiction of the Tribunal depends*."⁵⁵ In *Luchetti v. Peru* (2007), on the other hand, a variation of the same argument has been applied in relation to judicial findings of fact. In considering whether the Tribunal failed to exercise its jurisdiction by failing to give proper weight to Peruvian judgments that were claimed to have conclusively resolved the dispute between the investor and the local municipality, the ICSID Annulment Committee considered that "it cannot be left to each individual State to create, through its own rules of *res judicata*, obstacles to international adjudication."⁵⁶

The same type of arguments were equally deployed in the context where existing domestic judicial pronouncements were of relevance to determining the liability of the respondent State. In *Maffezini v. Spain* (2002), where the question arose as to the possible attribution of the acts of a regional development agency to the Respondent State, the view was taken that "a domestic determination, be it legal, judicial or administrative, as to the juridical structure of an entity undertaking functions which may be classified as governmental [...] is not necessarily binding on an international arbitral tribunal."⁵⁷ In support of this proposition, reference was made to the principle enunciated in Article 4 ARSIWA that a characterization of an act as internationally wrongful cannot be affected by the characterization of the same act as lawful by internal law. In the same line, other tribunals took the position that internal law, though relevant to the analysis whether the conduct of an entity is to be attributed to the State, ultimately cannot be determinative of that State's responsibility under international law.⁵⁸

4.2.2. Arguments Based on Categorical Distinctions between International and Domestic Law and the Resulting Differences between International and Domestic Adjudicatory Bodies

Some investment tribunals relied, instead, on the dualist distinctions between the domestic and international legal order, and the ensuing difference in the nature and function of international adjudicatory bodies when compared to their domestic counterparts. Unlike the supremacy argument which seems to have frequently been premised on the assumption that the domestic judicial process could be subverted with a view to stripping an international tribunal of its competence to consider a claim and avoiding the state to incur responsibility, the arguments based on the separateness of legal orders have not necessarily originated in bias towards domestic courts. Indeed, though sometimes invoked precisely as a reason that justified the disregarding of particular domestic judicial pronouncements, the same type of arguments have also been considered a reason for investment tribunals to actually follow domestic pronouncements – an issue which I further explore in 4.3.1. Among the pronouncements of investment tribunals, one can find two variations on the separateness argument. In some cases, greater weight was given to the different nature of investment arbitration – as a *mechanism* – when compared to adjudication by domestic courts; in others, greater emphasis was placed instead on the distinction between the domestic and the international *legal orders* as such.

⁵⁵ Hussein Nuaman Soufraki v The United Arab Emirates (Decision of the Ad Hoc Committee on the Application for Annulment) (ICSID Case No ARB/02/7, 5 June 2007) [59]; emphasis in the original.

⁵⁶ *Luchetti v Peru (Decision on Annulment)* (ICSID Case No ARB/03/4, 5 September 2007) [87].

⁵⁷ *Maffezini v Spain (Jurisdiction)* (ICSID Case No ARB/97/7, 25 January 2000) [82].

⁵⁸ cf *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago (Award)* (ICSID Case No ARB/01/14, 3 March 2006), [200]; *InterTrade Holding GmbH v The Czech Republic (Final Award)* (UNCITRAL, PCA Case No 2009-12, 29 May 2012), [165].

4.2.2.1. The Argument on the “Separate and Distinct” Dispute Settlement Arrangements

An early example where the separateness argument was used as reason to ignore the findings of the contractually-designated forum can be found in the annulment decision in *Wena Hotels v. Egypt* (2000). The case arose out of the seizure by the Egyptian state-owned hotel company of two hotels that were the subject of separate lease agreements, which had been entered into with that company by the Claimant. The latter commenced two separate contractual arbitrations in Cairo on the basis of the lease agreements. The local arbitral tribunals in both cases awarded Wena compensation for damages, but also ordered it to surrender the hotel to the Egyptian state hotel company due to its own breaches of the lease agreement.⁵⁹ Wena subsequently commenced treaty-based arbitration against Egypt, in which an ICSID Tribunal decided on the merits of Wena’s treaty claims, without taking any account of the findings of the contractual arbitral fora. This eventually became one of the grounds on which Egypt sought annulment of the award. The ICSID Annulment Committee, however, found no manifest failure on the part of the Tribunal to apply the law in the fact that this only took account of Egypt’s obligations under the treaty, without considering the underlying contractual relationship. Drawing a distinction between the leases, which were deemed to concern questions that were “by definition of a commercial nature”, and the Treaty, which concerned questions that were “essentially of a governmental nature”, the Committee concluded that, while Wena and the state company agreed to a particular contract, the applicable law and the dispute settlement arrangement “in respect of one kind of subject”, it was also apparent that Wena could invoke the treaty “for the purpose of a different kind of dispute” and that the treaty had “a different and separate dispute settlement arrangement” with potentially a different choice of law provision.⁶⁰ The Committee noted that there was a connection between the leases and the treaty, since the former were designated to operate under the protection of the latter. But this was simply a condition precedent to the operation of the treaty and did “not involve an amalgamation of different legal instruments and dispute settlement arrangements”; rather, the “private and public functions of these various instruments are thus kept separate and distinct.”⁶¹

In a similar way, it was by reference to the “special protection” available under the investment treaty that the Tribunal in *Malicorp v. Egypt* (2011) sought to justify its decision not to defer to the findings previously made by a local commercial arbitral tribunal, which was deciding in the contractual action that arose out of the purportedly unjustified termination of Claimant’s airport concession contract. Though conceding that the local award had the authority of *res judicata* in relation to the contract claims and thus “prohibits a party from reintroducing a new action that is similar on all points”,⁶² the Tribunal decided not to base its ruling on the findings made in that award.⁶³ The Respondent’s firm opposition to the local arbitration and its attempts to have the award set aside in Egyptian state courts raised in the eye of the Tribunal a degree of “uncertainty” that “justifies the Arbitral Tribunal in verifying, as a matter ancillary to the guarantees offered by the Agreement, that, even if that award were to be set aside, the conclusions arrived at by this Arbitral Tribunal would be no different from those of the CRCICA Arbitral Tribunal.”⁶⁴ The local commercial award could thus be ignored because investment arbitration was a “special method” provided for by the treaty to protect against contractual

⁵⁹ *Wena Hotels Ltd v. Arab Republic of Egypt (Award)* (n 18), [60]-[62].

⁶⁰ *Wena Hotels Ltd. v. Arab Republic of Egypt* (Decision of the Ad Hoc Committee on the Application for Annulment) (ICSID Case No. ARB/98/4, 5 February 2002), [31].

⁶¹ *Ibid*, [35].

⁶² *Malicorp Limited v The Arab Republic of Egypt (Award)* (ICSID Case No ARB/08/18, 7 February 2011), [103(b)].

⁶³ 130.

⁶⁴ 130. cf 103(d) (repeating that the ‘degree of uncertainty concerning the outcome of the commercial procedure’ made it ‘acceptable’ for the party claiming to have been injured to use the remedies afforded by the investment treaty).

breaches that could not be resolved by using the “ordinary procedure” in the form of commercial arbitration or the local courts.⁶⁵

4.2.2.2. *The Separateness of Legal Orders Argument*

Some investment tribunals maintained instead that it was because of the separate existence of the domestic and the international legal orders that domestic judicial decisions could not produce normative effects in the international legal sphere. Domestic courts’ judgments remained contained within the domestic legal order, and the international tribunal was at liberty to take or not take cognizance of them.⁶⁶ An exponent of this approach is the Annulment Decision in *Luchetti* (2007), where the view was taken that “[w]hile an international judgment which is *res judicata* will in principle constitute a legal obstacle to a new examination of the same matter, *res judicata* at national level produces its legal effects at national level and will in international judicial proceedings not be more than a factual element.”⁶⁷ In a similar way, the Tribunal in *Vigotop v. Hungary* (2014) concluded that, though the relevant domestic judicial decision had “*res judicata* effect as a matter of Hungarian law”, it did not have such effect “on the international plane” and therefore did not bind it.⁶⁸

4.2.3. Reliance on Specific Powers, Duties, or (the Absence of) Obligations

Apart from the more principled arguments premised on purported hierarchical relationships or on qualitative distinctions between international and domestic courts and the different legal orders within which each of these are operating, tribunals have not infrequently relied on *specific powers* that purportedly permitted them to ignore domestic judicial determinations, or that were even deemed to require from them to leave such determinations aside. Such powers have most often been found in specific provisions of jurisdiction-conferring instruments, such as the ICSID Convention; occasionally, however, they were also deemed to implicitly pertain to them by virtue of their nature of adjudicatory bodies.⁶⁹ In some cases, instead, tribunals referred to the absence of *specific obligations* that would demand from them to follow the findings of domestic courts on a particular matter.

4.2.3.1. *Kompetenz-Kompetenz principle*

Where the particular determination emanating from the domestic courts was such as to possibly have a bearing on the existence or scope of their adjudicatory powers, investment tribunals most often relied on the power that is expressly conferred to them under most arbitration rules to be *judge of their own competence* (i.e. the *Kompetenz-Kompetenz* principle). A typical example in this respect is the award in *Petrobart v. Kyrgyz Republic* (2003), where the Tribunal established pursuant to the Kyrgyz Law of Foreign Investment did not consider itself bound by prior determinations by Kyrgyz courts finding Claimant not to have made a qualifying investment within the meaning of that law, on the ground that Section 2 of the Swedish Arbitration Act (as the *lex loci arbitri* in that case) and Article 21 of the UNCITRAL Rules gave it the power to determine its own jurisdiction.⁷⁰ In a similar way, a great deal of ICSID Tribunals relied on the power granted to

⁶⁵ 103(c).

⁶⁶ cf also *EDF/Saur v Argentina (Award)* (n 22), [1130], refraining from taking a position whether domestic judicial decisions on purely contractual matters would preclude subsequent adjudication of the same contractual claims by international tribunals.

⁶⁷ *Luchetti v Peru (Decision on Annulment)* (n 56), [87].

⁶⁸ *Vigotop v Hungary* (n 23), 509.

⁶⁹ On inherent powers of adjudicatory bodies, see further C Brown, *A Common Law of International Adjudication* (OUP 2007) 55-81.

⁷⁰ *Petrobart v Kyrgyz Republic* (n 4), 39.

them in Article 41(1) of the ICSID Convention to be judge of their own competence. Illustrative in this respect are several cases that have been commenced against Venezuela on the basis of its Foreign Investment Law. While the latter was claimed to contain a standing offer to arbitrate disputes before the ICSID Centre, the Supreme Court of Venezuela already pronounced itself to the effect that no such consent had effectively been expressed in that statute. That Supreme Court's decision, however, has by and large been ignored by investment tribunals. Referring to the power granted to them under Article 41(1) of the ICSID Convention, most tribunals took the view that interpretations given to domestic law by State organs, including domestic courts, were "not determinative" of and could "not control" their competence.⁷¹ The same line of argumentation was not only followed in other ICSID cases where consent to arbitrate was sought in domestic statutes,⁷² but also in many cases where domestic judgments had a bearing on issues where *renvoi* is made to domestic law, such as in relation to the legality of an investment or the nationality of an investor. In *Inceysa*, for example, the absence of an obligation to defer to the findings of El Salvador's Supreme Court was further sustained on the basis of Article 41(1) of the ICSID Convention. Referring to the latter, the Tribunal concluded that "as the legality of the investment is a premise for this Tribunal's jurisdiction, the determination of such legality can only be made by the tribunal hearing the case".⁷³

It is interesting to note that many investment tribunals interpreted Article 41(1) of the ICSID Convention not only as granting them *freedom* to depart from conclusions reached by domestic judicial and other authorities, but construed it as a *positive obligation* that required them to decide the particular issue for itself. In this sense, the *Inceysa* Tribunal considered that the principle expressed in Article 41(1) of the ICSID Convention "imperatively obligates" it to decide the issue of its competence.⁷⁴ In the same vein, the Tribunal in *Soufraki v. UAE* (2004) held that it would "decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question", arguing that "[w]here, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue."⁷⁵ The tribunals in *Siag and Vecchi v. Egypt* (2007) in *Pey Casado v. Chile* (2008) subsequently endorsed the principle formulated in the *Soufraki* award.⁷⁶ Expressly referring to Article 41 of the ICSID Convention, the *Siag* Tribunal considered that it "must determine the nationality of the Claimants."⁷⁷ The *Pey Casado* Tribunal, instead, attempted to additionally justify its broad power of appreciation with respect to the content and effects of domestic nationality laws, by considering such powers to be consistent with the spirit of the ICSID Convention and Article 25(2)(a) thereof.⁷⁸

⁷¹ See *Mobil* (n 3), [74]; *Cemex* (n 3), [69]; *Brandes* (n 3), [99] (not itself quoting art 41(1), but referring to the argument to this effect advanced by the *Cemex* Tribunal); *Tidewater* (n 3), [74] and [107]; *Opic* (n 3), [63]; *ConocoPhillips* (n 3), [227]; *Highbury* (n 3), [157-58].

⁷² See eg *Pacific Rim v El Salvador* (Decision on the Respondent's Jurisdictional Objections) (ICSID Case No ARB/09/12, 1 June 2012), [5.30].

⁷³ *Inceysa* (n 5) [209].

⁷⁴ *Soufraki* (n 8) 148.

⁷⁵ *ibid* [55]; cf [21] where the tribunal refers to art 41(1) of the ICSID Convention.

⁷⁶ *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* (Jurisdiction) (ICSID Case No ARB/05/15, 11 April 2007), [150-153]; *Pey Casado v Republic of Chile* (n 8), 319.

⁷⁷ *Siag & Vecchi v Egypt*, *ibid* 153.

⁷⁸ *Pey Casado* (n 8), [319]-[322]. The Tribunal noted that during the *travaux préparatoires* of the ICSID Convention reference was made to the possibility that an investment tribunal would have to deal appropriately with cases where a host State would use its nationality laws in an abusive manner, such as in the case when it imposes its nationality upon a foreign investor for the purpose of withdrawing its consent.

4.2.3.2. Rules Pertaining to the Appreciation of Evidence

Whereas the *Kompetenz-Kompetenz* principle has been usefully applied in situations where the existence or scope of the tribunals' adjudicatory powers was at issue, a different kind of argument had to be resorted to where particular determinations emanating from the domestic courts were of such nature as to being of concern to questions of merits. Another reason for denying *res judicata* effects to domestic judicial pronouncements was thus found in the power – sometimes considered a duty – of investment tribunals to make an *autonomous appreciation of evidence presented to them*. An early example of such an approach can be found in the jurisdictional award in *SPP v. Egypt* (1988). In the circumstances of that case, the Claimant – which entered with Egypt into a project to develop an international tourist complex at the Pyramids Oasis in Egypt – previously obtained an ICC award in its favor in a contractual arbitration that it had brought against the Egyptian General Organization for Tourism and Hotels and Egypt (EGOTH). As that award was later annulled by French courts on jurisdictional grounds, the Claimant brought the same matter before an ICSID Tribunal on the basis of an Egyptian Law containing an ICSID arbitration provision. In the ICSID proceedings, Claimant requested the Tribunal to adopt and incorporate as its own the pertinent findings of fact made by the ICC tribunal, which would include findings relevant to the interpretation and application of the contracts that Claimant had entered into with Egypt and EGOTH. The ICSID Tribunal, however, refused to accede to such request, finding it “unacceptable, both in principle and under the Centre’s Arbitration Rules.”⁷⁹ As to the former, the arbitrators considered that an approach resulting in the Tribunal abdicating its fact-finding function and adopting as its own the findings of another tribunal would be “hardly consistent with the basic function of evidence in the judicial process, which is to enable the tribunal to determine the truth concerning the conflicting claims of the parties before it.”⁸⁰ As to the latter, the Tribunal noted that Rule 47(1) of the ICSID Arbitration Rules expressly required that the award be in writing and contain a statement of the facts as found by the Tribunal. These reasons justified the Tribunal to make its own determination of the facts necessary to render the award.⁸¹

The same approach was later adopted by the ICSID Tribunal in *Bivater Gauff v. Tanzania* (2008). In the circumstances of that case, the question arose whether, in taking consideration of facts concerning the contractual relationship between Claimants' investment vehicle and the Water and Sewerage Authority of Dar Es Salaam, the Tribunal was in any way bound by an UNCITRAL Award that had been rendered by a commercial arbitral tribunal established pursuant to the contracts, which purportedly resolved the contractual disputes between the contractual partners. The Tribunal ultimately decided not to accord deference to the UNCITRAL award, preferring to make its own determinations on all matters of fact and law. The argument went as follows. First, the Tribunal considered that since it “can only discharge its mandate by considering issues relevant to the contractual relationship, it obviously has jurisdiction to do so.”⁸² Second, the Tribunal was of the opinion that “on a reasonable construction” of Article 47 of the ICSID Arbitration Rules – which provides in the relevant part that the award shall contain, among other elements, “a statement of the facts as found by the tribunal”⁸³ – it was obliged to make its own finding of facts. Referring particularly to the *SPP* decision, the Tribunal explained that adopting the finding of facts made by the UNCITRAL tribunal would be “inconsistent with

⁷⁹ *SPP v Egypt (Decision on Jurisdiction)* (ICSID Case No ARB/84/3, 14 April 1988) [73].

⁸⁰ *ibid.*

⁸¹ *ibid* 74-75.

⁸² *Bivater Gauff v Tanzania (Award)* (n 19), 471.

⁸³ *ibid* 47(1)(g).

the basic function of evidence in the judicial process, which is to enable the tribunal itself, as part of its own mandate, to determine the truth of the conflicting claims of the parties before it.”⁸⁴

The power to make an autonomous appreciation of evidence was sometimes considered to be an *inherent power* that necessarily belongs to an investment tribunal in view of its adjudicatory functions, as opposed to a power that is *expressly granted* to them in the relevant jurisdictional instrument. This was the approach of the ICSID Annulment Committee in *Fraport v. Philippines* (2010), which thus considered the decision of the Philippine Prosecutor not necessarily to be dispositive of the question whether Fraport’s investment was made in accordance with domestic law on the ground that an investment tribunal “retains the ultimate power to judge the probative value of evidence placed before it.”⁸⁵ The Committee did not attempt to trace this particular power back to a specific provision in the ICSID Convention or the Rules of Arbitration, but apparently considered it to be inherent to any investment tribunal were this to perform efficiently its adjudicatory functions. In a similar way, the Tribunal in *Emmis v. Hungary* (2014) invoked the “independent power to judge the probative value of evidence placed before it, including evidence of municipal law” when holding that “decisions of municipal courts arising directly out of the same set of facts” would not be “necessarily dispositive” of the question whether Claimant possessed a contractual right relating to the grant of a new radio broadcasting licence, and thus a covered investment.⁸⁶

4.2.3.3. *Absence of Specific Obligations*

Finally, instead of relying on specific powers or duties, some investment tribunals simply found that there was no *specific obligation* requiring them to recognize the *res judicata* effects of domestic judicial pronouncements. In *CSOB v. Slovak Republic* (2000), for example, the Tribunal advanced the general proposition that “[t]he ICSID Convention does not require an ICSID tribunal to accept the binding effect of national court decisions”, referring expressly to the exclusive remedy rule laid down in Article 26 of the ICSID Convention.⁸⁷ In the circumstances of that case, however, the argument was not raised in relation to existing domestic judicial pronouncements, but with respect to the question whether it was for the Tribunal or for the national courts to determine the amount of damages for contractual breach. The argument was thus directed at any prospective judicial pronouncements. In *Chevron/Texpet v. Ecuador (Lago Agrio)* (2015), on the other hand, the same type of argument was raised in relation to existing pronouncements. In the circumstances of that case, the Ecuadorian courts deciding a domestic environmental claim involving the investor already pronounced themselves on the nature of the claims pleaded by the plaintiffs in the domestic suits. In deciding on whether or not such claims were barred under certain settlement agreements, the treaty Tribunal held that it was “not strictly bound to follow their result or reasoning as a matter of international law”.⁸⁸

In some cases, the same argument was developed by reference to domestic legal provisions. In *Petrobart v. Kyrgyz Republic* (2003), the Tribunal thus held that the judgments of Kyrgyz courts would not be binding on it because, in accordance with Swedish law (as the *lex loci arbitri* in that case), foreign court judgments were binding on arbitral tribunals seated in Sweden

⁸⁴ *ibid* 473.

⁸⁵ *Fraport v Philippines* (Decision on the Application for Annulment) (ICSID Case No ARB/03/25, 23 December 2010) [242].

⁸⁶ *Emmis v Hungary* (n 9), 176. The Tribunal invoked elsewhere power expressly granted to it under art 41(1) ICSID to be judge of its own competence – cf. 132.

⁸⁷ *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic* (Decision of the Tribunal on Respondent’s Further and Partial Objection to Jurisdiction) (ICSID Case No ARB/97/4, 1 December 2000) [35].

⁸⁸ *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* (Decision on Track 1B) (UNCITRAL, PCA Case No 2009-23, 12 March 2015) [140].

only if capable of being recognized and enforced in the Swedish legal order, which – in the absence of explicit statutory or treaty support – was not the case in relation to judgments emanating from the Kyrgyz Republic.⁸⁹ Though practice is scant on this issue, one would expect that arguments based on the absence or presence of an obligation to give effect to domestic judicial pronouncements are more likely to be considered by investment tribunals that cannot otherwise rely on the traditional supremacy argument, such as non-ICSID tribunals whose jurisdiction is based on a particular contract or domestic law provision. The possibility of ignoring in such cases particular judicial pronouncements will entirely depend on the *lex loci arbitri* and the applicable arbitral rules (as, in fact, giving effect to domestic decisions might sometimes be required as a matter of public policy).

4.2.4. Arguments Pertaining to Identity of Actions in the Formal Sense

Finally, the last set of the arguments that have sometimes been brought up by investment tribunals to deny domestic judgments *res judicata* effect on issues of domestic law⁹⁰ were those pertaining to the absence of the requisite parity of the parties, causes of action, and/or applicable legal standards. In *Inceysa*, for example, the Tribunal additionally rejected the idea that the Supreme Court’s judgments could have disposed of the legality question on the ground that, “from the viewpoint of strict procedural theory”, the basic requisites of *res judicata* – namely, the identity of the parties and that of the claims – were not met in the circumstances of the case.⁹¹ Following *Inceysa*, the *Fraport I* Tribunal for the same reason refused to accord *res judicata* effects to the findings of the Philippine Public Prosecutor which were relevant to determining the investment’s legality in that case.⁹² In *EDF/SAUR v. Argentina* (2012), the Tribunal proceeded to ignore several decisions that had previously been rendered by Argentinean courts on matters relating to Claimant’s concession on account of the fact that parity was not satisfied on all three accounts: the disputing parties, the causes of action, and the applicable legal standards in domestic proceedings were different.⁹³ In the view of the Tribunal, it was “generally accepted that an identity requirement must be satisfied in order for a tribunal to take into account the decisions of national courts.”⁹⁴ But even the failure to satisfy the identity requirements only on one account were sufficient reason for not according *res judicata* to domestic judgments. In *EURAM v. Slovakia* (2012), where the Slovak Constitutional Court had already determined the illegality of the impugned measure, the doctrine of *res judicata* was held to have no application, since neither the Claimant nor its subsidiary, was party to the proceedings before the Constitutional Court.⁹⁵ All in all, however, the non-fulfilment of the formal requirements of *res judicata* was not frequently used as an argument justifying declining to give effect to domestic judicial decisions. Furthermore, where actually used, the argument was usually invoked as an ancillary ground.

⁸⁹ *Petrobart v Kyrgyz Republic* (n 4) 38-41.

⁹⁰ The focus here is on issue preclusion in relation to questions of domestic law, not the possibility of preclusion of the treaty claim as such. This latter aspect will more extensively be considered in Part III. Admittedly, however, some investment tribunals had the tendency to consider both aspects of preclusion in discussing the possibility that domestic determinations be granted *res judicata* effects. See eg *Helnan v Egypt* (n 23), [125]-[126] (noting that a decision by a national court or a private tribunal cannot be opposed as *res judicata* to the admissibility of the treaty claim); or *Teco Guatemala v Guatemala (Award)* (ICSID Case No ARB/10/23, 19 December 2013) [475] (rejecting the possibility that domestic judgments could have preclusive effects on issues of international law to be determined by the Tribunal).

⁹¹ *Inceysa* (n 5), [214]-[217].

⁹² *Fraport I* (n 6), [390].

⁹³ *EDF/SAUR v Argentina* (n 22), [1130]-[1136].

⁹⁴ *ibid* [1132].

⁹⁵ *EURAM v Slovak Republic* (n 17), [394].

4.2.5. Supporting Argumentation

The above-described arguments have often been employed in combination with various argumentative techniques that had the effect of relegating the role of domestic law to a secondary one and reinstating international law as the primary law to be applied to determine the issue before the tribunal. Such techniques serve an important purpose: to the extent that a particular issue could be decided by reference to international law, and not solely by domestic law, domestic judicial decisions ceased to enjoy epistemic superiority vis-à-vis the international tribunal and could thus be neglected also from a practical point of view.

One of the areas where such argumentative techniques have successfully been applied are the rules applicable to the interpretation of domestic statutes containing unilateral offers to arbitrate disputes with investors. In the early jurisprudence, different approaches were taken with respect to the standards applicable to interpreting such domestic instruments. To the extent that the question of the applicable rules of interpretation was actually addressed,⁹⁶ investment tribunals have taken the view that such offers were to be interpreted either exclusively by reference to international law,⁹⁷ by reference to primarily domestic law,⁹⁸ or by way of concurrent application of both domestic and international law.⁹⁹ Since the decision in *Mobil v. Venezuela*, however, the view has increasingly gained support that offers to arbitrate included in domestic legislation are to be interpreted in accordance with the rules of international law applicable to interpreting unilateral declarations – thus, neither in accordance with domestic rules of statutory interpretation, nor in accordance with the general rules of treaty interpretation – but in accordance with the *sui generis* standard demanding that such declarations be interpreted “in a natural and reasonable way” and having “due regard to the intention of the State concerned”.¹⁰⁰ Though municipal law remained relevant to determine the existence and validity of the instrument in which the declaration was embodied,¹⁰¹ and potentially to clarify the intention of the State making the declaration,¹⁰² the question whether a particular statement constitutes consent to arbitration has thus been treated as one of international law. This has had obvious advantages: by holding that such offers to arbitrate, albeit expressed in domestic legal instruments, are not governed exclusively by domestic law, investment tribunals were not required to bow to particular findings of domestic courts on points of domestic law, nor were they compelled to rely on domestic jurisprudence in ascertaining the relevant rules of statutory interpretation.

⁹⁶ In many cases where domestic legislation was invoked as jurisdictional basis, the relevant text was so clear that tribunals did not need to take a position on the rules of interpretation to be applied. See eg *Tradex Hellas S.A v Republic of Albania (Decision on Jurisdiction)* (ICSID Case No ARB/94/2, 24 December 1996) [79]; *Inceysa* (n 5), 332; *Rumeli Telekom AS v Kazakhstan (Award)* (n 38), [333]–[335]; *Bimuter Gauß (Tanzania) Ltd v Tanzania* (n 19), [329].

⁹⁷ *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/97/4, 24 May 1999) [35], [36] and [46] (“the question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law; it is governed by international law as set out in article 25(1) of the ICSID Convention”).

⁹⁸ *Zhimvali Development Ltd v Republic of Georgia (Award)* (ICSID Case No ARB/00/1, 24 January 2003) [339]–[340] (“the Tribunal must follow that national law guidance, but always subject to ultimate governance by international law”).

⁹⁹ *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt (Decision on Objections to Jurisdiction)* (ICSID Case No ARB/84/3, 14 April 1988) [61] (the Tribunal applying ‘general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations’).

¹⁰⁰ *Mobil* (n 3), [85]; subsequently followed in *Cemex* (n 3), [79]. This standard of interpretation is inspired by the practice of the ICJ in interpreting unilateral declarations of compulsory jurisdiction under art 36(2) of the ICJ Statute. cf *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 454 [49].

¹⁰¹ *Tidewater* (n 3), [102(6)] and [103].

¹⁰² *Mobil* (n 3), [96].

A comparatively similar strategy has occasionally been used in the context of contract-based investment arbitrations, though the argumentative technique used for that purpose has been a different one. Since contractual dispute settlement clauses are synallagmatic in type and already contain a perfected agreement to arbitrate, such clauses cannot be compared to unilateral obligations. Instead, reliance has been made on the principle of separability of the arbitration agreement which not only presupposes that the agreement to arbitrate is independent from the contract in which it is embodied, but also that such agreement need not necessarily be governed by the same law as the contract itself.¹⁰³ Accordingly, even where the underlying contract is governed by domestic law, the principle of separability of the arbitration agreement permits investment tribunals to assume that the agreement to arbitrate is governed by international law. Since the question of consent to arbitrate needs not be determined in such cases exclusively by domestic law, there is again no need to bow to particular findings of domestic courts on points of domestic law. Illustrative in this respect is the award in *Kalimantan* (2009), where the Tribunal invoked the principle of autonomy of the arbitration agreement in asserting that it will apply international law to determine whether the ICSID Centre had jurisdiction over the dispute, and not solely Indonesian law as the law applicable to the contract containing arbitration clause.¹⁰⁴

An altogether different strategy was to reintroduce international law as the primary applicable law with respect to issues where *renvoi* would otherwise have to be made to domestic law by exploiting domestic constitutional arrangements regulating the reception of international law into the domestic legal order. An example where such technique has successfully been applied is the *Inceysa* award. In determining the legality of Claimant's investment, the Tribunal in that case did not inquire whether the investment had been made in conformity with specific Salvadorian laws, but whether it complied with the BIT as such – given that by virtue of Article 144 of the Salvadorian Constitution, the BIT also constituted the law of El Salvador. Admitting, however, that the BIT lacked substantive rules that would be relevant to such analysis, the Tribunal determined the legality of Inceysa's investment in light of the generally recognized rules and principles of international law, which it was entitled to apply pursuant to the choice-of-law clause in the BIT – the principle of good faith, the principle *nemo auditor propriam turpitudinem allegans*, the principle prohibiting unjust enrichment, and the principles forming part of international public policy.¹⁰⁵ This clever construction of the legality test permitted the tribunal to avoid direct application of the domestic law of El Salvador, with regard to which Salvadorian courts would otherwise enjoy epistemic superiority.

Another argumentative technique that had the effect of demoting the role of domestic law to one of secondary importance was, instead, to treat issues of domestic law as mere facts of which an international tribunal might – or might not – take cognizance. Variations of this argumentative technique can be found in several awards. For example, notwithstanding the relevance of internal law in determining the status of a State organ,¹⁰⁶ the Tribunal in *Maffezzini* took the view that whether or not an entity was to be regarded as an organ of the State was “a question of fact and law to be determined under the applicable principles of international law”.¹⁰⁷ In *Luchetti*, the view was taken that a judgment which is *res judicata* at the national level “will in international judicial proceedings not be more than a factual element.”¹⁰⁸ Likewise, in *Bivater Gauff*, the pronouncements

¹⁰³ Generally on the principle, see ML Moses, *The Principles and Practice of International Commercial Arbitration* (CUP 2008) 18.

¹⁰⁴ *Kalimantan* (n 30), [163]-[168].

¹⁰⁵ *Inceysa* (n 5), [218]-[229], [234], [240], [245], [253].

¹⁰⁶ cf art 4(2) ARSIWA ‘An organ includes any person or entity which has that status in accordance with the internal law of the State.’

¹⁰⁷ *Maffezzini* (n 57), [82].

¹⁰⁸ *Luchetti* (n 67), [87].

of the contractual forum were treated merely as potential evidence of facts, which the Tribunal could possibly ignore, given that it considered itself bound to make its own findings of fact.¹⁰⁹ In the end, by relegating questions of domestic law to matters of purely factual significance, tribunals were thus once more in the position to ignore the pronouncements of the domestic courts which would otherwise enjoy epistemic superiority on issues of domestic law.

In addition to employing the argumentative techniques just described, investment tribunals have had the habit of resorting to what one could call “strategies of confinement”: advancing explanations that made possible the parallel-coexistence of different findings on the same points of domestic law. One such strategy was simply by factually distinguishing the domestic judicial pronouncements that may be at variance with the tribunal’s own findings on domestic law issues. In *Ares v. Georgia* (2008), where the question arose whether the invalidation by Georgia’s courts of a share purchase agreement necessarily signified that the investment had been made illegally, the Tribunal for example held that the invalidation, even though having retroactive effect, only occurred a year after the purchase agreement had been made.¹¹⁰ In view of the arbitrators in that case, the Tribunal’s finding that the original acquisition of the shareholdings was in substantial accordance with Georgian law could therefore “happily co-exist” with the conclusions arrived at by the domestic courts half a year later the transaction was not in accordance with such law.¹¹¹

Quite commonly, however, tribunals exploited the distinction between the domestic and the international legal orders in such a way that the supremacy that is habitually accorded to domestic judicial organs in relation to questions of domestic law was only recognized in relation to the domestic legal order, but not on the international plane. The prime example of such an argumentative technique can be found in the decision of the ICSID Annulment Committee in *Soufraki*, where the emphasis was put on the “notable difference between the *granting* of nationality on the national level – which is a *constitutive* act – and the *recognition* of nationality on the international level – which is a *declaratory* act”.¹¹² The consequence of this distinction was that, in verifying whether nationality had been granted in accordance with the national law requirements, international investment tribunals would not be encroaching upon the competences of domestic courts – since they would not be deciding as to whether an investor possessed a particular nationality (for, as the Committee opined, “an international tribunal cannot decide that a nationality granted by a State does not exist in the national legal order in which it has been created”), but only determining whether such nationality can be recognized on the international level (a right which, according to the Committee, an international tribunal undoubtedly had if it was “to determine the existence of the treaty-required nationality as a jurisdictional requirement by reference to the laws of the State whose nationality is claimed”).¹¹³ However, given this fundamental difference between the constitutive and the declaratory acts, the epistemic superiority that domestic courts otherwise enjoyed with respect to questions of nationality would not need to be recognized on the international plane to the same degree as it needs to be recognized within the national legal order; for, “[r]espect for States’ sovereignty approaches its limits when it comes to recognizing a nationality *in the international realm*”.¹¹⁴ In a similar way, the *Bivater Gauff* Tribunal relied on the distinction between treaty and contract claims to conclude that any findings it would make with respect to the contract would solely have effect

¹⁰⁹ *Bivater Gauff* (n 19), 470-72; cf 474 confirming, for the avoidance of doubt, that it has solely ‘taken into consideration facts concerning the contractual relationship’.

¹¹⁰ *Ares v Georgia* (n 7), [5.4.33]-[5.4.39].

¹¹¹ *ibid* [5.4.38].

¹¹² *Soufraki* (n 55), [55].

¹¹³ *ibid* [60]; emphasis in the original.

¹¹⁴ *ibid* [60]; emphasis in the original.

as between Claimant and the Respondent State in the context of the treaty claims, and would not be binding as between the parties to contract in the context of their separate contract dispute.¹¹⁵ Ultimately, the strategy of confinement, too, had the effect of justifying the Tribunal's ignorance of the pronouncements made by the contractual forum.

The different argumentative techniques have in common that they enabled investment tribunals to shift back their enquiry from one solely focused on questions of domestic law, to one focused on questions of international law where domestic law merely played a subordinate role – and thus furnished additional justifications for investment tribunals not being required to follow domestic judicial pronouncements.

4.2.6. Policy Rationale(s) Against Granting Legal Effects to Domestic Pronouncements

As noted in 1.4.2.1., the idea that domestic judicial pronouncements cannot have *res judicata* effects on international adjudicatory bodies is one well engrained in the thinking of international lawyers, and as such also continues to be replicated in the specific context of investment arbitration.¹¹⁶ The historical foundations of this idea lie in the old conception of domestic courts and international adjudicatory bodies being creatures of different legal orders, applying different bodies of law, and operating independently from one another. In the context of investment arbitration, however, such conception becomes difficult to sustain, at the very least because investment tribunals are frequently called upon to concurrently apply both domestic and international law. Moreover, in circumstances where international law itself requires the application of domestic law as a condition for an international norm to apply, the argument of how “international law trumps domestic law” itself loses much of its justificatory strength.¹¹⁷

One can probably find a more convincing rationale for not recognizing preclusive effects of local judgments on points of domestic law in the fact that such judgments potentially originate from organs that are not in themselves independent from the State itself.¹¹⁸ In other words, there is always the danger that domestic courts' pronouncements are self-serving, produced with a view to frustrating the conduct of an investment arbitration, or else avoiding the State's responsibility under international law. It is debatable, however, whether denying such pronouncements *a priori* normative force is really the proper way to conceiving an appropriate relationship between investment tribunals and domestic courts, particularly in light of the latter's superior knowledge

¹¹⁵ *Bivater Gauff* (n 19), 471.

¹¹⁶ See eg A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 95 (‘Relevant decisions of national courts should be taken into consideration, as instances of interpretation and application of the domestic law, but cannot bind a treaty tribunal.’).

¹¹⁷ See J Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24(3) *Arbitration International* 351, at 351, noting the perpetual tensions in the field of investment law between ‘the proposition that a host state cannot rely on its own law as a justification for failing to comply with its international obligations, including those obligations arising under treaties for the protection of foreign investment’ and ‘the proposition that an investment is, in the very first place and by definition, a transaction occurring in the host state and governed by its laws.’ On this point, see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment), [2008] ICJ Rep. 177, [124] finding Article 27 VCLT, pursuant to which ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’, not applicable to situations where a State is applying rules of domestic law according to the terms of the international obligation itself.

¹¹⁸ But see WS Dodge, ‘National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA’ (2000) 23 *Hastings Int'l & Comp. L. Rev.* 357, 381-382, who considers the issue of bias to be less relevant to the question of whether domestic courts' judgments should be accorded *res judicata* effects, given that in investor-State arbitration, the investor remains essentially free not to bring a suit in domestic courts. In his view, the reason why such judgments should not be accorded preclusive effects, instead, is that this could deter foreign investors from first seeking resolution of their disputes in domestic courts. This line of argument, however, seems to overlook the fact that the foreign investor can not only act as claimant in domestic proceedings, but may also appear as respondent.

of domestic law and their greater legitimacy when it comes to the interpretation and application of that law. A more convincing solution is rather to accord domestic judgments preclusive effects – though subject to the condition that such judgments are unimpeachable from the perspective of international standards pertaining to the administration of justice and international law in general.¹¹⁹ Indeed, one may argue that precisely because investment tribunals are vested with the power to review the propriety of domestic judicial conduct from the perspective of international standards (a matter which is extensively discussed in Part II of the present study), they should otherwise recognize *res judicata* effects in the absence of improper conduct on the part of domestic courts.¹²⁰ The more so in view of the general obligation on the part of international adjudicatory bodies to apply domestic law as interpreted by domestic judicial authorities – a point on which I further expand in chapter 5.

4.3. Arguments supporting Acceptance of Domestic Judicial Pronouncements

It would be wrong to conclude, however, that investment tribunals uniformly discarded the possibility of being bound by domestic judicial pronouncements. On the contrary, in a not insignificant number of cases, tribunals considered themselves under a duty to follow domestic judicial pronouncements insofar as *questions of domestic law* were concerned. The logic that was seemingly followed in such cases was that, precisely because domestic courts have primacy within the domestic legal order, international tribunals have to respect their determinations in relation to matters concerning the interpretation or application of domestic law. The precise legal argumentation varied. Some investment tribunals were prepared to formally recognize in relation to domestic judicial determinations the effect of *res judicata* on points of domestic law (4.3.1.). Others simply considered that they had to accept the courts' determinations on such points (4.3.2.). Then again others accepted the binding nature of prior judicial determination as a matter of (collateral) estoppel (4.3.3.).

4.3.1. *Res Judicata* on Points of Domestic Law

The leading precedent of a decision originating in the domestic legal order being formally accorded the effect of *res judicata* in the context of an investment arbitration is the award in *Helnan v. Egypt* (2008). In the circumstances of that case, the question arose as to the effect of a local commercial award that had previously been rendered in a contractual arbitration between the Claimant and the Egyptian General Company for Tourism and Hotels – which was final and binding as a matter of Egyptian law – on the arbitration that Claimant subsequently commenced against Egypt pursuant to the pertinent investment treaty. Though concluding that the commercial award could not be opposed to the admissibility of the Claimant's treaty claims, the ICSID Tribunal nonetheless found it could not disregard the principle of *res judicata* and thus review *de novo* the facts pertaining to contractual issues. In the Tribunal's view: "When it is found

¹¹⁹ For a similar approach, see S Farnham, 'Claim Suspension and Issue Preclusion in Multiparty Investment Disputes: The Need for Autonomous, International Principles' in IA Laird (ed), *Investment treaty arbitration and international law*, vol. 7 (JurisNet, 2014), 203-232, at 216, 223, arguing in favour of giving preclusive effect to factual findings of a prior contract adjudication, but on the condition that the investor does not suffer material prejudice where the local forum is incapable of providing adequate relief, where it fails to meet minimum due process standards, or where there is a significant risk that its decision will not be enforced.

¹²⁰ This would appear to be also in accordance with the practice of the International Court of Justice. See *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Merits, Judgment)* [2010] ICJ Rep 639 [70] ("The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts [...]. Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.")

by an international tribunal that the holding of the local award was determined strictly by considerations pertaining to contractual issues, it will not be appropriate for an international tribunal to replace the decision of the local court on a contractual issue subject to local law. Instead, *res judicata* will apply...”.¹²¹

The Tribunal recalled that, in accordance with the traditional view, no *res judicata* effect was to attach to a decision of a municipal court so far as an international jurisdiction is concerned. Contrary to conventional arguments, however, this was not because of any hierarchical superiority purportedly enjoyed by international tribunals over national courts, but merely on account of the differences in the causes of action pursued before each forum, with the necessary consequence that each forum therefore performs its duties in different legal orders.¹²² In the view of the Tribunal, this had two important consequences. On the one hand, a domestic judicial decision could not directly affect the competence of the international tribunal to decide a claim grounded in international law, in the absence of strict identity of parties, subject matter, and causes of actions. On the other hand, however, such tribunal “*must accept the res judicata effect of a decision made by a national court within the legal order where it belongs.*”¹²³ For a domestic pronouncement to generate preclusive effects in this way, it was thereby irrelevant that the parties to the domestic proceedings and the parties to the treaty-based arbitration were not strictly the same. (Indeed, in the circumstances of the *Helnan* case, the Claimant in the local arbitration was an Egyptian state instrumentality, while Helnan appeared there as Respondent and Counterclaimant). In the view of the Tribunal, it was “not without some contradiction” that Helnan relied on the separate legal personality of the state instrumentality for the sole purpose of denying the alleged *res judicata* effect of the local award, while at the same time maintaining that the instrumentality’s conduct was attributable to the Egyptian State.¹²⁴ Having said this, the Tribunal made equally clear that the preclusive effect thus generated by the local award on points of domestic law was not absolute, but applied “as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.”¹²⁵ Therefore, having found no inadequacies in the conduct of local arbitral proceedings, in the award itself, or in its enforcement, the Tribunal accepted the findings made in the local arbitral award, particularly the fact that neither Claimant nor EGO TH were actually found to have breached the hotel management contract and that the cause of the contract termination lay in the impossibility of the contract to be performed, rather than in the downgrading of the hotel on the side of Egyptian authorities, which was at the origin of Claimant’s treaty claim against Egypt.¹²⁶

The *Helnan* Tribunal’s approach was not unprecedented. Already in *Saluka v. Czech Republic* (2006), the Tribunal was prepared to accept determinations previously made in the context of related domestic proceedings in deciding whether Claimant’s investment had been legally made. At issue in that sense was particularly the legality of certain transactions which enabled Saluka’s predecessor in rights to acquire and then sell on the shareholding of two valuable Czech breweries. The treaty Tribunal saw “no reason to dissent from” the decision rendered in a local commercial arbitration which confirmed the validity of those transactions, given that those matters were considered by the parties to be *res judicata* as a matter of Czech

¹²¹ *Helnan v Egypt* (n 23), [108].

¹²² *ibid* [124].

¹²³ *ibid* [125] and cf [143].

¹²⁴ *Ibid* [127].

¹²⁵ *ibid* [106].

¹²⁶ *ibid* [150], [163]-[68].

law.¹²⁷ The same kind of argument was previously also employed by arbitrator Bernardo Cremades when he dissented from the majority's decision in the *Fraport* award (2007) on the ground that Claimant could not be deemed to have structured its investment in contravention of the Philippine Anti-Dummy legislation that otherwise prohibited foreigners to control Philippine public utility companies, in circumstances where the Philippine Supreme Court had actually annulled the concession pertaining to the operation of the airport terminal in which Claimant had held an interest and where such annulment was thus *res judicata* under Philippine law.¹²⁸

4.3.2. Acceptance of, and Deference to, Domestic Courts' Decisions

Rather than articulating the issue in formal terms of *res judicata*, many investment tribunals simply *accepted* domestic judicial pronouncements as effective in relation to matters of domestic law that had to be determined. In *Liman v. Kazakhstan* (2010), the Tribunal thus held that it had to “accept” the judgments of Kazakh courts which resulted in the invalidation of Claimant's license contract and on that ground also rejected the claim under the umbrella clause insofar as Claimant could not validly invoke any contractual rights.¹²⁹ Similarly, the Tribunal in *Hassan Andri v. Romania* (2015), explicitly quoted *Helnan* for the proposition that it will “accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings” and thus recognized that the Claimant had been validly deprived of its right to be granted concession as a result of a Constitutional Court's decision repealing the law regulating such concessions.¹³⁰ A similar practice has been followed in many other cases where claims of alleged expropriations¹³¹ or violations of the umbrella clause¹³² were flatly dismissed on the ground that they were premised on rights that had effectively been extinguished by means of judicial decisions.

Other tribunals justified their acceptance of prior judicial determinations by reference to the need of according *deference* to domestic courts on points of domestic law. In *Gami v. Mexico* (2004), the Tribunal held it would “defer” to domestic judicial pronouncements as “an authoritative expression of national law” – though, only insofar as the “licitness of expropriation as a matter of Mexican law” was concerned.¹³³ In *Unglaube v. Costa Rica* (2012), the Tribunal considered that, had it been necessary to undertake an interpretation of the domestic legislation in question, it “would, without hesitation, have found that, under the Constitution and laws of Costa Rica, it is the Attorney General and the Supreme Court who are empowered to give authoritative and final interpretation of the law” and that therefore, it was “not appropriate for this Tribunal to substitute an opinion of its own or make any finding of liability unless the Attorney General and the Court are found to have acted in a manner which is arbitrary,

¹²⁷ *Saluka v. Czech Republic* (Partial Award) (UNCITRAL, 17 March 2006) [216].

¹²⁸ *Fraport I* (n 6), Dissenting Opinion of Mr. Bernardo M Cremades, [26]. Admittedly, Cremades' argument on this point was somewhat inconsistent: on the one hand, he argued that the Tribunal was ‘not bound by a decision of a Philippine court’; on the other hand, he maintained that the *res judicata* nature of the annulment under Philippine law ‘must be accepted’ by the Tribunal. But the implications were clear: the Tribunal was expected to recognize the legal effects of the Supreme Court's judgment as a matter of Philippine law since ‘its own judgment on Philippine law must be premised on Philippine law itself.’ *ibid.*

¹²⁹ *Liman Caspian Oil BV v. Republic of Kazakhstan* (n 25), [442]-[443].

¹³⁰ *Hassan Andri v. Romania* (Award) (ICSID Case No ARB/10/13, 2 March 2015) [326]-[327].

¹³¹ See eg *Azinian v. The United Mexican State* (n 24) [100]; *Arif v. Moldova* (n 28) [415]-[417]. cf also *Hassan Andri v. Romania* *ibid* [325]-[328], confirming the principle though rejecting the expropriation claim already on the ground that the extinguished right was not in itself capable of being considered an investment.

¹³² See eg *Bosh International and B&P v. Ukraine* (n 27) [258]-[259] and [276]-[286]; *Swisslion v. Macedonia* (n 27) [265]-[275], and [323]-[325]; or *Arif v. Moldova* (n 28) [398].

¹³³ *Gami Investments, Inc v. The Government of the United Mexican States* (Final Award) (UNCITRAL, 15 November 2004) [41].

discriminatory or otherwise shocking to the conscience”.¹³⁴ In a similar way, the Tribunal in *Teco v. Guatemala* (2013) took the view that, even though the decisions of the Guatemalan courts that had been rendered in cases involving the Claimant’s subsidiary could not be “determinative” of the Tribunal’s assessment of the application of international law to the facts of the case, the Tribunal “may have to defer” to them when particular aspects of the dispute were subject to Guatemalan law and the judgments decided some of the questions in dispute concerning the interpretation of the Guatemalan regulatory framework.¹³⁵

4.3.3. Doctrine of Collateral Estoppel

Finally, in a handful of cases, investment tribunals accepted prior domestic determinations on grounds of estoppel. In *Desert Line Projects v. Yemen* (2008), an ICSID Tribunal thus accepted as binding contractual matters decided in a prior domestic contractual arbitration, on the ground that Respondent – having illegitimately pressured the Claimant to accept a settlement agreement and thereby suspending the debate about the validity of the local arbitral award, and having caused the Claimant to alter its position in fundamental ways to its detriment – was subsequently “estopped from seeking to achieve the same effects” by again attempting to contest the validity of the local arbitral award.¹³⁶ But while in *Desert Line Projects*, the application of estoppel was still tightly bound with the peculiar circumstances of that case, in *Grynberg v. Grenada* (2010) the principle was latter applied as a matter of general proposition. Facing the question whether it was bound by the findings of a prior ICSID Tribunal with respect to contractual claims and counter-claims decided in relation to the same parties,¹³⁷ the *Grynberg* Tribunal thus specifically invoked the doctrine of “collateral estoppel” – a doctrine which it considered “well established as a general principle of law applicable in the international courts and tribunals such as this one” – to conclude that the contractual award was binding upon it.¹³⁸ Thereby, the Tribunal took also the principled view that, “[e]ven when the contractual forum is not an ICSID Tribunal, BIT tribunals do not reopen the municipal law decisions of competent fora, absent a denial of justice.”¹³⁹

The idea that investment tribunals can be bound by defences of estoppel based on a prior domestic judgment was later endorsed in *Ampal-American v. Egypt* (2017).¹⁴⁰ There, however, the doctrine was further extended to situations going beyond the strict identity of parties. In the *Desert Line* case, the question of party identity did not directly arise, as the claimant and respondent in the domestic and international proceedings were the same. Nor was it directly an issue in the *Grynberg* case, where the claimant in the prior domestic arbitration was an investment vehicle wholly-owned by the claimant in the subsequent treaty proceedings. In *Ampal-American*, in contrast, the question of issue preclusion arose in circumstances where the claimants in the treaty arbitration were merely one of the shareholders in the investment vehicle involved in the local contractual arbitration, which was furthermore conducted with Egyptian State instrumentalities, but not Egypt itself. In the view of the *Ampal-American* Tribunal, however, the doctrine of *res judicata* was not only applicable to the parties to the prior decision, but also to “those persons

¹³⁴ *Unglaube v Republic of Costa Rica (Award)* (n 14), [253].

¹³⁵ *Teco v Guatemala* (n 90) [474], [483]. In the circumstances of that case, it was particularly the decisions of the Constitutional Court of Guatemala that have been considered to ‘have consequences on the findings that the Arbitral Tribunal will have to make under Guatemalan law’[475].

¹³⁶ *Desert Line Projects LLC v. The Republic of Yemen (Award)* (ICSID Case No. ARB/05/17, 6 February 2008) [208].

¹³⁷ cf *RSM Production Corporation v Grenada (Award)* (ICSID Case No ARB/05/14, 13 March 2009).

¹³⁸ Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Company v Grenada (Award) (ICSID Case No ARB/10/6, 10 December 2010) [7.1.2].

¹³⁹ *ibid* [7.1.11], [7.1.14]. In support of this statement, the Tribunal referred to the reasoning in the *Helnan* award, which it considered “persuasive and applicable” in the circumstances of the case.

¹⁴⁰ *Ampal-American Israel Corporation and others v. Arab Republic of Egypt (Decision on Liability and Heads of Loss)* (ICSID Case No. ARB/12/11, 21 February 2017) [266].

who are in privity of interest with them” – for, insofar as “in the context of investment arbitration, a shareholder is entitled to pursue a claim for investments that are indirectly held through a corporation, it must also be subject to defences that would be available against the corporation, including the defences of estoppel based on a prior judgment.”¹⁴¹ Having established that Claimants in the treaty proceedings were thus in privity of interest with the claimant in the domestic proceedings, and that the conduct of the Egyptian State instrumentalities was attributable to Egypt, the ICSID Tribunal ultimately concluded that the domestic forum’s findings on contractual issues relevant to the treaty claims had a *res judicata* effect between the parties in the treaty proceedings.¹⁴²

The doctrine of (collateral) estoppel has thus provided an alternative basis for treating prior domestic pronouncements on contractual matters or other issues of domestic law as binding insofar as such matters are relevant to the subsequent treaty claims.¹⁴³ Apart from its formal endorsements in recent jurisprudence, the doctrine finds also broader resonance in the practice of investment tribunals. As noted in 4.1.2.3., several of them have been willing to consider whether inconsistencies in the parties’ conduct before the domestic and the international forum could have given rise to estoppel, and at least in one case, a Tribunal found the Respondent to be “barred” from disputing a point of domestic law where it accepted such point in previous domestic proceedings.¹⁴⁴

4.3.4. Policy Rationales in Favour of Granting Legal Effects to Domestic Pronouncements

The more recent proclivity of some investment tribunals to treat prior domestic pronouncements as capable of producing normative effects, though welcomed by some,¹⁴⁵ has not been met without reservations. According to Wehland, if a treaty tribunal were bound by a domestic judicial decision rendered in parallel proceedings (even if only as a matter of domestic law), the protective scope of the applicable treaty would supposedly be “significantly curtailed”.¹⁴⁶ In the same vein, Spierman posits that, if the view advanced in *Helman* were to be applied generally, it had “the potential to crumble the competence of ICSID tribunals without any real support in international law”.¹⁴⁷ Surely, from the standpoint of investment tribunals, such concerns are understandable, as treating domestic judicial pronouncements as preclusive directly challenges their claim to adjudicatory authority. Yet, much also depends on what one understands under the notion of *res judicata*. As noted in 1.4.2.1., the principle deems not be considered an absolute one. In the international context especially, the concept of *res judicata* ought not revolve around the question of reviewability of a prior pronouncement, but should solely turn on the question of the acceptance thereof.¹⁴⁸ As noted in 4.2.6., this acceptance can certainly be conditioned on such pronouncement’s validity.

¹⁴¹ *ibid.*

¹⁴² *ibid.*, [268]-[270].

¹⁴³ This, in itself, is not surprising as in many domestic legal systems, estoppel-related doctrines are frequently resorted to as a way to overcome the strict conditions otherwise attaching to the principle of *res judicata*. See V Lowe, ‘Res judicata and the Rule of Law in International Arbitration’, (1996) 8 *African Journal of International and Comparative Law* 38, 41ff.

¹⁴⁴ *Middle East Cement* (n 44), [135].

¹⁴⁵ See eg CT Kotuby and JA Egerton-Vernon, ‘The Adoption by International Tribunals of a Substantive/Transactional Approach to *Res Judicata* – A New Paradigm in International Dispute Resolution?’ (2015) 30 *ICSID Review* 486.

¹⁴⁶ H Wehland, ‘The Regulation of Parallel Proceedings in Investor-State Disputes’ (2016) 31 *ICSID Review* 576, at 584.

¹⁴⁷ O Spiermann, ‘Premature Treaty Claims’, in C Binder et al. (ed), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 463-489, at 478 fn 72.

¹⁴⁸ But see thus H Wehland, *The coordination of multiple proceedings in investment treaty arbitration* (OUP, 2013), 147-153, to whom the question of *res judicata* seems primarily to relate to the question of reviewability.

At the same time, one must also not be oblivious to broader policy considerations. Namely, prior domestic proceedings may frequently have been caused by the same event that precipitated subsequent investment arbitration and that the aim of both actions may be to resolve substantially the same grievance. Especially if the investor has initiated both proceedings, the policy grounds that usually underpin the application of the doctrine of *res judicata* – viz., the importance of avoiding inconsistent and contradictory decisions, the preventing of double recovery and double jeopardy, and the minimizing of economically undesirable duplication of proceedings¹⁴⁹ – are hence equally relevant in the relation between domestic courts and investment tribunals. Among these, the demand for legal certainty is perhaps the most pressing of all. As a previously seized domestic forum may have already dealt with the same or similar factual and legal issues, and as that forum may in fact have been better positioned to make particular findings of fact¹⁵⁰ and/or possesses better knowledge of applicable law (as the case usually is with domestic courts’ understanding of domestic law), the general principle that the law should be applied consistently provides a cogent reason why a subsequently seized investment tribunal should endeavor to provide full effect to prior findings of domestic fora.¹⁵¹ Failure to do so is likely to undermine the rule of law and in the long run further threaten the legitimacy of investor-State arbitration.¹⁵²

Against this backdrop, it is then certainly comforting that at least some investment tribunals have been willing to accord legal effect to prior domestic pronouncements, by either applying the principle of *res judicata* pursuant to a less strict test than one requiring perfect identity of actions, or else by resorting to doctrines such as that of deference, estoppel and the like. Indeed, one may not only wonder whether a strict application of the triple identity test is actually appropriate in the context of international arbitration,¹⁵³ but also how a formalistic approach to this issues can be reconciled with other practices in investment arbitration, where the lack of strict identity has generally not been deemed a barrier to adjudication: such as when it came to extending the benefits of an ICSID arbitration clause to parties not expressly named in the arbitration agreement,¹⁵⁴ to granting standing to shareholders to claim for reflective losses,¹⁵⁵ or to attributing the conduct of statal entities and instrumentalities to the State more generally. Unless, of course, one accepts that formalism must be selectively applied to all issues that would be

¹⁴⁹ See generally ‘ILA Final Report on Res Judicata and Arbitration’ reproduced in (2009) 25(1) *Arbitration International* 67. See also A Reinisch, ‘The Issues raised by Parallel Proceedings and Possible Solutions’ in M Waibel, et al (eds), *The backlash against investment arbitration: perceptions and reality* (Kluwer, 2010), 113-126, 115.

¹⁵⁰ See Bottini (n 53), 312-313, submitting that investment tribunals should accord great weight to decisions of local judges, especially if they are criminal judges, which are generally better equipped to handle domestic corruption cases, and further suggesting that investment tribunals and domestic courts engage in a process of cross-fertilization that can be useful for *inter alia* gathering evidence to prove illegal acts.

¹⁵¹ See further M Stanivuković, ‘Investment arbitration: effects of an arbitral award rendered in a related contractual dispute’ (2014) 4 *Yearbook on International Arbitration* 150.

¹⁵² See Farnham (n 119), 207.

¹⁵³ See especially A Sheppard, ‘Res Judicata and Estoppel’ in BM Cremades Sanz-Pastor and JDM Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration* (Kluwer, 2005), 219–242, at 233, arguing that in international arbitration, where there is little or no opportunity to join a third party, or have another tribunal stay its proceedings to await the outcome of another arbitration, applying a strict test – which puts form over substance and ignores the underlying realities – can easily cause injustice. See also Farnham (n 119), 213, seeing the most important argument against the application of a strict identity of parties test in the fact that, unlike in domestic legal systems, in treaty based investment arbitrations even minority shareholders have standing to bring claims with respect to contracts to which they are not party.

¹⁵⁴ See eg *Holiday Inns S.A. and others v. Morocco* (Decision on Jurisdiction) (ICSID Case No. ARB/72/1, 12 May 1974); *Amco v Indonesia* (n 16) [24]ff; or *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (Award) (ICSID Case No ARB/81/2, 21 October 1983).

¹⁵⁵ See eg *CMS Gas Transmission Company v Argentine Republic* (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/01/8, 17 July 2003), [65]; or *Azurix Corp v Argentine Republic* (Decision on Jurisdiction) (ICSID Case No ARB/01/12, 8 December 2003) [73]-[74].

capable of undermining the investment tribunals' adjudicatory authority – a premise, on which many arbitral awards were seemingly building upon.

4.4. Factors Affecting Reception of Specific Judicial Determinations on the Part of Investment Tribunals

Still, practice may often deviate from formal pronouncements on normativity. Notwithstanding the fact that a great number of investment tribunals thus refused to be bound by domestic judicial findings or pronouncements, at the end of the day, many of them were nonetheless inclined to give weight to such findings and pronouncements in the process of adjudicating the treaty claims. Why did, for example, the *Vigotop* Tribunal, after holding that it would decide the issues of domestic law “in its own right” and in “light of the evidence before it”, in the end nonetheless decide to follow the Supreme Court's findings in relation to the validity of a particular contract?¹⁵⁶ The following part attempts to single out some of the factors that could potentially explain the propensity of tribunals to give or not to give weight to particular judicial decisions (4.4.1.). Thereafter, some observations will be made about the standards of review applied by investment tribunals to the scrutiny of domestic decisions (4.4.2.).

4.4.1. Factors Determining the Evidentiary Value of Judicial Determinations

There has been a habit of treating domestic judgments as evidence in the generic sense. In the view of the *Amco* Tribunal, for example, “judgments of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal.”¹⁵⁷ Similarly, the *Petrobart* Tribunal, considered such judgments as “evidence in the arbitration in question”.¹⁵⁸ Seen in this light, the main factor determining the reception of domestic pronouncements would therefore seem to be their *relevance* to the domestic legal issues on which decision is required. Yet, this obviously fails to explain why particular judgments have sometimes been ignored in circumstances where these were clearly relevant. Rather, three factors appear to be capable of explaining the propensity of investment tribunals to follow domestic judicial determinations: the epistemic superiority of domestic courts, the circumstances in which the particular judgment has been invoked, and the quality of the judgment as such.

4.4.1.1. Domestic Courts' Expertise in Domestic Law

Some investment tribunals acknowledged that an important reason why it was appropriate to follow specific determination of a domestic court lay in the potential *epistemic superiority* of domestic judgments. Such superiority has frequently been recognized in relation to *questions of domestic law*. According to the *Chevron/Texpet (Lago Agrio)* Tribunal, “[a]s a practical matter, without more, the considered judgments of any municipal court applying its own municipal law, especially an appellate court, are (absent special circumstances) the best evidence of the content and application of that law to the same or similar situations.”¹⁵⁹ In a similar way, the *Vigotop* Tribunal felt it appropriate to give “due consideration” to a Supreme Court judgment because the latter was evidence of Hungarian law.¹⁶⁰ In some cases, however, investment tribunals seemed prepared to recognize domestic courts superiority also when it came to determining *questions of fact*.

¹⁵⁶ *Vigotop v Hungary* (n 23), [509], [535].

¹⁵⁷ *Amco v Indonesia* (n 16), 177.

¹⁵⁸ *Petrobart v Kyrgyz Republic* (n 4), 41 (observing that ‘a judgment rendered by a foreign court of law may well become relevant as evidence in the arbitration in question’).

¹⁵⁹ *Chevron (Track 1B)* (n 88), [140].

¹⁶⁰ *Vigotop v Hungary* (n 23), 509; *Chevron (Track 1B)* (n 88), [140]; *Teco Guatemala v Guatemala* (n 90).

The relatively greater capacity of domestic courts to determine facts relevant to establishing bribery or corruption would seem to explain, for example, the willingness of the tribunals in *Telsim*, *Nico Resources*, or *TSA* to consider or even take into account domestic judgments in determining the legality of a particular investment. It would also explain the propensity of the tribunals in *Tecmed* or *Rompotrol* to rely on domestic judgments as evidence on questions of public concern or national security.

4.4.1.2. *Attitude of the Litigating Parties towards the Judgment*

An obvious factor explaining the reception of judgments on the part of investment tribunals is also the *context* in which the particular judgment has been invoked, and particularly the *acceptance of the judgment on the part of the litigating parties*. As attested to by the awards in *Feldman*, *PSEG*, or *SLAG*, it appears that tribunals will have little incentive to ignore a domestic judgment where none of the litigating parties opposes it. In contrast, as suggested by the awards in *Inceysa*, *Fraport*, *Bewater/Gauff*, *Malicorp*, or *Chevron*, tribunals might be more inclined to ignore a particular judgment when one of the litigating parties will contest it. As further shown by the award in *Saluka*, where a litigating party will accept in earlier proceedings a judgment to be binding, it will be difficult to contest the same judgment in proceedings before the investment tribunal. The acceptance of a particular judicial determination on the part of investment tribunals appears, on the other hand, to be less contingent on which of the litigating parties will be relying on it. Admittedly, one could be tempted to argue that investment tribunals will have greater reservations about judgments that are favorable to the Respondent State, given that such judgments stem from one of the State's own organs.¹⁶¹ In practice, however, investment tribunals have refused with equal frequency to give weight to domestic judgments that appeared favourable to the Claimant,¹⁶² and conversely, to accept judgments that were clearly favorable to the Respondent's position.¹⁶³

4.4.1.3. *Quality of the Domestic Judgment*

The third factor that seems to have been of influence on the tribunals' propensity to take account of particular judicial determinations is the *quality of a particular judgment*. At the more basic level, a determinative factor in this respect will be the *validity* of the decision as such. In *SPP*, for example, a key reason for the findings of fact previously reached in a domestic commercial arbitration procedure was certainly the fact that the prior award had later been annulled by domestic courts.¹⁶⁴ Another factor will likely be the absence of any signs of *bias* on the part of the judicial body taking the decision. For example, in a number of arbitrations brought against Venezuela pursuant to its Foreign Investment Law, investment tribunals seem to have systematically ignored a decision of Venezuela's Supreme Court that had previously interpreted that law as not providing for the necessary consent to ICSID jurisdiction precisely because that decision was claimed to be politically tainted.¹⁶⁵ The question of possible bias would furthermore seem to explain why investment tribunals in cases such as *Niko Resources* or *Telsim* seemed to have had less

¹⁶¹ See eg *Amco Asia Corporation and others v Republic of Indonesia* (n 16), *Mobil* (n 3) (and other cases brought against Venezuela pursuant to its foreign investment law), *Petrobart v Kyrgyz Republic* (n 4), *Luchetti* (n 67).

¹⁶² Most notably in *Inceysa* (n 5), *Fraport I* (n 6).

¹⁶³ *Vigotop v Hungary* (n 23); *Azinian v The United Mexican State* (n 24); *Liman Caspian Oil BV v Republic of Kazakhstan* (n 25); *Bosh International and B&P v Ukraine* (n 27); *Arif v Republic of Moldova* (n 28); *Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia* (n 27).

¹⁶⁴ See also *Helnan v Egypt* (n 23), [163], suggesting that the effects of a prior domestic commercial award could be ignored only where 'it would be established that the rendering of the Award was made in breach of the Treaty, or general international law'.

¹⁶⁵ *Tidewater* (n 3), [31].

reservations about accepting judgments that stemmed from courts other than those of the Respondent State.

The quality of the judgment, however, has increasingly come to be understood in the sense of the *propriety of a particular decision from the perspective of international standards applicable to the administration of justice*. Already early in the practice of international adjudicatory bodies, the principle had found recognition that domestic courts' pronouncements will lack effect on the international plane where such pronouncements are tainted by denial of justice.¹⁶⁶ This same proposition has eventually been endorsed – both as a matter of principle and as a matter of fact – in the practice of investment tribunals. At the level of general proposition, investment tribunals thus frequently expressed themselves in favour of denying binding effect to domestic judgments that violate international law.¹⁶⁷ In accordance with the oft-repeated observations of the *Helnan* Tribunal, domestic judicial determinations have to be accepted “as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.”¹⁶⁸ Or as the *Grynberg* Tribunal put it, “BIT tribunals do not reopen the municipal law decisions of competent fora, *absent a denial of justice*.”¹⁶⁹

This “no deficiencies”-approach resonates with the practice of a great deal of investment tribunals that were prepared to accept domestic judicial determinations precisely because the domestic judicial process had been found to be in conformity with international standards of administration of justice. This was not only the case where the domestic judicial pronouncements in question formed the very object of the treaty claims – such as in relation to claims of judicial expropriation,¹⁷⁰ claims premised on court-attributed breaches of the umbrella clause¹⁷¹ – which

¹⁶⁶ See eg F Wharton, *A digest of the international law of the United States*, vol 2 (1886), sec 238, p 671 (“The defense of *res adjudicata* does not apply to cases where the judgment set up is in violation of international law.”); or Dissenting Opinion of Commissioner Nielsen in *Teodoro García and MA Garza (United Mexican States) v United States of America* (IV UNRIAA 119, 3 December 1926) 126 (“I take it that international law recognizes the right of the authorities of a sovereign nation, particularly a court of last resort, to put the final interpretation upon the nation's laws. Possibly there may be an exception to this general rule in a case where it can be shown that a decision of a court results in a denial of justice; that is, when a decision reveals an obviously fraudulent or erroneous interpretation or application of the local law.”).

¹⁶⁷ *Feldman v Mexico* (n 13) [140] (“this Tribunal is not bound by a decision of a local court if that decision violates international law”); or *Waste Management, Inc v United Mexican States (I)* (ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Hight of 8 May 2000) [51] (“to the extent that the local remedies were unavailing, as in the present case, the NAFTA claimant's basis of claim against the contesting government would again be reduced by application of the *res judicata* of the unfavorable local result unless, and to the extent that, such unfavorable local result were to be considered itself as an international denial of justice.”)

¹⁶⁸ *Helnan v Egypt* (n 23), 106.

¹⁶⁹ *Grynberg v Grenada* (n 138), [7.1.11], [7.1.14].

¹⁷⁰ *Arif v Republic of Moldova* (n 28), [415]-[417] (rejecting the claim that the judicial annulment of Claimant's concession amounted to expropriation *inter alia* on the ground that the Moldovan courts have not acted in denial of justice); or *Hassan Andri v Romania* (n 131), [325]-[328] (considering that the repealing of a law by Romania's Constitutional Court would not have amounted to an expropriation in the absence of a denial of justice; referring specifically to *Helnan*'s ‘no deficiencies’-test, [327]).

¹⁷¹ See eg *Liman Caspian Oil BV v Republic of Kazakhstan* (n 25) [442]-[443] (accepting the result of domestic judicial proceedings on the ground that the Kazakh courts did not violate international law); or *Bosh International, Inc and B&P v Ukraine* (n 27), [258]-[259] and [276]-[286] (rejecting the claim under the umbrella clause since the contract had been validly terminated through Ukrainian court proceedings, which on their part did not violate any treaty standards); *Swisslion DOO Skopje . The Former Yugoslav Republic of Macedonia* (n 27) [265]-[275], and [323]-[325] (summarily disposing of the claim under the umbrella clause since the relevant contract was validly terminated by Macedonian courts, which on their part did not act contrary to international law in their treatment of the legal proceedings before them, or otherwise committed a denial of justice); *Arif v Republic of Moldova* (n 28), [398] (finding the claim under the umbrella clause inadmissible, inasmuch as the relevant contracts had been irrevocably annulled by the whole of the Moldovan judicial system and the Tribunal was persuaded that there had been no denial of justice towards the investor). For similar views, see also *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/02/6, Dissenting Opinion of

were rejected by investment tribunals precisely because of the fact that the impugned judicial conduct conformed with international standards. Also in other situations where domestic judicial pronouncements were relevant to the treaty claims – in that they confirmed the domestic legal validity of certain measures,¹⁷² or purportedly affected the stability of the domestic legal framework¹⁷³ – such pronouncements were accepted insofar as no impropriety had been found on the part of the courts. Indeed, even on the occasion where domestic judicial pronouncements were relevant to matters pertaining to the tribunal’s jurisdiction, the tendency was expressed towards accepting such pronouncements “[a]bsent good cause for disregarding them”, such cause potentially presenting itself if the pronouncements had been made in “blatant violation” of domestic law.¹⁷⁴

The very same principle underpins arbitral decisions where domestic judicial determinations were, conversely, ignored precisely because the propriety of the judicial process, or that of the decisions themselves, was put into question. Most illustrative is perhaps the Interim Award in *Chevron/Texpet v. Ecuador (Lago Agrio)* (2015), where the Tribunal refused to accept the Ecuadorean courts’ pronouncements on a point of domestic law relevant to the Claimant’s treaty claim, inasmuch as the claim was premised on the purportedly wrongful adjudication on the part of Ecuadorean courts of Claimants’ liability for environmental damage. The Tribunal considered that, in normal circumstances, it would have wished “to be guided” by Ecuadorean courts as regards relevant issues of Ecuadorean law; however, in the exceptional circumstances where Claimants alleged multiple denials of justice at the hands of the Respondent’s Courts, the Tribunal considered it was “precluded” from adopting a deferential approach.¹⁷⁵ But already in the earlier award in *Chevron/Texpet v. Ecuador* (2010), no account was taken of, nor consideration given to domestic Ecuadorean judgments relating to Claimant’s contractual claims, precisely because those judgments had been rendered after delays that were found to be so unreasonable as to amount to a violation of the applicable BIT.¹⁷⁶

Interestingly, the “no deficiencies”-approach was even followed in cases where the propriety of the domestic judicial process was not even put into question. In *Vigotop*, for example, the Tribunal – in spite of its initially proclaimed intention to determine the domestic law issues for itself – eventually based its conclusions on a Supreme Court’s decision, after it had itself found no evidence of any procedural unfairness in the conduct of the legal proceedings before

Professor Crivellaro of 29 January 2004) [12], expressing the view that the claims which were otherwise found inadmissible under the umbrella clause could only return to the treaty tribunal in case of a denial of justice by the Philippine courts, which were the applicable contractual forum, for ‘they cannot certainly return in case of a wrong judgment in the merits; we are not a Court of Appeal in respect of domestic courts.’

¹⁷² See *Azinian v The United Mexican State* (n 24), 96-99, where Mexican judgments confirming the invalidation of Claimant’s concession were accepted on the ground that, in circumstances where the Mexican law governing the validity of public service concessions was not in itself expropriatory, a governmental authority could ‘not be faulted for acting in a manner validated by its courts’ unless the conduct of such courts were ‘disavowed at the international level’.

¹⁷³ See eg *Unglaube* (n 14), 251-253, rejecting a claim for violation of fair and equitable treatment premised on a purportedly *contra legem* interpretation of a domestic statute, on the ground that it was ‘not appropriate for this Tribunal to substitute an opinion of its own or make any finding of liability unless the Attorney General and the Court are found to have acted in a manner which is arbitrary, discriminatory or otherwise shocking to the conscience.’

¹⁷⁴ See *Ares v Georgia* (n 7), 5.4.26-5.4.28, where the Tribunal, though having rejected the possibility of being bound by determinations made by the Georgian judiciary, nonetheless held that, ‘[a]bsent good cause for disregarding them, we see no principled reason why this Tribunal ought not to look carefully at the conclusions of the Georgian courts [...] to assist us in reaching our own conclusions.’

¹⁷⁵ *Chevron (Track 1B)* (n 88), [140]-[142].

¹⁷⁶ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Partial Award on the Merits)* (UNCITRAL, PCA Case No 34877, 30 March 2010) [377]. Respondent relied on some of them with a view to proving that Claimants’ contractual claims would have failed See eg [436] or [465].

the Hungarian courts.¹⁷⁷ Conversely, the decisions of the tribunals in *Luchetti*, *Bivater Gauff* and *Malicorp* not to give weight to prior determinations by local courts or contractually-designated adjudicatory fora can be compellingly explained by deficiencies in the local adjudicatory process. In *Luchetti*, for example, the Tribunal's decision not to attribute significance to Peruvian judgments seemed to have been motivated by Respondent's own allegations that those judgments had been attained under "corrupt and egregious circumstances".¹⁷⁸ In *Bivater Gauff*, it was Claimant's complaints about irregularities which allegedly occurred in the local arbitral procedure that most likely weighed in to the Tribunal's decision eventually to ignore the local commercial award in its entirety.¹⁷⁹ In *Malicorp*, instead, it was the Respondent's opposition to the validity of the contractual dispute settlement procedure leading to the local commercial award that seemingly prompted the ICSID Tribunal to re-examine the latter's conclusions.¹⁸⁰

The making of the propriety of the domestic adjudicatory process into a key element controlling the reception of domestic judicial pronouncements on the part of investment tribunals has arguably the advantage of moving the discussion away from doctrinal inquiries as to the possibility of domestic judicial decisions having *res judicata* effects on the international legal plane, into a more pragmatic, circumstances-specific treatment of each judicial precedent. Not only does such approach enable tribunals to avoid taking stances on difficult doctrinal questions, but importantly, also accords greater respect to domestic judicial organs which, at the end of the day, still enjoy epistemic superiority on questions relating to the interpretation and/or application of domestic law. In this regard, the "no-deficiencies" approach also aligns in a better way with international tribunal's general duty to construct domestic law in accordance with domestic judicial authorities – a matter that will more extensively be discussed in chapter 5. Finally, practice suggests that the "no deficiencies" approach can easily be fitted into a variety of claims. Not only has such approach been followed in relation to claims that were wholly or partly predicated on alleged judicial misconduct,¹⁸¹ as attested to by the *Helnan* and *Vigotop* awards, it can equally been applied in circumstances where the particular judicial conduct is not otherwise part of the cause of action.¹⁸² Where, on the other hand, the tribunal's competence to undertake such an inquiry is put to question, the investment tribunals are still at liberty to simply ignore domestic judicial pronouncements – just as in the *Malicorp* and *Bivater Gauff* cases, where tribunals also refrained from actually making any pronouncements as to the propriety of the domestic adjudicatory process.¹⁸³ In light of this practice, it is perhaps not surprising that the idea of the reception of particular domestic pronouncements being contingent upon the quality of domestic decision-making processes has also been gaining support in academic writings.¹⁸⁴

¹⁷⁷ *Vigotop v Hungary* (n 23), [510].

¹⁷⁸ *Luchetti* (n 67), [37].

¹⁷⁹ *Bivater Gauff* (n 19), 466-477.

¹⁸⁰ *Malicorp (Award)* (n 21), 103(d); cf 44-60.

¹⁸¹ cf *Limn Caspian Oil BV v Republic of Kazakhstan* (n 25), *Arif v Republic of Moldova* (n 28), *Hassan Awdi, Bosh International and B&P v Ukraine* (n 27), *Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia* (n 27), *Chevron (Track 1B)* (n 88) and *Chevron (Contractual Claims)* (n 176).

¹⁸² *Helnan v Egypt* (n 23), *Vigotop v Hungary* (n 23).

¹⁸³ *Bivater Gauff* (n 19), *Malicorp (Award)* (n 21). The Tribunal in *Malicorp* even explicitly noted that it was not for itself to rule on the validity of the commercial award – since in the circumstances of the case it had not been asked to do so, and since the Respondent could not, at any rate, be held liable for a decision made by an autonomous commercial arbitral tribunal. [103(d)]

¹⁸⁴ See C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, 2009), [3.81] (affirming that in the absence of any evidence that the findings of domestic law by national courts, tribunals, or regulatory bodies are tainted by some lack of due process, deference should be shown to those findings); or M Swarabowicz, 'Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System' (2017) 8(2) JIDS 280, at 301 (advancing the proposition that the preclusive effect of a local judgment be recognized, 'to the extent that it is procedurally unimpeachable and the local law does not oblige him [i.e. the court] to rule in favour of the host State.').

4.4.2. Standard of Review Applicable to the Scrutiny of Judicial Determinations

A final matter that needs to be considered is the standard of review that investment tribunals have applied to the scrutiny of domestic judicial pronouncements. As noted in the preceding sections, the standard has in many cases been a non-deferential one: tribunals proceeded to determine the relevant issue of domestic law for themselves, *de novo*, ignoring thereby any pronouncements that had previously been made in respect of that issue by domestic courts. However, where investment tribunals were prepared to accord weight to domestic judicial pronouncements, they did not subject them to a particularly heightened scrutiny.

Granted, the cases where domestic judicial pronouncements have been accorded *total deference* – in the sense, that they were applied as they were, without more – were rather exceptional ones. This might have been the case where a particular pronouncement was not subject of contention between litigating parties,¹⁸⁵ or else where the validity of such pronouncements was not put to question.¹⁸⁶ In most situations, the standard of review was a deferential one. First, investment tribunals have by and large rejected the idea of subjecting domestic judgments to a test of *correctness*. The most vocal objections in this respect were expressed by the Tribunal in *Arif*, which did not wish to reconsider whether Moldovan courts correctly annulled Claimant's contract on the ground that it was "not a court of appeal of last resort" and that there was "no compelling reason that would justify a new legal analysis by this Tribunal regarding the invalidity of these agreements which has already been repeatedly, consistently and irrevocably decided by the whole of the Moldovan judicial system."¹⁸⁷ Second, and most notably, tribunals have frequently also refrained from subjecting domestic decisions to the less-intrusive test of *reasonableness*. Exceptions are the awards in *Vigotop*, where the Tribunal's acceptance of the domestic court's findings was actually premised on the fact the reasoning of that court was deemed "credible" and persuasive under the circumstances,¹⁸⁸ and in *Malicorp*, where the Tribunal went as far as noting that the decision of the contractual arbitral forum to award damages did "not seem unreasonable", even if the Tribunal did not otherwise base its own conclusions on the said decision.¹⁸⁹ Apart from that, however, the greatest part of investment tribunals were satisfied with the least-intrusive "*no-deficiencies*" test. This implied that a domestic court's decision was accepted on its substance, as long as the process leading to it complied with the international standards applicable to the administration of justice.¹⁹⁰

All in all, the approach of investment tribunals would generally seem to accord with the practice of other international adjudicatory bodies when reviewing domestic judicial pronouncements. On the one hand, it accords with that of the ICJ, which has had the inclination of accepting domestic judicial pronouncements when these were not disputed by either of the parties,¹⁹¹ and in other situations subjecting them to the test of manifest incorrectness.¹⁹² On the

¹⁸⁵ See eg *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Award)* (ICSID Case No ARB/05/15, 1 June 2009).

¹⁸⁶ See eg *Investment v Czech Republic* (n 10), 192-193. Accepting Czech courts' findings with respect to validity of a share purchase agreement to the extent it was not asked by the parties to rule on the question of validity.

¹⁸⁷ *Arif v Republic of Moldova* (n 28), [416].

¹⁸⁸ *Vigotop v Hungary* (n 23), 535.

¹⁸⁹ *Malicorp (Award)* (n 21), [143].

¹⁹⁰ See cases quoted *supra* in 4.4.1.3.

¹⁹¹ See eg *Fisheries case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116 (18 December 1951), 134, and Dissenting Opinion of Sir Arnold McNair, [1951] ICJ Rep 158, at 181 ("But this Court, while bound by the interpretation given in the St. Just decision of Norwegian internal law, is in no way precluded from examining the international implications of that law"); and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* [2008] ICJ Rep 177 (4 June 2008), 146 ("It is not for this Court to do other than accept the findings of the Paris Court of Appeal on this point.").

other hand, it would seem to accord with that of the ECtHR, which was prepared to subject domestic judicial pronouncements on points of domestic law to greater scrutiny in circumstances where domestic law needs to be considered by way of *renvoi* (as opposed to other circumstances where domestic role is merely relevant as a fact).¹⁹³

The practice of investment tribunals also confirms that, as a standard of review, deference does not necessarily imply that domestic decisions may not be subject to intensive scrutiny. Illustrative in this respect is the *Feldman* award, where the issue arose as to whether a decision of Mexico's Supreme Court decided solely the question of Claimant's entitlement to a zero percent tax rate in relation to its tobacco reselling business, or whether it also decided the question of specific invoicing requirements that in practice prevented the Claimant from benefiting from that tax rate. After a careful scrutiny of the Supreme Court's decision, the ICSID Tribunal concluded the former was the case, basing itself not only on a textual reading of the judgment (in the view of the Tribunal, "a careful reading" of the decision revealed no mention of the statutory provision imposing the invoicing requirement¹⁹⁴), but also on its teleological interpretation (the fact that the judgment might not have addressed or resolved the invoicing question did not render it meaningless, since the judgment still had considerable practical benefits in that it protected Claimant's entitlement to a favorable tax rate with respect to items whose export did not give rise to invoicing problems).¹⁹⁵

4.5. Conclusions

The conclusions that one can tentatively draw from this examination of arbitral jurisprudence are the following. Investment tribunals have by and large been dismissive of the idea that they would be under a legal duty to follow the outcome of domestic court procedures, and specifically, to be formally bound by previous domestic judicial pronouncements on points of law and/or fact that were relevant to the issues in proceedings before them. In practice, tribunals have been the least inclined to accord the effect of *res judicata* to those domestic judicial pronouncements which purported to put into doubt the existence or scope of their own adjudicatory powers. This, in itself, is not surprising. As discussed in chapter 2, investor-State arbitration was intended to provide an alternative to domestic litigation. Accepting that domestic courts could affect the operation of investment tribunals would end up rendering investment arbitration an ineffective dispute settlement mechanism; indeed, it would go against such mechanism's *raison d'être*.

What is interesting in this regard is that the failure to satisfy the formal requirements for *res judicata* – the identity of the parties, facts, causes of action – was rarely invoked as the main reason for declining effects to a domestic judgment. In justifying their decision not to follow or take account of domestic judicial pronouncements, investment tribunals more often provided other justifications. Many of them built on the argument of supremacy of international law, and the related arguments underpinning such supremacy – namely, the idea that a host State should not be permitted to (ab)use its domestic law to avoid its international responsibility, as well as the idea that a host State should not be sitting as judge in its own cause (the *nemo iudex* principle). Another group of arguments were those pertaining to the dualist separation of legal orders. In the end, however, investment tribunals appeared most comfortable in simply invoking specific powers or duties bestowed upon or enjoyed by them, by virtue of their adjudicatory functions:

¹⁹² See *Ahmadou Sadio Diallo* (n 120), [70] (referring to the Court's power to ignore a domestic judgment 'where a State puts forward a manifestly incorrect interpretation of its domestic law').

¹⁹³ *Case of Kononov v Latvia (Judgment)* (ECtHR, Application no 36376/04, 24 July 2008) 198.

¹⁹⁴ *Feldman v Mexico* (n 13), 121.

¹⁹⁵ *ibid* 122.

the *kompetenz-kompetenz* principle entitling them to be judges of their own jurisdiction, and the duty to autonomously appreciate the evidence submitted to them.

These general inclinations notwithstanding, the examination of arbitral practice has also disclosed how some investment tribunals have nonetheless been prepared to recognize, under specific circumstances, the preclusive effect of domestic judicial decisions in relation to questions of domestic law that were relevant to the claims before them. Such acceptance of domestic pronouncements most frequently occurred in the context where the subject of prior judicial determinations were certain contractual issues on which the subsequent international claim was premised. The fact that investment tribunals were prepared in such cases to accept those pronouncements is, in itself, again not surprising. In circumstances where the investor has already had contractual issues determined by domestic courts, the possibility of those same issues being reconsidered by the investment tribunal would effectively turn the international procedure into a form of appellate review. But while the idea of foreclosing re-litigation of already settled issues is inherent to the doctrine of *res judicata*, investment tribunals rarely formulated their duty to follow domestic courts pronouncements on such contractual issues in terms of that doctrine. Many times, prior pronouncements were simply followed as a matter of practice, *de facto* giving rise to issue preclusion in the subsequent arbitration procedures.

What the examination of arbitral practice has finally revealed is that the extent to which investment tribunals will be prepared to defer to domestic judicial pronouncements will ultimately depend upon the quality of those pronouncements. Investment tribunals will more likely accept the outcome of those domestic judgments which emanate from independent, disinterested judicial decision-makers, and which are not tainted by deficiencies in procedure or substance. In other words, investment tribunals will likely accord deference to domestic judgments as long as the propriety of those judgments will not be put into question from the perspective of international law. As a matter of general policy, there are certainly good reasons for according deference to domestic courts under such specific conditions. Domestic courts will generally have better knowledge of domestic law than arbitrators on investment tribunals. They will usually be also better placed to make certain factual determinations that are relevant to the application of domestic legal rules. But the reasons for according deference are not only practical ones. As the following chapter will demonstrate, investment tribunals are not at freedom to entirely ignore the pronouncements of domestic courts on points of domestic law. On the contrary, they are also under a duty to interpret and apply that domestic law in accordance with the domestic jurisprudence.

5. DOMESTIC JURISPRUDENCE AS AN AID TO THE INTERPRETATION AND APPLICATION OF DOMESTIC LAW

Though often refusing to accord *res judicata* effects of specific domestic judicial decisions, investment tribunals with equal frequency acknowledged the great utility of domestic jurisprudence in the law ascertainment process generally.¹ As the present chapter intends to demonstrate, tribunals in fact recurrently resorted to such jurisprudence in determining questions of domestic law that were relevant to the resolution of claims pending before them. The question that is central then is how domestic jurisprudence should theoretically be conceived, apart from simply being considered as “evidence in the arbitration in question”.² Are investment tribunals bound to considering such jurisprudence when interpreting domestic law? If so, how are they to become acquainted with such jurisprudence? Furthermore, under what circumstances are tribunals more likely to accept the case-law of domestic courts when interpreting or applying international law? And eventually, how do tribunals actually make use of this case-law in practice? These are the questions that the present chapter purports to address.

After explaining the reasons warranting resort to domestic jurisprudence in the law ascertainment process (5.1.), this chapter outlines the duties of investment tribunals with regard to the use of domestic jurisprudence in the ascertainment of domestic law (5.2.). It also touches on the factors controlling the reception of jurisprudence on the part of investment tribunals (5.3.), before it finally looks at the practical challenges facing tribunals when considering domestic judicial pronouncements in the law ascertainment process (5.4.).

5.1. Reasons for Resorting to Domestic Jurisprudence in the Law Ascertainment Process

Resort to domestic jurisprudence may be necessary for a variety of reasons in the law ascertainment process. In the practice of investment tribunals, domestic judicial decisions have often been consulted with a view to clarifying concrete statutory provisions whose interpretation or application gave rise to uncertainty (5.1.1). But perhaps equally often with a view to resolving questions of grater complexity, which could not be resolved by a simple application of statutory provisions (5.1.2.). Occasionally, domestic judicial decisions had even been referred to for other reasons than because of actual dicta on points of law; namely, because of certain factual information that was indirectly of assistance in the law ascertainment process (5.1.3.). Admittedly, however, a variety of reasons can concurrently explain reliance on a particular judicial decision, which means that any classification therefore occurs at the cost of some generalization.

¹ See e.g. *Occidental v Ecuador (Final Award)* (LCIA Case No UN3467, 1 July 2004) 137 (recognizing how pronouncements of municipal courts provided ‘useful guidance in understanding’ domestic legislation); *Emmis v Hungary (Award)* (ICSID Case No ARB/12/2, 16 April 2014) 176 (expressing the view that domestic judgments were ‘likely to be of great help’ in determining the content of specific municipal laws); or *Feldman v Mexico (Award)* (ICSID Case No ARB(AF)/99/1, 16 December 2002) [84] (considering that domestic judgments provide ‘necessary background’ to a tribunal’s understanding of domestic legal issues).

² *Petrobart v Kyrgyz Republic (Award)* (SCC Case No 126/2003, 29 March 2005) 41 (observing that ‘a judgment rendered by a foreign court of law may well become relevant as evidence in the arbitration in question’).

5.1.1. Uncertainties Concerning the Applicable Statute

One of the most common reasons necessitating resort to domestic jurisprudence was that the domestic legal provision in question gave rise to uncertainty. One of the causes of such uncertainty was that the terms actually used in the particular provision were capable of being interpreted in more than one way, which gave rise to ambiguity. In *Occidental v. Ecuador* (2004), for example, support was thus sought in domestic jurisprudence for the purpose of determining whether a provision of the Ecuadorian Tax Code granting “manufacturers” the right to VAT refunds equally applied to companies engaged in petroleum extraction even though these were allegedly not engaged in “manufacture”.³

Most commonly, however, the cause of uncertainty lay in the circumstance that the relevant matter was not expressly mentioned in the legal provision in question, but the provision was capable of being applied, or was alleged to apply by analogy. In *CME v. Czech Republic* (2003), a domestic judgment was quoted by the Tribunal in support of the conclusion that the date on which contractual damage claims become due in accordance with the Czech Civil Code was equally applicable to tort claims.⁴ In *Pey Casado v. Chile* (2008), domestic jurisprudence was considered to establish whether the provision of the Chilean Constitution governing the loss of Chilean nationality equally applied to a voluntary renunciation of nationality that was otherwise not expressly mentioned in the Constitution.⁵ In *Fraport v. Philippines II* (2014), a domestic judgment was cited in support of the conclusion that the statute in question equally prohibited the interference of minority shareholders in the management of a public corporation even though these were not expressly listed in the category of persons to whom the prohibition applied.⁶ In *Dan v. Hungary* (2015), prior jurisprudence was examined and relied upon in determining the competence of a Hungarian court to order submission of additional documents not expressly required in the governing statute.⁷ Whereas in *Rusoro Mining v. Venezuela* (2016), a judgment of the Venezuelan Supreme Court was scrutinized with a view to establishing whether transfers of shares in companies holding mining concessions equally fell under an authorization requirement that the Mining Law otherwise imposed on direct transfers of concessions.⁸

References to domestic jurisprudence were particularly common in construing certain fundamental legal provisions, such as domestic provisions relating to the nature and scope of proprietary rights, which are commonly drafted in open-ended language. In *BG v. Argentina* (2007), the jurisprudence of Argentinean courts was thus considered in the process of determining that property rights were not limited to assets registered as such for accounting purposes.⁹ In *Glamis Gold v. USA* (2009), judicial decisions were referred to in support of the conclusion that an unpatented mining claim constitutes real property in every sense.¹⁰ In *Khan Resources v. Mongolia* (2015), a judicial precedent was carefully scrutinized in seeking to determine

³ *Occidental v Ecuador (Final Award)* (n 1), [136]-[43].

⁴ *CME v Czech Republic (Final Award)* (UNCITRAL, 14 March 2003), [631]-[32].

⁵ Victor Pey Casado and President Allende Foundation v Republic of Chile (Award) (ICSID Case No ARB/98/2, 8 May 2008) [306]-[10].

⁶ Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines (Fraport II) (Award) (ICSID Case No ARB/11/12, 10 December 2014), [411].

⁷ *Dan v Hungary (Decision on Jurisdiction and Liability)* (ICSID Case No ARB/12/9, 24 August 2015)[110], [113], [136].

⁸ *Rusoro Mining Ltd v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB(AF)/12/5, 22 August 2016) [324]-[339].

⁹ *BG Group Plc. v. The Republic of Argentina (Final Award)* (UNCITRAL, 24 December 2007), [120]-[127]. The Tribunal explained that resort had to be made to the interpretive work of the courts as no statutory definition of the term ‘assets’ could be found under any Argentine law of general application.

¹⁰ *Glamis Gold Ltd v US (Award)* (UNCITRAL NAFTA, 8 June 2009), [37].

whether mining licences could constitute intangible property under Mongolian law.¹¹ In *Emmis v. Hungary* (2014), in turn, domestic jurisprudence was canvassed more broadly with a view to clarifying the categories of rights that could be generally recognized as proprietary under Hungarian law and the essential requirements for a right to have a proprietary character,¹² but also with a view to confirming that the rights acquired by virtue of a company's participation as a bidder in the tender for the new broadcasting license did not have a proprietary character.¹³ Though used with a view to resolving ambiguities, in the majority of these cases the role of jurisprudence was primarily a supplementary one. Domestic judgments were invoked solely for confirmative purposes; to support the interpretation given to a provision by the investment tribunal on the basis of a plain meaning of the text.

Finally, domestic jurisprudence was sometimes considered to establish how the statutory provision was applied in practice. In the case of *Siag v. Egypt* (2007), the practice of domestic courts was scrutinized with a view to confirming whether or not a declaration expressing intention to retain Egyptian nationality, as expressly laid down in the relevant statute, continued to remain an applicable requirement under Egypt's nationality law. Though the provision laying down such requirement did not, on the face of it, give rise to ambiguity, domestic jurisprudence had to be scrutinized since Respondent alleged the trend of not giving effect to such requirement to have emerged in domestic judicial practice.¹⁴

5.1.2. Uncertainties Concerning the Law in General

Apart from reasons relating to legal uncertainty, support had often-times been sought in the jurisprudence of domestic courts because of the complexity of the particular question of domestic law; that is, where the resolution of the issue could not be found in the simple statutory interpretation of one or more concrete legislative provisions.

The following awards provide some illustration. In *Nykomb v. Latvia* (2003), domestic judgments were considered in determining the legal effects of the references to Latvian laws and regulations as used in the price clauses in the contracts that Claimant's subsidiary had entered into with the national electric energy distributor.¹⁵ In *Consortio Groupement L.E.S.I.-DIPENTA v. Algeria* (2005), Italian jurisprudence was considered in establishing whether an unincorporated consortium of companies had the capacity under Italian law to act in its own right.¹⁶ In *Pey Casado v. Chile* (2008), Chilean jurisprudence was relied upon in determining whether failure to comply with specific registration requirements laid down in the Chilean Civil Code entailed the absolute nullity of a share purchase transaction.¹⁷ In *Micula v. Romania* (2013), a Romanian judgment was canvassed with a view to establishing whether special financial incentives provided for by the Romanian government gave rise to vested rights or else a right to compensation.¹⁸ In *Apotex v. USA* (2013), a US domestic judgment was cited in support of the conclusion that final approval of a tentatively approved Abbreviated New Drug Application was not automatic.¹⁹ In *MetalTech v.*

¹¹ Khan Resources BV, and Cauc Holding Company Ltd v The Government of Mongolia (Award) (UNCITRAL, 2 March 2015) [307].

¹² *Emmis v Hungary (Award)* (n 1), [178]-[179], [182], [186]-[191].

¹³ *ibid* [245]-[253].

¹⁴ Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Decision on Jurisdiction) (ICSID Case No ARB/05/15, 11 April 2007) [54], [130]-[132].

¹⁵ *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia (Arbitral Award)* (SCC, 16 December 2003) 26.

¹⁶ *Consortio Groupement LESI-DIPENTA v Algeria (Award)* (ICSID Case No ARB/03/08, 10 January 2005) [39(iii)].

¹⁷ *Pey Casado v Chile* (n 5), [226]-[27].

¹⁸ *Micula v Romania (Final Award)* (ICSID Case No ARB/05/20, 11 December 2013) [450]-[52].

¹⁹ *Apotex Inc. v. United States of America (Award on Jurisdiction and Admissibility)* (UNCITRAL, 14 June 2013) [210].

Uzbekistan (2013), judicial practice concerning bribery was cited in determining whether it was unlawful under Uzbek law to pay a Government official to take steps toward the performance of an action in circumstances where the official actually lacked authority to perform such action.²⁰ In *Teco v. Guatemala* (2013), Guatemalan Supreme Court judgments were considered to clarify the legal nature of certain recommendations issued by a technical committee and the obligations that the national electricity regulator had towards such recommendations.²¹ In *Tulip Inn v. Turkey* (2014), a Turkish judgment was referred to in ascertaining the legal status of public economic enterprises under Turkish law.²² In *Emmis v. Hungary* (2014), Hungarian judgments were invoked to clarify the precise legal nature of the general terms of tender, which was relevant for determining whether the broadcasting regulator was bound by those terms.²³ In *Fraport v. Philippines II* (2014), Philippine judgments were relied upon for the purpose of determining the defining moment when a corporate entity had to comply with the particular statute, or whether eventual violations of that statute could eventually be cured.²⁴ In *Chevron v. Ecuador (Lago Agrio)* (2015), a prior domestic judgment was considered with a view to determining the circumstances under which a claim can be treated as an individual claim as opposed to a collective or diffuse claim.²⁵ Finally, in *Accession Mezzanine* (2015), support was sought in Hungarian judgments for the purpose of determining the possibility of renewal of broadcasting rights under the broadcasting agreement held by Claimant's radio company,²⁶ the extent of the broadcasting regulator's discretion in awarding points in a particular tender process,²⁷ or the competence of Hungarian courts to directly award a broadcasting right or otherwise compel the regulator to enter into a new broadcasting agreement.²⁸

In some cases, domestic jurisprudence had to be consulted due to the practical impossibility of ascertaining the law in other ways than through domestic jurisprudence. Sometimes, recourse to jurisprudence was a convenient way to establishing how the law was actually applied in practice. In *Siag v. Vechi* (2007), for example, domestic jurisprudence was considered to determine the evidentiary value of certificates of nationality in general.²⁹ Very often, however, judicial decisions have had to be considered with a view to ascertaining the existence of particular doctrines and principles, insofar as these could not be ascertained directly from statutory provisions. Particularly in relation to common law systems, where cases can often be the sole source of the law in a particular field, scrutiny of domestic case-law has almost been unavoidable. In some cases, the analysis was sustained by simple reference to the most pertinent judicial precedents. In *LETCO v. Liberia* (1986), for example, domestic judicial authorities were quoted in support of the possibility under Liberian law of awarding compensation for foregone profits,³⁰ whereas in *PNG Sustainable Development v. Papua New Guinea* (2015), reference was made to domestic and English jurisprudence in support of the proposition that PNG law recognized a principle of statutory interpretation analogous to that of *effet utile*.³¹ In other cases, the scrutiny of domestic precedents was much more extensive. In *FW-Oil v. Trinidad and Tobago* (2006), for

²⁰ *MetalTech v. Uzbekistan (Award)* (ICSID Case No ARB/10/3, 4 October 2013) [283].

²¹ *Teco v. Guatemala (Award)* (ICSID Case No ARB/10/23, 19 December 2013) [512]ff.

²² *Tulip Inn v. Turkey (Award)* (ICSID Case No ARB/11/28, 10 March 2014) [288].

²³ *Emmis v. Hungary* (n 12), [245]-[246].

²⁴ *Fraport v. Philippines II* (n 6), [397], [430].

²⁵ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (Decision on Track 1B) (UNCITRAL, PCA Case No 2009-23, 12 March 2015) [168]-[75].

²⁶ *Accession Mezzanine v. Hungary* (ICSID Case No ARB/12/3, 17 April 2015) [93]-[9].

²⁷ *ibid* [126].

²⁸ *ibid* [134]-[44].

²⁹ *Siag v. Egypt* (n 14), [51], [149], [152]-[53], [193].

³⁰ *Liberian Eastern Timber Corporation v. Republic of Liberia* (Award) (ICSID Case No ARB/83/2, 31 March 1986) [41].

³¹ *PNG Sustainable Development v. Papua New Guinea* (ICSID Case No. ARB/13/33, 5 May 2015) [316].

example, a great deal of jurisprudence of various common law countries was carefully examined with a view to determining whether common law recognized a process contract as a specific form of contract regulating the conduct of negotiations towards the final contract.³² In *World Duty Free v. Kenya* (2006), likewise, the jurisprudence of England and several other common law jurisdictions was considered in determining the consequences under common law of a contract obtained by bribery.³³

Yet, the practice of extrapolating principles and doctrines from domestic jurisprudence has not been limited to the field of common law. First, such practice has equally been followed in relation to legal questions arising in the context of civil law jurisdictions. In *Acuven v. Venezuela* (2003), for instance, domestic judicial decisions were referred to in stating the general position under Venezuelan law on the scope of lost profits compensation and the standard of proof applicable to determining the amount of loss.³⁴ Second, the practice has also extended to extrapolating principles and rules from several systems of law, as normally required when determining the existence of general principles of law. In the same *World Duty Free* case, the domestic jurisprudence of several common and civil law jurisdictions was thus drawn upon to conclude that bribery was contrary to international public policy of most States.³⁵ While in *Niko v. Bangladesh* (2013), decisions of different jurisdictions were similarly invoked in support of the proposition that contracts having influence peddling or bribery as their objectives or motives were generally treated as void or unenforceable and could thus be denied effect by international arbitrators.³⁶

5.1.3. Factual Relevance

In some of the cases, in turn, domestic judgments have been considered or relied upon, not so much because of the specific judicial pronouncements on points of domestic law, but because they provided the factual context for the tribunals' own interpretation of a particular statutory provision. In *Fraport v. Philippines II* (2014), for example, reference was made to a Philippine Supreme Court's judgment in explaining the purpose of the statutory prohibition preventing the employment of aliens, which purpose was then considered by the investment tribunal to confirm that the statutory prohibition applied to all and any executive or management personnel.³⁷ Similarly, in *Emis v. Hungary* (2014), a Hungarian Supreme Court's judgment was quoted in explaining the overall purpose of a tendering process, which purpose was then considered to explain that the rights obtained in relation to that process could not be deemed to constitute valuable proprietary assets.³⁸ On the other hand, in *Mobil v. Venezuela* (2010), and some other cases where the tribunal's jurisdiction was premised on domestic legislation, domestic laws were considered to possibly play "a useful role" in determining the State's intention in formulating the legal instrument through which consent to arbitrate was expressed.³⁹

Last but not least, an inquiry into domestic jurisprudence was occasionally necessary insofar as jurisprudential developments itself formed the factual premise of the treaty claim. The

³² *FW-Oil v. Trinidad and Tobago (Award)* (ICSID Case No ARB/01/14, 3 March 2006) [153]-[56], [168], [173]-[74], [178].

³³ *World Duty Free v. Kenya (Award)* (ICSID Case No ARB/00/7, 4 October 2006) [161]-[65], [172]-[81], [185]-[87].

³⁴ *Acuven v. Venezuela (Award)* (ICSID Case No ARB/00/5, 23 September 2003) [345], [349].

³⁵ *World Duty Free* (n 33), [140]-[53].

³⁶ *Niko v. Bangladesh (Decision on Jurisdiction)* (ICSID Case No ARB/10/18, 19 August 2013) [436].

³⁷ *Fraport v. Philippines II* (n 6), [462].

³⁸ *Emmis v. Hungary* (n 12), [251], [253].

³⁹ *Mobil v. Venezuela (Decision on Jurisdiction)* (ICSID Case No. ARB/07/27, 10 June 2010) [96]; also *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela (Decision on Jurisdiction)* (ICSID Case No. ARB/08/15, 30 December 2010) [89].

most straightforward example of this type of situations is the award in *Eli Lilly v. Canada* (2017), where the Tribunal extensively examined Canadian jurisprudence for the purpose of establishing whether Canadian courts dramatically changed their interpretation of the utility requirement under Canadian patent law, through a series of cases adopting the promise utility doctrine. In the circumstances of that case, the alleged “dramatic” departure from prior case-law was the factual premise for Claimant’s claim that the invalidation by the Canadian judiciary of two of its drug patents through application of the promise utility doctrine amounted to a violation of the minimum standard of treatment and an act of expropriation.⁴⁰ Yet, examples of domestic jurisprudence being used for similar purposes can be found in other cases. In *Dan Cake v. Hungary* (2015), where the very object of the claim was the alleged impropriety of a Metropolitan Court of Budapest’s judgment, the Tribunal examined a previous decision of High Court of Appeal, insofar as the impugned judgment referred to “consistent judicial practice”.⁴¹

5.2. The Scope of Investment Tribunals’ Law-Ascertainment Duties

Apart from the many practical reasons that may certainly warrant resort to domestic jurisprudence, the question arises as to the existence of any reasons of *legal* nature that may actually necessitate such resort. The argument that I intend to make in the present section is that domestic judicial decisions do not represent just any other evidence that the investment tribunals are free to neglect when interpreting and applying domestic law. Given the special weight that is given to domestic jurisprudence in national legal systems (5.2.1.), I argue that there is actually a duty on the part of investment tribunals to consider such jurisprudence when determining a point of domestic law that is essential to the issues raised by the disputing parties for decision (5.2.2.). In view of this duty, I therefore explore the extent to which investment tribunals can be deemed to know such jurisprudence, and the implications arising therefrom (5.2.3.).

5.2.1. The Legal Weight of Domestic Jurisprudence: From Sources of Law to Evidence of Interpretation and Application of Domestic Law

Domestic judicial pronouncements carry particular legal weight in the law ascertainment process. This is not solely the case in those countries – primarily of the common law tradition – where judicial decisions are treated as sources of law (appropriately called “case-law”), but also in countries that do not do so. Of course, in countries where judicial decisions are deemed to form part of the law – in the same sense as, for instance, legislation – judgments actually constitute *the law*. For that reason already, investment tribunal will have to give them proper consideration, just as domestic courts will normally treat them as binding and, pursuant to the doctrine of *stare decisis*, will be required to follow them when deciding subsequent cases with similar issues or facts. The more so given that in common law systems, judgments often operate so as to affect the rules of positive law, by amplifying them, qualifying them, displacing them, or at the very least, by assisting in the formation of new positive rules of law through the creation of new analogies.⁴² Yet, even in legal systems where judicial decisions do not have the status of sources of law, such as those of the civil law tradition, judgments do carry a particular weight in the law ascertainment process, insofar as they are considered to represent *authoritative interpretations of positive laws*. Indeed, although considered not to constitute binding precedent, in many civil law systems, prior decisions (especially those of superior courts) will be treated as persuasive and, by virtue of the doctrine of *jurisprudence constante*,

⁴⁰ *Eli Lilly and Company v. The Government of Canada* (Final Award) (ICSID Case No UNCT/14/2, 16 March 2017) [307]-[389].

⁴¹ *Dan Cake S.A. v. Hungary* (Decision on Jurisdiction and Liability) (ICSID Case No. ARB/12/9, 24 August 2015) [136].

⁴² cf A Lincoln, ‘The Relation of Judicial Decisions to the Law’ (1907) 21 Harvard Law Review 120, 126.

lower courts will be bound to consider them when reaching a decision.⁴³ Regardless of the legal tradition, therefore, domestic judicial pronouncements provide authoritative evidence as to the content of domestic law, which investment tribunals ought not to neglect.

5.2.2. Duty to Consider Domestic Jurisprudence in the Interpretation and Application of Domestic Law

In view of the considerable legal weight accorded to judgments in many domestic legal systems, it is of little surprise that international courts, when faced with the need to interpret and apply domestic law, have deemed it necessary to do so in accordance with relevant domestic jurisprudence. The relevant considerations facing an international court in such case have been famously set out by the Permanent Court of International Justice (PCIJ) in the *Loans* cases (1929). In *Brazilian Loans*, the Court thus explained that,

“[o]nce the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.”⁴⁴

While in the circumstances of that case, the Court was expressly permitted to depart from decisions of domestic courts, the Court remained of the view that it

“... must pay the utmost regard to the decisions of the municipal courts of, a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied”.⁴⁵

In the related *Serbian Loans*, the Court further added to this that

“leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal [...] would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members.”⁴⁶

The principles and considerations enounced by the Permanent Court in the *Loans* cases were not novel ones. Already in the *Garçía and Garçá* case (1926) before the Mexican Claims commission, Commissioner Nielsen professed the existence of “a well-recognized general principle that the construction of national laws rests with the nation’s judiciary.”⁴⁷ Indeed, the principle has never been seriously contested. Not only has the Permanent Court reaffirmed the

⁴³ See eg V Fon and F Parisi, ‘Judicial precedents in civil law systems: A dynamic analysis’ (2006) 26(4) International Review of Law and Economics 519-35.

⁴⁴ *Brazilian Loans (Judgment)* PCIJ (ser A) No 21 (12 July 1929) 124.

⁴⁵ *ibid.*

⁴⁶ *Payment of Various Serbian Loans Issued in France (France v Kingdom of the Serbs, Croats, and Slovenes) (Judgment)* (1929) PCIJ ser A No 20 (12 July 1929) 46-47.

⁴⁷ Dissenting Opinion of Commissioner Nielsen in *Teodoro Garçía and MA Garçá (United Mexican States) v United States of America* (3 December 1926) IV UNRIIAA 119, at 126.

principle in later cases,⁴⁸ but also the PCIJ's successor, the International Court of Justice,⁴⁹ as well as other international adjudicatory bodies⁵⁰ have frequently endorsed the proposition that an international adjudicatory body is bound to follow domestic jurisprudence in the interpretation and application of domestic law.

In the investment arbitration context, too, the principle has consistently been upheld that arbitrators are not at liberty to interpret domestic law in accordance with what they themselves consider to be the most appropriate interpretation, but that they are essentially bound to follow the practice of domestic legal authorities in the ascertainment of the content of domestic law. Among the first to expressly endorse such principle was the Annulment Committee in the *Soufraki* case (2007). In considering Claimant's grief in that case that the original Tribunal had not applied Italian nationality laws as an Italian court would have done, the Committee took the view that "[a]n international tribunal's duty to apply Italian law is a duty to endeavour to apply that law in good faith and in conformity with national jurisprudence and the prevailing interpretations given by the State's judicial authorities".⁵¹ This was considered to follow from the general principle that "when applying national law, an international tribunal must strive to apply the legal provisions as interpreted by the competent judicial authorities and as informed by the State's 'interpretative authorities'"⁵² – a principle that the Committee deduced from the abovementioned holdings of the PCIJ in the *Serbian and Brazilian Loans* cases. The principle found endorsement in subsequent jurisprudence. The Annulment Committee in the *Fraport* case (2010), relying on the same PCIJ precedents, considered that an investment tribunal "should give particular consideration" to municipal decisions as to the construction of the relevant legislation in determining "how it would be applied within the municipal legal system".⁵³ Specifically, the Committee confirmed that the Tribunal was under an "obligation [...] to apply municipal law as it would be applied in the Philippines, taking into account the evidence of the relevant authorities as to the proper construction of that law."⁵⁴ Eventually, the duty of investment tribunals to

⁴⁸ *Panevezys-Saldutiskis Railway* (1938) PCIJ Ser A/B, No 76, 19 ("The question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian courts alone can pronounce a final decision.")

⁴⁹ See *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Merits Judgment)* [2010] ICJ Rep 639 (30 November 2010) [70] ("The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts.") See also *Elettronica Sicula SpA (ELSI), United States v Italy (Judgment)* [1989] ICJ Rep 15 (20th July 1989) [62] ("Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts...").

⁵⁰ See eg ECtHR, *Case of Kononov v Latvia (Judgment)* Application No 36376/04 (24 July 2008), [197] ("it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation so that its role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention"); and similarly *Korbel v Hungary (Judgment)* Application No 9174/02 (19 September 2008), [72]; WTO, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* WT/DS213/AB/R and Corr1 (19 December 2002) [157] (evidence as to the scope and meaning of domestic law "will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."); or STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL-11-01/I/AC/R176bis (16 February 2011) [35] ("In consonance with the case law of international tribunals, [...] generally speaking the Tribunal will apply Lebanese law as interpreted and applied by Lebanese courts").

⁵¹ *Hussein Nuaman Soufraki v The United Arab Emirates* (Decision of the Ad Hoc Committee on the Application for Annulment) (ICSID Case No ARB/02/7, 5 June 2007) [96].

⁵² *ibid* [96] cf [97] (restating that it had "to strive to apply the law as interpreted by the State's highest court, and in harmony with its interpretative (that is, its executive and administrative) authorities").

⁵³ *Fraport AG Frankfurt Airport Services Worldwide v Philippines* (Decision on the Application for Annulment) (ICSID Case No ARB/03/25, 23 December 2010), [236].

⁵⁴ *ibid* 244.

interpret and apply domestic law in accordance with the way that such law would be understood and applied by domestic courts has been explicitly recognized in other cases.⁵⁵

Unlike the PCIJ in the *Brazilian and Serbian Loans* cases, which derived the duty to defer to domestic judicial pronouncements in applying domestic law from the nature and functions of it as an international tribunal applying international law – *i.e.*, a body established with a view to resolving disputes among states on the basis of international law, composed of members of various national background, and not to be presumed to know the domestic laws of the various countries⁵⁶ – none of the investment tribunals proceeded to spell out the source of such duty. However, if one is to follow the reasoning of the *Fraport* Annulment Committee, which noted in its decision that an investment tribunal “had not been chosen for its knowledge of Philippine law”,⁵⁷ the duty on the part of investment tribunals to follow domestic jurisprudence in the ascertainment of the content of domestic law could logically be inferred from the circumstance that investment tribunals are not necessarily composed of arbitrators having sufficient knowledge of the domestic law that they are supposed to apply. This is an aspect that calls for further examination.

5.2.3. Duties pertaining to the Possession, Acquisition, and Application of Knowledge of Domestic Jurisprudence

If investment tribunals are thus bound to apply domestic law in accordance with the relevant domestic jurisprudence, the question necessarily arises as to their actual knowledge of this jurisprudence. Can this knowledge be presumed, pursuant to the principle of *iura novit curia* (5.2.3.1.)? If such presumption is not applicable, are investment tribunals otherwise bound to engage in their own research with a view to identifying and establishing the most relevant jurisprudence (5.2.3.2.)? Alternatively, are they bound to seek the views of the parties as to the details of the applicable law, including their views on the pertinent domestic jurisprudence (5.2.3.3.)? Lastly, if they receive such views, to what extent are they then bound by the parties’ submissions on the content of that jurisprudence (5.2.3.4.)?

5.2.3.1. Duty to Know Domestic Jurisprudence

When it comes to the ascertainment and application of the law to the circumstances of the case, there are still some notorious differences in the powers and duties that different legal systems accord to adjudicators. While common law systems have traditionally favoured a more limited role for courts in the adversarial search for the truth, in civil law systems, the law is generally presumed to lie within the “judicial knowledge” of the courts, in light with the maxim *iura novit curia* – the principle which literally stands for the proposition that “the judge knows the law”.⁵⁸ By virtue of this principle, not only are the parties dispensed with the need to prove that the rule, upon which they rely, actually exists as valid law, but judges can also apply the law by right of

⁵⁵ See eg *Teco v Guatemala (Anward)* (n 21), 477 (recognizing that the Tribunal’s task was to apply ‘the content of Guatemalan law as interpreted by the Constitutional Court’) and 500 (holding that it was necessary to apply Guatemalan law ‘in light of the relevant findings of the Guatemala Constitutional Court’); or *Emmis v Hungary* (n 1), [175] (acknowledging that the Tribunal ‘must seek to determine the content of the applicable law in accordance with [...] the manner in which the law would be understood and applied by the municipal courts’).

⁵⁶ See *Brazilian Loans* (n 44), 124 and *Serbian Loans* (n 46), 46.

⁵⁷ *Fraport (Annulment)* (n 53), [236]; footnotes omitted.

⁵⁸ cf FA Mann, ‘Fusion of the Legal Profession’, (1977) 93 L.Q.R. 367, 375.

their authority (*ex officio*). It is in both senses that the principle has also been considered and applied in the context of international adjudication.⁵⁹

Fundamentally, the notion of *iura novit curia* is about who ultimately bears the responsibility to know and apply the law correctly: is it for the adjudicator to identify the applicable legal principles, with claimants merely needing to assert and prove the facts and clarify the relief sought? Or is it for the parties to educate the adjudicator on the content of the relevant legal rules? In investment arbitration, one can quickly reject the idea that responsibility for the ascertainment and application of the law would lie exclusively with the arbitrators, so that – in line with the civil law adage *da mihi factum, dabo tibi jus* (“give me the facts, and I will give you the law/justice”) – the parties would solely be required to plead their facts. Under most arbitration rules, it is obligatory for the parties to explicitly state the juridical bases of their claims and defences,⁶⁰ meaning that the parties cannot avoid also pleading the law. The question, rather, is a more specific one: whether beyond the statement/invocation of rules, the parties need also adduce evidence as to the content of those rules, and educate the tribunal on the specific nature and detail of the applicable law, or whether the tribunal can instead be deemed to literally “know the law” – that is, to be aware of it and to understand it – independently from any potential input from the parties.

In the context of international commercial arbitration, doubts have frequently been expressed about the idea that arbitrators could (or should) be deemed to be acquainted with the applicable law, given especially that commercial arbitral tribunals have no proper *lex fori*.⁶¹ In the context of international adjudication, in contrast, the proposition was generally accepted that the law could be deemed to lie within the judicial knowledge of a court, with the consequence that the parties would not carry the burden of establishing or proving particular rules.⁶² The issue of contention has been, rather, whether the proposition equally holds true for questions of domestic law. In the *Brazilian Loans*, the PCIJ namely rejected the suggestion that, as “a tribunal of international law”, it would be “obliged also to know the municipal law of the various countries.”⁶³ Investment tribunals, on their part, have largely not expressed themselves on this particular issue. While some of them formally endorsed the extension of the principle of *iura novit curia* to issues of domestic law,⁶⁴ none in fact subscribed to the literal implications thereof: the presumption that they would necessarily be familiar with domestic law and national jurisprudence of the host State involved in the proceedings.⁶⁵ And so, too, academic views considering the

⁵⁹ See e.g. ICJ, *Fisheries Jurisdiction (UK v Iceland)* (Judgment) [1974] ICJ Rep 3 (25 July 1974) [17]; or *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 (27 June 1986), [29]. See generally B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953) 299-301.

⁶⁰ See eg Rule 31(3) ICSID Arbitration rules (requiring the memorial to contain ‘a statement of law’, and the counter-memorial to include ‘observations concerning the statement of law in the last previous pleading’ and ‘a statement of law in answer thereto’); or art 20(3)(e) UNCITRAL (requiring the statement of claim to include ‘[t]he legal grounds or arguments supporting the claim.’) and art 21(4) (replicating the same requirement with respect to the statement of defence).

⁶¹ cf ILA Report on ‘Ascertaining the Contents of the Applicable Law in International Commercial Arbitration’, reproduced in (2010) 26(2) *Arbitration International* 193, at 201-06.

⁶² *Fisheries Jurisdiction* (n 59), [17].

⁶³ *Brazilian Loans* (n 44), 124.

⁶⁴ *Oostergetel v Slovak Republic (Award)* (UNCITRAL, 23 April 2012) 140-41; and *MetalTech v Uzbekistan* (n 20), [287] (“when it comes to applying the law, including municipal law, as opposed to establishing facts, the principle *iura novit curia* – or better *iura novit arbiter* – allows it to form its own opinion on the meaning of the law.”)

⁶⁵ See FG Sourgens, KAN Duggal & IA Laird, *Evidence in international investment arbitration* (OUP, 2018), 135, suggesting that the practice of investment arbitration ‘on its face further disproves the assumption that tribunals know the law in a non-trivial sense’.

application of *iura novit curia* to questions of domestic law remain mostly limited to observations at the level of principle.⁶⁶

One can possibly advance arguments both in favour and against the proposition that domestic law and domestic jurisprudence could be taken to lie within the “judicial knowledge” of investment tribunals. Speaking in favour of such presumption is certainly the fact that investment tribunals today must concurrently apply *both* international law (i.e. the applicable investment treaty and/or general international law) *and* the law of the host State that is party to the investment dispute (either as the law directly applicable to the merits, or else as the law indirectly applicable by *renvoi*).⁶⁷ In that, investment arbitration differs from international commercial arbitration more generally, where it may often be difficult to identify a particular *lex fori*, as well as from inter-State judicial or arbitral proceedings, where the adjudicatory bodies are usually mandated to apply solely international law. At the same time, it is also clear that a general presumption in favour of investment tribunals knowing domestic law may not sit particularly well with some of the underlying premises of investment arbitration itself. Conceived as an alternative to domestic litigation, the very *raison d’être* of investment arbitration has been to provide for a neutral forum where investment disputes can be decided by arbitrators that are not involved with, or related to the host State. Indeed, some arbitration rules, of which most notably the ICSID Convention, actually place limitations with respect to the nationality of arbitrators that can be appointed to resolve a particular dispute.⁶⁸ In practice, of course, it may not infrequently happen that one of the arbitrators – usually, the one appointed by the State party to the dispute – will have some knowledge of the law of the host State. Whereas such arbitrators can certainly assist the co-arbitrators in familiarizing themselves with the content of the domestic legal rules that the tribunal might be required to apply, it is rather far-fetched to consider in such cases that the tribunal can actually be deemed to *know* the law. Besides, to the extent that such presumption would rest on the expertise of one of the party-appointed arbitrators, this could place the appointing party – in most cases, the Respondent State – in a more advantageous position, and possibly even run against the *nemo iudex* principle.⁶⁹

⁶⁶ See eg A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 88-89.

⁶⁷ See O Chukwumerije, ‘International Law and Article 42 of the ICSID Convention’ (1997) 14 *Journal of International Arbitration* 79, 82, explaining that it is both domestic and international law that must be deemed to be the *lex fori* of ICSID tribunals; as well as J Hepburn, *Domestic Law in International Investment Arbitration* (OUP, 2017), 120, considering that *iura novit curia* must extend to all of the applicable law, including any relevant domestic law.

⁶⁸ According to Article 39 of the ICSID Convention, in the absence of agreement of the disputing party to the contrary effect, ‘[t]he majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute’. Rule 1(3) of the ICSID Arbitration Rules further stipulates that ‘[t]he majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.’

See also art 6.1 LCIA Arbitration Rules providing that ‘[w]here the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise’; and Article 13(5) ICC Arbitration Rules stipulating that ‘[t]he sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.’

⁶⁹ On this problem, see J Waincymer, ‘International Arbitration and the Duty to Know the Law’ (2011) 28(3) *Journal of International Arbitration* 201, at 220. Then again, the problem must not be overstated. In the context of ICSID arbitrations, arbitrators are required to ‘exercise independent judgment’ (art 14(1) ICSID Convention).

Given these limitations concerning the composition of investment tribunals, one cannot thus identify a general duty on the part of investment tribunals to actually know domestic law and jurisprudence. Indeed, most arbitration rules do not even prescribe any specific qualifications that arbitrators should have. The ICSID Convention, on the other hand, merely demands that arbitrators or conciliators be persons of “recognized competence in the fields of law, commerce, industry *or* finance”, even if adding that “competence in the field of law shall be of particular importance” in the case of persons sitting on arbitral tribunals.⁷⁰ However, the Convention does not otherwise require that such competence be one concerning any specific field of law – save for the demanding that, in designating the arbitrators, “due regard” shall be paid “to the importance of assuring representation on the Panels of the principal legal systems of the world”.⁷¹ Thus, while investment arbitrators will frequently be lawyers by education, they may not necessarily be qualified or educated in the applicable substantive or procedural domestic law. In the end, it is of course the parties that bear primarily responsibility for the appointment of arbitrators and that hence should ensure that, even if not knowledgeable of the applicable law, their appointees are at the very least capable of properly understanding it.⁷²

5.2.3.2. *Duty to Become Acquainted with Domestic Jurisprudence*

In the absence of an obligation on the part of arbitrators to already possess the required knowledge of domestic jurisprudence, the question then necessarily arises as to how the arbitrators are to obtain such knowledge and become familiar with the jurisprudence if they are to apply domestic law in the same way as it is applied in the host State. Facing such a situation in the *Brazilian Loans* case, the PCIJ considered that an international adjudicatory body “may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied”, either “by means of evidence furnished to it by the Parties” or “by means of any researches which the Court may think fit to undertake or to cause to be undertaken.”⁷³ The possibility must thus first of all be considered whether investment tribunals are under some sort of general obligation to become acquainted with the relevant judicial precedents for the purposes of interpreting and applying domestic law in the exercise of their mandate.

Conceivably, one could possibly construe such an obligation from their general duties to apply the proper law,⁷⁴ and to render an enforceable award. In the context of the ICSID Convention, it is well-established that applicable law provisions are not stating “simple advice or recommendations”,⁷⁵ but that the non-application of the proper law is capable of amounting to an excess of powers and thus constituting a valid reason for annulment of an award.⁷⁶ In the case

⁷⁰ ICSID Convention, art 14(1).

⁷¹ ICSID Convention, art 14(2).

⁷² ICSID Convention, art 14(1), in fact specifically requires that the appointed arbitrators be persons who “may be relied upon to exercise independent judgment.” On this basis, some have therefore suggested that in the context of investment arbitration, the concept of *iura novit curia* must be construed in the relational sense, as to how the law is tethered to the context of a specific dispute and the frame of the submissions of the parties within it, and not in absolute terms, so that law could be deemed to exist and be sought independently. See FG Sourgens, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors* (Brill, 2015), 124ff.

⁷³ *Brazilian Loans* (n 44), 124.

⁷⁴ Pursuant to Article 42(1) of the ICSID Convention, tribunals ‘shall decide’ a dispute in accordance with the rules of law agreed by the parties, and in the absence of such agreement, ‘shall apply’ the law of the host State and applicable rules of international law. Similarly, pursuant to art 35(1) UNCITRAL Arbitration Rules, tribunals ‘shall apply’ the applicable rules of law designated by the parties, and failing such designation, they ‘shall apply’ the law that they determine to appropriate.

⁷⁵ *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (Ad hoc Committee Decision on Annulment) (ICSID Case No ARB/81/2, 3 May 1985), [58].

⁷⁶ *ibid* [59], [61]; *Amco Asia Corporation and others v Republic of Indonesia* (Ad hoc Committee Decision on the Application for Annulment) (ICSID Case No ARB/81/1, 16 May 1986) [23], and (Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award) (17 December 1992), [7.19]; *Maritime International Nominees Establishment v Republic of Guinea*

of legal systems where domestic judicial decisions constitute the law, or else in circumstances where judicial decisions can constitute the only evidence of the law, it is certainly possible to interpret the failure to apply a relevant judicial precedent as a failure to apply the proper law. In *Klöckner v. Cameroon* (1985), the absence of any “reference whatsoever to legislative texts, to judgments, or to scholarly opinion” demonstrating the existence of a concrete legal principle of French civil law was sufficient reason for the ICSID Annulment Committee to conclude that the Tribunal failed to apply the proper law.⁷⁷ But even in circumstances where, in applying statutory provisions, an investment tribunal omits to take account of how those provisions are interpreted by the competent judicial authorities, grounds could arise for annulment of an award. The obligation to apply the proper law namely entails the obligation to apply *all relevant law*, which in relation to domestic law means the law as applied by domestic courts. In the words of the Annulment Committee in *Soufraki* (2007), the duty is thus “to strive to apply the law as interpreted by the State’s highest court, and in harmony with its interpretative (that is, its executive and administrative) authorities.”⁷⁸ Furthermore, ICSID tribunals can also be taken to be subject to a more specific obligation to familiarize themselves with relevant domestic judicial precedents in the particular circumstances where the applicable statutory provisions are unclear or indeterminate. As Article 42(2) of the ICSID Convention expressly prohibits the finding of *non liquet* on the ground of silence or obscurity of the law, tribunals may have to resort *inter alia* to domestic judicial decisions to clarify such obscurities of the law.⁷⁹ Specific duties of this kind do not seem to arise in other types of investment arbitration.

The consequences of non-application of proper law are admittedly somewhat different in the context of non-ICSID investment arbitrations. Under most jurisdictions, the challenges of the ensuing awards are not permitted on the basis that the arbitral tribunal had made a mistake in applying the law on the merits.⁸⁰ Nor can recognition and enforcement of an award be refused on such basis.⁸¹ Yet, just like in the ICSID context, a non-ICSID tribunal’s failure to apply the proper law to the merits may under many domestic laws still constitute a failure to act in accordance with the arbitration agreement, and thus constitute ground for annulment.⁸² Furthermore, the lack of a valid arbitration agreement can be direct ground for annulment of non-ICSID awards,⁸³ as well as ground for refusal of their recognition and enforcement.⁸⁴ Failure to consider domestic jurisprudence in the interpretation or application of domestic law will thus have direct consequences in the circumstances where such law is relevant to determining the

(Decision of the *Ad hoc Annulment Committee*) (ICSID Case No ARB/84/4, 22 December 1989) [5.03]; *Empresas Lucchetti, SA and Lucchetti Peru SA v The Republic of Peru (Decision on Annulment)* (ICSID Case No ARB/03/4, 5 September 2007) [98]. See generally Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 954 ff.

⁷⁷ *Klöckner (Annulment)* (n 75), [71]-[79]; emphasis added. cf *AMCO (Annulment I)* (ibid) [58] – failure to refer to Indonesian case-law (as well as other sources of Indonesian law) was not found to amount to non-application of Indonesian law, as the original tribunal was purporting to apply international, and not domestic law. In specific circumstances, failure to provide legal authorities for an award might also be relied upon in the context of an alleged failure to state reasons, which can be a separate ground for annulment under art 52(1)(e) ICSID. See further Schreuer et al, *ICSID Commentary*, ibid 996-1023.

⁷⁸ *Soufraki (Annulment)* (n 51) [96].

⁷⁹ cf Schreuer et al, *ICSID Commentary* (n 76), 631, at [247].

⁸⁰ cf art 34(2) UNCITRAL Model Law. An exception is the US, where awards can be set aside for ‘manifest disregard of the law’ (as per *Wilko v Swan* 346 US 427, 74 S Ct 182 (1953)); a possibility which is also available for non-domestic awards (*Shanghai Foodstuffs Import & Export Corp v International Chemical*, No 99 CV 3320, 2004 US Dist LEXI 1423). The standard for ‘manifest disregard’ is a demanding one, however. Limited review is also possible in the UK. A tribunal exceeds its powers and renders an annulable award under s 68(2)(b) of the Arbitration Act 1996 if the tribunal has applied the wrong system of law to the dispute or particular issues.

⁸¹ cf art V New York Convention.

⁸² See on this G Verhoosel, ‘Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID’ in J van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (2009), at 299-300.

⁸³ UNCITRAL Model Law, 34(2)(a)(i).

⁸⁴ New York Convention, art V(1)(a).

scope and extent of the agreement to arbitrate the investment dispute. The approach adopted in many domestic systems towards reviewing the investment tribunals' jurisdictional determinations has been namely that of a *de novo* review.⁸⁵

All in all, a duty to become acquainted with domestic jurisprudence can thus be said to flow from the general obligation under most *lex arbitri* to apply the proper law to issues of both jurisdiction and merits, as well as from the general obligation ensuing from the various *lex loci arbitri*, as well as the ICSID and the New York Conventions, to render an enforceable award.⁸⁶ This duty can be taken to exist in both ICSID and non-ICSID arbitrations.

The duty to familiarize themselves with pertinent judicial precedents, however, does not imply that arbitrators are to become experts in domestic case-law. The duty to consider the relevant jurisprudence in the law ascertainment process is one of due diligence and no consequences can be attached to the improper interpretation or application of domestic law based on a tribunal's incorrect understanding of such decisions. In ICSID annulment practice, the distinction is namely well-established between non-application of the governing law and the erroneous application of such law.⁸⁷ Hence, as established by the Annulment Committee in *Soufraki* (2007), errors committed by ICSID tribunals in the interpretation or application of domestic law "in the process of striving to apply the relevant law in good faith" will not necessarily constitute a ground for annulment.⁸⁸ As further determined by the Annulment Committee in *TECO v. Guatemala* (2016), an allegation that a tribunal interpreted and applied domestic judicial decisions incorrectly will therefore equally not constitute a valid ground for annulment.⁸⁹ This is not to deny that, in some cases, the errors may be of such gravity so as substantially to amount to the non-application of the law. But what is required in such cases is an *egregiously wrong* interpretation or application of the proper law, which only occurs in the event of "[s]uch gross and consequential misinterpretation or misapplication of the proper law which no reasonable person (*"bon père de famille"*) could accept", and is thus of greater gravity than even a "serious error" in the interpretation of the law.⁹⁰ The distinction between applying the applicable law incorrectly and applying the incorrect applicable law is equally well established in the domestic review of non-ICSID arbitral awards.⁹¹

5.2.3.3. Duty to Pursue Proprio Motu Research into Relevant Domestic Jurisprudence

With the existence of an obligation on the part of investment tribunals to become familiarized with the jurisprudence of domestic courts thus established, it is important to determine upon whom the burden of educating the arbitrators befalls. Is it upon arbitrators themselves to become educated in the applicable law and related jurisprudence by means of their own inquiries; or is it

⁸⁵ See eg *The Republic of Ecuador v Occidental Exploration & Production Company* [2006] EWHC 345 (Comm); [2006] 1 Lloyd's Rep. 773 (Judgment of English High Court) at [7]; or *Ecuador v Chevron / Texpet*, NJB 2014/1779 (Judgment of the Supreme Court of the Netherlands, 26 September 2014), [4.2].

⁸⁶ On this general duty more generally, see GJ Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18(2) *Journal of International Arbitration* 135.

⁸⁷ *Klockner I (Annulment)* (n 75), [60]; *Amco I (Annulment)*, (n 76) [23]; *Soufraki (Annulment)* (n 51), 85; *CMS v Argentina (Decision of the Ad Hoc Committee on the Application for Annulment)* (ICSID Case No ARB/01/8, 25 September 2007) [49]; or *Malicorp Limited v. The Arab Republic of Egypt (Decision on the Application for Annulment)* (ICSID Case No. ARB/08/18, 3 July 2013) [154]-[155].

⁸⁸ *Soufraki (Annulment)* (n 51), 97. For endorsement, see also *Malicorp (Annulment)* (n 87), [155].

⁸⁹ *TECO Guatemala Holdings, LLC v Republic of Guatemala (Decision on Annulment)* (ICSID Case No ARB/10/23, 5 April 2016) [279].

⁹⁰ *Soufraki (Annulment)* (n 51), 86.

⁹¹ See eg *CME v Czech Republic (Decision)* Svea Court of Appeal, Case No T 8735-01, 15 May 2003, 91; or *International Thunderbird Gaming Corp v Mexico*, 473 F Supp 2d 80.

primarily upon the parties themselves to sufficiently brief the arbitrators on the relevant domestic case-law?

From the perspective of *lex arbitri*, there is little support for the proposition that, in exercising their duty to familiarize themselves with pertinent domestic judicial authorities, investment tribunals would actually be bound to pursue their own inquiries into issues of domestic law. With the exception of the LCIA Rules of Arbitration, which explicitly empower arbitral tribunals to conduct such enquiries that are necessary to ascertain the applicable law,⁹² most international arbitration rules, including the ICSID Arbitration Rules, remain actually silent on the tribunals' powers and duties with respect to the ways that cognition is taken of the applicable law. Neither do most national arbitration laws direct arbitral tribunals to ascertain the content of the governing law in any particular way, and those that do, do so in a permissive manner.⁹³ In the absence of guidance on this point in most *lex arbitri*, resort must therefore be made to the practice of investment tribunals to determine whether arbitrators had considered themselves under a duty to undertake their own independent research into the relevant jurisprudence.

Apart from formal endorsements of the *iura novit curia* principle, investment tribunals have generally not considered themselves obliged to conduct legal research into the domestic law that had to be applied. Admittedly, in *BP v. Libya* (1979), the Tribunal did consider itself “both entitled *and compelled* to undertake an independent examination of the legal issues deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied upon by the Claimant.”⁹⁴ It can be debated, however, whether the Tribunal really considered itself required to engage in such further research, or whether it merely deemed such research appropriate in the circumstances where the Respondent State was absent from the proceedings, and the Tribunal had solely the benefit of argument presented by the Claimant. More can perhaps be inferred from the proposition advanced by the Tribunal in *CME v. Czech Republic* (2003), which stated that it was not “bound to research, find and apply national law which has not been argued or referred to by the parties and has not been identified by the parties or the Tribunal to be essential to the Tribunal’s decision.”⁹⁵ For, in the inversed situation where domestic law were essential to the decision, the statement could be taken to mean that a tribunal would have to independently research and find such law.

From the perspective of the broader practice, however, what one may possibly conclude is that investment tribunals have largely considered to have the power, but not the obligation, to pursue their own research into domestic law and jurisprudence. In several cases, tribunals have thus engaged in *proprio motu* inquiries into relevant jurisprudence, without any second thoughts as to whether such inquiries were actually permissible.⁹⁶ Indeed, in *LESI – DIPENTA v. Algeria* (2005), the Tribunal considered that it “must then take into consideration the information

⁹² See art 22.1(iii) of the LCIA Arbitration Rules providing in the relevant part that “[t]he Arbitral Tribunal shall have the power, upon the application of any party or [...] *upon its own initiative*, but in either case only after giving the parties a reasonable opportunity to state their views [...] to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in [...] *ascertaining [...] the law(s) or rules of law applicable* to the Arbitration Agreement, the arbitration and the merits of the parties’ dispute”. Emphasis added.

⁹³ JDH Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (OUP 2013), 156-57. Most notable in this respect is art 34(2)(g) of the English Arbitration Act of 1969, which provides that the tribunal may decide ‘whether and to what extent the tribunal should itself take the initiative of ascertaining the facts and the law.’

⁹⁴ *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* (Awards of 10 October 1973 and 1 August 1974) 53 ILR 297, at 313; emphasis added.

⁹⁵ *CME v Czech Republic* (n 91). 411

⁹⁶ See eg *Nio Resources (Jurisdiction)* (n 36), 436; *World Duty Free* (n 33), 140, 147, 149, 152, *FW-Oil* (n 32), 178.

provided to it by the Claimant, *as well as information that it has been able to retrieve for itself*.⁹⁷ At the same time, there were also cases where tribunals did not feel the need to engage in their own research into domestic law and jurisprudence, in spite of them having identified a clear need of expert evidence on issues of domestic law. In *Laboud v. Congo* (2014), for example, the Tribunal expressly requested the parties to tender evidence on the principles of interpretation of Congolese law. Having been provided no such evidence, the Tribunal did not proceed to make its own inquiries into Congolese law, but resorted to general principles of law for the purpose of interpreting the applicable statute.⁹⁸ In the end, however, care must be taken in drawing inferences from such scant practice. In most cases where domestic judicial decisions were considered in the law ascertainment process, the relevant judicial precedents were provided by the litigating parties and the experts whose legal opinions had been tendered in support of their case. Even in *MetalTech v. Uzbekistan* (2013), where *jura novit curia* was formally endorsed at the level of principle by an ICSID tribunal, the background information on domestic law was provided for in the academic commentaries that had been filed by Respondent.⁹⁹

Finally, the proposition that arbitral tribunals shall have the power, but not the obligation, to make their own inquiries with a view to establishing the contents of domestic law has also been endorsed by academic commentators and arbitrators.¹⁰⁰

5.2.3.4. Duty to Seek Parties' Views on Relevant Jurisprudence

Absent a direct duty on the part of investment tribunals to conduct their own researches and investigations into the applicable domestic law and related jurisprudence, it is necessary to inquire how tribunals should otherwise acquire relevant knowledge on the contents of domestic jurisprudence.

The tribunals' duty to become familiarized with domestic jurisprudence appears to be, in the first place, a duty that is to be exercised on the basis of the evidence presented to the tribunal by the parties themselves. In *Emmis v. Hungary* (2014), the Tribunal thus held it "must seek to determine the content of the applicable law *in accordance with evidence presented to it as to the content of the law and the manner in which the law would be understood and applied by the municipal courts*".¹⁰¹ In the second place, it is a duty that is to be exercised by means of requesting additional evidence from the parties, or else by means of studies that tribunals may request to be undertaken.¹⁰²

Under both ICSID and UNCITRAL arbitration rules, investment tribunals certainly have the power to call upon the parties, at any stage of the proceedings, to produce any documents or evidence that may be necessary to decide issues before them.¹⁰³ Indeed, requests to brief tribunals on issues of domestic law have not been uncommon in arbitration practice,¹⁰⁴ including requests

⁹⁷ *LESI v Algeria* (n 16), [Ch II, 39]; emphasis added.

⁹⁸ *Laboud v Congo (Award)* ICSID Case No ARB/10/4, 7 February 2014) 281-83.

⁹⁹ *MetalTech v Uzbekistan* (n 20), 288.

¹⁰⁰ See G. Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions' (2005) 21 *Arbitration International* 631 at 636.

¹⁰¹ *Emmis v Hungary (Award)* (n 1), [175]; emphasis added.

¹⁰² See GC Moss, 'Tribunal's Powers Versus Party Autonomy' in P Muchlinski, F Ortino, & C Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP, 2008), 1207-1244, at 1235, similarly concluding that '[t]he duty of the arbitral tribunal to investigate the law seems to consist in asking the parties to produce additional evidence of the law or appointing legal experts, rather than in directly investigating the law'.

¹⁰³ ICSID Convention, art 43 and ICSID Arbitration Rules, Rule 34(2); UNCITRAL Rules (2010), art 27(3).

¹⁰⁴ See eg *Saar Papier Vertriebs GmbH v. Poland (Final Award)* (UNCITRAL, 16 October 1995), [15], [79]; *Swembalt AB Sweden v The Republic of Latvia (Award)* UNCITRAL (23 October 2000) [44]; *Daimler Financial Services AG v Argentine Republic (Award)* (ICSID Case No ARB/05/1, 22 August 2012) [111]; or *Lahoud v Congo* (n 98), [281]-[83].

with respect to domestic judicial authorities.¹⁰⁵ The evidence thus requested may – and frequently will – include expert evidence. Furthermore, both ICSID and non-ICSID tribunals have, or can be taken to have the power to appoint independent experts, who could possibly advise them on issues of domestic law and jurisprudence.¹⁰⁶ Last but not least, investment tribunals operating under ICSID, as well as under other arbitration rules will generally have the power to accept *amici curiae* briefs, which could brief them on issues of domestic law and jurisprudence.¹⁰⁷

In most cases, requesting the production of evidence on relevant domestic jurisprudence will remain at the discretion of the tribunals. There is, however, also authority for the proposition that, in those circumstances where a question of domestic law is *essential* to their decision, investment tribunals may also be under an *obligation* to seek the parties' views as to the content of domestic law, including on the meaning and effect of any relevant municipal decisions. The existence of such an obligation has seemingly been recognized by the ICSID Annulment Committee the *Fraport*, which annulled the original award precisely because the Tribunal failed to solicit such views.¹⁰⁸ The Tribunal's majority in that case construed the legislation in question on the basis of its own reading of the pertinent provisions, in disregard of the fact that the Philippine Public Prosecutor had previously adopted a different interpretation of that same legislation, and that it had done so after having considered, but expressly rejected the interpretation used by the majority.¹⁰⁹ The dissenting arbitrator, Bernardo Cremades, argued that the majority therefore misconstrued the relevant provisions.¹¹⁰ The Annulment Committee, however, did not dispute the correctness of the Tribunal's interpretation, but took issue instead with the fact that the question as to the potential violation of the said legislation was not considered in any detail in the expert reports that were filed in the proceedings before the Tribunal, nor by the parties in their post-hearing briefs.¹¹¹ Indeed, the Committee eventually found that the failure on the part of the original Tribunal to provide parties with the opportunity to submit evidence on the relevant legislation – and, particularly, to make submissions relative to the way this legislation had been applied by the Philippine Public Prosecutor – constituted a serious departure from a fundamental rule of procedure and was thus ground for annulment.¹¹² The Committee was of the opinion that, to the extent that Philippine law was applicable, the Tribunal should have given "particular consideration" to municipal decisions as to the construction of the law, that this was "particularly important" since the Tribunal "had not been chosen for its knowledge of Philippine law", and that "the right of the parties to be heard

¹⁰⁵ *World Duty Free* (n 33) [59]-[60].

¹⁰⁶ According to Rule 34(2) ICSID Arbitration rules, '[t]he Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses *and experts*'; emphasis added. Yet, expert evidence need not be furnished by party-appointed experts, as ICSID tribunals at times proceeded to directly appoint independent experts. See *S.A.R.L. Benvenuti & Bonfant v People's Republic of the Congo* (ICSID Case No ARB/77/2, 8 August 1980) [1.24] and [4.77]; or *American Manufacturing & Trading, Inc v Republic of Zaire (Award)* (ICSID Case No ARB/93/1, 21 February 1997) [7.19]. In contrast, art 29(1) of the UNCITRAL Rules (2010) allows the tribunal, after consultation with the parties, to 'appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal.' A similar provision can be found in art 21 LCIA Rules.

¹⁰⁷ See eg Rule 37(2) ICSID Arbitration rules allowing the tribunal to allow a person or entity that is not a party to the dispute to file a written submission regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which such submission would assist it in the determination of a legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

¹⁰⁸ *Fraport (Annulment)* (n 53), [235]-[247].

¹⁰⁹ *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines (Fraport I)(Award)* (ICSID Case No. ARB/03/25, 16 August 2007), [357]-[382], [396]-[404].

¹¹⁰ *ibid*, Dissenting Opinion of Mr. Bernardo M. Cremades, [16].

¹¹¹ *Fraport (Annulment)* (n 53), [237]-[241].

¹¹² *ibid* 235-47.

importantly includes an opportunity to be heard on the meaning and effect of any such relevant municipal decisions.”¹¹³

The *Fraport* annulment decision might have been the first time where the investment tribunal’s duty with respect to obtaining the views of the litigating parties on issues concerning domestic law, including their views on pertinent jurisprudence, has clearly been spelled out. It does seem, however, that the existence of such duty also explains earlier examples of investment tribunals granting latitude to the disputing parties in the production of jurisprudence that had been claimed to be relevant to the interpretation of domestic law.¹¹⁴

5.2.3.5. Duty to Apply Accurate Law and Jurisprudence

In most cases, it will be through statements on domestic law and through witness and expert evidence supporting such statements that the relevant jurisprudence will be introduced to international investment tribunals by the litigating parties. In many of those cases, the tribunals may be more than satisfied with the parties’ submissions.¹¹⁵ In others, they may – rightly or wrongly – consider such submissions partisan. The same applies to the additional explanations and clarifications that tribunals may receive from parties as to the meaning and effect of domestic judicial pronouncements, which may ultimately be found one-sided and biased. The question then eventually arises as to the extent to which investment tribunals are free to disregard the evidence of, and the arguments on domestic jurisprudence that the parties themselves have introduced.

The answer to both elements of this question appears relatively straightforward. First, if investment tribunals can be taken to possess the power to pursue their own research on domestic jurisprudence (or cause such research to be conducted), they cannot possibly depend entirely on the legal authorities introduced by the litigating parties and their experts.¹¹⁶ If they believe that parties may not have presented appropriate or sufficient judicial authorities, or may selectively relied upon them in their construction of applicable law, they are thus at liberty to engage themselves in further research, or cause such further research to be undertaken, if necessary through the appointment of experts. Second, inasmuch as tribunals are bound to apply domestic law in such way as it would actually be applied in the domestic legal system, and therefore to take into account the evidence of the relevant judicial authorities as to the proper construction of that law, they are necessarily not bound to follow the parties’ arguments and views on those judicial authorities, but are free to base their decisions on their own understanding of such

¹¹³ *ibid* [236]; footnotes omitted.

¹¹⁴ See eg *Siag v Egypt* (n 14), [167], noting how leave was granted to the Respondent to submit additional domestic judicial authorities after the hearing.

¹¹⁵ See eg *Eli Lilly v Canda* (n 40), [311] (noting how the analysis ‘necessarily touches upon aspects of Canadian patent law previously unfamiliar to the Members of the Tribunal’ and how ‘[t]he Tribunal has been greatly assisted by the Parties’ submissions and the testimony of their experts and witnesses, and thereby reaches its conclusions with confidence’).

¹¹⁶ Indeed, as a general proposition, investment tribunals cannot be taken to be limited in their inquiry to the authorities provided by the parties. See *RSM Production Corporation v Grenada (Decision on the Application of RSM Production Corporation for a Preliminary Ruling)* (ICSID Case No ARB/05/14, 7 December 2009) [23] (‘Although not cited by the Applicant or the Respondent, there are a number of other arbitral decisions which deal with the power of international courts and tribunals to reopen a case for newly discovered evidence. On the basis of the principle of *jura novit curia*, the Committee is able to consider the relevance of those decisions.’); *Bosb International, Inc and BeP Ltd Foreign Investments Enterprise v Ukraine (Award)* (ICSID Case No ARB/08/11, 25 October 2012) [30] (rejecting that late submission of certain authorities ‘affects its ability in this Award to take judicial notice of, refer to, or rely on, any relevant legal principles or judicial or arbitral decisions in accordance with the principle of *jura novit curia*’); and *Daimler Financial Services AG v. Argentine Republic (Decision on Annulment)* (ICSID Case No. ARB/05/1, 7 January 2015) [295] (‘This Committee is of the view that an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it.’).

jurisprudence.¹¹⁷ The leeway enjoyed in this respect by investment tribunals had duly been noted in *MetalTech v. Uzbekistan* (2013), where the Tribunal observed that “when it comes to applying the law, *including municipal law*, as opposed to establishing facts, the principle *iura novit curia* – or better *iura novit arbiter* – allows it to form its own opinion on the meaning of the law.”¹¹⁸ Indeed, given that investment tribunals have “a duty to endeavour to apply that [domestic] law in good faith and in conformity with national jurisprudence and the prevailing interpretations given by the State’s judicial authorities”,¹¹⁹ they are in fact obliged to set aside possibly incorrect readings of domestic jurisprudence advanced by the parties.¹²⁰

Eventually, the question arises whether investment tribunals are limited to considering the domestic judicial authorities invoked by the parties solely for the purposes of the parties’ arguments, or whether they are free to draw other inferences from such authorities, including those giving rise to arguments not directly raised or insufficiently developed by the parties to the proceedings. In arbitral practice, there is generally support for the proposition that, within the boundaries of the relief that is sought, investment tribunals will not be limited to the legal arguments advanced by the parties – provided that the tribunal’s own solution and reasoning remains within the legal framework established by the parties.¹²¹ In the context of ICSID arbitrations, it has generally been understood that the possibility to depart from the parties’ arguments remains at the discretion of the tribunals.¹²² In the context of non-ICSID arbitrations, in turn, tribunals may occasionally be under an obligation to apply a rule of law that has not been adduced – though, this will depend on the *lex loci arbitri*. Referring to the principle of *iura novit arbiter*, for example, the Tribunal in *Oostergetel v. Slovakia* considered that it was “under an obligation to apply the law *ex officio* without being bound by the arguments and sources invoked by the Parties”.¹²³ The source of this obligation, which in the circumstances of that case was deemed applicable to *both* domestic and international law, was in the applicable Swiss arbitration law, which governed that arbitration.

An altogether different question is whether investment tribunals, inspired or induced by particular judicial authorities, may venture to investigate issues of law not addressed or considered at all in the parties’ arguments. Particularly in relation to jurisdictional matters, investment tribunals may of course be under a duty to consider certain issues *ex officio*. In non-ICSID arbitrations, investment tribunals may thus be bound to apply particular mandatory provisions of the *lex loci arbitri*, and generally be bound to consider their own jurisdiction if they are to comply with their duty to render an enforceable award.¹²⁴ In ICSID arbitrations, it is specifically in the event of a party’s default that investment tribunals are under a duty to examine

¹¹⁷ cf ILA (Recommendations on Applicable law) (n 61), Recommendation 7.

¹¹⁸ *MetalTech v. Uzbekistan* (n 20), 287; emphasis added.

¹¹⁹ *ibid* [96].

¹²⁰ See further Waincymer (n 69), 218-219, listing the danger of inadvertent or incompetent behavior on the part of the parties when it comes to the notification of all relevant legal authorities, and the importance that the correct application of the law will have in ensuring stability and predictability among the policy rationales behind the application of the *iura novit curia* principle, and 239, arguing that adjudicators must interpret statutes correctly even if the parties wrongly assert the meaning.

¹²¹ See eg *Klöckner (Annulment)*, (n 75) [91]; *Caratube International Oil Company LLP v The Republic of Kazakhstan (Decision on the Annulment Application)* (ICSID Case No ARB/08/12, 21 February 2014) [92]-[93]. For an example from outside the ICSID context, see eg *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v Republic of Moldova (Award)* (SCC Case No 93/2004, 22 September 2005) [2.2.1]. For a general discussion of arbitral jurisprudence on this point, see E De Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP 2014) 103-07.

¹²² *Mr Patrick Mitchell v Democratic Republic of the Congo (Annulment)* (ICSID Case No ARB/99/7, 1 November 2006) [57].

¹²³ *Oostergetel v. Slovakia (Award)* (n 64) [141].

¹²⁴ cf UNCITRAL Model Law, art 34(2)(a)(iii); and New York Convention, arts V(1)(a) and (c) and (2).

proprio motu the existence of their own jurisdiction.¹²⁵ It is therefore not inconceivable for tribunals to closely scrutinize certain jurisdictional issues, such as whether the investment has not been made illegally or the transaction underlying the investment is not contrary to international public policy, even where the parties may not have addressed those issues at all.

The situation is somewhat different in relation to legal issues that may have a bearing on the merits of the dispute. Whilst arbitration tribunals are generally discouraged from introducing new issues of law that arise during the ascertainment of the applicable law on their own motion, a certain discretion may occasionally be justified, particularly where there are issues that could touch upon public policy.¹²⁶ In the context of investment arbitration, it is not unimaginable, for example, for tribunals to take a more active role in the event of weakness of a developing respondent State's representation.¹²⁷ However, in view of arbitrators' general duty to respect the parties' fundamental procedural rights,¹²⁸ investment tribunals will not only be advised,¹²⁹ but also obliged in such cases to provide the parties with the opportunity to respond to any new legal sources introduced by the tribunal and not take the parties "by surprise", or else run the risk of having the award annulled on account of a serious departure from a fundamental rule of procedure for failing to respect the parties' right to be heard in an adversarial procedure.¹³⁰

5.3. Factors Affecting Reception of Domestic Jurisprudence in the Law-Ascertainment Process

At the end of the day, whilst recognizing their general duty to give particular consideration to municipal decisions in interpreting and applying domestic law, investment tribunals were also equally adamant in emphasizing their "independent powers of assessment"¹³¹ when it comes to judge the probative value of evidence presented to them, including in relation to evidence of domestic law.¹³² The question then necessarily arises as to the factors that, beyond the mere question of relevance, may potentially influence the propensity of investment tribunals to take into account the jurisprudence of domestic courts. When compared to the situations described in chapter 4, where investment tribunals frequently refused to accord any dispositive effects to prior domestic judicial determinations involving the specific investor and/or its underlying investments, tribunals were, on the whole, better disposed towards drawing on domestic jurisprudence that was unrelated to the dispute before them. But as the following section intends to demonstrate,

¹²⁵ ICSID Arbitration Rules, Rule 42(4).

¹²⁶ cf ILA (Recommendations on Applicable law) (n 61), Recommendations 6 and 13. See further P Landolt, 'Arbitrators' Initiatives to Obtain Factual and Legal Evidence' (2012) 28 *Arbitration International* 173, at 215-216, identifying in particular investment arbitration as an instance where arbitrators should take a more active role in obtaining legal evidence, given the substantial impact that such arbitrations will usually have on the public interest.

¹²⁷ See on this A Dimolitsa, 'The equivocal power of the arbitrators to introduce ex officio new issues of law' (2009) 27(3) *ASA Bulletin* 426, at 428 identifying the situations of party default, weakness of representation, presence of a state party, importance of the issues or amounts at stake, and the probability of the award becoming a precedent as the circumstances under which arbitrators are more advised to exercise *proprio motu* the power of ascertaining the contents of the applicable law. Similarly also Waincymer (n 69), 218.

¹²⁸ ICSID Convention, art Art 52(1)(d); ICSID Arbitration Rules, Rule 6 (impartiality of arbitrators), and Rules 31 and 32 (parties right to be heard in an adversarial procedure, equal treatment of the parties).

¹²⁹ cf ILA (Recommendations on Applicable law) (n 61), Recommendation 8.

¹³⁰ On the caution to be exercised in reconciling proactiveness with basic principles of due process, see further Dimolitsa (n 127), 432-438; Waincymer (n 69), 228-242; Sourgens et al (n 65), 143-145; and I Kalnina, '*Jura Novit Curia*: Scylla and Charybdis of International Arbitration' (2008) 8 *Baltic Yearbook of International Law* 89, at 101-103. See also G Knuts, '*Jura Novit Curia* and the Right to Be Heard – An Analysis of Recent Case Law' (2012) 28 *Arbitration International* 669.

¹³¹ cf ICSID Arbitration Rules, Rule 34(1) ('The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value').

¹³² See *Fraport (Annulment)* (n 53), [236]; *Emmis* (n 1), [176].

this particular circumstance has not been the only factor to affect the acceptance of domestic jurisprudence on the part of investment tribunals.

5.3.1. Factors Determining the Evidentiary Value of Domestic Jurisprudence

It has sometimes been suggested by investment tribunals that the evidentiary value of domestic jurisprudence in the law-ascertainment process is one to be determined in light of the context of each case.¹³³ In practice, however, two factors seem to have conditioned the reception of domestic judgments on the part of investment tribunals: the narrower issue of potential bias of the judicial decision-maker (5.3.1.1.), and the broader issue of the propriety of the judicial process as such (5.3.1.2.).

5.3.1.1. Bias of the Judicial Decision-Maker

The propensity of investment tribunals to take specific judicial pronouncements into account in their interpretation of domestic law seems to be linked to the question of independence of domestic judicial organs – or better, the potential lack thereof. Independence, in this sense, does not concern so much the problem of impartiality of domestic courts towards the parties in the domestic judicial proceedings, but more the potential bias that such courts could have in favour of the interests of the host State of which they form part. Concerns about the domestic judicial process being misused with a view to affecting the claim before investment have sometimes openly been expressed by investment tribunals in refusing to give heed to specific judicial pronouncements.¹³⁴ Yet, the same concern possibly explains why investment tribunals, conversely, had little objection to taking into account, and relying upon, domestic judicial pronouncements that were unrelated to the investor in question – precisely because such previous case-law was likely to have been delivered in circumstances that did not have an immediate bearing on the claim in question.¹³⁵ Concerns about judicial bias, furthermore, explain why tribunals seemed to have had fewer misgivings about taking into account judicial pronouncements – even where these directly concerned the investor in question or its investment – that originated from domestic courts other than those of the host State.¹³⁶ Apparently, foreign courts were likely to be more indifferent in relation to the issues at question than the domestic courts of the host State were expected to be.

This of course means, on the other hand, that in the absence of any doubts as to the lack of independence on the part of the judiciary, there should be nothing to prevent investment tribunals from taking account of judicial pronouncements that had been made in relation to the specific investor and had potentially arisen directly out of the same set of facts as those underpinning the cause of action before the investment tribunals. This, in the end, is also what has been suggested by the *Fraport* Annulment Committee, when noting that:

“the decisions of municipal authorities seized of cases against an alien which arise directly out of the same set of facts may need to be scrutinised very carefully by an international

¹³³ See eg *Petrobart* (n 2), 41, noting that ‘a judgment rendered by a foreign court of law may well become relevant as evidence in the arbitration in question,’ while suggesting that ‘[t]he weight, if any, to be attributed to such evidence will depend on the facts and the legal issues involved in the individual case.’

¹³⁴ Eg *Inceysa Vallisoletana SL v Republic of El Salvador* (Award) (ICSID Case No ARB/03/26, 2 August 2006).

¹³⁵ *PNG Sustainable Development* (n 31), [316]; *Soufraki (Annulment)* (n 51), 104; *Siag v Egypt* (n 14), *Pey Casado* (n 5), 227; *Lesi v Algeria* (n 16), *Tulip Inn* (n 22), 288; *Khan Resources* (n 11); *Occidental* (n 1), 137-43; *FW-Oil* (n 32), 166-69 and 177-78; *Glamis Gold* (n 10), 37; *Apotex* (n 19), 210; *Accession* (n 26), 93-95, 126, 134-144; *Fraport II* (n 6), 397-462; *World Duty Free* (n 33), 140-53, 161-87; *Nico Resources* (n 36), [436]; *Nykomb* (n 15), 26-27; *Dan Cake v Hungary* (n 7), [109]-[10], [113], [136]; *Micula* (n 18), [450]-[51]; *LETCO* (n 30), [41]; *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB/00/5, 23 September 2003), [345]-[49]; *CME* (n 91), [631]-[632]. See also *Chevron (Track 1B)* (n 25), [167].

¹³⁶ *Rumeli Telekom AS v Kazakhstan (Award)* (ICSID Case No ARB/05/16, 29 July 2008); *Nico Resources* (n 36).

tribunal. The tribunal would need to satisfy itself, *inter alia*, as to the impartiality of the relevant decision-maker, in view of the pendency of proceedings against the state of which that decision-maker is an organ. The tribunal retains the ultimate power to judge the probative value of evidence placed before it.¹³⁷

In the circumstances of that case, the decision concerned a resolution of the Philippine Public Prosecutor, which the Committee found that it should have been taken into account by the original Tribunal, in view of it “being adverse to the interests of the state” and “appeared to have been reached independently.”¹³⁸ In several other cases, investment tribunals did not have reservations to take into account domestic judicial pronouncements relating to the investor in question.¹³⁹

5.3.1.2. *Propriety of the Domestic Judicial Process*

A further element that has seemingly controlled the reception of domestic judicial pronouncements on the part of investment tribunals was the question of the propriety of the domestic adjudicatory process leading to the pronouncement in question. Propriety in this respect has sometimes been linked to the question of the validity of the particular judicial decision as a matter of domestic law. In *Micula v. Romania* (2013), for example, it seems that the characterization of a Romanian Supreme Court decision as being potentially *ultra vires* by Claimant’s domestic law expert (who also happened to be a former president of that Court) might have contributed to the Tribunal’s refusal to consider such decisions as “decisive” to the interpretation of the relevant domestic instrument.¹⁴⁰ However, propriety has more often been linked to the conformity of the judicial process and the ensuing outcome with the minimum standards prescribed by international law in relation to the domestic administration of justice. As already discussed in 4.4.1.3., it has been the absence of such propriety that has primarily been seen by investment tribunals as reason to ignore specific judicial determinations. The prime example in this regards is the partial award in *Chevron/Texpet v. Ecuador (Lago Agrio)* (2015), in which, on the one hand, the desire was expressed to be guided on any relevant issue of Ecuadorean law by decisions of Ecuadorean courts (given that such decisions provide “the best evidence of the content and application of that law to the same or similar situations”);¹⁴¹ while on the other hand, no guidance in this respect was accepted from Ecuadorean court judgments rendered in a case involving the investor in circumstances where those judgments were subject of allegations of multiple denial of justice.¹⁴² While those “very unusual, if not wholly exceptional, circumstances” prevented the Tribunal from relying on those specific judicial pronouncements,¹⁴³ the Tribunal had no trouble considering the pronouncements made by the Ecuadorian Supreme Court in an earlier and unconnected case, *inter alia* because Claimants did not seek to impugn those pronouncements “on grounds of any impropriety or denial of justice”.¹⁴⁴

At the end of the day, of course, the problem of judicial bias could easily be subsumed under the broader heading of propriety of the judicial process as such. As further discussed in Part II, the international standards of administration of justice themselves require that justice is delivered by impartial and independent courts. But there is also another reason why propriety of the domestic judicial process should be considered as the singular most important element

¹³⁷ *Fraport (Annulment)* (n 53), [242].

¹³⁸ *ibid* [243].

¹³⁹ cf *TECO* (n 21), *Mezzanin* (n 26).

¹⁴⁰ *Micula v Romania* (n 18), 451.

¹⁴¹ *Chevron (Track 1B)* (n 25), [140].

¹⁴² *ibid* [141]-[42].

¹⁴³ *ibid* [141].

¹⁴⁴ *ibid* [167].

controlling the reception of domestic judicial pronouncements on the part of investment courts. Focusing too narrowly on the issue of independence of domestic courts might result in an *a priori* presumption of judicial bias in favour of the interests of the host State, which could undermine the authority of domestic judicial pronouncements in circumstances where this might not be warranted.¹⁴⁵ As appositely noted by the *Chevron/Texpet v. Ecuador (Lago Agrio)* Tribunal, however, guidance must be accepted from domestic courts not solely because “courtesy, comity and due respect” should be accorded to the Respondent’s judicial branch, but because “[a]s a practical matter, without more, the considered judgments of any municipal court applying its own municipal law, especially an appellate court, are (absent special circumstances) the best evidence of the content and application of that law to the same or similar situations.”¹⁴⁶ According to the Tribunal, furthermore, “the publicly stated reasons of a municipal court would ordinarily carry far more weight than the submissions of disputing parties.”¹⁴⁷

5.3.2. The Standard of Review Applicable to Tribunals’ Scrutiny of Domestic Jurisprudence

The fact that investment tribunals are bound to apply domestic law in accordance with the jurisprudence of domestic courts implies that tribunals cannot refuse to apply a particular judicial decision on the sole ground that they disagree with such jurisprudence. As pointed out by the PCIJ in the *Brazilian Loans* case, this would otherwise have the inappropriate consequence that the international court would be applying rules other than those actually applied in the specific domestic legal system.¹⁴⁸ In the related *Serbian Loans* case, the PCIJ seemed to suggest that some scrutiny of domestic judgments was nonetheless possible, when finding certain pronouncements of the French Court of Cassation to be “reasonable” ones.¹⁴⁹ In both of the *Loans* cases, however, the PCIJ retained the view that a great deal of deference had to be accorded to domestic judicial pronouncements on those points of law which concern matters where states retain a large degree of regulatory authority.¹⁵⁰ The PCIJ’s successor in the *Diallo* case (2000) likewise confirmed that it “does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts.”¹⁵¹ In contrast to the PCIJ, the ICJ did not further suggest that the acceptance of domestic judicial pronouncements could possibly be subject to the test of reasonableness – unlike a State’s *own* interpretation of its domestic law, which the Court considered possible to be set aside where such interpretation is “manifestly incorrect” and has been put forward “for the purpose of gaining an advantage in a pending case”.¹⁵² Then again, some other international adjudicatory bodies considered it possible to depart from domestic courts’ application or interpretation of domestic law in the event that such application or interpretation appears to be “unreasonable”.¹⁵³

¹⁴⁵ Take for example the *Inceysa* award, where the Supreme Court decisions relied upon by the Claimant were actually adverse to the interests of the Respondent state, but the Tribunal nonetheless decided to ignore them on the ground that allowing such decisions to be determinative of the legality of a particular investment would give the State the possibility to redefine the scope and content of its own consent to the jurisdiction of the investment tribunal. [213].

¹⁴⁶ *Chevron (Track 1B)* (n 25), [140]

¹⁴⁷ *ibid* 140.

¹⁴⁸ *Brazilian Loans* (n 44), 124

¹⁴⁹ *Serbian Loans* (n 46), 46

¹⁵⁰ *ibid* (the PCIJ explaining that ‘It would be a most delicate matter to do so [i.e. setting aside domestic judgments], especially in cases concerning public policy—a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself—and in cases where no relevant provisions directly relate to the question at issue’). For similar observations, see *Brazilian Loans* (n 44), 124-35.

¹⁵¹ *Ahmadou Sadio Diallo* (n 49), 70.

¹⁵² See *ibid* [70]; emphasis added.

¹⁵³ STL, *Interlocutory Decision* (n 50), [39].

Investment tribunals, on their part, have generally accepted that their task was to apply domestic law as it is, and not as they thought it should be. The Annulment Committee in *Soufraki* explained in this sense that “an international tribunal cannot set aside a substantive law on nationality upon the ground that it does not approve of this law or believes that there is a better or more modern rule.”¹⁵⁴ This is not to say that some investment tribunals have not emphasized that they retained some degree of freedom when applying domestic law. The Tribunal in *Emis v. Hungary* thus noted that, while being obliged to determine the content of the applicable law in accordance with the manner in which the law would be understood and applied by domestic courts, it retained “its independent powers of assessment and decision” with regard to questions of domestic law essential to the issues raised by the Parties for its decision.¹⁵⁵ In practice, however, domestic judicial decisions were not subjected to particularly intrusive standards of review. Investment tribunals essentially applied them as they were, without subjecting them to a tests of correctness. In *Eli Lilly v. Canada* (2017), where a Canadian Supreme Court’s ruling was reviewed for the sole purpose of assessing the factual basis of Claimant’s case (and thus not for judging that ruling against any legal standard), the Tribunal declined to dismiss the Supreme Court’s analysis of an earlier precedent on the basis that such analysis was purportedly “unpersuasive”, as argued by the Claimant.¹⁵⁶ Furthermore, with respect to another Canadian Supreme Court’s judgment, the Tribunal “fundamentally” saw “no basis for questioning the Canadian judiciary’s interpretation of its own Supreme Court precedent.”¹⁵⁷ In some cases, the suggestion was nonetheless made that the acceptance of particular precedents might nonetheless depend on their reasonableness. In *Rusoro Mining v Venezuela* (2016), the Tribunal expressed the view for example that the conclusion reached by the Venezuela’s Supreme Court in a prior precedent was a “rather unobjectionable” one, even if it eventually found the precedent otherwise inapposite.¹⁵⁸ In general, however, it seems that, where domestic judgments were disregarded, this was primarily due to their lack of relevance, not for lack of persuasiveness.¹⁵⁹ In *Micula v. Romania*, where the correctness of a particular Supreme Court judgment was put to doubt, the Tribunal was thus “far from certain that it should revisit as such the validity of the Constitutional Court’s decision”, finding instead that the decision was simply not decisive for interpreting the nature of the domestic instrument in question.¹⁶⁰ All in all, there is little indication that the deference accorded by investment tribunals depended on the subject matter governed by domestic law.

This is not to suggest that deference was *always* applied in the scrutiny of domestic jurisprudence. As already detailed in the previous section (5.3.1.), investment tribunals were rather consistent in refusing to draw conclusions from judicial precedents, where the propriety of such pronouncements could have been questioned from the perspective of international law. In that, investment tribunals did not depart from the approach of other adjudicatory bodies.¹⁶¹

¹⁵⁴ *Soufraki (Annulment)* (n 51), [60].

¹⁵⁵ *Emmis v Hungary* (n 1), 175.

¹⁵⁶ *Eli Lilly v Canada* (n 40), 327 and 331.

¹⁵⁷ *ibid* 321.

¹⁵⁸ *Rusoro Mining v Venezuela* (n 8), 339, 338.

¹⁵⁹ See also *EURAM v Slovakia (Second Award on Jurisdiction)* (UNCITRAL, 4 June 2014) [230] (“the Tribunal considers that the facts of the Arkhangelskoe case are sufficiently different from those of the present case that they afford little guidance”).

¹⁶⁰ *Micula v Romania* (n 18), 451.

¹⁶¹ cf eg STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I/AC/R176bis, 16 February 2011) [39]; or *Ida Robinson Smith Putnam (USA) v United Mexican States* (IV UNRIAA 151, 15 April 1927) 153 (“The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country. [...] A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law”).

Furthermore, and equally in accordance with the practice of other adjudicatory bodies,¹⁶² investment tribunals refused to adopt a non-deferential approach in cases where the statutory construction supported by the particular judicial precedent would not be in conformity with the State's international obligations (even where the propriety of that precedent could not have been otherwise put into question). In *Pey Casado v. Chile* (2008), a domestic judicial decision that purportedly rejected the possibility of outright renunciation of Chilean nationality was thus essentially ignored – as opposed to two other judicial decisions that were simply dismissed for lack of relevance – apparently because the interpretation of the Chilean constitution that would seemingly follow from the former decision was not in accordance with Chile's obligations under the Inter-American Convention on Human Rights and under a bilateral convention on double nationality.¹⁶³ Eventually, such an approach accords more broadly with the theory of the supplemental and corrective function that international law is supposed to play in ICSID arbitration generally, even if the theory has essentially only been applied in relation to the law governing the merits of the dispute.¹⁶⁴

5.4. The Law Ascertainment Process: Legal Methods and Techniques

Having discussed the practical reasons justifying, as well as the legal reasons necessitating resort to domestic jurisprudence in the law ascertainment process, including the scope of the tribunals' duties in relation to obtaining such jurisprudence and admitting it into the law ascertainment process, it is finally worth examining how such jurisprudence was actually used by investment tribunals in determining questions of domestic law.

In the ideal case, investment tribunals would have had at their disposal judgments of sufficient relevance and specificity to allow for immediate transposition of judicial pronouncements to the issues of domestic law before them. What if, however, among the available judgments, none really contains dicta of direct relevance to the issue? Or what if no jurisprudence exists to which avail could be made? Or what if domestic jurisprudence is unable to provide a clear answer because it is contradictory and is capable of supporting different readings of the same domestic statute? The following sections discuss this type of situations and examine how investment tribunals have resolved the challenges posed in the domestic law ascertainment process in circumstances where the available domestic jurisprudence was not immediately relevant to the legal issues before the investment tribunal (5.4.1), where there was no jurisprudence available on the matter (5.4.2.), where there were no positive laws applicable to the situation (5.4.3.), and where the available jurisprudence was unsettled and conflicting (5.4.4).

5.4.1. Methods of Jurisprudential Analysis: Analogies and Adverse Inferences

Investment tribunals did not always have the luck of being provided with domestic judicial pronouncements that actually addressed the specific issue of domestic law of which resolution was required, and were thus exactly applicable to the peculiar situation that was before them for determination. What were then investment tribunals to make of such domestic judgments that the disputing parties invoked and relied upon in justifying their own understanding of the legal

¹⁶² Eg *STL (Applicable Law)* (n 161) [39]. cf also *Serbian Loans* (n 46), 46-47 ('[i]t is French legislation, as applied in France, which really constitutes French law, and *if that law does not prevent the fulfillment of the obligations in France* in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant.' Emphasis added).

¹⁶³ *Pey Casado* (n 5), 306-07, 314.

¹⁶⁴ cf *Klockner (Annulment)* (n 75), [69]; *AMCO (Annulment)* (n 76), [148]; or *LETCO* (n 30). On the theory, as well as its criticism, see E Gaillard and Y Banifatemi, 'The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 ICSID Review 375, at 389ff.

issue? Though frequently rejecting such judgments for lack of relevance,¹⁶⁵ surprisingly often investment tribunals also found ways to draw from those judgments all kind of inferences that assisted in deciding the issues of domestic law.

One way of drawing inferences was by the usual way of *analogy*. In the simple form, analogies were based on potential similarities between cases. In *Nykomb v. Latvia*, for example, the Tribunal saw nothing wrong in interpreting the price clauses in the electricity purchasing contract entered into by Claimant's subsidiary by reference to the interpretation that had been given by Latvian courts to a similar price clause in domestic judicial proceedings involving another electricity supplier.¹⁶⁶ Sometimes, analogies took more complex forms, as the rationales of particular decisions were also taken into account. Thus, in *Pey Casado v. Chile*, for instance, the Tribunal found support for the proposition that a waiver of Chilean nationality was only prohibited if leading to a situation of statelessness in the ruling of a Chilean court where the renunciation of nationality was made conditional upon the acquisition by the plaintiff of the nationality of Nicaragua.¹⁶⁷ On the other hand, investment tribunals also had the habit of drawing *adverse inferences* from case law. Particularly common in this respect was to relying on the absence of judicial pronouncements demonstrating the contrary proposition. In construing a statutory provision, the Tribunal in *Fraport v. Philippines II* took thus the view, for example, that there was "nothing [...] in prior judicial interpretations" indicating that a narrower reading was required.¹⁶⁸ The Tribunal in *Chevron v. Ecuador (Lago Agrio)* similarly placed emphasis on the fact that "the Supreme Court did not reject the possibility" of an Ecuadorian court entertaining a particular type of claim.¹⁶⁹

Admittedly, investment tribunals have often taken a cautious approach in drawing inferences from domestic case-law. In *Emmis v. Hungary* (2014), for example, care was taken when drawing conclusions from a particular domestic judgment to distinguish Claimant's factual position from the position of the plaintiff in the domestic case.¹⁷⁰ In *Chevron v. Ecuador (Lago Agrio)* (2015), likewise, note was taken of the different factual positions of the plaintiffs in the domestic cases under review.¹⁷¹ In *Micula v. Romania* (2013), on the other hand, care was taken not to draw unwarranted conclusions – be it by way of analogy, be it by way of adverse inferences – from a judicial decision that concerned financial incentives provided under a different law than those provided to the Claimant.¹⁷² Likewise, in *Fraport v. Philippines II* (2014), care was taken not to draw unwarranted conclusions from a domestic decision dealing with a regulatory enforcement regime different than the one provided for in the statute under interpretation.¹⁷³

This is not to say, however, that there have not been cases where domestic judicial decisions had perhaps been used in an overly creative, albeit not necessarily incorrect way. An interesting example is the award in *PNG Sustainable Development v. Papua New Guinea* (2015), where the existence in the law of Papua New Guinea of a principle of statutory interpretation analogous to that of *effet utile* was inferred from the fact that the Supreme Court of Papua New Guinea recognized as applicable in the legal system of Papua New Guinea the English common law principles that had been in force at the time of that State's independence, and the fact that in

¹⁶⁵ *Siag v Egypt* (n 14); or *Pey Casado* (n 5) [307]; *EURAM v Slovak Republic* (n 159), [230]; *Rusoro Mining* (n 8) [338].

¹⁶⁶ *Nykomb v Latvia* (n 15), 26.

¹⁶⁷ *Pey Casado v Chile* (n 5), [309]-[310].

¹⁶⁸ *Fraport v Philippines II* (n 6), [421].

¹⁶⁹ *Chevron (Track 1B)* (n 25), [172].

¹⁷⁰ *Emmis v Hungary* (n 1), [247]-[248].

¹⁷¹ *Chevron (Track 1B)* (n 25), [173].

¹⁷² *Micula v Romania* (n 18), [450]-[452].

¹⁷³ *Fraport v Philippines II* (n 6), [430].

accordance with a contemporary decision of the UK House of Lords such principle of statutory interpretation had already been recognized under common law at the relevant time.¹⁷⁴ From the perspective of common law practice, such approach might be permissible; however, if the law of Papua New Guinea indeed recognized such principle of statutory interpretation, one would have expected the Tribunal to cite pertinent authorities from the judicial practice of PNG courts.

It must also be noted that the inferences that investment tribunals have drawn in some cases were very far reaching. The clearest example is perhaps *Teco v. Guatemala* (2013). In spite of the fact that, in the judgment under the Tribunal's scrutiny, the Constitutional Court had not decided whether the national energy regulator had the obligation to give serious consideration to an expert commission's recommendations, or to give reasons for a decision to depart from them (since that was also not requested from the Court), the Tribunal nonetheless inferred from that judgment that the Constitutional Court "obviously" could not have intended to say that the regulator could arbitrarily and without reasons disregard the recommendations. Justification for such inference was found in the fact that nowhere in its decision did the Constitutional Court say that the regulator enjoyed complete discretion, as well as the fact that an unlimited discretion would be manifestly at odds with the regulatory framework.¹⁷⁵ Instead, what the Constitutional Court was deemed to have "intended to say" in its judgment was "clearly" that the regulator could not delegate powers to the expert commission.¹⁷⁶

5.4.2. Obstacles to law ascertainment – Issue not Addressed by Courts

In the less ideal situations, investment tribunals had no jurisprudence whatsoever that could assist them in the law ascertainment process. The most common response in such situations was to construe the relevant statutory provisions on the basis of a plain reading of the text, potentially aided by the expert opinions on issues of domestic law that were tendered to the tribunals by the disputing parties. What is interesting, however, is that in many such situations, the very absence of domestic judicial pronouncements was invoked as a reason for adopting a particular construction of the applicable domestic statute. In *Fraport v. Philippines II*, for example, the position was taken that, insofar neither party had pointed to a judicial decision, the Tribunal had to determine for itself whether a violation of the relevant statute required knowledge on the part of the persons involved, which in the end it did by construing the provision in accordance with its plain meaning.¹⁷⁷ Similarly, in *Laboud v. Congo* (2015), the Tribunal considered that, in the circumstances where the elements of a statutory provision had not been further defined in the particular law or in Congolese jurisprudence, it had no choice but to give those elements their ordinary meaning.¹⁷⁸ Conversely, in *Clayton v. Canada* (2015), the Dissenting Arbitrator Mc Rae considered the fact that the Tribunal "did not have the benefit of a determination by a Canadian federal court on the matter" as a reason why the Tribunal should have refrained from concluding that Canadian law had been violated by Canadian authorities in that case.¹⁷⁹

Of particular interest, however, is also the practice of drawing adverse inferences from the absence of jurisprudence demonstrating the contrary. Illustrative of such approach is the award in *Saba Fakes v. Turkey* (2010), where the question arose whether the provision of Article 413 of the Turkish Commercial Code, which required share certificates to be signed by at least

¹⁷⁴ PNG Sustainable Development (n 31), [316].

¹⁷⁵ *Teco v Guatemala* (n 21), [561]-[562].

¹⁷⁶ *ibid* [564].

¹⁷⁷ *Fraport v Philippines II* (n 6), [427].

¹⁷⁸ *Laboud v Congo* (n 98), [305].

¹⁷⁹ William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada (UNCITRAL, PCA Case No 2009-04, 10 March 2015) Dissenting Opinion of Professor Donald McRae, [34].

two persons authorized to sign on behalf of the company, also applied to temporary share certificates. Though Respondent maintained that a joint signature was also a prerequisite for the validity of temporary certificates,¹⁸⁰ the Tribunal placed emphasis on the Respondent's expert's admission that such requirement was neither expressly contemplated in the Turkish legislation, nor addressed by Turkish courts.¹⁸¹ The Tribunal thus drew adverse inferences from the absence of an express legislative stipulation: "To the extent that there appears to be no case law or legal provision in Turkish law requiring a double signature on a temporary share certificate, the Tribunal considers that in the present case the Respondent did not meet the burden of proof of the compulsory nature of such requirement in Turkish law."¹⁸²

5.4.3. Obstacles to Law Ascertainment – Issue not Addressed by Legislator

A different kind of difficulties have arisen in the law ascertainment process in circumstances where there was no legislation that was capable of accommodating a particular factual situation (that is, in circumstances where there may have been a *non liquet* in relation to positive law). Considering that under Article 42(2) of the ICSID Convention, investment tribunals are prohibited from bringing in a finding of *non liquet* on the ground of silence or obscurity of the law, tribunals have come up with two types of responses to this problem. One way to resolve the problem was to avoid taking a position on the disputed point of domestic law, by deciding the issue on the basis of factual elements. An example of such approach can be found in *Accession Mezzanine Capital v. Hungary* (2015), where the question arose whether Hungarian law recognized the notion of "chose in action", in the sense of a separate right to enforce another right, as recognized in the common law tradition. Giving rise to this question was the Claimant's alternative argument that it possessed such a chose-in-action with respect to the right to enter into a new broadcasting agreement as a lawful winner of the tender process. The Tribunal took the view that it "cannot take a stab in the dark on a complex question of national law in respect of which it has had no assistance from the Parties' legal experts";¹⁸³ for, "[d]iscerning the necessary elements for the existence of a chose-in-action is likely to be a complex matter in Hungarian law — assuming that the concept is even recognised under that law — just as it is in the national legal systems with which the Tribunal is more familiar."¹⁸⁴ But this did not mean that the Tribunal left the issue undecided. Besides rejecting the chose-in-action claim for being presented too late, the Tribunal also found that the such claim would have faced "insurmountable difficulties" in circumstances where Hungarian courts, having invalidated the tender procedure, had no power to declare Claimant as the winner of the tender and therefore no power to make a declaration to the effect that the national radio broadcasting regulator must enter into a new broadcasting agreement with a particular bidder.¹⁸⁵

Another way to resolve the problem was to speculate as to the position that a domestic tribunal would have taken had it been presented with the contested issue of domestic law. Illustrative of such approach is the lesser-known award in *F-W Oil Interests v. Trinidad and Tobago* (2006). The Tribunal in that case had to determine whether the Claimant had acquired rights of contractual or other nature in relation to an offshore oil and gas development and production project that would be capable of falling within the protection of the applicable investment treaty. The Claimant alleged to have acquired such rights through a public tender process, out of which it emerged as the winner. Though admitting that it had not obtained a definitive operating

¹⁸⁰ *Saba Fakes v Turkey* (Award) (ICSID Case No ARB/07/20, 14 July 2010) [127]-[28].

¹⁸¹ *ibid* [128].

¹⁸² *ibid* [129].

¹⁸³ *Accession Mezzanine Capital* (n 26), [66].

¹⁸⁴ *ibid*.

¹⁸⁵ *ibid* [68].

agreement in relation to the exploitation of the specific oil field, Claimant maintained in particular that in the course of its dealings with State-owned entities a “process contract” came into existence which made legally binding provision for the way in which a final contract was to be arrived at. The ICSID Tribunal faced the problem, however, that such contracts have not yet been recognized under the laws of Trinidad and Tobago, in the sense that “the entire field of relevant law does not yet exist, since the legislature and the courts have not had occasion to address it”.¹⁸⁶

The Tribunal therefore considered that the only possibility for it to resolve that question was to “speculate” on how a domestic court would proceed, in the absence of direct local guidance, if faced with a claim as presented by the Claimant.¹⁸⁷ For that purpose, the Tribunal assumed that the domestic courts would have arrived at conclusions “generally similar to its own, even if not identical in expression or details.”¹⁸⁸ In thus stepping into the shoes of a court of Trinidad and Tobago, the ICSID Tribunal considered that the local judges would have adopted a two-stage inquiry: initially, by approaching the matter “from first principles, and in particular the general principles of the law of contract which can safely be assumed to be broadly similar in Trinidad and Tobago to those developed by the common law throughout the Commonwealth”; and thereafter, by examining how common law courts elsewhere have reasoned in similar situations, which would involve “the accumulation of a body of authorities, such as that placed before this Tribunal, which the court would marshal to see what ideas, perspectives, theories and reasoning could be deduced and applied to the matter in hand.”¹⁸⁹ The Tribunal was further of the opinion that such court would be inclined to look particularly at the English cases (given the historical legacy of that source with the law of Trinidad and Tobago) and reported cases from Canada (as the problem there had been discussed intensively at all levels).¹⁹⁰ In the end, it was particularly on the basis of the latter that the Tribunal found common law to recognize the possibility of a process contract and identified general principles applicable to such contracts, as well as specific rules concerning particular situations.¹⁹¹ At the same time, the Tribunal concluded that none of the Canadian precedents would actually be relevant to the Claimant’s situation, since all concerned events occurring before something like a process contract came into existence.¹⁹² Reverting therefore to the principles of common law from which the domestic court would be obliged to proceed in the situation like that concerning the Claimants, the Tribunal considered that, though legal systems recognize an obligation on the parties to work towards a contract in a way consonant with good faith, the English common law of contracts which applied in Trinidad and Tobago did not (yet) recognize a contract to negotiate as having any binding force (relying, in particular, on the opinions of Lord Denning M.R. and Lord Diplock in *Courtney v. Tolani* (1975) decided by the Court of Appeal of England and Wales).¹⁹³ In the view of the Tribunal, therefore, Claimants’ have not obtained a legally enforceable right under the law of Trinidad and Tobago that could thus be capable of falling under the protection of the investment treaty.

Admittedly, however, the approach taken by the Tribunal in *F-W Oil Interests* was exceptional in many ways. First, the question as to the possibility of a process contract was actually not essential to the decision, since the Tribunal already concluded on the facts of the case

¹⁸⁶ *FW Oil Interests* (n 32), [152].

¹⁸⁷ *ibid* [152].

¹⁸⁸ *ibid* [171].

¹⁸⁹ *ibid* [153].

¹⁹⁰ *ibid* [154].

¹⁹¹ *ibid* [166]-[168]ff.

¹⁹² *ibid* [173].

¹⁹³ *Courtney and Fairburn Ltd v Tolani Brothers (Hotels) Ltd* [1975] 1 All ER 716 (Court of Appeal of England and Wales) [173], [177]-[78].

that no legally enforceable commitments could possibly have come into existence in view of the disclaimers attached to the public tender procedure.¹⁹⁴ The reasons why the Tribunal nonetheless wished to speculate as to how the Courts of Trinidad and Tobago would hypothetically have proceeded was apparently solely to do justice to the voluminous pleadings that had been made on that point by the parties.¹⁹⁵ Second, the Tribunal itself – composed as it was of pre-eminent common law practitioners¹⁹⁶ – possessed sufficient knowledge of the law to make a decision on such complicated legal issue. Third, the whole approach was solely possible because the legal system with respect to which the Tribunal had to make a decision was one of common law, where – in contrast with civil law systems – the possibility is generally accepted of the law being developed through judicial decisions. At the same time, it must be noted that, despite its general propensity to speculate on a question of domestic law on which neither the legislators nor the courts of Trinidad and Tobago had yet taken position, the Tribunal adopted a very cautious approach in drawing inferences and conclusions from the jurisprudence of other common law jurisdictions. As to the English judicial authorities, the Tribunal was aware that, though seemingly based on generally accepted principles of English Law, these might have been decisively influenced by European Community Law. As to the Canadian precedents, the Tribunal was aware that those were decided against the background of formal tendering structures and contractual practices unrelated to those existing in Trinidad and Tobago And were thus unsafe to be followed directly.¹⁹⁷

5.4.4. Obstacles to Law Ascertainment – Jurisprudence Unsettled or Contradictory

A different kind of problem has arisen in the law ascertainment process where the domestic jurisprudence invoked by the disputing parties turned out to be unsettled or outright contradictory. Such problem was particularly acute where the available judicial pronouncements contradicted, or otherwise raised doubts about the plain meaning of a particular domestic statute. How should international tribunals proceed in such cases, particular if account is taken of their duty to construe domestic law in accordance with domestic judicial pronouncements? Shall they ignore the available judicial decisions altogether and construe the relevant provisions of domestic law autonomously, without basing themselves on any available judicial pronouncements? Or shall they review domestic pronouncements and chose the approach that they consider to be the most reasonable one?

The International Court of Justice has opted for the second approach, explaining in the *ELSI* case that “[w]here the determination of a question of municipal law is essential to the Court’s decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and ‘If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law.’”¹⁹⁸ Such approach was not unprecedented, as the Court was in fact weaving forth on the position taken on this issue by its predecessor in the *Brazilian Loans* case. Investment tribunals, on their part, have not taken a uniform position on this matter, but came up with different solutions to the problem of conflicting jurisprudence: while many of them refused to take a position as to which judicial decisions are the preferable or the

¹⁹⁴ *FW Oil Interests* (n 32), [165], [182].

¹⁹⁵ *ibid* [165].

¹⁹⁶ The Tribunal was presided over by Fali S Nariman, a distinguished Indian Constitutional jurist and senior advocate to the Supreme Court of India, and composed of Sir Franklin Berman, a British barrister and former FCO legal adviser, and Lord Mustill, serving at that time as Lord of Appeal in Ordinary.

¹⁹⁷ *ibid* [155]-[56].

¹⁹⁸ *ELSI* (n 49) [62], quoting from (*Brazilian Loans*, 124).

better one (5.4.4.1.), some had little reservations from deciding which of those decisions is most in the conformity with the domestic law (5.4.4.2.).

5.4.4.1. *Refusal to Take Position on Unsettled or Contradictory Jurisprudence*

Amongst those refusing to take a position on unsettled jurisprudence, some tribunals proceeded to interpret the relevant statute for themselves. In *Petrobart v. Kyrgyz Republic* (2003), for instance, inconsistent domestic judgments were simply disregarded and the Tribunal sustained its decision on an autonomous interpretation of the relevant provisions of domestic law. In the circumstances of that case, the issue arose whether Claimant was a foreign investor within the meaning of the Kyrgyz Foreign Investment Code. In order to confirm such proposition, Claimant relied on an earlier decision that the Bishkek City Court had rendered in the context of Claimant's contractual claims, which purportedly recognized, in express terms, the Claimant as a "foreign investor". In dismissing such proposition, Respondent instead relied on a later ruling of the same Court, which apparently concluded that Claimant had made no foreign investment within the meaning of the Code and thus arguably implied that Claimant was not a foreign investor. Facing the alleged inconsistency, the Tribunal concluded that neither of the decisions "can serve as a basis for conclusions" and thus limited its analysis to a literal construction of the Code, which the Tribunal itself interpreted "against the background of the facts and circumstances presented to it".¹⁹⁹

Most other tribunals facing inconsistent or contradictory jurisprudence, however, preferred to entirely avoid deciding a disputed point of domestic law, premising their analysis instead on other considerations. In *Feldman v. Mexico* (2003), for example, the Tribunal was facing the question whether Claimant's company had a right under Mexican tax legislation to obtain tax rebates on cigarettes that it exported. The entitlement to the latter depended on whether or not the exporter was capable of producing invoices stating the excise tax paid on the cigarettes – a requirement that the Claimant's company, for reasons unrelated to the Respondent's authorities, had never been able to comply with. At a certain point, the company challenged the constitutionality of the invoicing requirements, but obtained divergent answers from Mexican courts.²⁰⁰ Against this background, and while recognizing that the Mexican courts' discussion of domestic legal issues provided "necessary background" to its understanding of these issues "as required for a proper application of NAFTA and international law", the Tribunal was "not inclined" to give those decisions "significant weight".²⁰¹ This was because of several reasons. First, neither of the disputing parties had suggested that those decisions were controlling. Second, some of the domestic proceedings were not final. Third, the conflicting positions taken by the domestic courts had the effect of "creating a conflict which this Tribunal cannot and should not try to resolve". Fourth, the courts were applying Mexican law which did not necessarily provide the same results as the provisions of NAFTA and international law applied by the Tribunal. And fifth, the court decisions were not claimed to have been breaching the international law standard for denial of justice.²⁰² In the circumstances of the case, the Tribunal could actually afford not to decide the contradictions in Mexican jurisprudence, since it was never disputed that the relevant

¹⁹⁹ *Petrobart v. Kyrgyz Republic* (2003) (n 2), 43.

²⁰⁰ *Feldman v. Mexico (Award)* (ICSID Case No ARB(AF)/99/1 82-83, 16 December 2002) [82]-[83]. While the first instance Fiscal Tribunal held that the tax administration could not require itemized invoices due to the company's impossibility to comply with such requirement, a Circuit Court subsequently took the position that the requirement was not contradictory with the zero percent tax rate, whereas a Court of Appeals conversely again held that the company did have a constitutional right to the rebates notwithstanding its inability to produce invoices showing the tax amounts separately. At the time of the Tribunal's award, the proceeding remained *sub judice* before the competent federal courts which were yet to deliver the final decision.

²⁰¹ *ibid* [84].

²⁰² *ibid* [84].

provisions of Mexican Tax legislation at all relevant times prescribed the invoicing requirements. Hence, the outcome of the domestic proceedings in that case would not have affected the Tribunal's findings in relation to Claimant's expropriation claim, for even if Mexican courts had ultimately decided that the denial of rebates was unconstitutional, Claimant could not have reasonably argued that post investment changes in the law destroyed its investment.²⁰³

Similarly reluctant to take a definite stance towards contradictory domestic decisions was the Tribunal in *EnCana v. Ecuador* (2006). A central question in that case was whether foreign oil companies operating in Ecuador were entitled to refunds of value added tax (VAT). Pursuant to Ecuador's Tax Code, manufacturers in general could seek a refund of VAT paid on goods produced in Ecuador for export. But the Code was unclear as to the scope of activities that were to fall under manufacture. As of a certain point, the Ecuadorian Tax Authorities began to deny oil companies the right to VAT refunds on the ground that crude oil could not be considered a "fabricated" (manufactured) good. Some of these oil companies, including EnCana's Ecuadorian subsidiaries, challenged the Tax Authorities' decisions in Ecuadorian Tax Courts, but those challenges resulted in contradicting judicial decisions.²⁰⁴ The majority of the arbitrators in that case was ultimately not willing to take a position on the conflicting jurisprudence, taking the view that "[t]he Tribunal cannot pick and choose between different and conflicting national court rulings in order to arrive at a view as to what the local law should be."²⁰⁵ According to the majority, "[c]onsistent with well-established international principle and doctrine", the availability of a clause under the applicable BIT protecting the Claimant against uncompensated expropriations did "not convert this tribunal into an Ecuadorian tax court".²⁰⁶ The majority could afford such reluctance since, in the circumstances of that case, it was actually in a position to decide the question of expropriation "on the assumption (without deciding) that EnCana is correct on the substantive issues of Ecuadorian law".²⁰⁷

Similarly reluctant was the stance of investment tribunals in situations where particular judgments were claimed to depart from established domestic jurisprudence. In *Mamidoil v. Albania* (2015), the impugned judgment of Albania's Supreme Court was claimed to have "surprisingly deviated from previous case law" and thus denied Claimant justice. While the Claimant's expert had not provided case materials in support of such proposition, the Respondent's legal expert produced another decision of the Supreme Court, allegedly confirming that the impugned judgment applied the law correctly.²⁰⁸ The Tribunal took the view that

"it is not its role to make a final judgment over the disputed Albanian legal questions. Both legal experts have given reasoned opinions. The Supreme Court was divided over the correct answers. Both the majority and the dissenting minority have presented reasons

²⁰³ *ibid* [119].

²⁰⁴ *EnCana v Ecuador* (2006) (LCIA Case No UN 3481, UNCITRAL, 3 February 2006), [88]-[92]. In two cases brought by EnCana's subsidiaries, the City Oriente and City Investing cases, the Ecuadorian District Tax Court held that the applicable provision of the Tax Code was indeed not applicable to oil companies for reason of them not being manufacturers, though granted a partial VAT refund on the basis of a different provision of the Tax Code. The Supreme Court in the same cases upheld the lower court's reasoning. In contrast, in the Bellwether case brought by a different plaintiff, the same Supreme Court a few months had earlier rejected idea that Article 69A would not be applicable for reason of oil companies not being manufacturers. And yet again, the District Tax Courts in other cases, including for example in the Repsol case, reportedly continued to deny VAT refunds on the basis of Article 69A, this being possible due to the fact that Supreme Court decisions did not have the status of binding precedent until the Supreme Court has ruled the same way three times.

²⁰⁵ *ibid* [200] fn 138. Elsewhere, the Tribunal observed that the legality of tax measures is a matter to be determined by the courts of the host state ([142(1)]).

²⁰⁶ *ibid*, fn 138 to [200].

²⁰⁷ *ibid*.

²⁰⁸ *Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania (Award)* (ICSID Case No ARB/11/24, 30 March 2015) [767].

for their decision and opinion. It is not the Tribunal's role to take sides. It has also not been given evidence to determine whether the Supreme Court deviated from former court practice."²⁰⁹

Without therefore taking a position whether the impugned judgment deviated from previous jurisprudence, the Tribunal concluded that it was not clearly improper, discreditable or in shocking disregard of Albanian law, basing itself on "a review of the material before it and a careful reading of the Supreme Court's decision".²¹⁰ In *Eli Lilly v. Canada* (2017), the Tribunal likewise avoided taking a definite stance as to certain Canadian court precedents that were adduced to prove the subsequent reversal of Canadian patent law in the *AZT* decision of Canada's Supreme Court. Whereas the Claimant's and Respondent's legal experts provided conflicting assessments of those precedents, the Tribunal found both of these experts "credible and competent" and as each had made "a reasoned case", the "only appropriate conclusion, then, in the Tribunal's view, is that reasonable minds may differ in the interpretation of the cases."²¹¹ The Tribunal, again, was in a position to avoid taking a definite stance on the alleged contradiction in jurisprudence, as it had already determined, on the basis of its own reading of the *AZT* decision, that there was no reversal from prior law.²¹²

5.4.4.2. *Picking and Choosing from Available Jurisprudence*

In some of the cases, investment tribunals were more disposed to picking and choosing from contradictory or inconsistent domestic jurisprudence. The clearest example is the award in *Occidental v. Ecuador* (2004), where the Tribunal took a less cautious approach towards the same conflicting decisions of Ecuadorian courts that were also at issue in the *EnCana* case. Not only did the *Occidental* Tribunal have no trouble forming its own views as to the manufacturers' entitlement under the Ecuadorian Tax Code to obtain VAT refunds,²¹³ but the Tribunal held that its interpretation of the Code actually found support in the decisions of the Ecuadorian Supreme Court. Though admitting that there were "contradictions" in this jurisprudence,²¹⁴ the *Occidental* Tribunal had no trouble with picking and choosing the two Ecuadorian court decisions that it deemed most supportive of its interpretation of the Code.²¹⁵ The Tribunal concluded that under Ecuadorian tax legislation the Claimant was "entitled to such a refund, particularly as it has been held by the Ecuadorian courts that such a right pertains to exporters generally, whether involved in manufactures or in production."²¹⁶ But this was somewhat of an overstatement, as the Tribunal conveniently ignored another Supreme Court's decision, which the Tribunal itself acknowledged as not supporting its interpretation of the Code.²¹⁷ At the end of the day, perhaps, the approach taken in *Occidental* was most in line with the principle enounced in *ELSI* that it rests with the international tribunal or court to select the interpretation that can be considered most in conformity with domestic law.

A somewhat different approach was later followed by the Dissenting Arbitrator in the *EnCana* case. In his dissenting opinion, Arbitrator Grigera Naón did not consider that the final determination of issues under domestic law had to be entrusted to the national courts of the

²⁰⁹ *ibid* [768].

²¹⁰ *ibid* [769].

²¹¹ *Eli Lilly v Canada* (n 40), 333.

²¹² *ibid* 328-32.

²¹³ *Occidental v Ecuador* (n 1), 136.

²¹⁴ *ibid* 137.

²¹⁵ *ibid* 141.

²¹⁶ *ibid* 143.

²¹⁷ *ibid* 138-39.

state.²¹⁸ For an international tribunal, in his view, the local laws were to be considered as “*facts* to be freely evaluated by arbitrators to determine if the foreign investor’s entitlement to protection under international law has been infringed at a specific moment in time or not.”²¹⁹ Accordingly, Ecuadorian court decisions were not treated as potential source of domestic law, but merely as evidence of State conduct.²²⁰ Indeed, Arbitrator Naón sought to make clear that he was not “advocating any review by an international arbitral tribunal constituted under the Treaty of local court determinations as to the meaning or ‘right’ interpretation” of the relevant provisions of the Tax Code, nor was he advocating “the exercise by such tribunal of functions inherent in an appeals court in respect of local court findings or conclusions as to how such provision is or should be interpreted and applied locally.”²²¹ Rather, what an international arbitral tribunal was bound to examine was “whether measures based on such interpretation – considered as a fact – constitute an expropriatory taking under the Treaty.”²²² In other words, the problem of conflicting jurisprudence was to be resolved by treating the issue as one of fact, instead of one of law.

An altogether different approach was followed in the jurisdictional award in *Siag v. Egypt* (2007), where the alleged contradictions in domestic jurisprudence were eventually resolved through a careful scrutiny of the domestic decisions in question. In the circumstances of that case, the question arose whether one of the claimants effectively lost its Egyptian nationality as a result of obtaining the nationality of Lebanon. Pursuant to Egypt’s nationality law, a person seeking permission to obtain a foreign nationality was entitled at the same time to seek permission to retain the Egyptian nationality; though, if the latter permission was granted, the person was entitled to retain the Egyptian nationality provided that a formal declaration was made within a year expressing the wish to take advantage of such benefit.²²³ Respondent, however, argued that here was no unanimity of opinion among the more recent decisions of the Egyptian courts as to whether such declaration was actually required, having introduced several domestic cases that allegedly supported the opposite view.²²⁴ In seeking to determine the proper construction of Egypt’s nationality law, the ICSID Tribunal did not seek to resolve the alleged jurisprudential inconsistencies by simply selectively endorsing the judicial authorities submitted by the Claimants, which attested that the making of the declaration was required. The Tribunal actually dismissed all of Respondent’s case law for lack of relevance to the Respondent’s interpretation of the law.²²⁵ In other words, the Tribunal substantively engaged with the jurisprudence presented to it, ultimately resolving that there were no actual inconsistencies. Accordingly, the Tribunal thus held that it was “settled” under Egyptian law that a formal declaration had to be made, which meant that the Claimant, having made no such declaration, effectively lost his Egyptian nationality.²²⁶

5.4.4.3. Assessment

In the end, the different approaches pursued by international investment tribunals in dealing with uncertain or unsettled domestic jurisprudence do not substantially diverge from those of other

²¹⁸ Partially dissenting opinion of Arbitrator Grigera Naón in *EnCana* (LCIA Case No UN3481, UNCITRAL, 30 December 2005) [10]–[11].

²¹⁹ *ibid* [12].

²²⁰ See eg [56].

²²¹ *ibid* [72].

²²² *ibid*.

²²³ *Siag v Egypt* (n 14), 163.

²²⁴ *ibid* 105–06, 166–67.

²²⁵ *ibid* 168–69 (Some of the cases were found not to support the Respondent’s interpretation of the provision, some were found not to touch on the application of the relevant provision at all, while a case was found not to involve any detailed analysis of the relevant legal provision, and thus not to allow for any inferences to be made).

²²⁶ *ibid* 172.

international adjudicatory bodies. In the practice of the PCIJ and the ICJ, for example, one can find thus precedents where the Court had opted for one of the possible lines of authority in domestic jurisprudence,²²⁷ to precedents where potentially contradictory domestic jurisprudence had simply been left aside and the Court proceeded with its own interpretation of domestic law,²²⁸ to precedents where the Court had simply refused to conclusively determine points of domestic law where the jurisprudence was inconclusive or uncertain.²²⁹

5.5. Conclusions

All in all, the conclusions one can possibly draw are the following. Investment tribunals had frequent resort to the jurisprudence of domestic courts in interpreting or applying domestic law. Such jurisprudence was considered for a variety of reasons: with a view to clarifying concrete statutory provisions whose interpretation or application gave rise to uncertainty, for the purpose of determining questions of domestic law that could otherwise not be resolved by simple application of statutory provisions, or merely because of certain factual information provided for in domestic jurisprudence that was indirectly of assistance in the law ascertainment process.

But as this chapter proceeded to demonstrate, reasons for recourse to domestic judicial pronouncements ought not be sought in mere convenience. In being adjudicatory bodies applying a law originating from a legal order other than the one to which they owe their existence, investment tribunals are actually bound to consider such jurisprudence when determining points of domestic law that are essential to their decision. While investment tribunals cannot be presumed to literally “know” the law (there is, in fact, no obligation requiring that arbitrators have any expertise in the domestic law which they may be required to apply), it is possible to say that arbitrators are nevertheless under an obligation to familiarize themselves with any domestic law and jurisprudence that they may have to apply. This duty of education may not translate into an autonomous obligation on the part of investment tribunals to engage *proprio motu* in their own research of relevant jurisprudence. It does, however, entail that arbitrators are at the very least required to seek the views of the litigating parties as to any domestic jurisprudence that may be pertinent to the interpretation or application of domestic law before them. In the end, investment tribunals retain their independent powers of assessment and decision, and are therefore permitted to draw different conclusions from the case-law than those presented to them by the parties – subject, of course, to the general obligation that they interpret and apply domestic law in such way as it would actually be applied in the domestic legal system.

In exercising their independent powers of assessment and decision, investment tribunals are not expected to blindly follow domestic jurisprudence presented to them by the litigating parties.

²²⁷ *Serbian Loans* (n 46), 45-47. Although each of the parties adduced jurisprudence of French courts that allegedly supported their own different reading of Article 1895 of the French Code Civile (as to whether or not the provision suspended the application of gold clauses), the PCIJ concluded that “according to the information furnished by the Parties, the doctrine of French courts, after some oscillation, has now been established in the manner indicated by the French Government.” (47). The PCIJ followed the same approach in the *Brazilian Loans* (n 44), 125.

²²⁸ In the *Péter Pázmány University* case (1933), 235-36, the PCIJ was presented by the parties with divergent jurisprudence of Hungarian Courts as to the legal status of the Péter Pázmány University under Hungarian law. The PCIJ considered that the relevant statements in the domestic judgments were merely ‘of an incidental character (*obiter dicta*)’ and, accordingly, was ‘not inclined to attach importance to them’. Instead, it preferred to rely upon its own appreciation of the relevant provisions of Hungarian law. See *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University), Czechoslovakia v Hungary (Judgment)* PCIJ ser A/B No 61 (15 December 1933) 235-36.

²²⁹ In the *ELSI* case (n 49), [63], the Chamber of the ICJ was presented with different decisions of the Court of Cassation that purportedly demonstrated that it was possible to directly invoke provisions of an FCN Treaty before Italian courts. The jurisprudence was inconclusive, but the Chamber did not proceed to determine, on the basis of its own reading of the Italian Code of Procedure, whether an action based on the treaty could have been successful. Rather, the Chamber concluded that ‘it was for Italy to show, as a matter of fact, the existence of a remedy’.

As the present chapter also demonstrated, two factors have strongly influenced the investment tribunals' attitude towards particular case-law: the potential bias of the judicial decision-maker from which the case-law originated, and the propriety of the judicial process leading to the relevant case-law more generally. Apart from that, investment tribunals have largely adopted deferential standards of review and have not conditioned their acceptance of particular judicial decisions upon the correctness of the latter as a matter of domestic law. Indeed, this is also expected from them, as arbitrators are not chosen for their particular knowledge of domestic law. Lacking such expertise, it is perhaps not surprising that, in determining questions of domestic law, investment tribunals have frequently sought a basis for their determinations in the available jurisprudence, even if this occasionally entailed a large part of creativity on their part. Indeed, tribunals did not shy away from drawing analogies and adverse influences from available judicial pronouncements, and where necessary, conclusively determined points of domestic law even in circumstances where the domestic jurisprudence was unsettled or uncertain. It has been especially in such circumstances that tribunals proceeded to perceive domestic courts as partners proper.

* * *

In retrospect, when compared to the findings in chapter 4, the conclusions reached in chapter 5 may lead to a somewhat paradoxical, if not contradictory proposition that, on the one hand, domestic judicial determinations may not be taken to generate preclusive effects on investment tribunals, and yet those same tribunals may still be required, on the other hand, to consider domestic courts' pronouncements when interpreting and applying domestic law.²³⁰ In reality, this paradox is more apparent than real. The apparent contradiction is but the consequence of the fact that domestic judgments, as any other outcome of adjudication, generate effects at both the concrete and the abstract level.²³¹ While at the concrete level, it should be possible for investment tribunals to ignore how a specific judgment had determined the particular controversy between the litigating parties, it may not be possible for them to ignore the specific contributions that judgments generally make in relation to law-ascertainment and -clarification at the abstract level.

As both chapter 4 and chapter 5 further suggest, however, distinctions between concrete and abstract dimensions of prior judicial determinations may gradually lose importance, as investment tribunals increasingly treat the question of *propriety* as determinative of whether or not prior judicial determinations will be accepted. That is, regardless of whether a prior judgment is relevant because of concrete pronouncements *in casu*, or because of general pronouncements *in abstracto*, such pronouncements will mostly be accepted, as long as they are unimpeachable from the standpoint of international law. From the perspective of the present inquiry, domestic courts will thus be treated as *partners* in the law-ascertainment process, as long as their overall conduct does not make them *suspects*. The circumstances under which this will happen are discussed in the next part of the present inquiry.

²³⁰ The paradox was inadvertently captured by the Tribunal in *Emmis v Hungary (Award)* (n 1), [176], when denying that 'decisions of municipal courts arising directly out of the same set of facts will be necessarily dispositive of the question before an international tribunal' while at the same time conceding that 'determinations of municipal courts as to the content of the municipal laws that they are mandated to apply are likely to be of great help to an international tribunal.'

²³¹ See *supra* I.3.

PART II

Domestic Courts as Suspects:

State Responsibility for Judicial (Mis-)Conduct

II. INTRODUCTION INTO PART II

In the following three chapters, the inquiry shifts to those situations where the relationship between domestic courts and international tribunals becomes a “disharmonious” one – where investment tribunals begin to treat domestic courts’ conduct and their decisions as “suspect”, because such courts have purportedly engaged in improper or wrongful conduct vis-à-vis the foreign investor, and thereby engaged the responsibility of the State under international law.¹ Hence, the purpose of the next three chapters is to examine the practice of investment tribunals in scrutinizing the conformity of the conduct of domestic judicial authorities with the standards of treatment that States are to accord to investors under investment treaties. Before surveying this practice, it is necessary to consider, from a more general standpoint, the ways in which responsibility can arise under international law for the conduct of judicial organs, both as a question of attribution (II.1), and as a question of the nature of the obligation allegedly violated by the conduct of the judicial organs (II.2).

II.1. Responsibility of the State for the Conduct of Judicial Organs

The prevalent view today is that the conduct of domestic courts may engage the responsibility of the State on the ground that the acts of the judiciary are attributable to the State, just like the acts of any other State organ. The latter proposition is presently codified in Article 4(1) ARSIWA, which stipulates that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, *judicial* or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”² This provision is now considered to be reflective of customary international law.³

Admittedly, due to enduring disagreements regarding the circumstances under which judicial acts were capable of engaging the responsibility of the State, one may not infrequently find pronouncements in the jurisprudence of international adjudicatory bodies suggesting that the State may possibly not be held responsible for wrongs committed by the judiciary, at least not in the same way as other organs.⁴ Even as late as in 1984, the ICSID Tribunal in *AMCO v.*

¹ For a similar understanding, see LY Fortier, ‘Investor-state Tribunals and National Courts: a Harmony of Spheres?’ in DD Caron, SW Schill, A Cohen Smutny & EE Triantafyllou (eds), *Practising Virtue: Inside International Arbitration* (OUP, 2015), 292-307, at 292 (‘When each adjudicatory body understands and acts within its own sphere of competence, the relationship between national courts and international tribunals is in fact harmonious. However, when the court or tribunal deviates from its sphere of competence, the relationship is anything but harmonious. In fact, the tension is palpable.’).

² *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, art 4(1); Report of the ILC on the Work of its Fifty-third Session (2001), UN Doc A/56/10 (2001), at 43; and UN Doc A/RES/56/88 (2002); emphasis added.

³ cf ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ Rep 62 (29 April 1999) [62] (‘According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state. This rule, which is of a customary character...’).

⁴ See eg *Croft* case (7 February 1856), reported in A Lapradelle and N Politis, *Recueil des arbitrages internationaux* vol 2 (Pedone 1905), 1ff, at 24 (‘Quand toute une série de questions juridiques sont, en vertu de cette Constitution et d’autres dispositions de même nature, soustraies aux tribunaux ordinaires et soumises à des tribunaux spéciaux institués pour en connaître, toutes les fois qu’elles s’élèvent en matière administrative, le fonctionnement de cette juridiction ne constitue qu’un exercice véritable du pouvoir judiciaire, puisqu’il dépend uniquement de la libre et indépendante interprétation de la loi par des personnes qui en sont régulièrement chargées et non de l’obéissance à des ordres supérieurs. Il est, par suite, impossible de rendre le gouvernement ou l’Etat responsables des sentences prononcées par cette juridiction.’); and *Yuille, Shortridge Company* case (21 October 1861), reported in *ibid*, 78ff, at 103 (‘...Il serait donc tout à fait injuste de demander compte au gouvernement royal de P. des fautes commises par ses tribunaux. En vertu de la Constitution du royaume de P., les tribunaux sont parfaitement indépendants du gouvernement qui par conséquent ne peut exercer aucune influence sur leurs décisions; on ne peut donc pas l’en rendre responsable.’)

Indonesia contended that it was “common ground in international law that the international responsibility of a State is not committed by the acts of its municipal Courts, except where such acts amount to a denial of justice.”⁵ The problem with such statements, however, is that they conflate the question of attribution with the identification of the primary norm violated as a result of the conduct on the part of the judiciary.⁶ To be sure, no theory of limited responsibility (or perhaps even non-responsibility) of judicial organs ever gained traction in doctrinal writings.⁷ Neither did it find actual adherence in the jurisprudence of international courts and tribunals in general. On the contrary, international judicial and arbitral decisions time and again confirmed that, as a general matter, responsibility can be engaged as a result of the conduct of every organ, regardless of the function that such organ performs within the domestic legal order;⁸ and specifically, that responsibility can clearly be engaged by the conduct of the judiciary.⁹

A theory of limited responsibility for the conduct of judicial organs would also be difficult to uphold conceptually. The most commonly adduced argument in support of such theory is that premised on the domestic independence of the judiciary,¹⁰ which finds its underpinnings in theories such as Montesquieu’s separation of powers doctrine or the common-law doctrine of judicial independence. Such an argument, however, is incompatible with the prevailing international law conception of the State as a unitary actor, which presupposes that the State speaks with one voice on the international plane, regardless of the organ from which the voice emanates.¹¹ Specifically, the argument fails to take into account that, though perhaps independent

⁵ *Amco Asia Corporation and others v Republic of Indonesia (Award)* (ICSID Case No ARB/81/1, 20 November 1984), [150].

⁶ On careful reading, the views expressed in *Croft* (1856) and *Yuille* (1861) did not actually concern the question of possibility of judicial organs to engage the responsibility of the state as a subject of international law, but more properly concerned the question whether the judicial decisions in question constituted a breach of an international obligation. In both cases, the possibility was namely accepted that domestic courts could commit a denial of justice. Commenting on these cases, Eagleton appropriately observed: ‘There can be no doubt that a court, as any other agency of the state, may, through an internationally illegal act, bring responsibility upon its state; the difficulty lies in determining which of its acts are illegal.’ C Eagleton, *The Responsibility of States in International Law* (1928), at 71.

⁷ For a comprehensive rejection of the doctrine, see *inter alia* D Anzilotti, *Cours de Droit International* (1929), at 479-80; or H Urbanek, ‘Das völkerrechtsverletzende nationale Urteil’ (1958–59) 9 *ÖZöR* 213, at 246ff.

⁸ See eg *Salvador Commercial Company (El Salvador/US)* (XV UNRIAA 455, 1902) 477 (‘a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity’); or for a recent restatement of the principle, *LaGrand (Germany v United States of America)* (*Request for the Indication of Provisional Measures, Order*) [1999] ICJ Rep 9 (3 March 1999) [28] (‘Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be’). For further examples, see cases cited in ‘Third Report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, the internationally wrongful act of the State, source of international responsibility’, A/CN.4/246 and Add 1-3, YILC 1971, vol II(1), at 246-47; and J Crawford, *State Responsibility: The General Part* (CUP 2013), at 117.

⁹ See eg *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain)* (III UNRIAA 1479, 9 May 1934) 1501; *Différend concernant l'interprétation de l'article 79, par 6, lettre C, du Traité de Paix (Biens italiens en Tunisie — Échange de lettres du 2 février 1951)* (Decision 196) (XIII UNRIAA 422, 7 December 1955) 438 (‘La sentence rendue par l'autorité judiciaire est une émanation d'un organe de l'Etat, tout comme la loi promulguée par l'autorité législative, ou la décision prise par l'autorité exécutive. La non-observance d'une règle internationale, de la part d'un tribunal, crée la responsabilité internationale de la collectivité dont le tribunal est un organe, même si le tribunal a appliqué un droit interne conforme au droit international’). For more recent restatements of the principle, see *US – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R, 6 November 1998) [173] (‘[t]he United States, like all other members of the WTO and of the general community of states, bears responsibility for acts of all of its departments of government, including the judiciary.’); or ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 [63] (‘As indicated above, the conduct of an organ of a State – even an organ independent of the executive power [referring to the conduct of Malaysian courts] – must be regarded as an act of that State’).

¹⁰ For an example, see T Baty, *The Canons of International Law* (Murray 1930), 127-28; for a general discussion on this argument, see AV Freeman, *The international responsibility of states for denial of justice* (1938), 29-34.

¹¹ On this, see especially Anzilotti (n 6), 480. For confirmation, see Eagleton (n 6), 74; C De Visscher, ‘Le déni de justice en droit international’ (1935) 52(II) *Recueil des Cours* 365, 376-77.

of the government, the judiciary is not independent of the State.¹² Similar conceptual difficulties arise in relation to some other arguments that have occasionally been invoked in defense of a theory of limited judicial responsibility, such as those premised on the *res judicata* nature of domestic judicial decisions, or on limitations resulting from the internal (constitutional) structure of the State.¹³ It does not take much to conclude that any such justifications would be difficult to reconcile with certain fundamental principles of international law, such as the principle of supremacy of international law and irrelevance of the domestic law defense in the context of state responsibility. Last but not least, as a matter of policy, a theory allowing judicial organs to be treated differently from other State organs in the ascertainment of a State's international responsibility would not be a desirable one, as it would clearly lend itself to abuse. Hence, it is of little surprise that a potential theory of limited State responsibility for judicial action has been rejected at an early stage during the latest codification of the Law on State responsibility.¹⁴

II.2. Obligations of States with regard to Judicial Organs

If, as discussed above, the responsibility of the State for improper or wrongful conduct on the part of judicial officials does not depend on the position that these occupy in the internal machinery of that State, it is convenient next to identify the type and nature of international legal obligations that can be violated by such conduct. In general, the wrongful conduct of judicial organs is most often associated with one particular delict – that of denial of justice. The association between the two is that strong that it was sometimes believed that denial of justice was capable only of being committed by judicial organs; or conversely, that denial of justice is the only way that the judiciary can engage the responsibility of the State.¹⁵ Clinging to the latter opinion was, among other adjudicatory bodies, the Tribunal in the *AMCO v. Indonesia* case.¹⁶ Yet, the responsibility of the State for acts of its judiciary does not exhaust itself in the concept of denial of justice. Not only in academic writings,¹⁷ but also in international judicial and arbitral practice the possibility is now generally accepted that domestic courts can equally engage a State's responsibility through the misinterpretation or misapplication of treaties,¹⁸ or else through violations of specific rules of customary international law.¹⁹ In this respect, it must be said that the

¹² On this, Freeman (n 10), 31. This of course implies that the state cannot be held responsible for the conduct of judicial organs, which operate independent from it. cf. *Salem Case (Egypt, USA)* (II UNRIAA 1161, 8 June 1932) at 1202-03, exonerating Egypt's responsibility for denials of justice allegedly committed by the Mixed Courts because, by agreeing to the capitulatory regime, Egypt resigned part of its jurisdictional sovereignty and was thus unable to prevent repetition of fault on the part of such courts, to remove the judges or punish them by disciplinary action, or to modify the laws in accordance to which the courts were composed and had to decide their cases.

¹³ See Freeman (n 10), 34-38.

¹⁴ See Ago, 'Third Report on State responsibility' (n 8), 246-49.

¹⁵ See discussion in ch 6.1.

¹⁶ *Amco v Indonesia (Award)* (n 5), [150].

¹⁷ See eg E Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159(1) *Recueil des Cours* 1, at 278-79 ('The responsibility of the State for acts of judicial authorities may result from [...] a decision of a municipal court clearly incompatible with a rule of international law.');

and more generally J Paulsson, *Denial of Justice in International Law* (CUP 2005), 69-73.

¹⁸ See eg *SS 'Lotus' (France v Turkey) (Judgment)* (1927) PCIJ ser A, No 10, at 24 ('The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises.');

or *Martini Case (Italy v Venezuela) (Award)* (3 May 1930), reproduced in (1931) 25 AJIL 554, at 562-65.

¹⁹ See eg *Costa Rica Packet case (UK/Netherlands) (Award)* (184 CTS 240, 13 February 1897) (finding that a Dutch court had violated the freedom of the high seas by ordering the preventive custody of a British captain on the belief that the latter had unlawfully appropriated goods from a vessel adrift in the territorial waters of the Dutch East Indies, which vessel later turned out to have been located on the high seas).

conduct of judicial organs can be contrary to a rule of international law, either due to the judges themselves, or due to the restrictions upon the capacity of the courts set by the State's own laws. Admittedly, in the latter case, the actual organ committing the wrongful act may not actually be the judiciary, but the legislative that adopted the legislation which is contrary to international law. This is especially the case in those domestic legal system where courts are not entitled to directly apply international law, and hence, in exercising their function of applying internationally non-conforming domestic law, they will be constitutionally compelled to violate international law. Thus, whether or not the application of domestic legislation in ways contrary to international law will count as a wrong committed on the part of judicial organs will largely depend on the extent to which these will be able to take account of international law in interpreting and applying domestic law. But in legal systems where courts will be able to do so, their conduct will in itself be capable of amounting to a violation of international law.

Applying these principles to the investment arbitration practice, one can observe that contemporary investment tribunals have by and large retracted from the view advanced in *AMCO* and generally accepted that the conduct of the domestic judiciary may give rise to breaches of specific investment treaty standards, even in circumstances where that conduct itself would not otherwise have met the threshold of denial of justice. This is not to say that the concept of denial of justice has not remained of central importance to scrutinizing judicial conduct, as attested by the fact that the majority of cases are still pleaded and considered under the rubric of denial of justice. It does however mean that investors have the option of relying – and in practice do rely – on more than one standard of treatment in seeking redress for wrongful judicial conduct.²⁰

To take account of these developments, the inquiry proceeds in the following way. Chapter 6 examines the way in which the obligation not to deny justice has been construed and applied in the practice of investment tribunals. Thereafter, chapter 7 explores how the latter have applied other standards of treatment guaranteed by investment treaties in relation to judicial conduct. In both chapters, the emphasis of the inquiry is on the standard of review applied by investment tribunals to determining whether the judicial conduct in question violated international law. Studying the intensity by which tribunals exercise their supervisory powers is namely relevant to determining the proper scope of review that an international tribunal is to exercise over domestic judicial organs without assuming the role of a regular court of appeal. The last chapter in this part, chapter 8, deals with a matter that appears to be of relevance to at least some of the claims predicated on injuries committed by judicial organs: the question of local remedies and the extent to which these have been exhausted in order to prove violations of international law on the part of judicial organs.

²⁰ See eg *Romak SA (Switzerland) v The Republic of Uzbekistan (Award)* (UNCITRAL, PCA Case No AA280, 26 November 2009) [133]-[138], where the refusal on the part of Uzbek courts to enforce a commercial award rendered in the Claimant's favor was claimed to constitute a violation of art IV of the New York Convention (the improper interpretation and application of the NYC was qualified as constituting a breach of the umbrella clause in art 11 of the Switzerland-Uzbekistan BIT). It was further claimed that the conduct of the domestic Courts was incompatible with art 3 of the BIT, which required the host State to ensure a secure investment environment, the promotion of investments, and fair and equitable treatment before Uzbek courts. Moreover, it was argued to constitute an expropriation of contractual rights. Lastly, claiming that the impugned domestic decision contained gross defects in its substance, Romak argued the domestic courts' conduct amounted to a denial of justice, in violation of the BIT's FET standard and obligations under customary international law. The claims were dismissed for lack of jurisdiction, however.

6. STATE RESPONSIBILITY FOR DENIAL OF JUSTICE

It is unavoidable to begin the present part of the inquiry by focusing on an international “delict”¹ which is specifically concerned with judicial acts – that of denial of justice. It is on account of the latter that the responsibility of the States has historically most often been engaged as a result of acts or omissions of judicial organs, and it is also through the lens of the latter that investment tribunals most often appraised the propriety of judicial action. In order to evaluate the arbitral practice in this respect, the chapter begins by discussing the central tenets of the concept of denial of justice and its historic development (6.1). It then proceeds to a detailed examination as to how the concept has been applied in the contemporary arbitral practice, by focusing in particular on the nature of the State’s obligations in relation to the administration of justice and the threshold required for a finding of denial of justice (6.2), as well as the standard of review applied by domestic courts in reviewing domestic judgments in the context of denial of justice claims (6.3). As this chapter will demonstrate, investment tribunals were generally hesitant to hold a State responsible on account of denial of justice, demanding a high threshold to be met before a State could be reproached for having failed to provide an adequate system for the administration of justice.

6.1. The Customary International Law “Delict” of Denial of Justice

Denial of justice has a long pedigree in international law.² The origins of the concept date back to the Middle Ages, when it was customarily treated as a condition precedent to the lawful exercise of private reprisals. The letter could only be exercised when a sovereign had failed to accord justice to a foreign subject when the latter was ill-treated at the hands of its subjects. In its original meaning, denial of justice (*denegatio iustitiae*) was thus primarily understood in the sense of a failure of protective justice. In the course of the nineteenth Century, denial of justice gradually became a collective term implying all kinds of acts or omissions on the part of a State that were directed against foreigners, and began to be used by great powers to justify diplomatic interpositions (and even military interventions) with a view to obtaining reparation for wrongs committed against their nationals. However, once the notion of international delict found acceptance in the theory of international law in the late nineteenth Century, and reprisal became detached from denial of justice (i.e., by becoming accepted as a consequence of international delicts in general), the concept of denial of justice eventually reverted to its original meaning of a failure of protective justice. As such, the denial of justice began to be treated as a particular kind of international wrong that can possibly be committed against foreigners and has thus been primarily discussed in the context of the Law on State Responsibility for Injuries to Aliens.

6.1.1. Attempting to Define Denial of Justice – An Indeterminate Standard?

The present understanding of the concept began to crystalize in the 1920s and 1930s, by which time a considerable amount of judicial and arbitral practice already materialized on the topic. Contributing to this practice were primarily the diverse mixed claims commissions, which had

¹ In civil law jurisdictions, the term delict denotes wrongs consisting of an intentional or negligent breach of duty of care. Denial of justice is ordinarily also characterised as ‘delict’ insofar as it is conventionally seen as a breach of the duty to maintain an adequate system for the administration of justice. See eg J Crawford *State Responsibility: The General Part* (CUP 2013), 121, referring to denial of justice as a ‘nominate delict’. On the ‘delictual’ nature of denial of justice, see also *Arif v Moldova (Anard)* (ICSID Case No ARB/11/23, 8 April 2013) [432ff].

² On the development of the concept, see HW Spiegel, ‘Origin and Development of Denial of Justice’ (1938) 32 AJIL. 63.

been established since the end of the nineteenth Century for the purpose of settling claims that had arisen after internal disturbances and other events occurring in certain Latin American states during which foreign nationals had suffered damages. In the jurisprudence of those commissions, the term denial of justice was used in a variety of senses, with the consequence that a lively debate eventually ensued also among academics as to the precise contours of this delict.³ Several views have thus been expounded as to what does and what should eventually fall under the scope of the concept.⁴ In its broadest sense, denial of justice was still considered by some to denote all international wrongs committed against an alien (whether or not judicial in nature), and was thus effectively treated as a synonym for an international delinquency.⁵ In its narrowest sense, denial of justice was taken to refer solely the refusal to grant access to, or hearing in, a court, or the refusal of a court to pronounce a judgment – a position adhered to primarily by certain Latin American writers.⁶ In between those two extreme views, there were several others that linked the concept, in one way or another, to the administration of justice. Some have used denial of justice to describe all improper actions on the part of the courts, while excluding acts of other State organs.⁷ Others used the term to describe any failure of a foreigner to obtain redress, through local remedies, for injuries caused by acts of either public officials or private persons.⁸ Then again others considered the term to apply to all wrongful acts connected with the administration of justice, whether on the part of the courts or of some other organ of the State.⁹

³ Among the various contributions on the topic, see in particular EM Borchard, *The Diplomatic Protection of Nationals Abroad* (1919); C Eagleton, 'Denial of Justice in International Law' (1928) 22 Am J Int'l L 538; JW Garner, 'International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice' (1929) 10 Brit YB Int'l L 181; FS Dunn, *The Protection of Nationals* (1932); GG Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 Brit YB Int'l L 93; C De Visscher, 'Le déni de justice en droit international' (1935) 52(II) Recueil des Cours 365; OJ Lissitzyn, 'The Meaning of the Term Denial of Justice in International Law' (1936) 30 Am J Int'l L 632; and AV Freeman, *The international responsibility of states for denial of justice* (1938).

⁴ For a survey of the various schools of thought, see eg Lissitzyn, *ibid* 633-35; or De Visscher, *ibid* 385ff.

⁵ CC Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922) 491-92. For the same view, see also Separate Opinion of Commissioner Nielsen in *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (IV UNRIAA 60, 15 October 1926), 64.

⁶ This limited view was famously championed by M Guerrero in his report to the League of Nations Committee of Experts for the Progressive Codification of International Law, reproduced in 'Questionnaire No 4: Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners' (1926) 20(3) AJIL Supp 176. Guerrero defined denial of justice solely as 'a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although, in the circumstances, nationals of the State would be entitled to such access' (193), while expressly excluding responsibility for judicial errors, manifest injustice of judicial decisions, or for abnormal delay in the administration of justice (192). Similarly limiting denial of justice to 'the event that an injured foreigner was denied his day in court as provided by the local laws' was the Mexican Foreign Minister Mariscal in his correspondence with the United States, as reported in Dunn, *The Diplomatic Protection of Americans in Mexico* (Columbia UP 1933), 200. For other examples, see Freeman (n 3), 128-32.

However, a limited view of denial of justice was espoused by Professor Karl Strupp in art 6 of his 1927 Draft Treaty concerning the responsibility of a State for internationally illegal acts, reproduced in (1929) 23 AJIL Spl Supp 235 ('A denial of justice takes place if foreigners are denied access to the courts or if, contrary to existing international duties, such access is made dependent upon special conditions.').

⁷ See eg *Fabiani Case (France / Venezuela)* (24 February 1891), reproduced in JB Moore, *History and digest of the international arbitrations to which the United States has been a party*, vol 5 (1898), 4878.

⁸ See Eagleton (n 3), 553-59; or the Opinion of Van Vollenhoven in *BE Chattin (United States.) v. United Mexican States* (IV UNRIAA 282, 23 July 1927), at 288.

⁹ See eg Fitzmaurice (n 3), 108-09 (considering that 'every injury involving the responsibility of the state committed by a court or judge acting officially, or alternatively every such injury committed by any organ of the government in its official capacity in connexion with the administration of justice, constitutes and can properly be styled a denial of justice, whether it consists in a failure to redress a prior wrong, or in an original wrong committed by the court or other organ itself'); or De Visscher (n 3), 390 (defining denial of justice as 'Toute défaillance dans l'organisation ou dans l'exercice de la fonction juridictionnelle qui implique manquement de l'Etat à son devoir international de protection judiciaire des étrangers.').

The divergent doctrinal opinions as to the meaning of denial of justice were not merely semantic as some wished to suggest.¹⁰ At least in its broadest and narrowest conceptions, they reflected the conflicting political interests of capital-exporting and capital-importing countries as to the confines within which a State should be held responsible for the acts or omissions of its judicial organs.¹¹ These tensions eventually prevented that agreement would ever be reached at the inter-governmental level as to a possible definition of denial of justice. At the same time, it was nonetheless obvious that, in the practice of international adjudicatory bodies, international responsibility was accepted in a broader set of circumstances than merely those in which foreigners were denied access to courts – just as it was equally obvious that, from a doctrinal perspective, the broadest view of denial of justice was likely to render on its part the whole of the notion meaningless. Thus, the view which ultimately gained the broadest support in the doctrine was that denial of justice concerned all kinds of defects in the administration of justice, including those occasioned by non-judicial branches of government.¹²

This view seemed also conceptually the most sound one: the prohibition of denial of justice was namely understood to form part of the minimum standard of treatment under customary international law,¹³ which was said to require that States provide a system of justice that treats aliens fairly and impartially, and that generally affords adequate judicial protection to their rights.¹⁴ The cases of denial of justice were thus nothing but instances where the judicial organs of a State have failed to act up to the international minimum standard. In principle, of course, the failure to provide an adequate system of justice was capable of manifesting itself in ways too diverse to account for. Nonetheless, there was a growing convergence of opinion as to the most common improprieties that were susceptible of engendering responsibility on account of denial of justice – namely, denial or obstruction of access to courts; unwarranted judicial delays; serious deficiencies in the conduct of judicial proceedings; and possibly judgments that are manifestly unjust. Indeed, in most codification attempts of the law of State responsibility in the 1920s and 1930s (and even of latter date), definitions of wrongful judicial conduct were nothing but enumerations of those typical manifestations of denial of justice.¹⁵ But even when formulated

Support for such view could be found in *The Interoceanic Railway of Mexico (Acapulco to Veracruz) (Ltd), and the Mexican Eastern Railway Company (Ltd), and the Mexican Southern Railway (Ltd) (Great Britain) v United Mexican States* (V UNRIAA 178, 18 June 1931) 185.

¹⁰ See eg Fitzmaurice (n 3), 94, claiming that it was necessary ‘to put the discussion of the meaning of denial of justice on its true basis, which is one of terminology rather than of substantive rights.’ But such claims had only merit with respect to the intermediate positions, where the differences of views did not essentially affect the extent of the state’s responsibility. See also Lissitzyn (n 3), 645-646.

¹¹ This is not to say that the different views always followed the capital-exporting/capital-importing fault line. There were also lawyers from peripheral states that occasionally argued in favor of a broad conception of denial of justice. See eg the views expressed by the delegate of Brazil, Gastao da Cunha, at the Third Inter American Conference at Rio de Janeiro (1906), quoted with approval by J Bassett Moore and reproduced in (1915) 9 Am Soc’y Int’l L Proc 1, at 18-19.

¹² Freeman (n 3), 161ff.

¹³ Denial of justice and the minimum standard of treatment were often conflated in practice. Indeed, the standard set out in the *Neer* case to determining the propriety of governmental conduct in general appeared to have been extrapolated by analogy from standards applicable to determining denial of justice. See on this M Pappas, *Minimum Standard of Treatment* (2013), 48-54.

¹⁴ On the existence of a duty to provide such system, see eg CC Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922), 464ff; or WE Hall, *Treatise on International Law* (1924), 59-60. International law was at that stage essentially indifferent as to whether this system was adequate for the native population; all it required was that the system satisfied certain minimum requirements for the purposes of the regime which international trade and intercourse were conducted. See Dunn (n 3), 154-55. The concept of denial of justice was of course ancillary to the postulate that aliens enjoy certain substantive rights which every State must respect. See on this, Freeman (n 3), 68-70.

¹⁵ See on this, for example, art 9 of the 1929 Harvard Law School’s Draft Articles on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, reproduced in (1929) 23 AJIL Spec Supp 131, at 134; Arts 5 and 6 of the 1927 Resolution of the Institut de Droit international on ‘Responsabilité internationale des États à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers’; reproduced (in English) in (1928)

in this way, the definitions remained couched in variable or ambiguous terms that were incapable of being directly transposed to specific situations.¹⁶ This, in the end, was but the necessary consequence of the fact that the primary obligation in the case of denial of justice was formulated merely in terms of a duty to provide a system of a certain kind, which meant that also the violations of that duty necessarily remained at a certain level of abstraction.¹⁷

A factor that complicated the possibility of defining with greater precision the conduct that would amount to denial of justice lay in the fact that the obligation to provide an adequate justice system was a relatively indeterminate one. International law was claimed roughly to require that every State provide laws that are consistent with its international obligations, as well as judicial organs that are capable of administering justice impartially, in accordance with certain minimum standards indispensable to an objective determination of an alien's rights (with the necessary implication that such organs are thus composed of judges who are both honest and reasonably competent), and with sufficient efficiency.¹⁸ Of course, the efficacy of this system, as Hyde explained, was "always to be tested by the standard which the family of nations has fixed; and the evidence of that standard is to be found in the practice of enlightened States."¹⁹ But save for these vague prescriptions, international law was not considered to impose concrete requirements in relation to a State's internal judicial organization or procedure,²⁰ and certainly not in relation to how domestic law should be applied.²¹ International law's prescriptions in this field were considered to be all but exacting ones, for they did not require a State to scrupulously adhere to all the provisions of its domestic law, or to ensure that its judges never make mistakes, let alone to maintain a judicial system that operates perfectly in any case.²² On the contrary, the long accepted principle in that respect was that minor irregularities in the conduct of judicial proceedings would not be sufficient to engage the responsibility of the State, just as "mere" errors or mistakes in the interpretation or application of domestic law would not automatically turn a domestic judgment into an internationally wrongful one.²³ The rationale for maintaining this less than exacting standard in appraising the domestic judge's treatment of domestic law has sometimes been claimed to reside in the independence of the judiciary from government

22 *AJIL Spec. Supp.* 333; Articles 3 and 4 of Project No. 16 Diplomatic Protection of the American Institute of International Law (April, 1927), reproduced in (1929) 23 *AJIL Spec Supp* 232; or League of Nations Conference for the Codification of International Law, 'Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners: Basis of Discussion No 5', in S Rosenne (ed) *Conference for the Codification of International Law* (1930) (Oceana Publications 1975) 470. See also arts 6-8 of the 'Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens', in RR Baxter and LB Sohn, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 *AJIL* 545.

¹⁶ cf Dunn (n 3), 150.

¹⁷ Denial of justice could only be replaced by an equally indeterminate formula such as international due process. Freeman (n 3), 180-83; J Paulsson, *Denial of Justice* (CUP 2005) 7.

¹⁸ cf Fitzmaurice (n 3), 112; De Visscher (n 3), 381; Freeman (n 3), 1.

¹⁹ Hyde (n 14), [266].

²⁰ cf De Visscher (n 3), 397; A Roth, *The Minimum Standard of International Law Applied to Aliens* (Sijthoff 1949) 180.

²¹ cf D Anzilotti, *Cours de Droit International* (1929), 481 ('Dans ces cas le devoir doit être considéré comme rempli lorsque l'Etat, dont la magistrature offre toutes les garanties d'impartialité et d'indépendance, a accordé aux étrangers le droit d'agir, a déféré les coupables à l'autorité judiciaire : conformément au principe suivant lequel les devoirs internationaux sont autant que possible interprétés de manière à ne pas troubler l'ordre interne des pouvoirs étatiques, on doit tenir pour exclue toute obligation de l'Etat de garantir une sentence déterminée (par exemple une condamnation), toute faculté de mettre en cause son mérite intrinsèque, et ainsi de suite, à moins que le contraire ne résulte indubitablement d'un accord intervenu à cet égard entre les Etats.').

²² See Judge Huber's admonition in the *Spanish Zone of Morocco (Spain v UK)* (II UNRIIAA 615, 1 May 1925) 641, that '[a]ucune police ni aucune administration de justice n'est parfaite, et il faut sans doute accepter, même dans les pays les mieux administrés, une marge considérable où la tolérance s'impose.'

²³ Freeman (n 3), 82; Borchard (n 3), 332; Fitzmaurice (n 3), 111. For judicial confirmation of the principle, see eg PCIJ, '*Lotus*' (*France v Turkey*) (*Judgment*) (PCIJ ser A, No 10, 7 September 1927) 24.

control,²⁴ while other times in the practical impossibility to guaranteeing the infallibility of judges.²⁵ Such arguments, however, could not explain why no equivalent margin of error was granted to judges when mistakes committed resulted in a violation of specific rules of international law. Such mistakes, even if ordinary and reasonable ones, directly engaged the responsibility of the State.²⁶ Arguably, the more likely explanation why simple irregularities and judicial errors infringing only domestic legal rules were not considered to fall beneath civilized standards of administering justice was a more practical one: if standards prescribed by international law as to how domestic laws should be interpreted or applied were more exacting, international adjudicatory bodies would be susceptible to turning into regular courts of appeal.

Whether or not the content of the international standard was itself influenced by considerations as to the appropriate limits that international law should impose upon internal sovereignty and specifically upon the State's freedom to organize and conduct judicial prerogatives within its borders, it certainly had a direct bearing on the nature and scope of the review that an international tribunal was to exercise over domestic judicial conduct. The exact parameters of such review were most difficult to establish in relation to the substance of domestic judicial decisions.

6.1.2. Responsibility for Domestic Judicial Decisions

In the academic discussions taking place on the topic of denial of justice, the issue considered to be the most difficult one concerned the extent to which the State should be held responsible for the content of judicial decisions (the problem of "*mal jugé*").²⁷ The subject of contestation in this respect was not so much *whether* a State can held be responsible for improper judgments. Admittedly, a minority of commentators did champion the idea that domestic judicial decisions should not be open to international review. Guerrero, for example, expressed himself strongly against such possibility, for this would amount to interferences in the regular course of justice in another State which are "tantamount to attack on that State's internal sovereignty", as well as provide foreigners with an unfair advantage over that State's own nationals by opening a possibility of appeal additional to the remedies offered by national law.²⁸ But the majority of the writers seemed to agree on the necessity for admitting responsibility for the content of judgments if international law was to afford any meaningful protection to the rights of aliens.²⁹ Such proposition was also largely supported by arbitral and judicial practice. The problem was rather in determining the *circumstances under which* a domestic judgment could be considered improper from the perspective of international law. This proved a delicate task. On the one hand, there was less disagreement that this would have been the case if the judgment was contrary to a rule of international law, such as when it violates the provisions of an extradition treaty, or customary rules relating to immunities.³⁰ More difficult, on the other hand, was to pinpoint the

²⁴ See eg Garner (n 3), 182-83.

²⁵ See eg Fitzmaurice (n 3), 112.

²⁶ cf Freeman (n 3), 320.

²⁷ Fitzmaurice (n 3), 109, considered the question to be 'in some respects the most difficult of all those connected with this topic'. Freeman (n 3), 308, even described it as "one of the most confused and difficult problems in the whole field of international responsibility."

²⁸ See Guerrero (n 6), 190-91, arguing therefore that no responsibility can be claimed for judicial errors, including for judicial decisions vitiated by manifest or flagrant injustice.

²⁹ As noted on this point by Eagleton (n 3), 552, 'it is difficult, as a matter of abstract justice, to avoid the conclusion that where injustice is plainly evident, though the forms of law be observed, responsibility should be admitted. Otherwise the protection afforded by international law to aliens could be rendered farcical.'

³⁰ Garner (n 3), 183 (State responsible for erroneous interpretation or application of treaties or other rules of international law). See further C Dupuis, 'Liberté des voies de communication. Relations internationales' (1924) 2 Recueil des cours 125,

circumstances when the *application of domestic law itself* would be such as to give rise to the responsibility of the state – that is, even in the absence of a violation of a particular rule of international law demanding from the domestic judge a specific outcome.

6.1.2.1. *In Search of a Test for a Wrongful Judgment*

The criterion most often advanced to determine the propriety of domestic judgments – both in practice³¹ and in legal writings³² – was that of “manifest injustice” (or one of its variations, such as “notorious”, “gross” or “palpable” injustice). This formula was premised on the idea that an improper judicial outcome was one of a more or less identifiable kind: adjudicatory bodies would recognize a judgment that is a denial of justice when they would see it.³³ The vantage point, of course, was that of the civilized states: as Westlake explained, injustice “must be evident and palpable to the general consensus of the part of the world which possesses European civilisation”.³⁴ As such, however, the formula was not one characterized by legal certainty. Though the requirement that injustice be “manifest”, “notorious”, or “palpable” implied a certain element of seriousness, it did not provide a workable standard by which injustice could be measured; for, the degree of injustice can obviously vary from one’s standpoint. This was also recognized by certain lawyers in the periphery, who were anxious that a standard based on such vague notion as injustice would easily lend itself to abuse.³⁵ Besides, as a matter of legal theory, “injustice” as such was conceptually flawed as a measure for determining the (im-)propriety of judicial conduct, since the standards prescribed by international law in relation to the administration of justice did not go as far as requiring that domestic judgments be inherently just.³⁶

Though essentially adhering to manifest injustice as a device for measuring the propriety of domestic judgments, various schools of thought eventually emerged as to where the line should be drawn between merely erratic and manifestly unjust judgments. One way to work around the problem of indeterminacy of the criterion of “manifest injustice” was to focus on

359; Eagleton (n 3), 553; Fitzmaurice (n 3), 110 misapplication of international law by domestic courts will ipso facto involve the responsibility of the state

³¹ See eg Yuille, *Shortridge Company Case* (21 October 1861), reported in A Lapradelle and N Politis, *Recueil des arbitrages internationaux* vol 2 (Pedone 1905), 103.

³² The formula was frequently used already in the classical writings on the reprisals; see eg H Grotius, *De Jure Belli ac Pacis*, bk III, ch 2, V, 627 (speaking of a défi de justice ‘where in a very clear case judgment has been rendered in a way manifestly contrary to law’); or Vattel, *Droit de Gens* (1758), 354-55, [350] (explaining that justice is refused ‘by a judgment manifestly unjust and partial’, characterized by injustice that is ‘evident and palpable’). The notion of justice, on its part, has reportedly been used as far back as in the writings of G de Legnano, *Tractatus De Bello, De Represaliis et De Duello* (1360/1917), ch, CL, at 323. The formula of ‘manifest injustice’ persisted eventually in the various codification attempts of the 1920s and 1930s; see eg art 6, Institut de Droit International, ‘Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers’ (Lausanne, 1927). See also Freeman (n 3), 327; Borchard (n 3), 340 (‘grossly unfair’ or ‘notoriously unjust’).

³³ This idea was occasionally also expressed in practice. See eg Opinion of Commissioner MacGregor in the case of *Ida Robinson Smith Putnam (USA) v United Mexican States* (IV UNRIAA 151, 15 April 1927) 153, explaining that ‘[o]nly a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law’ (emphasis added).

³⁴ J Westlake, *Chapters on the Principles of International Law* (CUP 1894) 104 (original emphasis omitted). See similarly Garner (n 3), 188 explaining that domestic decisions will be regarded as ‘manifestly unjust’ when ‘measured by the “established standards of civilization”’.

³⁵ Guerrero (n 6), 190 (‘Nothing could be more dangerous than to admit the possibility of rehearing, elsewhere than in the courts of the country, a judicial decision alleged to be contrary to justice. An opening would thus be afforded for abuses of every kind, for the most serious violations of internal sovereignty and for countless international conflicts.’)

³⁶ cf also Freeman (n 3), 328, noting that the idea of manifest injustice was illogical from the viewpoint of sound legal theory because it looked at the effects and consequences of a judgment (which may be utterly irrelevant), and not, as it should, to the causes or source, of allegedly improper conduct.

potential faults in judicial proceedings that led to the decision, instead of on defects in the judicial decision itself. A decision would thus be considered manifestly unjust when resulting from a trial in which the foreigner had been denied the benefit of due process of law, or when the court itself lacked jurisdiction over the person or subject-matter.³⁷ But this approach did not provide a measure of much greater precision, since it was common ground that procedural faults had to be sufficiently gross before they would become a denial of justice and that mere “irregularities” in the course of judicial proceedings would not automatically make the conduct of a trial “palpably unjust”.³⁸ Besides, the question became “exceedingly delicate” when the judgment alleged to be unjust was reached by the observance of the regular forms of procedure.³⁹

Considering that a judgment can be taken to be unjust because it is erroneous in law or in fact, the majority of the commentators attempted to identify, instead, the type of judicial error that would engage the international responsibility of the State. An often invoked requirement in this respect was that the error be an *intentional* one. Thus, to give rise to manifest injustice, the error in question would have to be a malicious one – that is, inspired by ill will or bad faith,⁴⁰ discrimination, or general malevolence towards foreigners.⁴¹ The presence of such subjective elements would namely imply that the State had failed in its duty to provide judges that are honest ones. Yet, proof of those elements was difficult, if not impossible to furnish in practice. This brought claimants – on which the onus of furnishing such evidence rested, since bad faith could not be presumed – into a difficult position. Hence, a solution was sought in re-orienting the inquiry towards circumstances extrinsic to the judgment that could attest to such malice; namely, on any evidence of bias, fraud, or corruption on the part of the judges, or that of collusion between the legislative, the judiciary, and the executive branches of government or lack of judicial impartiality in general.⁴² Needless to say, the presence of such elements was equally difficult to establish.

Another way of identifying the judicial error of the kind that would transform a domestic judgment into a denial of justice was by reference to its *grossness*. The proposition in this respect was that the error itself might be of such a magnitude that it could not be explained otherwise than by the presence of bad faith on the part of the judges⁴³ (in which case the error as such was proof that the State had failed in its obligation to provide honest judges), or else that the error

³⁷ Borchard (n 3), 338-39. Among the contemporary academics, the primary proponent of such an approach is Paulsson, who considers that ‘denial of justice is about due process, nothing else – and that is plenty.’ See J Paulsson, *Denial of Justice* (CUP 2005) 7.

³⁸ See Borchard (n 3), 338-39, 341, acknowledging that mere ‘irregularities’ in the course of judicial proceedings would not automatically make the conduct of a trial ‘palpably unjust’, and requiring instead that faults be sufficiently gross.

³⁹ *ibid*, [341].

⁴⁰ See eg Borchard (n 3), 332, according to whom only ‘if the court has willfully and in bad faith disregard or misinterpreted its municipal law, does the state incur international liability’ (cf also 341, restating that the misapplication of municipal law had to be a ‘malicious’ one); or Fitzmaurice (n 3), 109, explaining that a judgment [of domestic courts applying domestic law] that rises to a denial of justice involves some element of actual bad faith on the part of the court. For a similar premise, see eg Arbitrator van Vollenhoven’s opinion in *BE Chattrin Case (United States v Mexico)* (4 UNRIAA 282, 23 July 1927) 286-87, holding that ‘[A]cts of the judiciary [...] are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, willful neglect of duty, or insufficiency of action apparent to any unbiased man.’

⁴¹ cf IDI Resolution of Lausanne (1927), art 6 (‘L’Etat est également responsable si la procédure ou le jugement constituent un manquement manifeste à la justice, notamment s’ils ont été inspirés par la malveillance à l’égard des étrangers, comme tels, ou comme ressortissants d’un Etat déterminé.’)

⁴² De Visscher (n 3), 407 (judgment obtained by fraud); Borchard (n 3), 341; Fitzmaurice (n 3), 112.

⁴³ E Jiménez de Aréchaga, ‘International law in the past third of a century’ (1978) 159 *Recueil des cours* 1, 282 (‘in cases where the breach of municipal law is exceptionally outrageous or monstrously grave may proof of bad faith be found in re ipsa’).

was of “such a character that no competent judge could have made it”⁴⁴ (in which case the judicial mistake indicated that a State had failed in its obligation to provide reasonably competent judges). Under either of the propositions, however, the inquiry was not made any easier, for legal opinion might again differ as to when a decision was so erroneous that it transpired bad faith, or that no court composed of competent judges could have made it;⁴⁵ although some did suggest that this would probably be the case when the failing is of such a degree that it could not be explained by any factual consideration or by any valid legal reason.⁴⁶ Admittedly, the focus on the grossness of the judicial error may not in itself have provided a more accurate yardstick against which the propriety of domestic judicial decisions could be measured; it did seem to indicate however that the inquiry could proceed on a more objective basis. If the presence of bad faith or incompetence of the judges could be inferred from the magnitude of the error, the judgment could then be evaluated on its own terms,⁴⁷ with the advantage that the claimant was relieved from its onus of proving the presence of bad faith on the part of domestic judicial organs. But the challenge again was in identifying the elements of appreciation. One suggestion was to scrutinize the quality and internal consistency of judicial argumentation, insofar as a decision that no honest or competent judge would likely have made was probably one characterized by some extreme defectiveness in judicial reasoning.⁴⁸ But this seemed again to be somewhat a loose measure, which left much latitude to the adjudicator deciding the specific case.

Yet another approach was to focus on the *manifestness* of the judicial error as such. In some cases, the idea was therefore advanced that a judicial decision which was “obviously erroneous”,⁴⁹ or pronounced “in open violation of law”,⁵⁰ would also be of such kind as to amount to a denial of justice. And at least in one of the cases decided by claims commissions denial of justice was established on the ground of the erroneous application of a domestic criminal statute.⁵¹ Although the idea that a judgment would be internationally wrongful if “clearly” contrary to law is not new,⁵² the test of “clear” or “manifest” error garnered only limited support

⁴⁴ Fitzmaurice (n 3), at 113. He considered this to be a ‘sound theoretical basis for intervention’, for ‘[i]f the answer is in the affirmative, it follows that the judge was either dishonest, in which case the state is clearly responsible, or that he was incompetent, in which case the responsibility of the state is also engaged for failing in its duty of providing competent judges.’

⁴⁵ cf Freeman (n 3), Fitzmaurice himself seemingly recognized the difficulty, admitting at (n 3), 114 that ‘many gaps and difficulties remain’ and that the question was ‘really one of fact in respect of which no definite rule can be formulated’. cf also Freeman’s admission at 331-32 that ‘further simplification and precision are not possible in a domain where the question is really one of degree and in which an extensive margin of latitude must necessarily be left to those arbitrators up whom devolves the duty of adjudicating claims.’

⁴⁶ See eg De Visscher (n 3), at 404,

⁴⁷ Support for such an approach could be found in *Martini Case (Italy v Venezuela) (Award)* (3 May 1930), reproduced in (1931) 25 AJIL 554, at 567 (holding that ‘If the decision of the Venezuelan court is based upon law, the psychological motives play no part. On the other hand, the defects in the decision may be such as to cause the inference of bad faith on the part of the judges, but, in this case also it is the objective character of the decision which is decisive.’).

⁴⁸ See eg De Visscher (n 3), 407.

⁴⁹ See Teodoro García and MA Garza (United Mexican States) v United States of America (IV UNRIAA 119, 3 December 1926) Dissenting opinion Nielsen, 126.

⁵⁰ See *Cotesworth and Powell (Great Britain v Colombia)*, reproduced in JB Moore, History and digest of the international arbitrations to which the United States has been a party (1898), 2083.

⁵¹ See *Abraham Solomon (United States v Panama)* (VI UNRIAA 370, 29 June 1933) 371-72, where the majority of the commission considered that a US citizen had been found guilty under the wrong provision of Panamanian law.

⁵² See eg Grotius (n 32), 627, holding that a judgment ‘rendered in a way manifestly contrary to law’ did not cancel a true obligation. See also J Irizarry Y Puente, ‘The Concept of ‘Denial of Justice’ in Latin America’ (1944) 43 Michigan Law Review 383, at 403-04, suggesting that for a notoriously unjust judgment, neither fraud nor corruption were necessary, but that it sufficed that ‘the law has been interpreted in a way that constitutes a plain corruption of its terms.’

in academic literature.⁵³ It did find endorsement, however, in the 1961 Draft Articles on the Law of Responsibility for Injuries to Aliens prepared by Baxter and Sohn, which identified an internationally wrongful domestic judicial decision as one that involved “a clear and discriminatory violation of the law of the State concerned”.⁵⁴ For practical purposes, the test of “clear” violation provided perhaps the most workable standard for establishing a denial of justice (even if the manifestness still depended upon the observers sensibility for errors). Yet, the application of such test clearly had the potential of bringing international adjudicatory bodies dangerously close to becoming courts of appeal.⁵⁵

The standard for establishing State responsibility for the content of judicial decisions was never settled. The leading modern treatise on the topic, that of Jan Paulsson, has built on the proposition that denial of justice is always procedural, and that the objective of the international adjudicator is therefore never to conduct a substantive review of domestic judgments.⁵⁶ As discussed later in this chapter, investment tribunals did not desist from reviewing the outcome of domestic judicial procedures on their substance. In doing so, adopted a variety of loosely formulated and indeterminate formulas, which ultimately predicated the responsibility of the State on the adjudicator’s perception of “propriety” in general.

6.1.2.2. *The Standard of Review*

The obvious attractiveness of cloaking the inquiry under the formula of “manifest injustice” was that it appeared to permit international adjudicatory bodies to re-examine the propriety of municipal decisions, while maintaining the impression that they were not sitting as courts of appeal on matters of domestic law. Indeed, the accepted rule that *bona fide* judicial errors did not entail responsibility even suggested that any inquiry into questions of domestic law was essentially irrelevant to the ascertainment of a judgment’s propriety.⁵⁷ This, of course, rested on the somewhat unrealistic proposition that it was possible to evaluate the outcome of a judgment on its own terms – i.e., by reference to the rather vague criterion of justice,⁵⁸ which not only presupposed the existence of an universal idea of justice, but also presumed that it was possible to review a judicial decision without considering the grounds that led the domestic judicial organ to arrive at it.⁵⁹ This was obviously not what adjudicatory bodies were actually doing.⁶⁰ In practice,

⁵³ For one of the earliest more elaborated proposals, see A Roth, *The Minimum Standard of International Law Applied to Aliens* (Sijthoff 1949), 184, suggesting that the test thus to be applied be ‘whether, according to national justice, the alien’s judicial treatment was correct and lawful’ and as a subsequent step ‘whether the State’s judicial organization measures up to the standard instituted by international law’. See also J Irizarry Y Puente, ‘The Concept of “Denial of Justice” in Latin America’ (1944) 43 Michigan Law Review 383, at 403-04, suggesting that for a notoriously unjust judgment, neither fraud nor corruption were necessary, but that it sufficed that ‘the law has been interpreted in a way that constitutes a plain corruption of its terms.’

⁵⁴ art 8, Draft Convention on the International Responsibility of States for Injuries to Aliens, reproduced in FV Garcia-Amador, LB Sohn & RR Baxter *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana, 1974), 196.

⁵⁵ cf AO Adede, ‘A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law’ (1976) 14 Can. Y.B. Int’l L. 73, at 92-93 unpersuasively denying that this could be the case.

⁵⁶ Paulsson (n 37), 7, 82-84.

⁵⁷ On such suggestion, see De Visscher (n 3), 405.

⁵⁸ For an example of such proposition, see Aréchaga (n 43), 282, arguing that ‘[t]he angle of examination is different from that of an appeal judge: it is not the grounds invoked by the domestic tribunal which must be scrutinized, but rather the result of the decision which must be evaluated, taking into account elements of justice and equitable considerations’.

⁵⁹ The critique in this respect was aptly formulated by Freeman (n 3), 171: ‘It is idle to suppose that the international body is not going to consider the substance of the national court’s judicial pronouncements but only the question of whether the State has complied with its international obligations. The gravamen of the complaint involved in many of these cases is whether the judicial proceedings were ‘regular’. How can an international tribunal decide this without reverting to the substance of the original cause of action giving rise to the claim? How can it be determined whether a given sentence of punishment corresponds to the civilized treatment exacted for aliens without pondering over the nature and gravity of the criminal charge upon which the prosecution was based?’ (original footnotes omitted).

of course, it may have been possible to avoid reconsideration of the facts and points of law upon which the judgment was founded in cases where an examination of the proceedings themselves revealed that guarantees indispensable to the proper administration of justice had not been observed, or where it was possible to determine the presence of ill will, bad faith, corruption, or bias on the part of the judges. But where no proof of such elements could be found, the faultiness of a decision had to be conditioned upon the grossness or manifestness of the judicial error, in which case the reviewing body could not but scrutinize the domestic judgment on points of law or the latter's application to the facts, even if only marginally. This gave rise to the question as to the appropriate standard of review.

Given the real apprehension that allowing international adjudicatory bodies to review domestic judgments on their substance could transform such bodies into appellate courts, there appeared to be consensus in both doctrine and jurisprudence that the task of examining proceedings before domestic courts and their outcomes had to be approached with reserve and that the standard of review had therefore to be a deferential one. The conviction was thus expressed about the "political and international delicacy to disacknowledge the judicial decision of a court of another country",⁶¹ and in several cases, adjudicators spoke out in favour of the general principle that respect was due by an international tribunal to the domestic judiciary, particularly to a State's highest courts.⁶² The deference thus owed to the domestic judiciary did not exclude the possibility of an international adjudicator performing a searching examination of the activities of the domestic judge; indeed, the international adjudicator was claimed to have a duty to do so.⁶³ Deference had rather to be applied to the assessment of domestic court's findings on points of law or fact. Deference was particularly to be accorded to domestic judges' findings of fact, which international adjudicators were not to second-guess, but remain limited in their

⁶⁰ See eg *Yuille, Shortridge Company Case* (n 31), 103, dismissing the claim of 'injustice palpable et évidente' on the ground that 'il est clair que dans l'espèce il ne s'agit ni d'un déni de justice ni d'un simulacre de formes, puisque c'est la cour d'appel qui a statué en basant son arrêt sur des principes de droit, encore qu'elle les ait mal appliqués aux faits' (emphasis added); or *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain)* (III UNRIAA 1479, 9 May 1934) 1501, holding that '[i]f the basis [of the international claim] were an alleged failure of courts or law to fulfil the requirements of international law [by rendering a "grossly unfair and notoriously unjust" judgment] it would have been natural to hold that all relevant facts and points of law which could support the private claim should be taken into consideration. Otherwise such a failure, especially of law, could not be ascertained.' For an example of an intensive review of a domestic judgment, see *Abraham Solomon (United States v Panama)* (VI UNRIAA 370, 29 June 1933) 371-72.

⁶¹ *Garrison's case (US v Mexico)* (7 November 1871); reproduced in in JB Moore, History and digest of the international arbitrations to which the United States has been a party, vol 3 (1898), 3129. The proposition was later endorsed in *Chattin* (n 40), 288. For a similar proposition, see *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase, Judgment) [1970] ICJ Rep 114, 5 February 1970) 160, Separate Opinion of Judge Tanaka (observing that: 'It is an extremely serious matter to make a charge of a denial of justice vis-à-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible.').

⁶² See eg *Ida Robinson Smith Putnam (USA) v United Mexican States* (IV UNRIAA 151, 15 April 1927) 153 (noting that '[t]he Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.'). or *Margaret Roper (USA) v United Mexican States* (IV UNRIAA 145, 4 April 1927) 148 (expressing the view that '[t]o undertake to pick flaws in the solemn judgments of a nation's highest tribunal is something very different from passing upon the merits of an investigation conducted by an official').

⁶³ See eg the views of Commissioner Nielsen in *George Adams Kennedy (USA v United Mexican States)*, (IV UNRIAA 194, 6 May 1927) 201 ('In considering the contentions advanced by the United States with regard to the impropriety of the proceedings instituted against the person who shot Kennedy, the Commission of course must have in mind the general principles asserted in behalf of Mexico with regard to the respect that is due to a nation's judiciary and the reserve with which an international tribunal must approach the examination of proceedings of domestic tribunals against which a complaint is made. As said by counsel for Mexico, such a tribunal of course does not act as an appellate court, but it is not precluded from making a most searching examination of judicial proceedings, and it is the duty of a tribunal to make such an examination to determine whether the proceedings in a given case have resulted in a denial of justice as that term is understood in international law.')

review to solely appraising the adequacy of the evidence supporting such conclusions.⁶⁴ All in all, the standard required for a finding of denial of justice was that of “convincing evidence”,⁶⁵ and there was a presumption operating in favour of the adequacy of domestic proceedings.⁶⁶ Most importantly, the test that was to be applied to the appraisal of judicial errors was not one of correctness, but one of reasonableness. As Freeman explained: “The case must be one as to which there is no possible doubt. As long as a reasonable difference of opinion subsists as to the propriety of the decision, resort to the international remedy is excluded.”⁶⁷ Or in the words of the famous *Neer* standard, denial of justice entails “an insufficiency of governmental action so far short of international standards that *every reasonable* and impartial man would readily recognise its insufficiency.”⁶⁸ To be characterized as such, the failing should be of such character that it could not be explained by any factual consideration or by any valid legal reason.⁶⁹

6.2. Denial of Justice in Investment Treaty Arbitration

In the aftermath of WWII, the topic of denial of justice began to attract less interest, both academically and jurisprudentially. The reasons for this are arguably two-fold. First, along with the process of decolonization, the legitimacy of the traditional practice of diplomatic interpositions, which has previously resulted in the establishment of the many mixed claims commissions, gradually collapsed.⁷⁰ Second, and more fundamentally, the development of human rights law obviated the need for further refinement of the law in this area, at least in relation to the personal security component of the international minimum standard of treatment. Thus, many of the injuries that in the past would have been characterized as denials of justice were now capable of being subsumed as human rights violations.⁷¹ Furthermore, obligations as to the treatment that

⁶⁴ See *Chatin* (n 40), 293 (explaining that ‘an accused person can not be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal can never replace the important first element, that of the Judge’s being convinced of the accused’s guilt; it can only in extreme cases, and then with great reserve, look into the second element, that is: the legality and sufficiency of the evidence’). For the endorsement of this view, see *Solomon* (n 60), Dissenting opinion of Panamanian Commissioner, at 376.

⁶⁵ *García & Garza* case (n 49), 123.

⁶⁶ cf *Putnam* case, op. cit., p. 153 (confirming that “[a] question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined.”). For the same proposition, see Freeman (n 3), 331 (arguing that “[t]he presumption of adequacy which surrounds municipal proceedings will operate to shield domestic judgments up until the time it is shown that the error was so serious that it could not be considered as a normal risk in the exercise of civilized judicial functions.”)

⁶⁷ Freeman (n 3), 331. cf also the Baxter and Sohn’s opinion as to the appropriate standard of review: ‘It is not enough that the international arbiter of the claim be persuaded that the result reached by the court of the respondent State was a doubtful one when measured against the law of that State or even that, on balance, the international arbiter would be inclined to reach a different result. The alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice.’ LB Sohn and RR Baxter, ‘Convention on the International Responsibility of States for Injuries to Aliens’ (Draft No 12 with Explanatory Notes, 1961) 98.

⁶⁸ *LFH Neer and Pauline Neer (USA) v United Mexican States* (IV UNRIAA 60, 15 October 1926) 62, emphasis added. In the *Neer* case, the formula was employed as a standard for measuring the ‘propriety of governmental acts’ in general. But the same standard was subsequently employed also specifically as a measure for determining denial of justice. See eg *García & Garza* case (n 49), 123.

⁶⁹ See eg De Visscher (n 3), 404.

⁷⁰ The few international precedents from this period that dealt with, or were likely to deal with, questions of domestic administration of justice did not involve States from the periphery. See eg *Interhandel Case (Switzerland v US)* (Judgment) [1959] ICJ Rep 6; *Ambatielos (Greece v. United Kingdom)* (Judgment, Merits) [1953] ICJ Rep 10; or *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase Judgment) [1970] ICJ Rep 3.

⁷¹ LF Damrosch et al, *International Law: Cases and Materials* (2001), 768; and A Ehsassi, ‘Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle’ in S Schill (eds), *International Investment Law and Comparative Public Law* (2010), 213–42, at 224. See also *Barcelona Traction, Light and Power Company Limited (New Application, 1962) (Belgium v Spain)* (Judgment, Merits, Second Phase) [1970] ICJ Rep 3, [91] (recognizing in general terms that ‘human rights...also include protection against denial of justice’).

individuals were entitled to receive in the administration of justice now also found explicit and concrete recognition in the human right to a fair trial;⁷² a right that was otherwise based on more or less the same prescriptions as those inherent to the prohibition of denial of justice.⁷³

With the advent of investment treaty arbitration in the 1990s, however, the traditional topic of denial of justice has experienced somewhat of a renaissance. Unlike human rights instruments with the right to a fair trial, investment treaties generally do not purport to set out concrete rights that investors would be entitled to enjoy in having their cases determined before host State courts (apart from the occasional stipulations concerning access to such courts).⁷⁴ As a matter of convenience, recourse was therefore made to the traditional concept of denial of justice. The latter made its entry in investment arbitration in two ways. In cases where the applicable investment treaties prescribed treatment in accordance with international law, the claims were normally considered against the background of the general State duty to provide a fair and efficient system of justice in accordance with the minimum standard of treatment required by customary international law.⁷⁵ In practice, however, it has become more common for denial of justice claims being presented as violations of the fair and equitable treatment obligation. Namely, since the requirement of due process is inherent to the notions of fairness,⁷⁶ investment tribunals invariably considered the prohibition of denial of justice to be subsumed under the FET obligation, and were therefore prepared to treat judicial conduct passing the threshold of the former as necessarily constituting a violation of the latter.⁷⁷

In determining denial of justice claims, investment tribunals have continued to apply the more or less indeterminate standards developed in the practice of pre-WWII claims commissions and various academic writings: the impropriety of impugned judicial conduct was to be determined through open-ended tests,⁷⁸ or by reference to one of its typical external

⁷² cf ECHR, art 6 ; ICCPR, art 14.

⁷³ See ICJ, *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep 209, [92]. ('But certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision.'). Quoted with approval in *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion)* [2012] ICJ Rep 10, [30].

⁷⁴ See infra ch 7.

⁷⁵ See eg *Loewen Group, Inc and Raymond L. Loewen v United States of America (Award)* (ICSID Case No ARB(AF)/98/3, 26 June 2003) at [153], recognizing 'the duty imposed upon a State by international law to provide a fair and efficient system of justice.'

⁷⁶ See eg I Knoll-Tudor, 'The "Fair and Equitable Treatment Standard" in the international law of foreign investment' (OUP 2008), 157-63; or R Kläger, 'Fair and equitable treatment' in international investment law (CUP 2011).

⁷⁷ See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Award, Resubmitted)* (ICSID Case No. ARB/97/3, 20 August 2007), [7.4.11] ; *Victor Pey Casado and President Allende Foundation v Republic of Chile (Award)* (ICSID Case No ARB/98/2, 8 May 2008) [652]-[657]; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan (Award)* (ICSID Case No ARB/05/16, 29 July 2008) [651],[654]; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (Award)* (ICSID Case No ARB/04/13, 6 November 2008) [188]; *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania (Award)* (ICSID Case No ARB/07/21, 31 July 2009), [93]; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan (Award)* (ICSID Case No ARB/07/14, 22 June 2010) [268]; *Frontier Petroleum Services Ltd v The Czech Republic (Final Award)* (UNCITRAL, 12 November 2010) [293]; *Spyridon Roussalis v Romania (Award)* (ICSID Case No ARB/06/1, 7 December 2011) [315]; or *Jan Oostergetel and Theodora Laurentius v The Slovak Republic (Final Award)* (UNCITRAL, 23 April 2012) [272].

⁷⁸ cf *Mondev International Ltd. v. USA (Award)* (ICSID Case No ARB(AF)/99/2, 11 October 2002), [127], referring to conduct that is 'clearly improper and discreditable'; or *Loewen* (n 75), [131], referring to an outcome that 'offends a sense of judicial propriety'.

manifestations.⁷⁹ In general, the impression remained that the delict of denial of justice was one “afflicted by imprecision”.⁸⁰ This notwithstanding, the view continued to prevail that the threshold for establishing a claim of denial of justice was a demanding one.⁸¹ The reason for this would not appear to lie in any sort of predisposition of investment tribunals to treat the judicial branch with greater circumspection than other host State organs. Rather, it merely has to do with the tribunals’ understanding of the nature of the delict of denial of justice as such, and the stringency of the standards applicable to domestic courts in general. Thus, denial of justice has been considered to imply “the failure of a national system as a whole to satisfy minimum standards”,⁸² which meant that a claim to that effect (1) cannot not be predicated upon the demonstration of wrongdoings on the part of an individual judge or the incorrectness of a specific decision, but on the system as a whole; and (2) necessarily requires judicial finality, which can usually be achieved only upon the complete exhaustion of all available local remedies. Furthermore, denial of justice was considered to entail a failure of the system of justice that is a “fundamental” one,⁸³ but which can only be established as such in cases of *major* procedural errors and particularly *serious* improprieties. Adherence to these demanding standards has resulted in investment tribunals only exceptionally holding a State liable for denial of justice.

The following four sections examine more closely how investment tribunals have dealt with denial of justice claims arising out of, respectively, refusals of court access (6.2.1), undue delays (6.2.2), fundamental breaches of due process in the conduct of proceedings (6.2.3), and/or the content of the judgment (6.2.4). This division more or less follows the analytical distinctions traditionally used in academic literature and arbitral awards to distinguish between the different manifestations of denial of justice.⁸⁴

⁷⁹ See eg *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States (Award)* (ICSID Case No ARB (AF)/97/2, 1 November 1999) [102]–[103] (holding that a denial of justice can be pleaded ‘if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way’, as well as if there is a ‘clear and malicious misapplication of the law’); or *Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia (Award)* (ICSID Case No ARB/09/16, 6 July 2012) [263] (describing denial of justice as not ‘giving access to courts’, providing ‘inadequate or unjust procedures incompatible with due process of law,’ or rendering a judgment which is ‘clearly improper and discreditable.’ Both lists coincide with the examples provided in art 9 of the Harvard Law School, Draft Convention on the Law of the Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners, discussed above.

⁸⁰ *AMTO v Ukraine (Final Award)* (SCC Case No. 080/2005, 26 March 2008), [75]. cf Paulsson (n 37), 10, calling denial of justice ‘an elusive concept’.

⁸¹ For express confirmation of the high threshold, see eg *Jan de Nul v Egypt* (n 77) [209]; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Partial Award on the Merits)* (UNCITRAL, PCA Case No 34877, 30 March 2010) [244]; *Liman Caspian v Kazakhstan* (n 77), [274]; *RosInvestCo UK Ltd v The Russian Federation (Final Award)* (SCC Case No V079/2005, 12 September 2010) [275]; *White Industries Australia Limited v The Republic of India (Final Award)* (UNCITRAL, 30 November 2011) [10.4.8]; *Oostergetel v Slovakia* (n 77), [291]; or *Vannessa Ventures v Venezuela (Award)* (ICSID Arbitral Tribunal Case No ARB(AF)04/6, 16 January 2013) [227]. This, regardless of whether the claim is framed as denial of justice in the proper sense or as a breach of the fair and equitable treatment standard. See thus *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia (Award on Jurisdiction and Liability)* (UNCITRAL, 28 April 2011) [625]; *Hesham T M Al Warraq v Republic of Indonesia (Award)* (UNCITRAL, 15 December 2014) [620].

⁸² *Oostergetel v Slovakia* (n 77), [273]; cf [225] (holding that ‘denial of justice deals with the failure of a system not of a single court’). Similarly, *Apotex Inc v The Government of the United States of America (Award on Jurisdiction and Admissibility)* (UNCITRAL, 14 June 2013) [282] (holding that denial of justice claims ‘depend upon the demonstration of a systemic failure of the judicial system’).

⁸³ *Liman Caspian v Kazakhstan* (n 77), [279].

⁸⁴ The question of enforcement of judgments has sometimes received separate treatment in the literature (eg Paparinskis (n 13)). For the purposes of the present analysis, however, this will not be necessary, since the question of enforcement, to the extent that it concerns the conduct of domestic courts, can usually be dealt in relation to the content of the judgment. To the extent that problems with enforcement arise solely as a result of intervention of other domestic organs (see eg *Petrobart v*

6.2.1. Denial of Court Access

Investment tribunals have been in agreement that the denial of access to courts ought to be treated as a denial of justice in one of its most elementary forms.⁸⁵ This, apart from the fact that obstruction of access to judicial remedies may under circumstances also be relevant to claims not predicated upon judicial conduct.⁸⁶ Furthermore, there has largely been agreement that denial of access to courts must be understood broadly, comprising not only situations of domestic court's unjustified refusal to entertain an investor's suit,⁸⁷ but also cases where access to judicial remedies is foreclosed as a result of the conduct of other state organs, such as on account of the failure of the legislator to provide an appropriate legal framework to that effect.⁸⁸ The question of access to courts is therefore broader than the question of propriety of domestic courts' conduct, as it also touches on the question of adequacy of the domestic system of justice as such.

In its essence, the question of access to courts turns on the *availability* of a remedy to which the investor can turn to redress wrongs suffered either at the hands of State organs, or as a result of the conduct of private parties. Availability, though, depends on a number of factors: the actual *existence* of a remedy, its *accessibility* by the investor, but at the end of the day also on its *effectiveness* in providing redress. In the practice of investment tribunals, claims of denial of justice predicated on a purported denial or obstruction of access to courts have thus necessarily given rise to diverse inquiries. If some generalizations were nonetheless to be made on the basis of available jurisprudence, what would certainly stand out is the considerable deference accorded by investment tribunals to the peculiarities and particularities of domestic legal systems. The right of access to court was not construed as requiring remedies of a specific type, nor were such remedies expected to produce results of a specific kind apart from achieving redress for the original wrong. Indeed, the right of access to court was not even construed as an absolute one.

Kyrgistan), the question of enforcement is not necessarily an issue of domestic courts' conduct, and will thus not be separately dealt with.

⁸⁵ See specifically *Swisslion v Macedonia* (n 79), [263] ('Not to deny justice implies at a minimum giving access to the courts.'). Confirming the principle in the general sense, see *Azizian* (n 79), [102]; *Feldman v Mexico (Award)* (ICSID Case No ARB(AF)/99/1, 16 December 2002) [140]; *Metalpar v Argentina (Award)* (ICSID Case No ARB/03/5, 6 June 2008), [180]-[181]; *AMTO* (n 80), [75]; *Vannessa Ventures v Venezuela* (n 81), [226]; *Iberdrola Energía SA v Guatemala (Award)* (ICSID Case No ARB/09/5, 17 August 2012), [432]; or *Arif v Moldova* (n 1), [447]; *Flughafen Zurich AG v Venezuela* (ICSID Case No ARB/10/19, 18 November 2014), [636], [638]; *OI European Group v Venezuela (Award)* (ICSID Case No ARB/11/25, 10 March 2015), [525].

⁸⁶ The question of access to courts has often been considered in relation to the legal consequences of contract breaches not taking the form of an exercise of governmental prerogative. Tribunals have largely been in agreement that denying the investor the opportunity to obtain redress in the contractually agreed forum or otherwise in the competent court could transform such contract breach into a violation of the fair and equitable treatment standard (see eg *Parkerings-Compagniet AS v Republic of Lithuania (Award)* (ICSID Case No ARB/05/8, 11 September 2007) [316]-[317]; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay (Further Decision on Objections to Jurisdiction)* (ICSID Case No. ARB/07/9, 9 October 2012) [285]). In circumstances where a denial of access amounts to an effective repudiation of the contractual right, this may also give rise to an expropriation claim (see eg *Waste Management v United Mexican States (II) (Award)* (ICSID Case No ARB(AF)/00/3, 30 April 2004), [174]-[175]; *SGS v Philippines (Jurisdiction)* (ICSID Case No ARB/02/6, 29 January 2004) [161]; *BIVAC v Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/07/9, 29 May 2009), [110].

⁸⁷ See eg *Azizian* (n 79), [102] ('A denial of justice could be pleaded if the relevant courts refuse to entertain a suit').

⁸⁸ See eg *AMTO* (n 80), [75] ('Denial of justice relates to the administration of justice, and some understandings of the concept include both judicial failure and also legislative failures relating to the administration of justice (for example, denying access to the courts).'); or *Iberdrola Energía* (n 85), [432] ('under international law a denial of justice could constitute [...] the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice') and [444] ('there is not only a denial of justice in relation to the actions of the judiciary, but also, among other hypotheses, when a State prevents an investor's access to the courts of that State; in that case there will be denial of justice even if the act comes from the executive or legislative body').

The following overview of arbitral practice shall substantiate and shed further light on these propositions.

6.2.1.1. *The Question of Actual Availability of Domestic Procedures*

Some of the cases necessitated a rather straightforward inquiry into whether an investor had at its disposal a domestic remedy that would allow it to obtain redress for an alleged wrong. A typical example in this respect is the case of *Iberdrola v. Guatemala* (2012), where the tribunals examination focused on the possibility for the investor's company to challenge regulatory measures adopted by Guatemala's National Electric Energy Commission (CNEE), which happened to affect Claimant's interests in a Guatemalan electricity distribution utility, the Empresa Eléctrica de Guatemala (EEGSA). The issue in that case was that EEGSA had appealed against several CNEE's resolutions before the Ministry of Energy and Mines, but those appeals were flatly dismissed on admissibility grounds, without being considered on their merits. The Claimant contended that no appeal was actually possible against the Ministry's dismissal, even if it admitted that an *amparo* procedure (i.e. a special form of judicial relief aimed at the protection of constitutional rights) was available against the underlying CNEE resolutions (which EEGSA actually pursued). Since *amparo* was an extraordinary procedure that was not equivalent to proceedings before the regular administrative courts, Claimant maintained that the availability of solely such procedure amounted to a real obstruction of EEGSA's right of access to justice.⁸⁹ But the Tribunal found no denial of justice on account of EEGSA allegedly being prevented from having its case properly examined by Guatemalan courts. First, the Tribunal conclusively resolved that appeal in the form of an *amparo* procedure was available directly against the Ministry's decision, and not solely against the underlying resolutions.⁹⁰ Second, the Tribunal was not convinced that the *amparo* procedure was an inadequate one, having deprived EEGSA of the opportunity to have the merits of the tariff question reviewed by Guatemalan courts. The Tribunal concluded that the scope of EEGSA's appeal went far beyond claims of violations of constitutional guarantees and fundamental rights which are normally the subject of *amparo*, as it in fact amounted to a proper judicial review of the challenged resolutions, including the conformity of the latter with applicable Guatemalan laws. In view of these conclusions, the Tribunal did not need to decide on the actual availability of a regular administrative appeal.⁹¹

6.2.1.2. *Refusal to Judge in Disguise*

In many of the other cases, however, the question of access to courts presented itself in more subtle ways. Traditionally difficult in this respect has been to determine whether the investor's failure to have its claims adjudicated on the merits – for example, as a result of a dismissal of a claim on procedural grounds – amounted in effect to an obstruction of access to justice, or even a disguised refusal to judge.⁹² A situation of this kind arose, for example, in *Waste Management v. Mexico* (2004). There, the claim of denial of justice was predicated on the allegedly unjustified dismissal by the Mexican federal courts of contractual claims brought by Claimant's subsidiary against the Mexican city of Acapulco on the ground that the subsidiary should first have sought resolution of the dispute by arbitration, as specifically required under the applicable concession contract. Admittedly, in the circumstances of that case, the grief was not formulated as a denial of justice by dint of refusal to judge. However, the Claimant pleaded denial of justice precisely because it considered that its subsidiary's access to the appropriate dispute settlement

⁸⁹ *Iberdrola Energía* (n 85), [457].

⁹⁰ *ibid* [459]-[464].

⁹¹ *ibid* [467]-[470]; [473],[476].

⁹² The classic precedent in this respect is the decision in the *Fabianni Case (France v Venezuela)*, where the admission of an appeal which was later indefinitely suspended was held to amount to a refusal to judge.

mechanisms was obstructed, given that the city resisted the contractually-agreed arbitration procedure, with the effect that subsidiary was forced at a one point to discontinue arbitration altogether.⁹³ But the Tribunal considered that the decisions of the Mexican Federal courts were not unreasonable on their own terms, and thus found no denial of justice.⁹⁴

The case of *Mamidoil v. Albania* (2015) gave rise to similar issues. In the circumstances of that case, the Claimant's subsidiary commenced proceedings before Albanian courts for the reimbursement of allegedly overpaid taxes, by bringing a claim for unjust enrichment under the Civil Code. The initially seized court of first instance accepted the possibility that the claim be brought as a civil law one. However, a majority at Albania's Supreme Court later decided that the plaintiff was not at liberty to bring its suit as a civil claim, considering instead that the claim was a public law claim under the Customs Code which had to be brought as such. Insofar as the subsidiary had not respected the mandatory pre-trial administrative procedure prescribed by the Customs Code, the Supreme Court then dismissed the claim. The Claimant's subsidiary eventually appealed to the Albanian Constitutional Court, but no violation of the constitution was found on the basis of such series of events. The Claimant therefore argued that the Supreme Court's decision was an improper and discreditable one, because it resulted in the subsidiary having lost all legal remedies against the unjustified taxation. Again, the Tribunal found no denial of justice in that case, in spite of the fact that the subsidiary's claims for tax reimbursement had never been addressed on the merits. In concluding that the Supreme Court's decision was "not clearly improper, discreditable or in shocking disregard of Albanian law", the Tribunal took note of the fact that the judgment was "reasoned, understandable, coherent and embedded in a legal system that is characterized by a division between public and private law as well as civil and administrative procedures".⁹⁵ The Tribunal therefore respected the specificity of the Albanian legal system, which distinguishes between civil and administrative courts, which requires that complaints under public law against the conduct and decisions of the administration be first addressed to the administrative body and its hierarchy, and which considers tax law to be part of the body of public law. The Tribunal also noted that, with respect to these specificities, the Albanian legal system was not any different than that of many other civil law countries.⁹⁶

6.2.1.3. *The Problem of Inconsistencies between Judicial Remedies*

Yet, the question of availability of judicial remedies has not only arisen in cases where the investor has failed to receive a decision on the merits of its domestic claims, but also in cases where its claims were determined on the substance, but the investor obtained inconsistent decisions on its claims by different judicial branches. On such ground, for example, denial of justice was pleaded in *Philip Morris v. Uruguay* (2016). In the circumstances of the case, the Claimant's grievance arose out of the unsuccessful challenges that it mounted against Uruguay's newly adopted tobacco packaging legislation. Specifically, through proceedings before Uruguay's Supreme Court of Justice (SCJ), the Claimant challenged the constitutionality of the Law prescribing the minimum surface area of cigarette packages to be covered by health warnings. Then, by means of a separate action before the Uruguay's Contentious Administrative Tribunal (Tribunal de lo Contencioso Administrativo, TCA), it also challenged the legality and validity of the Regulation through which the Law was implemented. Both challenges were ultimately unsuccessful. But while the SCJ upheld the constitutionality of the Law because the latter *did not* delegate authority to the competent ministry to require warnings covering more than 50% of tobacco packaging, the TCA apparently upheld the legality of the Regulation on the ground that

⁹³ *Waste Management II* (n 86), [87], and [120]-[123].

⁹⁴ *Waste Management II* (n 86), [129]-[130].

⁹⁵ *Mamidoil v. Albania (Award)* (ICSID Case No. ARB/11/24, 30 March 2015) [769] (emphasis added).

⁹⁶ *ibid* [765].

the law *did* delegate that exact authority to the competent ministry. The Claimant contended that the contradictory decisions, against which no further appeal was available, amounted to the “functional equivalent” of locking the Claimant’s subsidiary out of the court building, in that they have deprived the subsidiary of its right to a decision on the legality of the impugned regulatory measures, and thus inflicted a denial of justice.⁹⁷ Yet, the Tribunal was not convinced that a finding of denial of justice would have been appropriate because of the discrepancy between the two judicial outcomes. Of significance in this respect was that, under the Uruguay constitutional system, the SCJ and TCA were co-equal; both having original and exclusive jurisdiction over distinct subject matters and, as a result, operated independently of each other. The SCJ could thus uphold the constitutionality of a law in application of constitutional principles, while such interpretation did not bind the TCA in determining the legality of decrees rendered under that same law on the basis of the principles provided by administrative law.⁹⁸ Although the Tribunal did find it “unusual” that the Uruguayan judicial system separated out the mechanisms of review without any system for resolving conflicts of reasoning, it considered this merely to be “a quirk of the judicial system”,⁹⁹ and not in itself a reason for finding a denial of justice. And neither did the failure of the TCA to follow the SCJ’s interpretation of the Law provide reason to hold Uruguay liable for denial of justice. Although the TCA’s conduct might have appeared “unusual, even surprising”, it was not “shocking” and “not serious enough in itself”, for in the view of the Tribunal, “[o]utright conflicts within national legal systems may be regrettable but they are not unheard of”.¹⁰⁰ What seemingly mattered was that the Claimants were able to have their day(s) in court, and there was an available judicial body with jurisdiction to hear their challenge of the impugned regulatory measures and which gave a properly reasoned decision. At the end of the day, the Claimant was not left without a decision on the merits of its claims; both the SCJ and TCA separately upheld the legality of the measure the Claimants sought to challenge, even though each under its own jurisdiction and applying its own legal criteria. But the Tribunal did not consider international law to require the domestic judiciary to deliver perfectly consistent decisions. Instead, it observed that international adjudicatory bodies “should not act as courts of appeal to find a denial of justice, still less as bodies charged with improving the judicial architecture of the State”,¹⁰¹ while also recalling the admonition once made by Claimant’s own legal expert, professor Paulsson, that “the vagaries of legal culture that enrich the world are to be respected.”¹⁰²

6.2.1.4. *Restrictions on the Right of Access to Courts*

Of all the cases that raised the question of access to courts, the one that most clearly attested to the general tolerance of investment tribunals towards the vagaries and peculiarities of States’ domestic legal systems is that of *Mondev v. USA*, where the possibility was accepted of the investor’s right of access to justice being restricted, provided such restriction is a reasonable one.¹⁰³ In the circumstances of the case, access to a judicial remedy was hindered as a result of a Massachusetts statute, which granted state agencies immunity from tortious interference with contractual relations. While the Claimant was thus prevented from recovering damages it allegedly suffered on account of the conduct of one such agency, the Boston Redevelopment Authority (BRA), the Tribunal concluded that Claimant was not denied justice on account of

⁹⁷ *Philip Morris v Uruguay (Award)* (ICSID Case No ARB/10/7, 8 July 2016) [504]-[509], [521].

⁹⁸ *ibid* [522], [528].

⁹⁹ *ibid* [527].

¹⁰⁰ *ibid* [529]. In support of such proposition, the Tribunal’s majority relied on the ECtHR’s decision in *Sahin v Turkey*, where longer inconsistencies in the case-law were not in itself found to violate the right to a fair trial, *ibid* [531]-[532].

¹⁰¹ *ibid* [528].

¹⁰² *ibid* [533].

¹⁰³ This is generally in line with the jurisprudence of human rights courts; cf Paparinskis (n 13), 210-211.

such immunity. In the view of the Tribunal, circumstances could well be envisaged where the granting of a general immunity from suit to a public authority could amount to a breach of the minimum standard of treatment, such as in the event that immunities were granted to public authorities under contracts with NAFTA investors, or where statutory immunities existed for some types of intentional tort, such as assault or battery.¹⁰⁴ Yet, not just any restriction on the investor's right of access to a judicial remedy was considered to amount to a breach of the standard; what mattered to the Tribunal was the rationale underlying the immunity in question. Hence, in the Tribunal's view, reasons could "well be imagined" why a legislature might decide to immunize a regulatory authority from potential liability for tortious interferences in contractual relations; the most evident was that frequent litigation could be unnecessarily distractive for the BRA in fulfilling its regulatory tasks.¹⁰⁵ In the circumstances of the case, the restrictions preventing the investor to sue the BRA were thus found acceptable, with the Tribunal eventually concluding that "within broad limits, the extent to which a State decides to immunize regulatory authorities from suit for interference with contractual relations is a matter for the competent organs of the State to decide."¹⁰⁶ Of course, the immunity that was at issue in *Mondev* was granted pursuant to a statutory provision and the Claimant challenged the statute itself as not being in conformity with the minimum standard of treatment under international law, without otherwise contesting the correctness of the judicial decision applying the immunity as a matter of Massachusetts law.¹⁰⁷ Neither did the Tribunal wish to put into question the propriety of the decision as such.¹⁰⁸ But the award's underlying reasoning could equally be applied to immunities developed by judicial precedent, which have the potential of implicating the propriety of domestic courts' conduct as such.

6.2.2. Denial of Justice for Undue Delays

Investment tribunals have invariably followed the opinion developed in the earlier case law of various claims commissions that excessive delays are tantamount to denial of justice.¹⁰⁹ But as with other types of denial of justice claims, the threshold to establish liability on that basis turned out to be a rather demanding one. The occasional admonition that "international law has no strict standards to assess whether court delays are a denial of justice"¹¹⁰ is certainly accurate, to the extent that there are no pre-determined quantitative benchmarks that can be used to assess whether a specific delay should be considered undue. The test is one of "reasonableness", which is something to be determined in the light of the particular circumstances of each case. This is not to say, however, that international law prescribes no standards at all. The minimum standard of treatment, in accordance with which a State is bound to administer justice, is an autonomous standard, which means that the celerity by which justice is dispensed is not to be evaluated by reference to national practices. This is why the Tribunal in *Toto*, for example, was "not impressed" by the argument that the investor should have accepted the Respondent's legal system as it had found it, together with the protracted procedures before the Lebanese Conseil d'Etat and

¹⁰⁴ *Mondev* (n 78), [151]-[152].

¹⁰⁵ *ibid* [153].

¹⁰⁶ *ibid* [154].

¹⁰⁷ *ibid* [140].

¹⁰⁸ *Mondev* (n 78), [156].

¹⁰⁹ *Azinian* (n 79), [102]; *Jan De Nul* (n 77); *Pey Casado* (n 77); *AMTO* (n 80), [80], [83]; *Toto Costruzioni Generali SpA v Lebanon (Decision on Jurisdiction)* (ICSID Case No ARB/07/12, 11 September 2009) 156; *Oostergetel* (n 77), [288]-[290]; *Vannessa Ventures* (n 81), [226]; *Iberdrola Energía* (n 85), [432]; *Arif v Moldova* (n 1), [447]; *Flughafen* (n 85), [636]; *OI European Group* (n 85), [525]; cf also *Waste Management II* (n 86), [130].

¹¹⁰ *Toto v Lebanon* (*ibid*), [155]; cited with approval in *White Industries* (n 81), [10.4.9].

overcharged dockets in general.¹¹¹ The question then is how to assess whether certain performance from the local judicial system can be considered reasonable.

6.2.2.1. *Assessing by Comparing*

The methods used by investment tribunals for determining the reasonableness of delays (to the extent that one could discern them at all¹¹²) have somewhat differed, though in more recent jurisprudence the trend has gradually turned towards greater consistency, as investment tribunals now increasingly draw on criteria established in the jurisprudence of various human rights adjudicatory bodies. In that respect, a transition essentially occurred from the use of more simple, comparative law approaches to more comprehensive, multi-factor assessments. An example of the former can be found in the *Pey Casado v. Chile* (2008) award, where the Tribunal's assessment consisted of simply comparing the length of the alleged delay with cases decided by other adjudicatory bodies where delays of similar lengths gave rise to liability.¹¹³ This approach led the Tribunal to conclude that seven years of delays, which Mr. Pey Casado experienced in Chilean courts in seeking to obtain redress for losses sustained in relation to a newspaper business during the Pinochet regime, amounted to a "manifest" denial of justice.¹¹⁴

While this kind of reasoning later passed the test of annulment,¹¹⁵ it was certainly not without problems, since, by mechanically transposing conclusions from other cases, it failed to take account of the context in which those conclusions had been arrived at.¹¹⁶ The possibility that such selective and un-contextualized application of precedents could lead to outcomes that are neither coherent nor consistent becomes clear when the holdings in *Pey Casado* are compared with those made in another award later in the same year, *Jan De Nul v. Egypt* (2008), where no denial of justice on grounds of excessive duration of the proceedings was found in circumstances where the domestic courts took nearly ten years to take a decision on the merits.¹¹⁷ The different outcome was attributable to the fact that the Tribunal in *Jan De Nul*, although taking the view that the duration of the proceedings was "certainly unsatisfactory in terms of efficient administration of justice", was also "mindful that the issues were complex and highly technical, that two cases were involved, that the parties were especially productive in terms of submissions and filed extensive expert reports."¹¹⁸ The delays were thus assessed in the light of the particular

¹¹¹ *ibid* [161]-[162].

¹¹² Namely, there are also awards where references to the criteria used in the evaluation are lacking. See *Vannessa Ventures* (n 81), [226] (noting that there were instances where domestic courts failed to deal promptly, or at all, and that there were considerable delays with regard to many applications, but nonetheless finding that 'delays are not of an order that violates Respondent's obligations under the Treaty'); or *Arif v Moldova* (n 1), [447] (simply concluding that delays were not excessive).

¹¹³ In justifying why the delay of seven years was unreasonable, the Tribunal simply referred to the decision of the Anglo-Mexican Claims commission in *El Oro Mining and Railway Company*, where a failure to decide on a compensation claim in nine years was held to amount to a denial of justice, and the decision of the ECtHR in *Ruiz-Mateos v Spain*, where a failure to decide on a compensation claims for seven years was held to amount to an unreasonable delay in breach of art 6 ECHR. *Pey Casado* (n 77), [661]-[662].

¹¹⁴ *Pey Casado* (n 77), [674].

¹¹⁵ Although the damages award was annulled in 2012 for failure to state reasons and failure to hear arguments from the respondent, the denial of justice finding was expressly unaffected. See *Victor Pey Casado and President Allende Foundation v Republic of Chile (Decision on the Application for Annulment)* (ICSID Case No ARB/98/2, 18 December 2012).

¹¹⁶ Namely, in the *El Oro Mining* case of 1931, the British Mexican Claims Commission quite clearly explained that the test of whether a delay was a reasonable one 'will depend upon several circumstances, foremost among them upon the volume of the work involved by a thorough examination of the case, in other words upon the magnitude of the latter.' *El Oro Mining and Railway Company (Ltd) (Great Britain v United Mexican States) (Award)* (5 UNRIAA 191, 18 June 1931) 198. Similarly, the ECtHR in *Ruiz-Mateos* assessed the reasonableness of the delay by reference to the complexity of the case, the applicants' own conduct, and the conduct of the competent authorities (criteria which the Court developed through its case law), and not in the abstract. *Case of Ruiz-Mateos v Spain (Judgment)* (Application no 12952/87) 23 June 1993, [38]-[53].

¹¹⁷ *Jan de Nul* (n 77), [202]-[204].

¹¹⁸ *ibid* [204].

circumstances of that case, while taking account of different factors such as the complexity of the case and the procedural activity of the parties.¹¹⁹

6.2.2.2. *Towards a Multi-Factor Methodology*

These factors were later embraced by the Tribunal in *Toto v. Lebanon* (2009), which was the first modern investment tribunal that expressly attempted to develop an objective methodology to assessing the permissibility of judicial delays. Drawing on the jurisprudence of the Human Rights Committee in interpreting the fair trial obligations under Article 14 ICCPR, the *Toto* Tribunal formed the view that an assessment whether justice was rendered within a reasonable delay will depend “on the circumstances and the context of the case”, which required each lawsuit to be “analyzed individually with regard to: the complexity of the matter, the need for celerity of decision, and the diligence of claimant in prosecuting its case.”¹²⁰ Since then, other tribunals have followed the practice of undertaking an objective, multi-factor assessment whether a judicial delay amounts to a denial of justice, either applying the criteria developed by the *Toto* Tribunal,¹²¹ or further refining the applicable test, by expanding the scope of inquiry to the behaviour of all litigants involved, as well as the behaviour of the courts themselves.¹²² Eventually, the application of this test resulted in practically no finding of liability for denial of justice on the ground of undue delay. In most cases, the protracted proceedings were found to be explicable by the complexity of the cases in question,¹²³ by the behaviour of the claimants themselves,¹²⁴ by the

¹¹⁹ The procedural complexity of the case was considered a factor relevant to explaining the delays in already in another case that was decided in the same year. See *AMTO* (n 80), [83].

¹²⁰ *Toto* (n 109), [163]. On its part, the Human Rights Committee takes into account in its assessment the complexity of the matter, whether the Claimants availed themselves of the possibilities of accelerating the proceedings, and whether the Claimants suffered from the delay. The Tribunal explained that Lebanon was a party to the ICCPR and that the Committee's decisions were relevant to interpret the scope of art 14, despite the fact that Lebanon did not otherwise accept the competence of the Committee to hear individual communications pursuant to the Optional Protocol to the ICCPR. On the other hand, the Tribunal held that the decisions of the ECtHR in relation to art 6 ECHR were not relevant in that case, since Lebanon was not party to the ECHR and therefore lay outside its territorial scope. (ibid [157]-[158]). While undoubtedly correct, this approach was not consistently adhered to, as the Tribunal for example referred to how the French Conseil d'Etat had decided that ECHR arts 6.1 and 13 were violated when a lower administrative court took seven and a half years to rule on a request which did not present any particular difficulty. See FN 48 to [163].

¹²¹ See eg *Frontier Petroleum* (n 77), [328] (finding the criteria set forth in *Toto* ‘useful’); *Spiridon Roussalis* (n 77), [603] (applying the *Toto* criteria without express reference to any specific authority); or *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt (Award)* (ICSID Case No. ARB 09/15, 6 May 2014) [405]-[406] (otherwise endorsing *Toto*).

¹²² See *Chevron (Contractual Claims)* (n 81), [250] (holding that in the assessment of denial of justice for undue delays, the factors usually considered were ‘the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case, and the behavior of the courts themselves’); *Oostergetel* (n 77), [290] (agreeing with the view of the *Chevron* Tribunal); and *White Industries* (n 81), [10.4.10] (holding that the factors relevant to the determination of whether delays in judicial proceedings amount to a denial of justice include ‘the complexity of the proceedings, the need for swiftness, the behaviour of the litigants involved, the significance of the interest at stake and the behaviour of the courts themselves.’)

¹²³ See in particular *White Industries* (n 81), [10.4.11]-[10.4.13], where the delays were partly explained by the fact that the Claimant's proceedings in the Indian courts to enforce a commercial award have raised a hotly debated point of Indian arbitration law and involved issues of obvious significance in the field of commercial arbitration in India. See also *Oostergetel* (n 77), [289] and *Spiridon* (n 77), [603], where the complexity of the case was deemed one of the reasons explaining the delays.

¹²⁴ See *Oostergetel* (n 77), [289]-[290] (accepting the Respondent's explanation that delays were also caused by numerous incidental matters raised by the Claimants in the local proceedings and the refusal of the Claimant's local subsidiary to cooperate with the judge and trustees in the proceedings); *Spiridon*, para. 603 (noting the Claimant's lack of cooperation and active opposition during the criminal prosecution); *Pantechniki* (n 77), [101]-[102] (noting how the procedures before Albanian courts were to a significant degree prolonged by requests for postponement by Claimant's counsel in relation to what appeared to be an alternative argument concerning undue delays); *H&H Enterprises* (n 121), [406] (considering that Claimant did not actively pursue its claim before domestic courts).

absence of particular celerity in view of the nature of the domestic case,¹²⁵ and/or by specific circumstances explaining the behaviour of the courts.¹²⁶ Particular weight was also given in some cases to the fact that Claimants had failed to avail themselves of all available possibilities of accelerating the proceedings.¹²⁷

This is not to say, however, that such multi-factor assessment has necessarily resulted in investment tribunals being overly deferential in scrutinizing explanations advanced by the respondents to justify the delays. While there were cases where tribunals have appeared to accepted, without more, the justifications provided by the Respondent,¹²⁸ or otherwise relied on expert evidence¹²⁹ or claimants' own admissions,¹³⁰ there were also cases where tribunals did not refrain from forming their own views on certain matters. In *Frontier Petroleum Services* (2010), for example, the Tribunal carefully scrutinized not only the domestic court's decision, but also the court's record of hearings in arriving at its conclusion that the matters were not of such complexity to have justified protracted proceedings.¹³¹ Similarly intensive was also the review adopted in *Toto* in determining whether Claimants have availed themselves of all available possibilities of accelerating domestic proceedings. There, the Tribunal formed its own view as to the possibilities available to Claimant under the Lebanese Code of Civil Procedure (the provisions of which the Tribunal considered applicable as the general procedural law, in the absence of specific domestic legal remedies with respect to denial of justice in administrative courts) to speed up the proceedings before the Lebanese Conseil d'Etat.¹³² The review in *Toto* in that sense differed from the more cautious approach adopted by some other tribunals in scrutinizing matters relating to issues under domestic law, as is frequently the case when considering the complexity of a particular case. In *AMTO v. Ukraine* (2008), for example, the complexity of a case was seemingly accepted on the ground that "bankruptcy legislation is a technical subject matter",¹³³ while in *White Industries* (2011), the question whether Indian courts could properly entertain an application to set aside an arbitral award not made in India, was

¹²⁵ See *Frontier Petroleum* (n 77), [331] (finding no evidence that earlier action on the part of the domestic court would have made any difference in the Claimant's case); and *White Industries* (n 81), [10.4.14], where the need for celerity was held to be less compelling, since the Claimant's case concerned purely commercial matters and any potential losses could have been offset through the payment of interest.

¹²⁶ *Toto* (n 109), [165] (attaching importance to the domestic security situation and political turmoil which 'undoubtedly were not conducive to the functioning of Lebanon's judicial system and affected the proper functioning of Lebanese courts between 2002 and 2008'); and *White Industries* (n 81), [10.4.18] (considering it relevant 'to bear in mind that India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary').

¹²⁷ See eg *Toto* (n 109), [167] ('More importantly, the Tribunal has not seen evidence that Toto made use of local remedies to speed up the proceedings before the Conseil d'Etat'); *Oostergetel* (n 77), [288] ('expert evidence indicates that the Claimants did not avail themselves during the proceedings of the opportunity to complain about delays'); *Frontier Petroleum* (n 77), [330] (finding no evidence that Claimant had tried to accelerate its claim in accordance with Czech law and court practice). See also *Spyridion Roussalis* (n 77), [603] (noting that the domestic criminal proceedings against Claimant were offered to be dropped due to statute of limitations, but Claimant requested that the case proceeded).

¹²⁸ See eg *Jan de Nul* (n 77), [183] and [204] (the Tribunal was 'mindful' about the complexity of the matters and the parties' own conduct in the local proceedings, accepting in practice the defenses advanced by Respondent to justify the lengthy duration of the proceedings); *Oostergetel* (n 77), [289]-[290] (the Tribunal was 'satisfied' with the Respondent's explanations that delays were attributable to the complexity of the case and the claimant's own behavior); or *Spyridion Roussalis* (n 77), [603] (apparently accepting as conclusive the Respondent's characterization of Claimant being uncooperative during criminal proceedings).

¹²⁹ *Oostergetel* (n 77), [288] ('expert evidence indicates that the Claimants did not avail themselves during the proceedings of the opportunity to complain about delays').

¹³⁰ *Frontier Petroleum* (n 77), [330] (noting eg how 'Claimant's counsel confirmed at the hearing in this arbitration that there is nothing on the record to indicate that Claimant contacted the Regional Court to inquire as to the status of the action during the relevant period').

¹³¹ *ibid* [329].

¹³² *Toto* (n 109), [167] and fn 52.

¹³³ *AMTO* (n 80), [84].

simply accepted by the Tribunal's majority as remaining unsettled under Indian domestic jurisprudence, which meant that the issue was a complex one and that the delay experienced by Claimant in expecting that it be settled by India's Supreme Court was therefore reasonable.¹³⁴ The same case, on the other hand, also suggests that arbitrators may not accord the same kind of deference in circumstances where the domestic case also raises issues of international law. Thus, in contrast to the Tribunal's majority in *White Industries*, Arbitrator Brower perceived the setting aside questions as being one primarily governed by the 1958 New York Convention and, given the "clear consensus" that only the courts of the seat of arbitration were competent to set aside a foreign arbitral award, not one that could be characterized as a particularly complex. In fact, Arbitrator Brower was even prepared to consider the actions of Indian domestic courts as not justified and contrary to international law.¹³⁵

6.2.3. Fundamental Breaches of Due Process in the Conduct of Proceedings

Investment tribunals invariably accepted that irregularities in the conduct of judicial proceedings and other procedural defects in the process of administration of justice may give rise to a denial of justice. But there are variations in the jurisprudence as to the legal standards against which the procedural propriety was to be measured.

Conceptually, one could distinguish at least three, but perhaps four approaches in the jurisprudence. One way to determine the inadequacy of judicial proceedings was to look at whether the specific type of conduct giving rise to the irregularity was prohibited under international law. This was the approach taken in *Loewen*, for example, where the Tribunal concluded that international law attached special importance to discriminatory violations of municipal law,¹³⁶ and specifically, that it was the responsibility of the State under international law and, consequently, of the courts of a State, "to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice."¹³⁷ Another way of defining the content of the obligation was to rely on specific elements of the right of fair trial as guaranteed under human rights instruments. An example of such approach is the award in *Al-Warraq v. Indonesia* (2014), where Respondent's failure to comply with the elementary requirements for a fair trial when conducting domestic criminal proceedings against the investor (e.g. by failing to properly notify the Claimant of the criminal charges against him, by trying and convicting him in absentia, by subsequently failing to properly notify him of the sentence, as well as to enable him to appoint legal counsel and to appeal his sentence) were identified as breaches of discrete Respondent's obligations under the ICCPR and therefore held to amount to a denial of justice in violation of the fair and equitable treatment standard.¹³⁸ The third, and the most common approach, however, has been to simply categorize a particular irregularity as a breach of due process, without otherwise defining the parameters of the due process obligation. Pursuant to such "I know it when I see it" approach, the procedural shortcomings that tribunals considered as capable of constituting a denial of justice included, for example, the failure to hear the investor,¹³⁹ lack of proper notification,¹⁴⁰ or governmental

¹³⁴ *White Industries* (n 81), fn 69.

¹³⁵ *ibid* fn 69.

¹³⁶ *Loewen* (n 75), [135].

¹³⁷ *ibid* [123]. Support for this proposition was found in academic writings, although the Tribunal surprisingly also relied on a number of US domestic judicial decisions demonstrating how advocacy creating an atmosphere of hostility to a party by appealing to sectional or local prejudice had consistently been held as a ground for finding a mistrial. cf [123], [135].

¹³⁸ *Al-Warraq v Indonesia* (n 81), [556]-[621].

¹³⁹ See *Mondev* (n 78), [136] ("Conceivably there might be a problem if the appellate decision took into account some entirely new issue of fact essential to the decision and there was a substantial failure to allow the affected party to present its case."); *AMTO* (n 80), [80] ("there is no indication that the parties were not properly heard"); *Pantechniki* (n 77), [100] ("I am troubled by the clear violation of fair procedure if it is true (as appears to be the case) that the Court of Appeal rejected the

interference in domestic proceedings.¹⁴¹ Furthermore, tribunals have considered as axiomatic that the lack of judicial independence and impartiality, as demonstrated for example by proof of collusion between judges and plaintiffs or even corruption on the part of the judiciary, would attest to the absence of fair procedure.¹⁴² Finally, with the growth of arbitral jurisprudence, a fourth approach seems now to be emerging, whereby the content of the due process requirement is simply determined by reference to factors that other investment tribunals have considered as inherent to the notion of due process.¹⁴³

Regardless of the approach, investment tribunals by and large accepted that the obligation to adequately administer justice does not require from states the creation of a perfect judicial system that is free from errors. Hence, not every procedural irregularity in the conduct of domestic proceedings has been deemed to amount to a breach of international law, but only irregularities that would be considered “severe”, “significant” or “serious”,¹⁴⁴ in the sense that they would involve “major” procedural errors¹⁴⁵ or “gross deficiencies” in the administration of the judicial process,¹⁴⁶ or else cause the latter to be “fundamentally” flawed.¹⁴⁷ The test applied in practice has usually been a loosely formulated one – such as whether domestic courts “administer justice in a seriously inadequate way”,¹⁴⁸ or whether the disregard of due process could be said to lead to “justified concerns as to the judicial propriety of the outcome”.¹⁴⁹ It is fairly clear, however, that the scope of the inquiry pursuant to such tests has not been a particularly searching one. As appositely noted by the Tribunal in *Vannessa Ventures* (2012), “[t]he question is not whether the host State legal system is performing as efficiently as it ideally could: it is whether it is performing so badly as to violate treaty obligations.”¹⁵⁰ In practice, the approach has been either to avoid examining specific procedural errors by focusing on whether the trial as a whole satisfied international standards,¹⁵¹ or to limit the examination to those procedural errors that are

claim on a ground which the Claimant had not invoked and thus had no occasion to address. This is a serious matter.”); cf also *Deutsche Bank v Sri Lanka (Award)* (ICSID Case No ARB/09/2, 31 October 2012), [478].

¹⁴⁰ *Spyridion Roussalis* (n 77), [607] (“The record shows that the [court] orders were communicated to Claimant and he had an opportunity to contest them.”); *AMTO* (n 80), [78] (resolving that the courts had no obligation to publicize commencement of bankruptcy proceedings); *Mohammad Ammar Al Bahloul v Republic of Tajikistan (Partial Award on Jurisdiction and Liability)* (SCC Case No V(064/2008), 2 September 2009) 226–27.

¹⁴¹ *Petrobart v Krygz Republic (Award)* (SCC Case No 126/2003, 29 March 2005); cf *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan (Jurisdiction)* (ICSID Case No ARB/03/29, 14 November 2005).

¹⁴² *Arif v Moldova* (n 1), [448]; *Swisslion* (n 79), [268], *Vannessa Ventures* (n 81), [228]; *Liman Caspian* (n 77), [422]; *Oostergetel* (n 77), [294]–[296].

¹⁴³ See eg *Frontier Petroleum* (n 77), [289]–[296], [366]; *Flughafen* (n 85), [639], [680].

¹⁴⁴ *Azinian* (n 79), [102] (denial of justice occurs if domestic courts ‘administer justice in a seriously inadequate way’); *Chevron (Contractual Claims)* (n 81), [244] (the standard for denial of justice ‘requires the demonstration of “a particularly serious shortcoming” and egregious conduct that “shocks, or at least surprises, a sense of judicial propriety”’); *Oostergetel* (n 77), [287], for an instance where a Tribunal assessed whether ‘the procedural irregularities were in fact *severe* improprieties with an impact on the outcome of the case, to the point that the entire procedure becomes objectionable’; or *Swisslion* (n 79), [268], assessing whether there was ‘any *serious* procedural unfairness in the conduct of the legal proceedings’); *Al-Warraq v. Indonesia* (n 81), [620] (States have a duty to create ‘a system of justice where *serious* errors are avoided or corrected.’); all emphasis added. See also *AMTO* (n 80), [79] dismissing the claim because the alleged procedural irregularities in the Court’s handling of bankruptcy proceedings were considered insignificant.

¹⁴⁵ *Liman Caspian* (n 77), [279] (a fundamental failure of the court system ‘is mainly to be held established in cases of major procedural errors such as lack of due process’).

¹⁴⁶ *He & H Enterprises* (n 121), [403].

¹⁴⁷ *Flughafen* (n 85), [636]; and *OI European Group* (n 85), [525] (denial of justice occurs if courts dictate a sentence after a fundamentally flawed process (*procedimiento profundamente viciado*)).

¹⁴⁸ *Azinian* (n 79), [102].

¹⁴⁹ *Mondev* (n 78), [127].

¹⁵⁰ *Vannessa Ventures* (n 81), [227].

¹⁵¹ See eg *Loewen* (n 75), [121].

“manifestly” or “evidently” in disrespect of due process.¹⁵² As to the standard applied to evaluating the conduct of judicial proceedings, this was largely also a deferential one. As noted by the Tribunal in *Loewen*, since “perfect trials” are not to be expected in any country of the world, “an arbitral tribunal applying the provisions of a treaty and of international law is even more constrained to avoid nitpicking a trial record and the rulings of a trial judge.”¹⁵³ The following part considers more closely how this deferential approach was applied in concrete cases, by looking in particular at how tribunals proceeded to determining the severity of procedural irregularities and identifying issues concerning the (non)impartiality of domestic judicial organs.

6.2.3.1. *Impact on Investors’ Rights*

If only irregularities that are sufficiently severe are deemed capable of giving rise to a denial of justice, the first obvious question is how one is to determine severity. Investment tribunals approached this problem differently. One way was to evaluate procedural errors not on their own terms, but by reference to the consequences that the procedurally defective decision has had for the investor’s rights. An instance of such an assessment can be found in *Flughafen v. Venezuela* (2014), where importance had seemingly been given to the fact that the disputed decision of Venezuela’s Supreme Court (which likewise had been adopted without the relevant stakeholders having been heard) had an “enormous significance” (*enorme trascendencia*) as it deprived the local government of its ownership of the airport and the investor of its rights under the concession contract.¹⁵⁴

6.2.3.2. *Consequences on the Judicial Outcome*

More common, however, was to treat as serious only those procedural irregularities that had or would have had an impact on the outcome of the domestic court proceedings. Such practice was already reflected in the *Loewen* award, where proof of unfair treatment that was accorded the Claimant was found in the excessive verdict that was entered against Loewen in the suit brought against it by a local competitor. The manner in which the verdict was constructed by the trial judge and the jury was found to be the “antithesis of due process”.¹⁵⁵ At the same time, its magnitude suggested that the verdict was influenced by bias and prejudice, again proving that the trial judge failed to ensure that the litigation was free from discrimination and that Claimant as one of the litigants was exposed to sectional or local prejudice.¹⁵⁶

The practice of determining the seriousness of alleged procedural illegalities by considering the influence that these (may) have had on the outcome of proceedings could be readily observed in several other cases. In *Ares v. Georgia* (2008), the Claimants alleged that they were denied due process on account of the failure of the Georgian courts to send copies of a judgment to the proper address, in violation of the technical requirements of the Code of Civil Procedure. The Tribunal dismissed the argument on the ground that, “to the extent that the courts may have failed to follow these procedures to the letter, [...] Claimants were in no way prejudiced by any such failure.”¹⁵⁷ In *Frontier Petroleum* (2010), the domestic court’s failure to hear the Claimant on the arguments against enforceability of several commercial arbitral awards concededly raised “concerns of procedural fairness”, but did not rise to a treaty breach, since account had to be taken of the fact that the failure to provide a hearing was found to have had no bearing on the final outcome. Indeed, the

¹⁵² See in particular *Waste Management II* (n 86), [98] (referring to ‘a manifest failure of natural justice in judicial proceedings’), [130] (finding ‘no evident failure of due process’), and [132] (speaking of ‘clear failure of due process’); and also *Pausbok v Mongolia* (n 81), [626]; *Arif v Moldova* (n 1), [447]; *OI European Group* (n 85), [524].

¹⁵³ *Loewen* (n 75), [120].

¹⁵⁴ *Flughafen* (n 85), [691]. Cf also *Deutsche Bank* (n 139), [478].

¹⁵⁵ *Loewen* (n 75), [122].

¹⁵⁶ *ibid* [115],[123].

¹⁵⁷ *Ares International SrL and MetalGeo SrL v Georgia (Award)* (ICSID Case No ARB/05/23) [9.3.40].cf also [9.3.35].

fact that the domestic courts would not have come to a different conclusion had they given Claimant a hearing was considered a particularly “important” factor.¹⁵⁸ Similarly, in *Arif* (2013), the fact that a Romanian court of appeal decided *ultra petita* “by substituting a formal request by its logical deduction” was found to constitute an error, but no one “tainted by impermissible bias and bad faith” because the court’s decisions had no negative impact on the position and business of the Claimant’s subsidiary. In the absence of a negative impact, the decision was thus deemed “wrong, but not manifestly unjust”.¹⁵⁹ In *Oostergetel* (2012), on the other hand, the Claimants’ failure to demonstrate that “the procedural irregularities were in fact severe improprieties with an impact on the outcome of the case, to the point that the entire procedure becomes objectionable” led to the dismissal of the claim of procedural denial of justice.¹⁶⁰

The difficulty with this type of inquiries is that it necessitates a counterfactual analysis, as tribunals have to form an opinion about what would have happened in the event that no procedural irregularity had taken place. As some of the precedents demonstrate, such analysis can be framed in different ways. While in *Frontier Petroleum* the focus was on the question whether the alternative judicial outcome would have been any different in the absence of the regularity, the focus in *Arif* was on the question whether the alternative judicial outcome would actually have affected the Claimant’s position. Each type of analysis raises different problems. The approach in *Frontier Petroleum* raises the question as to how an investment tribunal should establish what the alternative judicial outcome could be, given that the tribunal is not itself a domestic court. In the circumstances of that case, the tribunal apparently second-guessed the alternative outcome by basing itself on the consistent position that various Czech courts had adopted in relation to the question whether a commercial award could be enforced against a bankrupt company. For the tribunal, it was “not likely that the decisions of the bankruptcy courts would or could have been different as a matter of Czech law.”¹⁶¹ The approach in *Arif*, on the other hand, raises the question as to how an investment tribunal should establish whether a different outcome would have impacted the Claimant. In the circumstances of that case, the Tribunal assessed the consequence of the wrongful judicial decision by apparently stepping itself into the shoes of the Claimant and analysing from that perspective what effect a different decision would have made in the circumstances of that case. The Tribunal thus held that of significance to the Claimant was only the actual invalidation of the results declaring it the winner of the tender for the establishment of a network of duty free stores in Moldova, whereas the unwarranted declaration of another winner did not in fact disadvantage the Claimant’s subsidiary, since the exclusivity right to open and operate duty-free business had in the meanwhile been repealed for reasons of competition law. This allowed the Claimant’s subsidiary to continue its operations, side by side with the winning competitor.¹⁶² Of the two approaches, of course, the former is the more interesting one, in that it raises the question as to the extent to which investment tribunals will substitute their views for that of the domestic courts. The award in *Frontier Petroleum* suggests in this respect that investment tribunals may adopt a deferential approach – by not seeking to determine how they would have decided the case, but to establish on the basis of existing domestic jurisprudence how domestic courts would have decided them.

6.2.3.3. Assessing Irregularities on their Own Terms

The practice of evaluating judicial improprieties by reference to their potential impact on the outcome of the case was not met without criticism. Most disapproving of such an approach was

¹⁵⁸ *Frontier Petroleum* (n 77), [411].

¹⁵⁹ *Arif v Moldova* (n 1), [469]-[470].

¹⁶⁰ *Oostergetel* (n 77), [287].

¹⁶¹ *Frontier Petroleum* (n 77), [411]-[413].

¹⁶² *Arif v Moldova* (n 1), [470].

the Tribunal in *Philip Morris v. Uruguay* (2016). This considered the question “of what a BIT-compliant domestic court would have decided” not to be determinative of whether a breach occurred, for a procedural impropriety could still occur “notwithstanding that the court could (and probably would) still have reached the same result absent the impropriety”, whereas “[e]ven apparently weak cases or apparently undeserving parties are entitled to minimum standards of due process, and this is true even if what they lost thereby was a remote chance.”¹⁶³ The Tribunal’s approach, instead, was in the first step to consider whether the procedural improprieties were “sufficiently grave in themselves as to rise to the standard of a denial of justice”, though, in the second step, also to evaluate whether “substantively” the claim was “nonetheless fairly determined”.¹⁶⁴ In the circumstances of the case, questions of procedural propriety arose in relation to the decision of the Uruguayan contentious-administrative court rejecting Claimant’s challenges of a regulatory act, which oddly contained several references to Claimant’s competitor (that happened to have separately challenged the same regulatory act before the same court), including references to the competitor’s expert witness that was not participating in the Claimant’s proceeding. Though noting that the court “appears to have copied and pasted” large chunks of the competitor’s decision directly into the Claimant’s decision “without taking care to correct incorrect references” to the competitor and the latter’s trademarks, the ICSID Tribunal found that the case “may hardly be characterized as a denial of justice”.¹⁶⁵ In the Tribunal’s view, “[c]learly, there were a number of procedural improprieties and a failure of form. But ultimately, the similarities between the two cases and the claims made in them support the conclusion that there has been no denial of justice. In substance, Abal’s [i.e. Claimant’s] arguments were addressed.”¹⁶⁶

6.2.3.4. Possibility of Rectification

Eventually, in the *Philip Morris* case just discussed, the Tribunal placed emphasis on the fact the Claimant, though having petitioned the administrative court to amend or clarify its original decision, failed to bring to that court’s attention the arguments that had purportedly not been dealt with in the judgment. The conclusion that the Tribunal drew from this fact was that, “[w]hether or not the subsequent proceedings were sufficient in themselves to cure a prior perfected denial of justice, they were at least relevant to the question whether a sufficiently egregious error occurred.”¹⁶⁷ In that, the *Philip Morris* Tribunal followed in the footsteps of some other tribunals, which proceeded to assess the seriousness of a particular irregularity by reference to the investor’s ability to rectify the irregularity in question. An early example of such deferential review can be found in the *Mondev* award (2002). There, the Tribunal expressed concern about the possibility that a US appellate court would have taken into account some entirely new issue of fact essential to its decision without the affected party being able to present its case, but in the circumstances of the case found no trace of a procedural denial of justice, because the affected party had the right (which it also had exercised) to apply for a rehearing and to seek certiorari to the Supreme Court.¹⁶⁸ Similar reasoning was used in dismissing the seriousness of alleged irregularities in other cases. In *Frontier Petrol Services* (2010), the domestic court’s failure to hear the Claimant on an issue that had been raised by bankruptcy trustees in an *ex parte*, private meeting with the judges, which later even adopted the trustee’s arguments, was not considered to amount to procedural unfairness and a denial of justice because Claimant, among other reasons, had the opportunity to appeal the decisions of the bankruptcy courts and in fact did so. The Tribunal

¹⁶³ *Philip Morris v Uruguay* (n 97), [575].

¹⁶⁴ *ibid* [576].

¹⁶⁵ *ibid* [578].

¹⁶⁶ *ibid*.

¹⁶⁷ *ibid* [579].

¹⁶⁸ *Mondev* (n 78), [136].

considered that the “availability of full rights of appeal has satisfactorily eliminated any procedural imperfections in the process which occurred in the lower courts”.¹⁶⁹ In *Oostergetel* (2012), where Claimants similarly alleged procedural irregularities in the domestic courts’ conduct of bankruptcy proceedings concerning a textile manufacturing company in which they invested, the Tribunal found no procedural denial of justice, partly because Claimants had availed themselves of the remedies available to them to complain about the alleged procedural errors, as reflected in the appeals they brought to Slovakia’s Supreme Court.¹⁷⁰ Finally, in *Arif* (2013), the failure of a Moldovan court to provide the Claimant’s subsidiary with a copy of a hand-written form, through which the local competitor amended its claim in the local suit, was not found to have amounted to a procedural denial of justice. The Tribunal took the view that the circumstances in which the claim was amended, “however peculiar they may seem,” had not violated due process, as it transpired that Claimant’s subsidiary was fully aware of the amendment, did not object to it, and even drew the appropriate consequences in further proceedings in superior courts.¹⁷¹

This type of reasoning on the part of investment tribunals is not surprising as it is nothing but the logical corollary of the argument that a State will not be held responsible for an aberrant domestic court’s decision which is capable of being reconsidered through further recourse to the domestic legal system – an argument that I further address in 8.1.2.

6.2.3.5. Proving Lack of Judicial Independence and Impartiality

Finally, of particular interest is also the manner in which investment tribunals have dealt with complaints concerning lack of independence and impartiality, or even corruption on the part of the judiciary. Several tribunals expressed the view that conduct of this kind, if proven, would constitute a serious violation of the State’s international obligations.¹⁷² However, precisely because of the seriousness of the judicial misconduct involved, most investment tribunals also considered that the standard for proving the lack of integrity on the part of judicial organs would be more demanding. It has now been largely accepted that generalized allegations relating to lack of independence or even corruption are not sufficient to satisfy the standard,¹⁷³ and that wrongdoing must properly be proved¹⁷⁴ (which usually requires more than mere inferences¹⁷⁵). In

¹⁶⁹ *Frontier Petroleum* (n 77), [410].

¹⁷⁰ *Oostergetel* (n 77), [284].

¹⁷¹ *Arif v Moldova* (n 1), [490]-[495].

¹⁷² See eg *Liman Caspian v Kazakhstan* (n 77), [422], emphasizing that ‘corruption is a serious allegation, especially in the context of the judiciary’ and that ‘[c]orruption, if found, would constitute a grave violation of the standard of fair and equitable treatment’; or *Vannessa Ventures v Venezuela* (n 81), [228], holding that allegations concerning the judiciary’s lack of independence and impartiality ‘would, if proven, constitute very serious violations of the State’s treaty obligations.’ These holdings are interesting in that they suggest that there could be a gradation in the types of breaches of the applicable standards.

¹⁷³ See *Liman Caspian* (n 77), [422] (agreeing that the standard of proof in respect of corruption is ‘a high one’ and that ‘generalized allegations of corruption in the Republic of Kazakhstan do not meet Claimants’ burden of proof’); *Oostergetel* (n 77), [296] (refusing to accept ‘mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system’ as evidence sufficient for establishing a treaty breach or a violation of international law); and *Swisslion* (n 79), [268] (dismissing allegations of corruption on the part of the judiciary on the ground that ‘other than general evidence relating to the alleged lack of independence of the Macedonian courts not shown to be related to the facts of the present case, there was no evidence of a lack of judicial independence or other judicial misconduct in the litigation that Swisslion sought to impugn’). For an earlier example, see *Parkerings-Compagniet* (n 86), [318]-[319] (where the statement of an expert witness that Claimant would not have stood a chance in the Lithuanian courts was not deemed to ‘reflect the actual reliability of the Lithuanian judiciary’).

¹⁷⁴ See *Liman Caspian* (n 77), [423] (considering that ‘Claimants have to prove corruption, [...]. [T]he issue is not one of inference’); *Vannessa Ventures* (n 81), [228] (confirming that allegations of lack of independence and impartiality ‘must be properly proved’). See also *Rumeli/Telsim* (n 77), [709] (considering that, even if allegations of conspiracy be supported only

that respect, tribunals also resisted attempts to shift the burden of proof despite the notorious difficulty of proving such illegitimate conduct.¹⁷⁶ Thus, as usefully explained by the Tribunal in *Vannessa Ventures* (2013), proof of a lack of independence and impartiality on the part of the judiciary “must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred”, which essentially means that “[i]nferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case.”¹⁷⁷

This is not to say, however, that the question of judicial independence and impartiality has not infrequently been considered in relation to previous domestic judicial decisions involving the claimant. On the one hand, it has not been uncommon to seek proof of impartiality in the fact that domestic courts decided in some cases in favour of the investor.¹⁷⁸ On the other hand, it has also not been unusual to seek to infer bias against the investor from specific domestic decisions. In *Flughafen*, for example, evidence of judicial bias was found in the reasoning adopted by the Constitutional Chamber of Venezuela’s Supreme Court in several decisions that affected the Claimant’s concession in a local Venezuelan airport. Impugned in that case was the Supreme Court’s decision that, though formally on a provisional basis, *de facto* permanently transferred control over the airport to the Central Government. This was ultimately found to amount to a denial of justice due to the Court’s failure – by acting *sua sponte*, without any of the affected stakeholders being heard – to observe the most elementary requirements of due process. The Tribunal considered the decision to be politically motivated, as the Court did not base the provisional transferral on a valid legislative act, but justified it by reference to one of its earlier decisions, by which the Central Government’s powers in airport matters were expanded. This was seen as attesting to the Court’s bias towards the Government. The same bias was held to transpire from the Court’s subsequent clarification of the decision, in which the possibility was anticipated, again without legislative legal basis, that the transfer of the airport would have become permanent.¹⁷⁹

6.2.4. Denial of Justice arising out of Content of the Judgment

In the practice of investment tribunals, there has been lesser consensus as to whether denial of justice can occur on account of the substance of an impugned judicial decision. In line with the argument that denial of justice can only be procedural,¹⁸⁰ at least some tribunals seemed to have adhered to the view that the substance of the judgment can only be of relevance to the extent

be circumstantial evidence, they must be ‘proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred.’)

¹⁷⁵ See *Bayindir (Jurisdiction)* (n 141), [252] (refusing to infer a breach of due process and lack of independence of Pakistan’s judiciary solely from the writing of the Chairman of a Pakistani domestic agency to the Minister of Communication that their legal counsel ‘will defend the case’ and get ‘a favourable outcome’ after appearing in court).

¹⁷⁶ See *Liman Caspian* (n 77), [423] (acknowledging ‘that it is very difficult to prove corruption because secrecy is inherent in such cases’, but considering that ‘this cannot be a reason to depart from the general principle that Claimants must fully comply with their undisputed burden to prove that in the case at hand there was corruption.’); and *Oostergetel* (n 77), [296] (explaining that the burden of proof ‘cannot be simply shifted by attempting to create a general presumption of corruption in a given State’).

¹⁷⁷ *Vannessa Ventures* (n 81), [228].

¹⁷⁸ *Waste Management II* (n 86), [130]; *Smisson* (n 79), [268]; and indirectly *Unglaube v Costa Rica (Award)* (ICSID Case No ARB/08/1, 16 May 2012) [277]; *Spyridon Roussalis* (n 77), [471], [607].

¹⁷⁹ *Flughafen v Venezuela* (n 85), [700]–[706].

¹⁸⁰ cf Paulsson (n 37), 7, 82–84.

that it provides evidence of lack of due process.¹⁸¹ In a fairly great number of awards, the proposition was nonetheless accepted that the outcome of the domestic legal process could ultimately be of such a nature as to constitute reason to engage the responsibility of the State on account of denial of justice. The question is under what circumstances this was to occur.

In most cases, the measure for evaluating the content of domestic judicial decisions was then by reference to their “judicial propriety”.¹⁸² As argued by the Tribunal in *Mondev* (2002), “[t]he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome” – an issue which ultimately boiled down to the question whether the impugned decision can be considered “clearly improper and discreditable”.¹⁸³ The Tribunal admitted, though, that this was “a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.”¹⁸⁴ The test was slightly elaborated upon in subsequent jurisprudence. In *Loewen* (2003), the Tribunal considered that “[m]anifest injustice in the sense of a lack of due process” would be enough to call into question the propriety of an outcome.¹⁸⁵ The Tribunal in *Waste Management* (2004) explained, instead, that leading to an outcome which offends judicial propriety would be conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process”, adding that this “might be the case with a manifest failure of natural justice in judicial proceedings”.¹⁸⁶

As in the past, the views diverged most in relation to the extent to which a judgment’s conformity with domestic law was relevant to the tribunal’s inquiry. Following the pronouncements in *Azinian* (1999) that a denial of justice can be pleaded in the event of a “clear and malicious misapplication of the law”,¹⁸⁷ a domestic court’s application of domestic law appeared to be of at least some relevance to determining the propriety of the judicial outcome. Indeed, in some decisions, the test referred to was even that of “clear and manifest illegality”.¹⁸⁸ In other cases, in contrast, the suggestion was made that a judgment’s conformity with domestic law was not of direct interest to international tribunals,¹⁸⁹ and even suggested that malicious application of the law was not to be determined by reference to the question whether a court

¹⁸¹ See eg *Rumeli/Telsim* (n 77), [653]. (‘the substance of a decision may be relevant in the sense that a breach of the standard can also be found when the decision is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith.’), and particularly *Liman Caspian v Kazakhstan* (n 77), [279] (‘The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice.’).

¹⁸² For examples endorsing and applying the test of ‘judicial propriety’, see in particular *AMTO* (n 80), [76]; *Jan De Nul* (n 77), [192]–[193], [209]; *Chevron (Contractual Claims)* (n 81), [244]; *Liman Caspian v Kazakhstan* (n 77), [275]–[279], [285]; *GEA Group v Ukraine (Award)* (ICSID Case No ARB/08/16, 31 March 2011), [312] [319]; *Spyridion Roussalis* (n 77), [471]; *Swisslion* (n 79), [263]; *Vannessa Ventures* (n 81), [227]; *Iberdrola Energía* (n 85), [429]; *Oostergetel* (n 77), [225], 291; *Arif v Moldova* (n 1), [447].

¹⁸³ *Mondev* (n 78), [127].

¹⁸⁴ *Ibid.*

¹⁸⁵ *Loewen* (n 75), [132].

¹⁸⁶ *Waste Management II* (n 86), [98].

¹⁸⁷ cf *Azinian* (n 79), [103].

¹⁸⁸ *Al Bahloul v. Tajikistan* (n 140), 237 (‘we do not find the Tajik court’s application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for Claimant’s claim of denial of justice’); *Flughafen* (n 85), [635] (requiring for denial of justice a ‘clear and manifest illegality’ (*antijuridicidad clara y manifiesta*)); and *OI Group v Venezuela* (2014), [525] (referring to a decision whose content is ‘manifestly inadmissible and unlawful’ (*manifestamente inadmisible y antijurídico*)).

¹⁸⁹ *Swisslion* (n 79), [264] (‘ICSID tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law. They only have to consider whether they constitute a violation of international law, and in particular whether they amount to a denial of justice.’).

correctly applied local law.¹⁹⁰ At best, a court's application of domestic law was only of indirect interest to an international tribunal, to the extent that misapplication of domestic law was deemed to have an evidentiary value. Specifically, breaches of domestic law have often been treated as elements essential to proving discrimination,¹⁹¹ arbitrariness,¹⁹² or failures of due process.¹⁹³

To the extent that the application of domestic law was thus either directly or indirectly relevant to a tribunal's inquiry, this begged the question as to the types of judicial error that were capable of giving rise to a denial of justice. While tribunals have largely accepted the principle that mere error committed by a domestic court in the interpretation or application of domestic law will not *per se* give rise to a breach of international law,¹⁹⁴ they have not adopted the same approach in determining when a particular error met the threshold of such a breach. One approach was to inquire whether a judicial error was the result of *maliciousness*.¹⁹⁵ Pursuant to the Tribunal in *Azinian*, a judicial decision would have been malicious, if it were insubstantial, bereft of a basis in law, or constituted a fundamental departure from established principles of domestic law.¹⁹⁶ Alternatively, a decision was deemed malicious if there was evidence that it was politically motivated.¹⁹⁷ But then again, other tribunals expressly rejected malicious intention as an element essential to proving denial of justice.¹⁹⁸ The alternative approach was therefore to inquire whether

¹⁹⁰ *Jan De Nul* (n 77), [209] ("There is no evidence on record of any discrimination, bias or malicious application of the law based on a sectional prejudice. In this instance, it is not the role of the Tribunal to review whether the Ismailia Court conducted a correct contractual analysis or correctly applied Egyptian law. Whether under Egyptian law the Court could [...] or on the contrary could not [...] invoke the provisions of the Contract in its Judgment is not for this Tribunal to decide.")

¹⁹¹ See especially *Loewen* (n 75), [135], holding that a particular decision that breached municipal law and was discriminatory against the foreign litigant was *per se* manifestly unjust.

¹⁹² See eg *Oostergetel* (n 77), [291]-[292], holding that the judicial outcome would have been 'discreditable and offensive to judicial propriety', if it was 'so bereft of a basis in law that the judgment was in effect arbitrary or malicious.'

¹⁹³ See *Liman Caspian* (n 77), [285]: ("The Tribunal views that a misapplication of domestic procedural or substantive law provision might under certain circumstances be an indication of lack of due process.")

¹⁹⁴ See eg *Azinian* (n 79), [99] (proving that the domestic decisions were wrong 'would not *per se* be conclusive as to a violation of NAFTA'); *Parkerings-Compagniet* (n 86), [313] ('an erroneous judgment (if there should be one) shall not in itself run against international law, including the Treaty'); *Pantechniki* (n 77), [94] ("The general rule is that 'mere error in the interpretation of the national law does not *per se* involve responsibility'"); *Liman Caspian* (n 77), 274 ('the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law'); *Alps Finance and Trade AG v The Slovak Republic* (UNCITRAL, 5 March 2011) [250] ('What international law prohibits is not a possible error in law, but a system of justice which falls below a minimum standard so as to lead to an inevitable denial of justice'); *Pausbok* (n 81), [628] ('even if the Court had been wrong in its conclusion, this does not mean that this would constitute a denial of justice under the Treaty or international law'); *Spyridion Roussalis* (n 77), 315 ('an "erroneous judgment" by a court would not violate the treaty in the absence of a denial of justice, that is, a violation of the due process principle'); *Oostergetel v Slovakia* (n 77), [273] ('it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous...'); *Iberdrola Energía* (n 85), [432] ('the Tribunal shares the position of the Claimant in that "... denial of justice is not a mere error in interpretation of local law"'); *Arif v Moldova* (n 1), [441] ('The opinion of an international tribunal [...] that the national court is in error, is not enough'); *Flughafen* (n 85), [640] ('violation of domestic law not a constitutive element of denial of justice') and [641] ('a denial of justice generally cannot be based on the domestic judge's misapplication of the domestic law').

¹⁹⁵ *Arif v Moldova* (n 1), [489] (egregious misapplication of procedural law and a procedure which is tainted by bad faith.); *Flughafen* (n 85), [640] – clear and malicious misapplication of domestic law required. cf also *Oostergetel* (n 77), [225].

¹⁹⁶ *Azinian* (n 79), [105], [120]. See also *Oostergetel* (n 77), [291]-[292].

¹⁹⁷ *Flughafen* (n 85).

¹⁹⁸ *Loewen* (n 75), [132] (holding that 'bad faith or malicious intention is [not] an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice'); *Jan de Nul* (n 77), [193] ('Denial of justice may occur irrespective of any trace of discrimination or maliciousness, if the judgment at stake shocks a sense of judicial propriety'); *Chevron (Contractual Claims)* (n 81), [244] ('the standard is objective and does not require an overt showing of bad faith').

the domestic decision was *egregiously wrong*.¹⁹⁹ The “egregiousness” of the error was relevant in that it either *per se* indicated the dishonesty/maliciousness of the judge, or else attested to the latter’s incompetence, which demonstrated in turn that the State had failed to provide an adequate system of justice.²⁰⁰

All in all, when examining whether a particular decision has amounted to a denial of justice, investment tribunals have remained rather reserved, and mostly deferential. At the most basic level, this is reflected in the general attitude of unwillingness to call into question a domestic decision in the absence of evidence of procedural improprieties, discrimination, arbitrariness, or “egregious errors”, even in circumstances where investment tribunals otherwise expressed the opinion that they could have possibly have come to a different conclusion had they been in the shoes of a domestic court.²⁰¹ The tendency has been to attempt to avoid directly reviewing domestic decisions on their content, by for example narrowing the inquiry to the process that led to the decision, or to merely assess a decision on its formal qualities.

6.2.4.1. Focus on Procedural Failures as a Way to Avoiding Direct Review

In seeking to bypass direct review of domestic judicial decisions, some investment tribunals have attempted to narrow their inquiry, as far as possible, on the process that led to the impugned decision. Even pursuant to such a restrained approach, however, they could not have completely avoided scrutinizing the content of a judgment, for the latter has still been deemed relevant to the extent that it attested to the lack of due process. In *Loewen*, for example, the verdict rendered against Claimant and its group of companies in the context of a contractual dispute with a local competitor was treated primarily as evidence demonstrating the failure on the part of the Mississippi Trial Judge to accord Claimant the process that it was due under international law. In fact, the method by which the verdict was construed was found to have been “the antithesis of due process”.²⁰² But this is not to say that the verdict as such was not examined. The Tribunal did

¹⁹⁹ See eg *Rumeli/Telsim* (n 77), [619]; *Arif v Moldova* (n 1), [442], [445], [453], [489]; *Unglaube* (n 178), [277]; *Iberdrola Energía* (n 85), [432]; *Hassan Andi v Romania (Anard)* (ICSID Case No ARB/10/13, 2 March 2015), [326].

²⁰⁰ See especially *Pantechniki* (n 77), [94], holding that wrongful application of the law ‘requires an extreme test: the error must be of a kind which no “competent judge could reasonably have made.” Such a finding would mean that the state had not provided even a minimally adequate justice system.’ See also *Unglaube* (n 178), [277] (inquiring whether a decision was ‘so egregiously wrong that no honest or competent court could possibly have given it’); *Iberdrola Energía* (n 85), [432] (‘the Tribunal shares the position of the Claimant in that “... denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed”.’); *Arif v Moldova* (n 1), [442] (‘a denial of justice is engaged if and when the judiciary has [...] misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.’).

²⁰¹ See eg *AMTO* (n 80), [84] (‘The decisions of the Ukraine courts might be considered by practitioners from other jurisdictions to be formalistic, but bankruptcy legislation is a technical subject matter. In any event, the Ukraine courts appear to have applied the law and to have in fact resolved the many appeals and cassation requests relatively rapidly. [...] [Claimant’s] evidence fails to prove any legal error, abuse, undue delay or interference in the process by the Ukrainian courts.’); *Sergei Pausbok* (n 81), 627 (‘The Court reaches a conclusion different from that of the Tribunal concerning the nature of the SCSA but this cannot be seen as denial of justice, unless some of the elements mentioned in the Waste Management or the other cases mentioned by Claimants were to be present. The Tribunal could find none of them.’); *Unglaube* (n 178), [278] (‘one may certainly study the actions of the Supreme Court in 2006, on two separate occasions in 2008, and in 2009 and find matters on which reasonable people may differ. In at least one of those cases, this Tribunal was critical of the Court’s initial decision – but the Tribunal concluded that the final outcome in October 2009, if not each step in the process leading up to it, was reasonable rather than arbitrary.’; original footnotes omitted).

²⁰² *Loewen* (n 75), [122]. At issue in that case was that, in the case of punitive damages, Mississippi law required a bifurcated trial procedure, whereby liability and punitive damages could not be considered at the same time. However, when the jury announced the initial verdict, this covered both compensatory and punitive damages. Instead of vacating the verdict due to procedural defects, the Judge accepted the compensatory damages portion of the verdict, while instructing the jury to determine again, after a further, and minimal, hearing of evidence, the amount of punitive damages. The jury returned then a much higher verdict for punitive damages, which was by far the largest ever awarded in Mississippi. The Tribunal

express the view that the verdict was “excessive”, though not basing this conclusion on comparative US judicial practice, but on the fact that the verdict “appeared” to be “grossly disproportionate” to the damage suffered by the plaintiff.²⁰³ Furthermore, the Tribunal did express the view that the verdict was probably inaccurately calculated, in that it seemingly resulted from a multiplication of damages on overlapping claims.²⁰⁴ The magnitude of the verdict was of relevance because it purportedly demonstrated that the verdict was influenced by bias, prejudice and passion.²⁰⁵

6.2.4.2. *An Assessment of a Judgment on its Formal Qualities*

Another way of bypassing direct review has been to appraise a domestic decision merely in relation to its formal qualities, by limiting the inquiry to issues, such as whether the decision was reasoned, whether it responded to parties’ submissions, or whether it was grounded in some legal basis. The intensity of review under such an approach seems to have been a variable one, ranging from what might not have been more than *prima facie* examinations, to what was clearly the result of a fully-fledged review.

In their assessment of domestic courts’ reasoning, some tribunals appeared thus satisfied with the fact that particular decisions were “reasoned”²⁰⁶ or “motivated”.²⁰⁷ Yet, others considered it important that the impugned decisions were “thoughtful, reasoned and reasonable”,²⁰⁸ that they entailed a “careful review” of lower court decisions,²⁰⁹ that they were “carefully drafted and can be followed in their reasoning from A to Z”,²¹⁰ or that contained reasoning that was “sufficiently detailed”.²¹¹ Similarly, in their assessment of whether impugned decisions addressed the plaintiff’s submissions, investment tribunals sometimes limited themselves to ascertaining that the impugned decisions “gave serious consideration to the positions of each party”²¹² or “expressly incorporated references to each of the parties’ submissions”,²¹³ whereas other times engaged in substantive review necessary to establishing whether a particular decision actually addressed the *petitum*.²¹⁴ And equally on the question of legal basis, the assessment varied between whether the impugned judgment provided “a grounded basis” for the decision,²¹⁵ to whether the judgment was actually grounded on an *adequate* legal basis.²¹⁶

In general, the obligation to provide a reasoned opinion has not been interpreted as imposing particularly high standards on the quality of the reasoning and argumentation. To begin

considered that the trial judge failed to adequately instruct the jury to limit their initial award to compensatory damages, whereas the procedure he adopted could actually have been interpreted as an invitation to increase the verdict. [88]-[96].

²⁰³ *ibid* [113].

²⁰⁴ *ibid* [106].

²⁰⁵ *ibid* [115].

²⁰⁶ See eg *Waste Management II* (n 86), [130].

²⁰⁷ *Spyridion Roussalis* (n 77), [607].

²⁰⁸ *Ares v Georgia* (n 157), [9.3.41].

²⁰⁹ *Rumeli/Telsim* (n 77), [619].

²¹⁰ *Arif v Moldova* (n 1), [453].

²¹¹ *Arif v Moldova* (n 1), [496].

²¹² *Pausbok* (n 81), [629].

²¹³ *Ares v Georgia* (n 157), [9.3.41].

²¹⁴ See eg *GEA v Ukraine* (n 182), [315] (concluding that it was ‘not that the courts of Ukraine never addressed the Claimant’s argument, it is simply that the courts heard those arguments and rejected them’); or *Iberdrola Energia* (n 85), [479]-[481] (finding that plaintiff never had raised some of the issues in domestic proceedings that it had claimed to have) and [489]-[493] (finding that the domestic court had clearly addressed the other relevant issues).

²¹⁵ *Arif v Moldova* (n 1), [496].

²¹⁶ *Flughafen* (n 85), [697]-[699]; or *OI European Group* (n 85), [532].

with, investment tribunals have generally not attached consequences to the fact that a particular judgment was terse, barely reasoned. In *Jan de Nul* (2008), for example, the view was taken that, although the judicial decision in question was “fairly short” and hardly qualified as an “ideal” decision after nearly ten years of proceedings, it was not a mere espousal of a report previously prepared by a panel of experts, and hence, could not be said to amount to a denial of justice.²¹⁷ In *Liman Caspian* (2010), the view was taken that the higher court “might have performed a rather cursory review of the lower court decisions”, but “on balance” no denial of justice was found because “especially on matters of procedure and the assessment of evidence, the practices of final appellate courts differ, and the fact that reasons were succinctly expressed does not entail that the underlying arguments were not considered.”²¹⁸ In *Pausbok* (2011), the possibility that the Supreme Court had upheld a lower court’s decision “without any detailed analysis” was found insufficient, by itself, to constitute a denial of justice, and besides, such qualification of the decision in the circumstances of that case was “an unfair one, bearing in mind the general practice of appeal courts in civil law regimes” and the fact that the decision contained “a solid summary of the views expressed by each party” and “gave serious consideration to the positions of each party”.²¹⁹ In *Arif v. Moldova* (2014), the Tribunal reasoned that, although the lower court’s decision “did barely go beyond the – correct – quotation of procedural norms on which it was based”, the handling of the matter by the court of appeal was conversely “transparent and reasoned”, and therefore concluded that, as “a system”, the Moldavian judiciary gave “overall reasoned decisions”.²²⁰

Furthermore, investment tribunal did not impose any particular demands when it comes to the structure of the courts’ argumentation. In *Iberdrola v. Guatemala* (2012), for example, the Tribunal expressed the view that the judgment of Guatemala’s Constitutional Court “could have been more precise in its concepts, or not have confused, as it appears to have done, the sequence in which certain acts should have occurred in the process”.²²¹ It ultimately concluded, however, that “mere discrepancy with the reasoning of the court decision, with the quality of the judgment, with the persuasiveness of its content or the surprise that the result may cause the claimant, do not constitute a denial of justice.”²²² On the same ground, the Tribunal dismissed the Claimant’s additional argument that the judgment gave the appearance of substantiation, by hiding behind a purported literal interpretation of the relevant legal provisions and resorting to pseudo-arguments, whereas its reasoning was actually non-existent. The Tribunal noted that it was “obviously” not its function to declare a denial of justice simply “because the Court should have applied different interpretive criteria and reasoning.”²²³ Of particular interest in this respect is also the decision in *Philip Morris v. Uruguay* (2016), where the Tribunal rejected a denial of justice claim predicated on the purported failure by the domestic tribunal to separately address each of the arguments raised by the Claimant in a reasoned manner. In the Tribunal’s view, “the fact that this discussion may have fallen under a different heading, or may have not been clearly structured, does not mean that the TCA failed to deal with Abal’s substantive arguments.”²²⁴ Though stressing that the refusal of courts to address a claim can clearly amount to a denial of justice, the Tribunal considered that it was not incumbent on domestic courts to deal with every argument presented to them in order to reach a conclusion; the question, instead, was whether, “in substance”, the

²¹⁷ *Jan De Nul* (n 77), [199].

²¹⁸ *Liman Caspian* (n 77), [383].

²¹⁹ *Pausbok* (n 81), [629].

²²⁰ *Arif v Moldova* (n 1), [447].

²²¹ *Iberdrola Energía* (n 85), [490].

²²² *ibid* [491].

²²³ *ibid* [503].

²²⁴ *Philip Morris* (n 97), [563].

domestic court had failed to decide “material aspects” of the relevant claim, such that the court could be said not to have decided the claim at all.²²⁵

This is not to say that the tribunal’s assessment never transgressed into evaluating the adequacy of the court’s reasoning, including the adequacy of the legal basis on which the decision was grounded. Particularly pertinent in this respect is especially the award in *Flughafen v. Venezuela* (2014) where a decision of Venezuela’s Supreme Court was found to amount to a denial of justice, among other reasons, because the judgment’s reasoning was deemed “manifestly insufficient”.²²⁶ Apart from the fact that the decision omitted any reference whatsoever to an applicable legal basis, the Tribunal considered the Supreme Court’s formal justification for deciding to transfer to the Central Government the administration and control of a local airport in which the Claimant held a concessionary interest to be based on “irrelevant” arguments. Namely, the same arguments that the Supreme Court used in an earlier decision to justify the transfer of the airport’s management to a temporary oversight board, were again used to justify the removal of the management from that same board and its transfer to the Central Government.²²⁷

6.2.5. Evaluating the Modern Standard of Denial of Justice

Despite the growth of investor-State arbitral jurisprudence, one remains rather perplexed as to how indeterminate the standards applicable to determining liability on the ground of denial of justice have remained. With the exception of claims predicated upon undue delays, which are now increasingly measured by yardsticks developed in the context of human rights jurisprudence on the right to a fair trial, most of the remaining denial of justice claims have continued to be determined on the basis of the same loosely formulated standards and formulas commonly applied in pre-WWII jurisprudence: grave irregularities, leading to egregiously wrong judgments that “shock” the arbitrators’ minds. The problem with such ill-defined standards is that they ultimately leave a great deal of discretion to arbitrators deciding each case and their subjective perceptions of “propriety”, with the consequence that one is often left with instances of unreasoned decision-making.²²⁸

With a view to devising a more systematic type of review, some have thus suggested that the starting point should be to evaluate decisions first for their conformity with domestic law, and subsequently to evaluate the conformity of such laws with international standards.²²⁹ This would certainly bring more clarity and structure in the tribunals’ adjudicative process. It would likely be also conducive to improving the rule of law at the national law – to the extent that international courts’ review of domestic courts’ application of domestic law is generally deemed capable of contributing to that end.²³⁰ But as investment tribunals have generally frowned upon

²²⁵ *ibid* [557].

²²⁶ *Flughafen* (n 85), [698].

²²⁷ *ibid* [697]-[699].

²²⁸ For a cogent critique of this practice, see A Bjorklund, ‘Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims’ (2004/2005) 45 *Va J Int’l L* 809, 866ff, who also warns that, in the long run, such ill-defined standards may end up undercutting the legitimacy of international tribunals.

²²⁹ Such two step approach has is part of the ‘sequential review’ proposed by Bjorklund (*ibid*, 873ff). This follows a similar suggestion by Roth (n 53), 184, and eventually also comports with the views of S Montt, *State Liability in Investment Treaty Arbitration* (Hart, 2012), 310ff, who argues more broadly that any meaningful test of arbitrariness in the context of the FET standard must also consider the legality of State behavior from the perspective of domestic law.

²³⁰ See generally A Nollkaemper, ‘Conversations among Courts: Domestic and International Adjudicators’, in CPR Romano, KJ Alter and Y Shany, *The Oxford Handbook of International Adjudication* (OUP, 2015), at 541. Particularly on the claim that investment treaty arbitration itself may provide a check on whether the host State, through its courts, acted in accordance with the rule of law, see further HE Kjos, ‘Domestic Courts under Scrutiny: the Rule of Law as a Standard (of Deference) in Investor-State Arbitration’ in M Kanetake and PA Nollkaemper, *The rule of law at the national and international levels: contestations and deference* (Hart, 2016), 353-382, at 357ff.

the idea that their task would be to conduct anything akin to appellate review, one may doubt whether such propositions are likely to gather support in practice. Indeed, as the preceding section demonstrated, investment tribunals have frequently pretended that they were not in fact exercising substantive review of domestic judgments at all. Still, it is equally clear that one cannot possibly determine that a particular judicial outcome is egregiously wrong or manifestly unjust without making at least some appreciation the domestic courts' application of law.²³¹ As the next section intends to demonstrate, investment tribunals have not in fact desisted from reviewing domestic decisions on their content – even if, when doing so, they often accorded much deference to domestic courts, especially on questions of domestic law.

6.3. Standards of Review Applied to Determining the Propriety of the Judicial Outcome

When determining the propriety of particular judicial outcomes, investment tribunals did not employ a uniform standard of review. On the whole, the standard was essentially a deferential one, but the intensity of the tribunals' scrutiny varied in relation to the issue under review, depending on the information that was available to them, and the expertise that they had in relation to the specific issue. The approaches could be roughly distinguished in relation to whether the dimension of review concerned points of law (6.3.1.), points of fact (6.3.2.), or the exercise of judicial discretion (6.3.3.).

6.3.1. Scrutiny of Courts' Treatment of Points of Domestic Law

An area where investment tribunals commonly accorded considerable deference to domestic courts was in determining whether or not a purportedly erroneous application or interpretation of domestic law was sufficiently egregious so as to amount to a denial of justice. The notion of “egregiousness” has thereby set the parameters of the standard of review. The view was commonly expressed that it was not for investment tribunals to verify in minute detail the correct application of domestic law, but merely to look for errors that are clear or manifest. The presumption thereby was one of domestic legality, meaning that the onus of proving misapplication of the law lies on the claimant.²³² What follows is first an examination of the investment tribunals' scrutiny of domestic law issues which had arisen either in relation to the application of the law to the claim before the domestic court (6.3.1.1), or to the powers of the court adjudicating upon it (6.3.1.2).

6.3.1.1. Points of Domestic Law Relevant to the Claim

In most cases where claims were brought in relation to the propriety of a particular judicial decision from the perspective of substantive issues decided by the court (on questions relating to the dismissal of contractual claims, standing, invalidation of transactions, enforcement of commercial awards etc.), investment tribunals have by and large refrained from forming conclusive views as to what the correct position on a particular matter might have been under domestic law. In some cases, the alleged impropriety was quickly dismissed, without much substantiation. For instance, in *Al Bahloul v. Tajikistan* (2009), the contention was made that the

²³¹ See Z Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63 ICLQ 867, at 882-883, who considers the idea that the content of a judgment merely provides evidence of procedural injustice to be 'nothing more than semantic camouflage for what amounts to a review of the substantive outcome produced by the domestic court. An international court cannot draw inferences from an injustice caused by substantive error unless it has determined that there has actually been a substantive error through an assessment of the applicable domestic law and that it is a particularly grave error.'

²³² *Flughafen* (n 85), [637].

economic court consciously misapplied Tajik law for the purpose of reducing Claimant's interests in a local subsidiary. Upon reviewing the legal basis on which the impugned decision was grounded, the Tribunal found the position taken by the court in question to be "more persuasive" than that taken by Claimant's legal expert and limited itself to concluding that the court's application of Tajik law on this issue was not "malicious or clearly wrong".²³³

In several other cases, however, investment tribunals substantiated their findings by resorting to the test of reasonableness. In view of the legal background of most arbitrators, it may not be surprising that such reasonableness test has frequently been based on what could be called a comparative law-approach.²³⁴ The reasonableness of a domestic decision was sought in whether the same rules or principles would be applied, or similar conclusions reached, in other legal systems. Examples of arbitral review based on such test can be found in several arbitral awards. Particularly paradigmatic in this respect is the award in the *Mondev* case (2002), where the Tribunal had to consider whether a decision of the Supreme Judicial Court (SJC) of Massachusetts dismissing a contractual claim was arbitrary and profoundly unjust because it purportedly involved a "significant and serious departure" from previous jurisprudence. The SJC's decision was premised on earlier authority, including a SJC's own decision of 1954, establishing that a material failure by a plaintiff to put the defendant in breach barred recovery. The Tribunal was of the view that the principle laid down in the judicial precedent relied upon by the SJC was one "*embodied in many other systems of contract law*" and was dealing with a question "*which all legal systems have to face*" (namely, whether an agreement in principle to transfer real property was binding, and whether all the conditions for the performance of such an agreement had been met), and therefore found nothing in SJC's decision "to shock or surprise even a delicate judicial sensibility".²³⁵

Another example is the award in *Mamidoil v. Albania* (2015), where the inquiry turned on the propriety of the Supreme Court of Albania's dismissal of a claim for the reimbursement of allegedly overpaid tax duties. The Supreme Court of Albania dismissed the claim on the ground that the claim was a public law claim under the Customs Code, which therefore required compliance with a mandatory pre-trial administrative procedure, while rejecting the possibility that the claim could also be brought as claim for unjust enrichment under the Civil Code, as Claimant's subsidiary attempted to do. The Tribunal understood that "*Albania – like many other civil law countries – distinguishes between civil courts and administrative courts*", that "*in situations where a private physical or legal person complains under public law about the conduct and decisions of the administration, it has to address its claim first – again like in many other civil law countries – to the administrative body and its hierarchy*", and that "*[i]n Albania – again like in many other countries – tax law is part of the body of public law.*"²³⁶ Against this backdrop, the Tribunal concluded that the Supreme Court's decision was not clearly improper, discreditable or in shocking disregard of Albanian law, considering instead that the judgment was "reasoned, understandable, coherent and *embedded in a legal system that is characterized by a division between public and private law as well as civil and administrative procedures.*"²³⁷ The interesting aspect of the *Mamidoil* award is that the Tribunal expressly ruled out the possibility of adopting a more stringent test than one based on the criterion of reasonableness. In the circumstances of that case, the Claimant invited the arbitrators to evaluate the correctness of the Supreme Court's decision, particularly as the possibility of bringing the reimbursement claim as one based on unjust enrichment had previously been accepted by the court of first instance that initially heard the claim, and there was

²³³ *Al Bahloul v Tajikistan* (n 140), [237].

²³⁴ Indeed, such an approach is one that has been frequently adopted by international adjudicators reviewing the propriety of domestic courts' conduct. See eg *Martini Case* (n 47), 574.

²³⁵ *ibid* [133]; emphasis added.

²³⁶ *Mamidoil v Albania* (n 95), [765]; emphasis added.

²³⁷ *ibid* [769]; emphasis added.

also a dissenting minority in the Supreme Court that considered it possible to bring the claim as a civil law one.²³⁸ The problem, of course, was that the Claimant's and Respondent's legal experts were divided on the question whether the Supreme Court acted in application of the law: while the former opined that the decision deviated from previous case law (though, surprisingly, without providing case materials in support of this opinion), the latter considered that the option of choosing between a civil or an administrative procedure existed only under specific circumstances (as supposedly attested to by another decision of the Supreme Court), which were not met in the case at hand.²³⁹ In such circumstances, the Tribunal deemed

“that it is not its role to make a final judgment over the disputed Albanian legal questions. Both legal experts have given reasoned opinions. The Supreme Court was divided over the correct answers. Both the majority and the dissenting minority have presented reasons for their decision and opinion. It is not the Tribunal's role to take sides. It has also not been given evidence to determine whether the Supreme Court deviated from former court practice.”²⁴⁰

The Tribunal recalled that a claim for denial of justice “must not be confounded with an appeal against decisions of national judiciary” and that it was “not a super-appellate court” and had “no competence to muse over the question of whether the majority of the Albanian Supreme Court was right when it overturned a decision of a first instance court, whether the first instance court had better reasoning or whether dissenters within the Supreme Court had the better reasoning.”²⁴¹

In some instances, comparisons with other legal systems were not explicit, but could be implied from the arbitral tribunal's assessment of a particular conclusion as being a “common” or “not unusual” one. In *Waste Management* (2004), the inquiry revolved around the propriety of Mexican courts' decisions dismissing suits brought by the Claimant's subsidiary Acaverde: one on account of the subsidiary's failure to materially prove the actual indebtedness under a concession contract, and the other because of the failure to first pursue contractual arbitration as required under the same contract. The Tribunal took the view that “[c]ertain of the decisions appear to have been founded on rather technical grounds, but *the notion that the third party beneficiary of a line of credit or guarantee should strictly prove its entitlement is not a parochial or unusual one*. Nor was it unreasonable, given the limitations of the Line of Credit Agreement, for the court in the second proceedings to insist that Acaverde comply with the dispute settlement procedure contained in the Concession Agreement.”²⁴² It therefore concluded that, “however these cases might have been decided in different legal systems, the Tribunal does not discern in the decisions of the federal courts any denial of justice”.²⁴³ In *Liman Caspian v. Kazakhstan* award (2010), the inquiry was on a Kazakh court's decision that was claimed to have wrongfully granted a plaintiff standing to bring a domestic suit against the Claimant. The Tribunal rejected the claim, explaining that “[e]ven if this decision were incorrect as a matter of Kazakh law, the conclusion that the right to bring suit for invalidation of a transaction is associated with the share and passes from a seller to a buyer certainly is not a decision which can be characterized as arbitrary, grossly unfair, unjust, idiosyncratic or involving lack of due process. *The rules governing corporate conduct [...] may often be underpinned by serious legal consequences, such as the voidability of the transaction in question*. In such cases

²³⁸ *ibid* [766].

²³⁹ *ibid* [767].

²⁴⁰ *ibid* [768].

²⁴¹ *ibid* [764].

²⁴² *Waste Management II* (n 86), [129].

²⁴³ *ibid* [130].

the law may well be that the loss lies where it falls.”²⁴⁴ And in the same *Mamidoil* case already discussed above, the Tribunal concluded with respect to another decision of Albania’s Constitutional Court, which reduced the temporary protection granted to Claimant’s local refinery against international competition from one year to six months, that such reduction was “neither extravagant nor unreasonable” and that “in the Albanian context, such a situation does not exceed the limits of acceptability.”²⁴⁵

Then again, in other cases, the analysis was more sophisticated and was supported by actual examples from foreign jurisprudence. An interesting example in this respect is the award in *Frontier Petroleum Services* (2010), where the question arose as to whether Respondent incurred responsibility because Czech courts refused to fully enforce a foreign commercial award against two Czech companies placed under bankruptcy proceedings by deeming such enforcement contrary to Czech public policy. In determining whether the decisions of the Czech courts were “reasonably tenable” in the sense that they applied a plausible interpretation of the public policy ground in Article V(2)(b) of the 1958 Convention,²⁴⁶ the Tribunal expressly referred to decisions of the French Cour de Cassation and the German Bundesgerichtshof, as well as the opinions of academic writers, confirming that the equality of creditors in bankruptcy proceedings and the equitable and orderly distribution of assets were recognized public policy principles sufficient to refuse the enforcement of arbitral awards under the New York Convention.²⁴⁷

Admittedly, the basis of comparison was not always in the commonalities between legal systems; sometimes, the reasonableness test was grounded on other criteria. In *Arif v. Moldova* (2013), for example, the Tribunal referred to economic rationales that seemingly explained the domestic court’s particularly strict application of certain legal requirements. At issue in that case was the propriety of a domestic judicial decision which invalidated an airport lease agreement held by the Claimant’s subsidiary on the ground that no prior approval or authorization for such agreement had been obtained by the State Administration of Civil Aviation as required by law, despite the fact that such approval had been granted subsequently. The Tribunal considered that “[i]t is well possible that courts in jurisdictions with a different legal tradition would have been less formalistic, that they would have reasoned in a more teleological way, that they would have tried to remedy the formal defect by economic considerations. All these arguments are valid in appeal proceedings. They may be better than the ones used by the Moldovan courts. They do not disqualify, however, the national courts’ application to such a degree to be so egregiously wrong that no competent and honest court would use them. This is all the less so, because the argument in favour of an imperative prior authorization is not void of economic sense.”²⁴⁸ Namely, the authorization was intended to guarantee the best and most profitable use of unused State property. Similarly, the Tribunal in *Frontier Petroleum Services* (2010) referred to economic considerations in support of its conclusion that Czech courts’ interpretation of the “public policy” exception under the New York Convention “was not unreasonable or impossible”: had the courts in that case enforced the foreign arbitral award against the bankrupt companies, the

²⁴⁴ *Liman Caspian* (n 77), [365].

²⁴⁵ *Mamidoil v Albania* (n 95), [796].

²⁴⁶ Admittedly, the issue before the Tribunal was not one strictly concerning domestic law, but also the scope of State’s discretion under the 1958 New York Convention not to grant enforcement of a foreign arbitral award. Yet, the Tribunal considered that ‘States enjoy a certain margin of appreciation in determining what their own conception of international public policy is’ and therefore did not find it necessary ‘to determine whether the findings of the Czech courts meet the applicable standard of international public policy, or to determine the precise contents of that standard’; rather, it was sufficient for it to examine whether the Czech courts applied ‘a plausible interpretation’ of the public policy exception under art V(2)(b) of the New York Convention – that is, whether the decision by the Czech courts were ‘reasonably tenable and made in good faith’ ([527]). The issue was therefore one where international law makes *renvoi* to domestic law.

²⁴⁷ *Frontier Petroleum Services* (n 77), [527]-[529].

²⁴⁸ *Arif v Moldova* (n 1), 453.

Claimant would have received preferential treatment in bankruptcy proceedings to the detriment of other creditors.²⁴⁹

A less elaborated reasonableness test was, on the other hand, used in circumstances where the inquiry concerned, not how domestic law provisions were applied to a plaintiff in judicial proceedings, but solely how these were interpreted. In evaluating particular interpretations of law, investment tribunals mostly applied a simple plausibleness test, pursuant to which a particular decision was assessed on its own terms, without there being any specific external rationales introduced. In *Liman*, for example, the Tribunal held that the Supervisory Court of Kazakhstan did not violate the fair and equitable treatment standard by accepting a law that had otherwise been published only in the Russian language as an official publication in terms of the Kazakh Code of Civil Procedure, since in the view of the arbitrators such a conclusion “at least can be considered as plausible”.²⁵⁰ Similarly, the Tribunal in *Arif* (2013) concluded that Moldovan courts’ decisions invalidating the results of a tender that the Claimant’s subsidiary had won did not “document bad faith and a lack of impartiality” and amounted to unfair and inequitable treatment simply because they adopted a narrow interpretation of one of the tender requirements. Having carefully studied the text of the tender specifications in different languages, the Tribunal concluded that the text of the tender, although imprecise, “allows to uphold the restrictive argumentation of the Supreme Court.”²⁵¹ Without seeking to justify the Moldovan courts’ interpretation by reference to external rationales, the Tribunal was simply “convinced that the Moldovan courts did not render decisions that no competent and honest court would have possibly been able to render.”²⁵²

In most of the cases just discussed, the rationale behind the adoption of a deferential approach towards the courts’ determinations of points of domestic law was the understanding that investment tribunals were not to perform appellate appeal.²⁵³

6.3.1.2. Points of Domestic Law Relevant to the Powers of the Judicial Organ

In some cases, the contested points of domestic law related specifically to the powers of judicial organs as such, and were thus relevant to determining the propriety of the exercise by the courts of those powers. On these issues, the approach adopted by investment tribunals in reviewing domestic court’s determinations has somewhat varied.

In some cases, investment tribunals engaged in a more serious scrutiny of domestic legal provisions and actually proceeded to conclusively determine the existence of particular judicial powers. In *Al Bahloul v. Tajikistan* (2009), the allegation was made that the Tajik court violated due process by accepting to hear a claim for annulment of a company board decision after the time frame for such challenges had purportedly already lapsed. The tribunal rejected that part of the claim after it established, for itself, that the applicable domestic statute prescribed no time limit for such challenges.²⁵⁴ In *Unglaube v. Costa Rica* (2012), issue was taken with a ruling by the Supreme Court of Costa Rica, issued in response to an *amparo* petition brought by private environmental activists, which temporarily suspended further development in an area adjacent to a natural park where Claimant’s property was situated. In examining the propriety of the imposition of such a buffer zone, the Tribunal “found” that the National Park Law made no mention of a buffer zone; nor that the possibility of introducing such a zone was ever considered

²⁴⁹ *Frontier Petroleum* (n 77), 530.

²⁵⁰ *Liman Caspian* (n 77), [390].

²⁵¹ *Arif v Moldova* (n 1), [462].

²⁵² *ibid* [463].

²⁵³ *Al Bahloul v Tajikistan* (n 140), [237]; *Waste Management II* (n 86), [129]. *Liman Caspian* (n 77), [364].

²⁵⁴ *Al Bahloul v Tajikistan* (n 140), [224]-[225].

by any of the Respondent's environmental agencies.²⁵⁵ In the view of the Tribunal, the ruling issued by the Supreme Court therefore raised "serious and troubling questions" and appeared to be "surprising and puzzling".²⁵⁶ In *OI European Group v. Venezuela* (2014), the fact that an administrative courts' injunction ordering the temporary occupation of the Claimant's glass production plants was based on other laws than on the 2002 Law on Expropriation for Public or Social Purposes was considered to raise "serious doubts as to its legality."²⁵⁷

A similar approach was notable also in *Dan Cake v. Hungary* (2015), where the Tribunal proceeded to conclusively determine whether the Metropolitan Court of Budapest was justified in deciding not to convene a composition hearing in the context of liquidation proceedings involving the Claimant's subsidiary on account of alleged deficiencies in the subsidiary's request for such hearing. Though the subsidiary had submitted all three of the documents required by law, the Court in that case ordered supplementary filings, listing seven additional requirements to be fulfilled before a composition hearing could be convened. In spite of the limitative language in Hungary's Bankruptcy Act, the Tribunal concluded that there was "some authority" for the proposition that a bankruptcy court had the power to require the submission of documents or information not mentioned in the Bankruptcy Act, provided that such documents were "necessary."²⁵⁸ The Tribunal did not therefore assess whether the bankruptcy court's decision was a reasonable one, but in fact determined whether the court had the power to order the additional documents, basing itself on the opinion expressed in an academic commentary on Hungary's Bankruptcy Act, and on inferences that could be made from an existing decision of another Hungarian court.

In other cases where the existence of specific powers on the part of judicial organs was at issue, the evaluation was founded, instead, on what essentially looked like a test of manifest unreasonableness. Pursuant to such test, investment tribunals seemingly looked only for errors that were clear and manifest and therefore discernible with little effort and without deeper analysis, which is usually possible only in the event of particularly serious improprieties. Illustrative in this respect is the award in *Arif v. Moldova* (2013), where the Tribunal had to evaluate whether the Economic Circuit Court breached fundamental principles of procedure by wrongfully arrogating jurisdiction over domestic suits involving the Claimant's subsidiary. The Tribunal studied the different legal provisions of the Law on Administrative Disputes and the Code of Civil Procedure, noting that the matters seemingly fell within the jurisdiction of both the Economic Court and the regular Court of Appeal, but eventually refused to form a conclusive view on the issue.²⁵⁹ The Tribunal explained that it "is confronted with a complex question of Moldovan procedural law which has been answered differently and contradictorily by the judiciary and by learned experts on Moldovan law. Both interpretations are based on arguments and on the words and objectives of the law. The Tribunal is not in a position and has no competence to take sides in this controversy. If it tried, it would indeed sit as a court of appeal over decisions of the Moldovan judiciary."²⁶⁰ Instead, the Tribunal deemed its role "is limited to determine whether the judiciary has denied justice by applying procedures that are so void of reason that they breathe bad faith", but found no such conduct.²⁶¹

Similar reasoning was also adopted in *Flughafen Zürich & Gestión e Ingeniería IDC v. Venezuela* (2014), in relation to the question whether the taking over by Venezuela's Supreme Court of the

²⁵⁵ *Unglaube* (n 178), [255].

²⁵⁶ *ibid* [231] and [233].

²⁵⁷ *OI European Group v. Venezuela* (2014) [532]. It needs to be noted, however, that the Tribunal refrained from determining whether the injunction amounted to a denial of justice in view of Claimant's failure to pursue local remedies.

²⁵⁸ *Dan Cake v Hungary* (Decision on Jurisdiction and Liability) (ICSID Case No ARB/12/9, 24 August 2015) [113].

²⁵⁹ *Arif v Moldova* (n 1), [474]-[480].

²⁶⁰ *ibid* [481].

²⁶¹ *ibid* [482].

Claimants' case from the regular administrative court (by means of a procedure known as *avocamiento*) occurred in conformity with the applicable law, or whether the Court arrogated its jurisdiction unlawfully, thereby committing a denial of justice. Both Claimants' and Respondent's produced expert opinions providing alternative constructions of the applicable legal provision, but the Tribunal held that it was not necessary for it to decide on the correct interpretation, since the wrongful act of denial of justice was, in its view, "reserved for situations in which the courts have flagrantly violated the law, not for doubtful situations in which you can legitimately defend different interpretations of the applicable rules".²⁶² Finally, it is worth noting that a similarly deferential approach was sometimes adopted in reviewing the scope of powers of other organs related to the administration of justice. In *Jan de Nul* (2008), the Tribunal thus refused to review whether a panel of experts convened as part of the domestic legal proceedings had allegedly exceeded its authority by investigating on the issue of liability of Suez Canal Authority, on the ground that, save in the event of "discrimination or severe impropriety", an investment tribunal in the context of a claim for denial of justice "does not review the scope of the jurisdiction of the national authorities or the application of the law."²⁶³

6.3.2. Scrutiny of Courts' Treatment of Points of Fact

As to the standard of review used to scrutinize domestic decisions in relation to points of fact, the practice of investment tribunals has been one of considerable variation. Decisive in this respect seemed to have been whether the investment tribunal in question had access to the factual record underpinning the domestic judicial decision. In circumstances where an appraisal of the factual circumstances was not possible, the tendency in the tribunals' assessment was to adopt a deferential approach. The latter was noticeable for example in the Tribunal's inquiry in *Arif* (2013) whether the Moldovan judiciary breached fundamental principles of the procedure by allowing a Claimant's competitor to bring a suit in spite of purportedly not having respected a mandatory preliminary application procedure. Noting that it "is not in a position and has no competence to retrace and reappraise the factual evidence," the Tribunal concluded that the domestic court's handling of evidence did not violate fundamental principles of procedure – referring merely to the fact that three levels of courts accepted the application as valid.²⁶⁴ Similarly, in relation to the question whether the courts failed to take into account that plaintiff had not respected a mandatory limitation period, the Tribunal concluded that "it cannot find an egregious misapplication of procedural law and a procedure which is tainted by bad faith" in circumstances where the Moldovan Supreme Court confirmed that the first instance and appellate courts had correctly decided to accept the late claim, noting again that it "is not in a position and no competence to retrace and reappraise the facts."²⁶⁵

If, however, the material evidence that was available to the domestic court will also be available to the reviewing court, there is authority for the proposition that the intensity of the tribunal's review will increase. Attesting to this is the award in *Azinian v. Mexico* (1999), where the arbitrations effectively engaged in partial *de novo* review of Mexican court judgments upholding as legally valid the annulment of the concession contract held by the Claimant, before they concluded that those courts had not committed a denial of justice. The contract in question, which related to the collection and disposal of waste in the Mexican city of Naucalpan de Juarez, was annulled at some point by the City authorities, primarily due to misrepresentations that the investors was found to have made in the process of obtaining the concession. The Tribunal concluded that the significant evidence of misrepresentation brought before it was "sufficient to

²⁶² *Flughafen* (n 85), [687].

²⁶³ *Jan de Nul* (n 77), [206].

²⁶⁴ *Arif v Moldova* (n 1), [485]-[486].

²⁶⁵ *ibid* [489].

dispel any shadow over the *bona fides* of the Mexican judgments.”²⁶⁶ In reaching such conclusion, the Tribunal considered “one need to do no more than to examine the twelfth of the 27 irregularities, upheld by the Mexican courts as a cause of nullity”, namely the contention that the City had been misled as to the investor’s capacity to perform the concession.²⁶⁷ Having examined the facts surrounding the presentation of the project to the Mexican authorities and the signing of the concession contract,²⁶⁸ the Tribunal found nothing in the courts’ application of Mexican legal standards for annulment of public service contracts that appeared “arbitrary or unsustainable in light of the evidentiary record. To the contrary, the evidence positively supports the conclusions of the Mexican courts.”²⁶⁹ Admittedly, this was not a fully-fledged review, as the Tribunal only reconsidered only one aspect of the factual evidence underpinning the domestic courts decisions. This was extensively available to the Tribunal, given that the Claimants centred their case on the contention that the contract termination amounted to an expropriation of their contractual rights and a violation of the minimum standard of treatment. On the other hand, the Tribunal did not need to engage in assessing the conformity of the domestic decisions with Mexican law, since the Respondent’s evidence on the relevant standards for annulment of concessions under Mexican law (particularly on the question whether a public service concession issued by municipal authorities based on error or misrepresentation was invalid under Mexican law) was not challenged by the Claimants and the Tribunal could simply accept it.²⁷⁰

An interesting instance of *de novo review* occurred in *Jan De Nul v. Egypt* (2008), where the Tribunal undertook its own examination as to the existence of alleged fraud on the part of Egypt’s Suez Canal Authority (SCA) for the purpose of establishing whether Egyptian courts committed a denial of justice by purportedly failing to remedy that fraud. The Claimants in that case entered into a dredging contract with the SCA. After completion of the dredging works, they complained of having been fraudulently misled with respect to the quantity and composition of the material to be dredged, first before the Egyptian courts to which they had turned to in an effort to obtain compensation, and later before an investment tribunal where they also complained of denial of justice. The Tribunal considered that, in order to determine whether the domestic judgment was “improper and discreditable” because it had failed to remedy the fraud, it first had to establish whether there was a fraud. This required it to look to the facts preceding the judgment and analyse them “through the prism of the claim for denial of justice”.²⁷¹ What this entailed in practice was nothing else than taking on the role of an Egyptian domestic court. For, whereas the parties argued their case on the basis of facts, the Tribunal resorted in its analysis to the rules on fraud under Egyptian law, from which it deduced that intent was a necessary element and that there was no fraud when the alleged victim could have known about the relevant facts by another means. As admitted by the Tribunal, this was a high threshold to meet, but it simply reflected the demanding nature of the concept of fraud and of a claim for denial of justice.²⁷² Indeed, after having thoroughly examined the facts, the statements, and reports on record, and having heard the leading persons involved in the negotiation and performance of the contract, the Tribunal could not establish to its satisfaction that the SCA committed fraud. While it was obvious to the Tribunal that the SCA, although obliged, did not disclose important information relating to the volume of dredging works during the tender process, the Tribunal considered that Claimants were nevertheless able, as “recognized professionals in their field”, to obtain such information by different means. Furthermore, there was no evidence of SCA having prior knowledge of the

²⁶⁶ *Azinian v Mexico* (n 79), [103].

²⁶⁷ *ibid* [104].

²⁶⁸ *ibid* [106]-[119].

²⁶⁹ *ibid* [120].

²⁷⁰ *ibid* [105].

²⁷¹ *Jan De Nul* (n 77), [207].

²⁷² *ibid* [208].

composition of the dredging works.²⁷³ Having thus determined, on the basis of its own review of available evidence, that no fraud had been committed, the Tribunal was eventually able to avoid reviewing the court decision itself. But by pursuing such analysis, the Tribunal did show its readiness to scrutinize the domestic court's decision as if it were a court of appeal.

6.3.3. Scrutiny of Courts' Exercise of Discretionary Powers

Another issue on which divergence of approaches was noticeable concerned the scrutiny applied by investment tribunals to evaluate the exercise by domestic courts of their discretionary powers. While the overall approach could generally be said to have been one of deference,²⁷⁴ the intensity of the scrutiny varied, apparently depending on the extent to which the exercise of discretion touched on issues of domestic law. The most striking example of deference that an investment tribunal could accord to a domestic court's exercise of discretionary powers could be found in the *Loewen* case, where the refusal on the part of the Mississippi courts to relax what appeared to be an unreasonable bonding requirement under Mississippi law, was not found to have transgressed the minimum standard of treatment mandated by Article 1105 NAFTA, in spite of the fact that such refusal effectively prevented the Claimant to pursue its domestic appeal. Had Loewen wanted to stay the execution of a judgment that was rendered against it in a contractual suit with one of its competitors, it would have had to post a *supersedeas* bond in the sum of no less than US\$625 million, equalling 125 per cent of the original verdict. Unable to underwrite such amount, Loewen petitioned the trial court to reduce the bond, relying for that purpose on the Mississippi Court Rules, which empowered the court to grant a stay of enforcement upon a bond other than that normally required, in case of "good cause shown" or when "appropriate". However, Loewen's motion was rejected by the trial judge on the ground that the general purpose of a *supersedeas* bond was allegedly to give absolute security to the party affected by the appeal, which in the judge's view necessarily covered the entire verdict. The judge furthermore had no reason to believe that the stay would not result in harm to the plaintiff's interest and saw no viable alternative for securing this interest others than by demanding that a full bond was posted.

In subsequently scrutinizing the trial judge's dismissal of Loewen's motion, the NAFTA arbitrators acknowledged that they would have reached a different decision had the same motion been before them. Namely, they "would not read the Rules as having the purpose of securing absolute security for the verdict awarded, more particularly when (a) there was a strong case for regarding the verdict as excessive and one which should be set aside, (b) the provision of absolute security was beyond the capacity of the appellant and (c) the prosecution of an appeal without a stay would work an injustice and in all probability foreclose the possibility of an appeal."²⁷⁵ Furthermore, the potential harshness in the way the bonding requirement sometimes operated seemed to them "a very good reason for interpreting the discretion conferred by Rule 8(b) more liberally than it was construed by the Mississippi courts."²⁷⁶ Yet, the arbitrators did not wish to replace their own construction of the Mississippi Court Rules with that of the Trial Judge: "If one accepts this interpretation of the Rules, and Judge Graves was bound by the interpretation, his decision did not reflect an error in principle."²⁷⁷ Furthermore, to the extent that denial of Loewen's

²⁷³ *ibid* [221]-[227] and [245]-[250] respectfully.

²⁷⁴ In some cases, the standard can be difficult to ascertain. See eg *Ares v Georgia* (n 157), [9.3.39], where the Tribunal found that 'on the facts' the domestic court's decision to hold Claimant's late-filed appeal to be inadmissible did not constitute an offence to judicial propriety. From this statement, it is difficult to gauge whether the Tribunal reached such decision over a correctness or reasonableness test.

²⁷⁵ *Loewen* (n 75), [185].

²⁷⁶ *ibid* [186]-[187].

²⁷⁷ *ibid* [184].

motion produced an “unjust result”, the arbitrators seemed to have been of the opinion that this was produced by the Rule itself, not because of the way the latter was applied. In that respect, the arbitrators found no lack of due process, noting that the trial judge took into consideration the various factors relied upon by the parties and, after weighing them, came up with a decision in the plaintiff’s favour. Hence, the ruling of the Trial Judge was found to be “at worst an erroneous or mistaken decision”, but not one transgressing the minimum standard of treatment.²⁷⁸

Other investment tribunals adopted a similarly deferential approach in examining the domestic court’s treatment of procedural issues before them. In *Mondev* (2002), the Claimant’s challenge of the propriety of the Supreme Judicial Court’s decision for allegedly failing to have remanded certain questions of fact to the jury, was dismissed on the ground that “[q]uestions of fact-finding on appeal are quintessentially matters of local procedural practice.”²⁷⁹ The Tribunal explained that, except in “extreme cases”, it did not understand how the application of local procedural rules could violate the minimum standard of treatment, adding that pursuant to the Claimant’s approach “NAFTA tribunals would turn into courts of appeal, which is not their role.”²⁸⁰ Equally deferential in reviewing a domestic court’s exercise of discretionary powers was the Tribunal in *Liman Caspian* (2010). Hence, the Tribunal did not find the Kazakh courts’ treatment of a specific statement as evidence and their refusal to base the decision on it as offensive to judicial propriety, although it did consider the treatment surprising. The Tribunal explained that its task did “not extend to the question whether the Kazakh courts applied the Kazakh provisions on withdrawal of claims correctly or in a persuasive manner”, but was restricted to examining whether the domestic decision breached Respondent’s obligations under the ECT, by being arbitrary, grossly unfair, unjust or idiosyncratic or involving lack of due process. Similarly, on the issue whether Kazakh courts improperly refused to consider the minutes of a shareholder meeting presented to them by the Claimant, the Tribunal admitted that their treatment of the minutes “might indeed have violated the Kazakh law provisions on the consideration of evidence”, but nonetheless held that, “particularly in view of the discretion courts have in the evaluation of evidence”, the Claimants have not met their burden of proving arbitrariness in the consideration of the minutes or else a misapplication of domestic law to such an extent that it attained the threshold for a breach of international law. This, notwithstanding the fact that Kazakh courts did not give any reasons for ignoring the minutes, nor did the Tribunal view the reasons laid out in this respect by the Respondent as entirely convincing.²⁸¹

Less restrained, on the other hand, was the Tribunal in *Jan De Nul* (2008), in inquiring whether the joinder of two cases in the domestic legal proceedings pursued mainly dilatory purposes, and whether the domestic court’s appointment of a new panel of experts only occurred as a pretext to overrule the unfavourable findings of a previous panel of experts. As to the former, the Tribunal formed its own idea as to the rationale for the joinder (noting that, had the contract which formed the basis of the claim been declared void in the first case, this would have had consequences on the second case), which led it to conclude the joinder did not “offend a sense of judicial propriety”.²⁸² As to the latter, the Tribunal considered all the underlying facts, including the conduct of the Claimant’s joint venture in those proceedings, before deciding that the appointment of a new panel of experts had not been arbitrary, or had shown a breach of due process.²⁸³

²⁷⁸ *ibid* [189]. For the same reason, the subsequent decision of the Supreme Court of Mississippi finding that the trial judge had not abused its discretion was also found not to have transgressed the minimum standard of treatment. [196]-[197].

²⁷⁹ *Mondev* (n 78), 136.

²⁸⁰ *ibid*.

²⁸¹ *Liman Caspian* (n 77), [377].

²⁸² *Jan De Nul* (n 77), [200].

²⁸³ *ibid* [201].

In a similar way, the Tribunal in *Dan v. Hungary* (2015) showed less restraint in probing whether the production of information or documents not otherwise required by the Hungarian Bankruptcy Law was indeed “necessary” to the extent that the absence of such information or documents therefore justified the refusal on the part of the Metropolitan Court of Budapest to convene a composition hearing in the context of liquidation proceedings. The Tribunal explained that its assessment whether or not any of those documents were necessary would not be based on a test of correctness:

“It is not the task of this Tribunal to determine whether it agrees, or disagrees, with the Metropolitan Court of Budapest as to whether the items required were indeed necessary. The Tribunal is not a court of appeal. A mere disagreement with what the Metropolitan Court of Budapest decided on one or another point would not establish that the decision was unfair or inequitable. However, the Tribunal might regard the decision to be unfair or inequitable if it found that some of the requirements were *obviously unnecessary or impossible to satisfy, or in breach of a fundamental right*, having in mind that since many employees had been laid off by the liquidator, the factory was not running at full capacity, as underlined in the request, so that unnecessarily postponing the convening could but ruin the possibility of a successful hearing, thereby dooming the investment to disappear.”²⁸⁴

Applying this deferential test, the Tribunal came to the conclusion that the decision was rendered “in flagrant violation” of the Hungarian Bankruptcy Act, having found that *all* of the seven requirements, upon which the Metropolitan Court of Budapest had purported to condition the mandatory convening of the composition hearing, were unnecessary; two of them even being in direct violation of the Claimant’s creditor rights, and at least one of them impossible to satisfy within a reasonable time.²⁸⁵ By thus requiring the Claimant’s subsidiary to submit a number of documents that were “not required by the law and were obviously unnecessary”, the Tribunal could not but conclude that the Metropolitan Court’s decision was such that it “shocked” a sense of juridical propriety and amounted to a denial of justice.²⁸⁶

6.3.4. Technique for Discounting the Relevance of Improprieties

Finally, the present analysis would not have been complete without mentioning an argumentative technique that has occasionally been used for discounting the relevance of purported improprieties in domestic courts’ reasoning. This is the technique whereby alleged improprieties are discarded as irrelevant through attributing them the status of *obiter dictum*.

An early application of such an argumentative technique can be found in *Mondev* (2002), in the context of the Tribunal’s appraisal of the pronouncements made by the Supreme Judicial Court of Massachusetts in dismissing LPA’s contractual claims. The domestic court rejected those claims on the ground that LPA had failed to put the City in breach, referring to a dictum of Justice Holmes that “[m]en must turn square corners when they deal with the Government.”²⁸⁷ The Tribunal acknowledged that, to the extent that this might suggest that governments were not subject to the same rules of contractual liability as are private parties, the dictum “might raise a delicate judicial eyebrow”, since a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 NAFTA on the minimum standard of treatment; however, in the Tribunal’s view, the Court’s remark “was at most a subsidiary reason for a decision founded on normal principles of the Massachusetts law of contracts, and the SJC expressly disclaimed any intention to absolve governments from

²⁸⁴ *Dan v Hungary* (n 258), [117]; emphasis added.

²⁸⁵ *ibid* [142]; for the Tribunal’s analysis, see [119]-[139].

²⁸⁶ *ibid* [145].

²⁸⁷ *Mondev* (n 78), [130].

performing their contractual obligations. In its context the remark was merely supplementary and was not itself the basis for the decision.”²⁸⁸

Similar argumentative moves could also be observed in other awards. In *Sergei Pausbok v. Mongolia* (2011), the argumentation was employed in relation to a declaration of the appellate court that a particular custodial agreement, which the Claimant’s gold mining company had entered into with the Central Bank of Mongolia, may have been an illegal transaction. The Claimant alleged that, since the consequence of such finding was that the whole transaction was null and void, this necessarily meant that the appellate court’s decision upholding the tax liability in relation to that agreement was clearly unjust and grossly erroneous so that it constituted a denial of justice. The Tribunal rejected this part of the claim, on the ground that the court’s declaration was “introduced by the Court as a supplementary reasoning but that it does not constitute the rationale for the decision.”²⁸⁹ Along similar lines, the Tribunal in *Philip Morris v. Uruguay* (2016) downplayed the fact that the domestic administrative court made reference in its judgment to the evidence of an expert that was not relied upon by the Claimant, but was part of the record of proceedings in the challenge filed by a different party against the same regulatory measure, by noting that “while it may be regrettable that there was such a reference in Abal’s judgment, it was not in the dispositive section and it can be understood, as the Respondent argues, as simply informing the context of the MPH decision to adopt the SPR, not as a key part of the reasoning.”²⁹⁰

6.4. Conclusions

What can one make out of this varied practice of investment tribunals? Compared to the various arbitral awards of the nineteenth century, and the diverse practice of mixed claims commissions that proliferated in the early twentieth century, in the investment arbitration era, the responsibility of the States has relatively rarely been engaged on account of denial of justice. Indeed, one can still count on one hand those instances in which denial of justice had been established in recent times – this being limited to the cases of *Victor Pey Casado, Flughafen, Dan Cake*, and most recently, *Chevron v. Ecuador*.²⁹¹ Does this mean that investment tribunals have become more deferential towards the conduct of domestic courts? Or have the standards against which the administration of justice is to be measured become less demanding?

There is no evidence that investment tribunals have come to treat domestic courts with greater circumspection than international adjudicatory bodies in the past. One thing that changed is probably the quality of administration of justice in many countries of the world. Though many of them may still face challenges in establishing robust judicial systems, at least when compared with the situation from over a century ago, the rule of law has *in general* improved in many parts of the world. For one, unlike foreigners in the past, investors today are rarely prevented from obtaining access to judicial remedies. The problem lies usually with the celerity with which justice is administered and with the oft-present corruption. Have investment tribunals then become at least more tolerant towards judicial delays? One needs to bear in mind that the context in which denial of justice claims are presented today differs significantly from the situations in the past. Much of the early jurisprudence on denial of justice related namely to the treatment of the individual alien, particular in the context of administration of criminal justice and the alien’s

²⁸⁸ *ibid* [134]; original footnotes omitted.

²⁸⁹ *Pausbok* (n 81), [628].

²⁹⁰ *Philip Morris* (n 97), 565,

²⁹¹ It is not surprising then that some have considered the guarantee against denial of justice to imply a ‘very limited scope of protection’. See R Dolzer, ‘Local Remedies in International Treaties: a Stocktaking’ in DD Caron, SW Schill, A Cohen Smutny & EE Triantafylou, *Practising virtue: inside international arbitration* (OUP, 2015), 280-291, at 290.

physical security in general. It had little to do with the treatment of foreign investors or investments, as we understand them in present times. In contrast, most of the claims predicated on purportedly wrongful judicial conduct today arise in relation to much more complex commercial disputes. These changed circumstances may arguably have been playing a role in the assessment of such claims.

There is no indication that the high threshold that has usually been required for a finding of denial of justice would have anything to do with the imposition of less stringent standards against which the adequacy of a State's system of administration of justice will be measured. The demand that only *grave* irregularities in domestic proceedings and only the most *egregiously* wrong judgments engage the responsibility of the state does not come from present day arbitral practice. These are standards that have been well-established in the pre-WWII jurisprudence already. Could it then be that the *application* of those standards has been more stringent than before? This is a claim that is difficult to test. As pointed out, the main problem with the denial of justice standards is precisely in the fact that they are ill-defined. What is grave and egregious ultimately rests on the adjudicators' perception of "propriety" in general, leaving thus a great deal of discretion to arbitrators in deciding each case. In the end, despite the ever-increasing case law on denial of justice in the context of investment arbitration, the general standards against which the adequacy of a State's administration of justice is measured continue to remain imprecise and susceptible to the subjective appraisal of the arbitrators in any given case.

As this chapter further demonstrated, there is no indication that the conduct of domestic organs would not have been subject to scrutiny, sometimes even intensive one. Surely, in line with the oft-expressed admonition that they are not courts of appeal,²⁹² investment tribunals frequently adopted a deferential approach when reviewing domestic court's findings on issues of domestic law. In some cases, however, they equally did not desist from proceeding to making conclusive determinations of issues of domestic law, sometimes even over a standard of correctness, and while engaging in *de novo* review. Thus, despite not purporting to be courts of appeal, they frequently were doing something that was suspiciously similar to that.

In view of the rather feeble prospects for successfully holding a State liable on account of denial of justice, it is not surprising that investors have increasingly been turning to other standards of treatment prescribed by investment treaties, in order to obtain redress for the injuries that they perceived to have suffered at the hand of the local judiciary. The next chapter explores how successful investors have been at that.

²⁹² cf. *Azinian* (n 79), [99]; *Mondev* (n 78), [126]-[127]; *Loeven* (n 75), [134]; *Waste Management II* (n 86), [129]; *Jan De Nul* (n 77), [209]; *AMTO* (n 80), [80]; *Helnan v Egypt (Award)* (ICSID Case No ARB/05/19, 3 July 2008) [106]; *Liman Caspian* (n 77), [274], [325]; *Apotex* (n 82), [278]; *Oostergetel v Slovakia* (n 77), [291], [299]; or *Arif v Moldova* (n 1), [441].

7. STATE RESPONSIBILITY FOR VIOLATIONS OF SPECIFIC TREATY STANDARDS

Denial of justice may have been the most common way through which the State's responsibility towards foreign investors has been engaged on account of the conduct of its judiciary. But does this mean that a State's responsibility necessarily exhausts itself in the concept of denial of justice? The practice of investment tribunals suggests the contrary: through their acts or omissions, domestic courts were taken to be equally capable of violating other standards of treatment prescribed by investment treaties. The purpose of the present chapter is to explore how these specific treaty standards have been construed and applied in relation to judicial conduct. Ultimately, the aim is to determine how stringently these standards could be said to operate – or better, how demanding the proof of their violation is, especially when compared to the high threshold that is generally required for a finding of denial of justice.

The succeeding sections of this chapter discuss the different categories of investment treaty obligations that have proven to be, or else deemed to be capable of engaging the responsibility of the State through the intermediary of the courts (7.2.-7.6). The discussion is preceded by some preliminary considerations as to how one can conceptually distinguish violations of specific treaty standards from the delict of denial of justice (7.1.), and is concluded with an analysis of the standard of review applied by investment tribunals in determining whether the said obligations have been breached (7.7). The chapter will demonstrate that investors have been increasingly successful in invoking the responsibility of host States on account of violations of concrete treaty standards. Such standards have namely been taken to provide investors with stronger protections against judicial misconduct than the traditional standard of denial of justice.

7.1. Denial of Justice Distinguished from Violations of other Treaty Standards

The obligation not to deny justice is not the only international obligation incumbent upon judicial organs; neither is every act or omission attributable to the judiciary and incompatible with a State's international obligations a denial of justice.¹ These distinctions were readily recognized in arbitral practice,² as well as State practice more broadly,³ even if in the classic writings of the early twentieth Century, disagreements existed as to the line dividing denial of justice from other wrongs thus occasioned by the judiciary. In the view of a scholar who systematically classified various types of obligations incumbent upon judicial organs, Eustathiadès, the division was essentially to be drawn between, on the one hand, the *general* international obligation not to commit denials of justice under customary international law; and on the other hand, *special* obligations that could be incurred either by treaty or general custom and which would typically have the effect of prescribing or proscribing the exercise of jurisdiction in specific cases (as in the

¹ cf AV Freeman, *The international responsibility of states for denial of justice* (Longmans 1938), 40-41.

² See especially *Martini Case (Italy v Venezuela) (Award)* (3 May 1930), reproduced in (1931) 25 AJIL 554, where Venezuela was held responsible for a decision of its Court of Cassation, which was found to be incompatible on several points with an international arbitral award previously rendered in accordance with an international treaty to which Venezuela was a party (see especially 577, 580, 581), but which was not otherwise found to amount to a denial of justice (569-76). In the same award it was further accepted that Court of Cassation could have rendered Venezuela also responsible for a violation of the 1861 Treaty of Commerce between Italy and Venezuela with respect to certain provisions of that treaty relative to the prohibition of monopolies (see 564-65).

³ See 1930 Committee on Codification, bases for discussion 5 and 6.

case of treaties regulating privileges and immunities of State agents), or requiring the pronouncement of a judicial decision containing a specified result (as in the case of extradition treaties requiring respect of the “specialty doctrine”).⁴ Freeman, in contrast, suggested in his seminal treatise that the dividing line ought not depend on the source of the obligation, but on its nature. Accordingly, the proper criterion to be resorted to in distinguishing situations of denial of justice from other international wrongful acts occasioned by judicial conduct was whether the conduct complained of “infringe[d] any international rule aiming, either wholly or in part, at the legal protection of the rights of foreigners.”⁵

The problem with Freeman’s conception is that, in the context of modern investment treaties, infractions constituting a denial of justice would then necessarily include judicial acts or omissions that violate other discrete standards of treatment. For what would, for example, the omission to guarantee freedom of monetary transfers, or the failure to provide adequate compensation for expropriated property, be other than the infringement of international rules “aiming [...] at the legal protection of the rights of foreigners”? Adhering to Freeman’s conception would therefore result in a conflation of denial of justice with violations of other investment treaty obligations, thus giving rise to important questions, such as whether the high threshold for a finding of denial of justice ought therefore be equally applicable to establishing whether the domestic judiciary violated other standards of treatment, or whether the principle of judicial finality be also applied to determining claims relating to violations of those discrete standards.⁶ The answer to these questions essentially depends on the nature and character of the investment treaty obligation in question, which can be more specific and exacting than the more general and fundamental obligation of providing a system of justice that adequately protects the rights of foreigners, in the nonfulfillment of which denial of justice finds emanation. An automatic transposition of the standards of denial of justice to determining violations of other treaty obligations is thus not necessarily warranted, even if in reality it may often be necessary, such as in circumstances where the wrongful conduct of domestic courts becomes a necessary legal predicate of a treaty claim, and the standard of denial of justice is (out of convenience) applied as a measure of wrongfulness.

At the level of principle, there is no question that violations of concrete standards of treatment incumbent upon a State under an investment treaty cannot materialize through the intermediary of the courts. As organs of the State, courts are obviously capable of engaging the latter’s responsibility on account of conduct which is not in conformity with the State’s international obligations.⁷ A factor of relevance in this respect is solely whether the obligations in question are of such a nature that they are also amenable to being violated through the conduct of domestic courts; for, not all international obligations invariably impose demands on how domestic courts should conduct themselves.⁸ The extent, to which particular obligations will be

⁴ K Eustathiadès, *La responsabilité internationale de l’État pour les actes des organes judiciaires et le problème du déni de justice en droit international* (Pedone 1936), 67-68.

⁵ Freeman (n 1), 50-51.

⁶ This is not to say that one cannot find traces of such thinking in existing jurisprudence. See eg *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi I) (Award)* (ICSID Case No. ARB/97/3, 21 November 2000) [80] (categorizing under the rubric of denial of justice instances of denial of access to courts, unfair treatment in those courts, judgments that are substantively unfair, as well as denial of ‘rights guaranteed to French investors under the BIT by the Argentine Republic’).

⁷ So much has also been accepted by investment tribunals. See eg *Arif v Moldova (Award)* (ICSID Case No ARB/11/23, 8 April 2013) [439]; or *Eli Lilly and Company v The Government of Canada (Final Award)* (ICSID Case No UNCT/14/2, 16 March 2017) [221].

⁸ To provide a random examples: a treaty obligation requiring parties to respect the immunity of diplomatic agents from the criminal jurisdiction of the receiving State (such as Art 31(1) of the Vienna Convention on Diplomatic Relations) will more likely be engaged by judicial conduct than a treaty obligation requiring parties to cooperate for the conservation and sustainable use of biological diversity (such as Art 5 of the Convention on Biodiversity).

incumbent upon judicial organs, will depend on their nature and character, as well as the material scope of their regulation. A great many of investment treaty standards are probably such that, under circumstances, could be construed as requiring specified conduct on the part of the judiciary. This is but the necessary consequence of, on the one hand, the fact that the very object of those standards is the protection of investments; and on the other hand, the fact that those investments are grounded in proprietary rights governed by host State law, and thereby subject to the adjudicatory jurisdiction of host State's courts, which are thus obviously capable of affecting those investments. In practice, of course, violations of some treaty obligations are more likely to materialize through the intermediary of the courts than violations of others – be it only because judicial organs may less often have dealings with the foreign investor than other State organs.

The purpose of the following sections is to examine those investment treaty obligations that have often been engaged in practice on account of acts or omissions by the judiciary, or that, due to their nature, are more likely than others to eventually be engaged by such acts or omissions. The analysis begins by discussing obligations entailing the maintenance of a judicial system of a particular kind – a category of obligations most susceptible of serving as a basis of claims predicated upon judicial conduct, given that the nonfulfillment of such obligations can usually be appreciated only through individual cases of treatment by domestic courts (7.2.). The analysis then proceeds to discuss a category of investment treaty obligations which, though not specifically directed at the judiciary, have often been engaged on account of judicial action, due to the fact that the courts, in their ordinary exercise of judicial functions, are susceptible of interfering in the rights that form the object of protection of those obligations. For practical purposes, the discussion separately addresses the problem of judicial expropriations (7.3.) and other treaty obligations aimed at providing legal and economic security to investments (7.4.). The remainder of the analysis is devoted to examining treaty obligations that, due to their nature and character, lend themselves to application in the judicial context – even though as such are not any more likely to be violated by the acts or omissions of judicial organs than by those of other State organs. For ease of discussion, the analysis in this respect separately discusses obligations that are capable of being construed as requiring specific treatment in judicial proceedings (7.5.), and obligations that are better disposed of being interpreted as requiring specific judicial outcomes (7.6.), although, at times, such distinction can appear somewhat artificial.

7.2. Obligations to Provide a System of Adequate Judicial Protection

As already discussed in Chapter 6, denial of justice was properly understood as a failure to provide a system of justice that adequately protects the rights of foreigners.⁹ The provision of such system was an essential element of the “established standard of civilization”,¹⁰ and an indispensable component of the protection that a State owed to foreign nationals and their property as part of the minimum standard of treatment under customary international law that developed in the nineteenth Century.¹¹ In the course of the twentieth Century, however, this minimum standard of treatment – which, in practice, as explained in chapter 2, turned out not to be one, but a set of (loosely defined) standards aimed at ensuring adequate protection to the life, liberty, and property of foreigners¹² – began to find concretization in specific standards of

⁹ See *supra* 6.1. cf also *Arif* (n 7), [432]-[434], [445].

¹⁰ See GW Gong, *The Standard of 'Civilization' in International Society* (Clarendon 1984) 15, 18.

¹¹ M Paparinskis, *Minimum Standard of Treatment* (2013), 46ff.

¹² See eg G Schwarzenberger, ‘The Protection of British Property Abroad’ (1952) 5 *Current Legal Problems* 295, at 298, where the duty to comply with the minimum standards of international law was described as follows: ‘In particular, the organization of every State must correspond to reasonably defined minimum requirements of the rule of law in the Anglo-Saxon sense or of the Continental *Rechtsstaat*. States must, for instance, provide for an independent judiciary. Interference with the property of foreigners is permissible only in the exceptional case of expropriation, that is to say, in circumstances

treatment that capital-exporting states began to include in their commercial, and later predominantly investment treaties. The treaty-drafters of the 1950s and 1960s articulated three specific rules which, in their view, flowed from the “well-established general principle of international law that a State is bound to respect and protect the property of nationals of other States”: namely, the obligation of assuring property fair and equitable treatment, the obligation to provide most constant protection and security, and the obligation to ensure that property is not impaired by unreasonable or discriminatory measures.¹³ To these specific rules, which since then have commonly been included in a single treaty provision, a separate standard was added which articulated the customary obligations concerning the conditions under which foreign property could be taken (i.e. what was known as the Hull formula).¹⁴ Curiously, though the newly formulated treaty standards attempted to buttress or improve the generic and loosely defined obligations under the minimum standard of treatment, none of them specifically addressed the question of the foreigner’s right of access to domestic judicial procedures, or more concretely defined the treatment that the foreigner was to receive at the hands of the judiciary.

As already noted in the previous chapter, in the practice of investment tribunals, the prohibition of denial of justice has chiefly found concretization under the principal of those treaty standards – that of the fair and equitable treatment. This development was not an entirely logical one, however, given that the FET standard, as originally formulated, was the one least considered to directly embody the elements of the minimum standard of treatment; the benefits of the latter were rather held to be embodied in the form of the positive obligation to ensure the “most constant protection and security”,¹⁵ which – as already explained in chapter 2 – had a much longer pedigree in the treaty drafting practice of the capital exporting states.¹⁶ But of greatest significance in this respect is perhaps the conceptual shift that the application of the denial of justice standard through the FET standard has brought about. While the delict of denial of justice was originally conceived as the nonfulfillment of a *positive duty* incumbent upon states under general international law, in the context of the FET standard, the prohibition of denial of justice has essentially been operating as a *negative duty* – as the obligation to abstain from treating investors unfairly and inequitably by denying them justice.¹⁷

To make up for this conceptual shift, investment tribunals began to extrapolate a positive duty to provide an adequate system of justice from concrete treaty standards. Apart from the fair and equitable treatment standard itself (7.2.1), the treaty provisions relied upon to construe such duty included the full protection and security standard (7.2.2), the non-impairment obligation (7.2.3), and the due process requirement in the context of expropriation clauses (7.2.4). Some states, on the other hand, supplied such a duty by incorporating in their investment treaties discrete obligations aimed at the assurance of a system of effective remedies. These were articulated in the form of what are presently known as the “effective means” obligations (7.2.5).

in which the property is required for public purposes. In this case, the procedure of expropriation must be judicial or quasi-judicial, and the owner is entitled to prompt, adequate and effective compensation. Otherwise, expropriation amounts to illegal confiscation and is an international tort.⁷

¹³ 1967 OECD Draft Convention on the Protection of Foreign Property, 8.

¹⁴ OECD Draft Convention, art 3.

¹⁵ See G Schwarzenberger, *Foreign Investments and International Law* (Stevens 1969), 114-15.

¹⁶ cf T. Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Brill, 2013), 59ff.

¹⁷ cf US Model BIT 2004, art 5(2)(a).

7.2.1. The *Unglaube* Case: The Duty to Provide “Adequate Legal Remedies” as part of the Fair and Equitable Treatment Standard

The award in *Unglaube v. Costa Rica* (2012) stands for the proposition that the obligation of fair and equitable treatment, in addition to the negative obligation not to deny justice, imposes upon the State also a positive duty to provide “adequate legal remedies” in its legal system.¹⁸ According to the *Unglaube* Tribunal, to establish a violation of this duty, the Claimant was required to “demonstrate that the laws of Costa Rica, taken as a whole, did not afford them an adequate opportunity, within a reasonable time, to vindicate their legitimate rights”.¹⁹ Though the purported focus of the inquiry was therefore on the legal framework as such, in order to appraise the functioning of the domestic system of judicial protection as a whole, the Tribunal did scrutinize specific instances of treatment accorded to the Claimants in the course of domestic judicial proceedings. But as with respect to establishing denial of justice, the threshold was a high one, as Claimant was required proving “more than simply that a particular court or administrative tribunal arrived at the wrong result”.²⁰

In the circumstances of that case, the Claimants acquired land for a tourism project in Costa Rica, but its development eventually got hindered by the Government’s decision to establish an ecological national park around the Claimants’ property. In the course of the years, the Claimants challenged some of the governmental measures before Costa Rican Courts, but ultimately without success. In light of this outcome, Claimants maintained before the Tribunal that the entire legal system of Costa Rica had amounted to a charade. According to the Claimants, the unavailability of adequate remedies revealed itself especially in the fact that the Costa Rican legal system did not remedy the allegedly unlawful and unjust stalling of the permit-issuing process, which froze the development of the area around the natural park. Apart from that, the inadequacy of the legal system was supposedly also reflected in the failure on the part of the Claimants to obtain judgments in their favour on several occasions. The Tribunal disagreed, however. One of the Claimants, Ms. Marion Unglaube, succeeded in some of her legal actions, and while she had not been successful in persuading Costa Rican courts that the suspension of development activities was unlawful, the facts did not establish that she actually had a legitimate claim, or that the failure of the judicial system to find in her favour in itself amounted to a denial of justice.²¹ Furthermore, the Tribunal considered that the negative outcomes, in themselves, did not establish the absence of timely and meaningful legal remedies, noting that Claimant has had “several important victories along the way, including at least one in the Supreme Court.”²² Taken together, the Tribunal was not able to establish an absence of adequate and timely avenues of legal recourse that would enable Claimants to vindicate the rights they claimed to possess.

The *Unglaube* case suggests that the determination of the adequacy of legal remedies will be context specific, and will be based on the evaluation of the remedial process as a whole. The scrutiny will not be based on a correctness test, but the Tribunals may nevertheless attempt to determine the legitimacy of domestic claims as such.

¹⁸ Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica (Award) (ICSID Case Nos ARB/08/1 and ARB/09/20, 16 May 2012) [271]-[278].

¹⁹ *ibid.*, 272.

²⁰ *ibid.*

²¹ *ibid.*, 277.

²² *ibid.*, 274.

7.2.2. The Duty to Make a Functioning System of Courts and Legal Remedies Available to the Investor as Part of the Full Protection and Security Standard

In the practice of investment tribunals, however, it was not so much the standard of fair and equitable treatment, but that of full protection and security that was more often susceptible to being interpreted as entailing a duty to provide an adequate system of justice. This, of course, is not in itself surprising given that the standard – which presently appears with no less frequency in modern investment treaties,²³ mostly as a complement to the FET obligation – has also been considered to be one that most directly embodied the benefits of the minimum standard in relation to the protection of property.²⁴

Among the first to interpret the standard as extending to the provision of *judicial protection* to investments was the Tribunal in *Lauder v. Czech Republic* (2001). The latter held, specifically, that the host State's duty under the full protection and security obligation “was to keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law.”²⁵ Other tribunals construed the standard in the same way: as entailing a duty to maintain a functioning judicial system that is available to the investor and that allows it to have its claims properly considered.²⁶ This was of course part of the general duty of providing a legal framework that offers legal protection to investors – a duty which, in the view of the Tribunal in *Frontier Petroleum Services v. Czech Republic*, necessarily comprises “both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights”.²⁷

On the face of it, such duty to provide “appropriate procedures that enable investors to vindicate their rights” would not seem to diverge from the duty to provide “adequate legal remedies” that the *Unglaube* Tribunal inferred from the fair and equitable treatment standard.²⁸ Nor, for that matter, would it seem to be any different from the general obligation to provide a system of justice that affords foreigners adequate judicial protection to their rights, which States purportedly owe to foreign investors as part of the minimum standard of treatment under customary international law. In fact, some tribunals construed and evaluated the duty in the same terms as a claim for denial of justice. For instance, in *Al Bahloul v. Tajikistan* (2009), the Tribunal considered that the concept of protection and security in investment treaties “could arguably cover a situation in which there has been a demonstrated miscarriage of justice”,²⁹ but ultimately

²³ See UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (2007), 28. The obligation to provide investors with full protection and security finds its source in the treaty-making practice the 19th Century, particularly in the early bilateral commercial treaties concluded by the United States. See JW Salacuse, *Law of Investment Treaties* (OUP 2010), 208-10.

²⁴ Schwarzenberger (n 15), 114. See also RR Wilson, ‘Property-Protection Provisions in United States Commercial Treaties’ (1951) 45 AJIL 83, at 102, explaining that the ‘most constant protection and security’ standard used in US commercial treaties was expressive of the minimum treatment intended.

²⁵ Ronald S Lauder v The Czech Republic (Final Award) (UNCITRAL, 3 September 2001) [314].

²⁶ See *Parkerings-Compagniet AS v Republic of Lithuania (Award)* (ICSID Case No ARB/05/8, 11 September 2007) [360]-[361] (confirming that the duty under the protection and security standard ‘was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court’); or *Frontier Petroleum Services Ltd v The Czech Republic (Final Award)* (UNCITRAL, 12 November 2010) [273] (the obligation is ‘to make a functioning system of courts and legal remedies available to the investor’).

²⁷ *Frontier Petroleum Services* *ibid*, [263].

²⁸ *Unglaube v Costa Rica* (n 18), [271]-[278].

²⁹ *Al Bahloul v Tajikistan* (Partial Award on Jurisdiction and Liability) (SCC Case No V 064/2008, 2 September 2009), [246].

found no violation of the FPS standard after referring to its previous findings in relation to the denial of justice claim predicated on purported due process violations.³⁰

The *Al Babloul* Tribunal took the view that establishing a miscarriage of justice in the context of the FPS standard is “not a matter of strict liability”, adding that an investor “is not guaranteed that he will prevail in a court action under all circumstances.”³¹ Other tribunals construed the standard in a similar way. According to the *Frontier* Tribunal,

“not every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, such as an international tribunal, is ‘wrong’ would not automatically lead to state responsibility as long as the courts have acted *in good faith* and have reached decisions that are *reasonably tenable*. In particular, the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated.”³²

In the circumstances of the *Frontier* case, the Tribunal eventually applied the FPS standard to the conduct of the judiciary solely in relation to claims concerning the allegedly excessive court delays.³³ The delays were eventually not found to have violated the standard, with the Tribunal finding the judicial system of the Czech Republic to have been available to Claimant and responsive to its requests, most of which were also addressed promptly. While there was a delay of 18 months, which had occurred between Claimant’s initial filing and the Regional Court’s first action and which was “not ideal”, the Tribunal “appreciated” that at the time in question, the Czech courts were experiencing at once a high volume of cases and a shortage of judges, which helped to explain such delay. Thus, “although not an optimal situation for the efficient resolution of claims,” the specific delay was not found to have risen to the level of a breach of the standard.³⁴ In the context of court delays, the Tribunal also dismissed the related argument that government officials would have breached the FPS standard by allegedly having failed to take action when alerted to the delay at the Regional Court, taking the view that such officials were not under an obligation to intervene in court proceedings between private parties;³⁵ nor, for that matter, in dealings between private parties outside the court room³⁶ – a point which was previously underscored by other tribunals.³⁷

All in all, the approach taken by the *Frontier* Tribunal in determining the Respondent’s compliance with the FPS standard was a deferential one and the Tribunal avoided setting any particular standard that a domestic legal system would have to meet, in order to be considered as providing “a functioning system of courts and legal remedies” available to Claimant. But other tribunals, too, refrained from setting any particular standards in that respect, aside from the

³⁰ *ibid* [247].

³¹ *ibid* [246].

³² *Frontier Petroleum Services* (n 26), [273]. See also [467] (“The Czech Republic made a functioning system of courts and legal remedies available to Claimant. Claimant availed itself of this system with only limited success. However, not every failure to obtain redress is a violation of the principle of full protection and security.”)

³³ For reasons unexplained, the Tribunal did not apply the standard in relation to the claim that the Czech Courts’ refusal to enforce and recognise a commercial arbitral award similarly amounted to a violation of the obligation to offer full protection and security, which the Tribunal solely assessed in relation to the FET standard cf *ibid* [469] ff.

³⁴ *Frontier Petroleum Services* (n 26), [336].

³⁵ *ibid* [337].

³⁶ See *ibid*, [464]-[465], where the Tribunal dismissed the FPS claim premised on the allegation that the Czech officials of the state agencies involved in the Claimant’s enterprise failed to ‘exert pressure’ on the bankruptcy trustees to properly protect the interests of Claimant.

³⁷ See *Lauder* (n 25), 314 (“The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships.”)

threshold issue of availability. What is particularly notable is that tribunals avoided making assessments as to whether the domestic remedies would actually be effective in redressing the wrongs allegedly suffered by investors. In *Lauder*, the Tribunal considered that numerous Czech court proceedings initiated by Claimant's entities against their commercial partner *ipso facto* showed that the Czech judicial system had remained fully available to the Claimant. Specifically, the fact that a decision was rendered in favour of one of those entities by the Regional Commercial Court in Prague was "conclusive evidence of this availability". The Tribunal arrived at such conclusion, in spite the fact that the decision in question had later been annulled by the High Court in Prague – evidently satisfied by the fact that an appeal was still pending before the Czech Supreme Court, which the Tribunal believed could still have rendered a favourable ruling.³⁸ The mere availability of a remedy was also sufficient to the Tribunal in *Saluka v. Czech Republic* (2006) not to find a failure to provide full protection and security in the fact that the Czech Supreme Public Prosecutor's Office, as the last instance for appeals, upheld the freezing of the Claimant's shares in a Czech bank on grounds on which the Claimant had not even been heard, in view of the fact that the Claimant was in a position to lodge, and in fact had lodged, a petition with the Czech Constitutional Court challenging the denial of its right to be heard.³⁹ Without otherwise wishing to decide whether the freezing of Claimant's shareholding was actually capable of falling within the scope of the FPS clause, the Tribunal accepted the availability of a constitutional challenge as sufficient to satisfy the FPS standard.

7.2.3. The *Belokon* Case: Unavailability of Judicial Remedies as a Breach of the Non-Impairment Clause

Occasionally, a duty of providing a legal framework that offers adequate legal protection to investments, including through judicial means, was effectively construed from the non-impairment clause. One such example can be found in the *Belokon v. Kyrgyz Republic* (2014) award. In the circumstances of that case, the Kyrgyz courts denied standing to the deposed former managers of the Claimant's bank to challenge the imposition of temporary administration on the bank, insofar as Kyrgyz law permitted only the temporary administrator, or a latter's delegate, to challenge such imposition.⁴⁰ The Claimant contended that the refusal of standing amounted to a denial of justice, which was then presented as one of the predicates for the FET claim.⁴¹ The Tribunal, however, considered it "more appropriate" to undertake the analysis of whether the inability to challenge the imposition of temporary administration amounted to a violation of the non-impairment obligation under Article 2(3) of the applicable BIT.⁴² Without otherwise inquiring whether the Kyrgyz judicial decisions were itself improper from the perspective of international law, the Tribunal concluded that "the failure to provide for a practicable means to challenge the imposition of temporary administration" was an unreasonable impairment of the right to develop and manage the bank, and to enjoy the fruits of its legitimate shareholding, which was prohibited by the BIT.⁴³

The Tribunal omitted to explain why it was "more appropriate" to consider that part of the claim under the non-impairment clause, and not according to the standard of denial of justice. The Respondent's failure to make available within its domestic legal system a mechanism to challenge the imposition of the impugned measure would likely have amounted to a denial of justice on its own account. At any rate, the standard thus construed on the basis of the non-

³⁸ *ibid*, 314.

³⁹ *Saluka Investments BV (The Netherlands) v Czech Republic (Partial Award)* (UNCITRAL, 17 March 2006) [493].

⁴⁰ *Valeri Belokon v The Kyrgyz Republic (Award)* (UNCITRAL, 24 October 2014) [100]-[105].

⁴¹ *ibid* [229].

⁴² *ibid* [253].

⁴³ *ibid* [266].

impairment clause was not a particularly demanding one; the issue turned on the elementary question of the availability of a remedy.

7.2.4. The *ADC* Case: Availability of an “Actual and Substantive Legal Procedure” as a Condition for Lawful Expropriations

Finally, a similar duty of providing appropriate remedial procedures to vindicate rights has other times been construed from treaty provisions conditioning the legality of expropriations. As a rule, investment treaties allow States to expropriate covered investments, provided that such expropriations be for a public purpose, non-discriminatory, in accordance with due process of law, and accompanied by the payment of adequate compensation.⁴⁴ Of importance to the conduct of domestic courts is particularly the requirement of due process of law, which is deemed to require that expropriation is carried out in accordance with procedures established in domestic legislation and fundamental internationally recognized standards, is conducted in a non-arbitrary manner, and with an opportunity for the affected investor to have the measure reviewed before an independent and impartial body.⁴⁵ The right to an independent review, of course, presupposes the existence of adequate review procedures and the absence of such procedures may be reason for a tribunal to conclude that the taking was not effected under due process of law. This is precisely what happened in the *ADC v. Hungary* (2006), where the Respondent was found to have failed to demonstrate that Respondent’s legal system provided methods enabling the Claimants to review the measures that amounted to the expropriation of the latter’s investment.⁴⁶ According to the *ADC* Tribunal, in the expropriation context, the “due process of law” requirement

“...demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that ‘the actions are taken under due process of law’ rings hollow.”⁴⁷

Though the *ADC* Tribunal did not elaborate on the source of this obligation, the requirement finds its normative basis again in the general obligation under customary international law to maintain and make available to aliens a fair and effective system of justice that affords adequate judicial protection to their rights.⁴⁸

Unlike the tribunals interpreting the FPS obligation, the *ADC* Tribunal proceeded to set qualitative requirements that a domestic judicial system was to meet to satisfy the due process requirement: the legal procedure had to “be of a nature to grant an affected investor a reasonable

⁴⁴ The language in the treaties varies, but the four conditions have arguably crystallized so as to represent customary international law on expropriation. See UNCTAD, *Expropriation* (Series on Issues in International Investment Agreements II, 2012), 27.

⁴⁵ *ibid*, 36ff.

⁴⁶ *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary* (Award) (ICSID Case No ARB/03/16, 2 October 2006) [438].

⁴⁷ *ibid* [435].

⁴⁸ See eg Schwarzenberger (n 15), 163, considering that the term ‘due process of law’ as used in the expropriation clauses is nothing but the minimum standard regarding the protection of foreign property under international law. For a concurring view, see Wilson (n 24), 88.

chance within a reasonable time to claim its legitimate rights and have its claims heard”.⁴⁹ Though this may not be an exacting standard, it was still sufficient for the Tribunal to reject Respondent’s (unsubstantiated) argument that Claimants could have ultimately sought legal remedies before the Hungarian Constitutional Court by way of the generic procedure available to a discontented party to request judicial review of whatever it believes to be in conflict with the Constitution,⁵⁰ and to conclude that, on the specific facts established in that case, there was no appropriate method for the investor to resort to contest the legality of the impugned measures.⁵¹ Those findings appear context specific, as it would otherwise be difficult to accept that the “reasonable chance” standard could not be satisfied through the possibility of a constitutional challenge of the impugned measure. In *EURAM v. Slovakia* (2012), for example, the Tribunal considered it would have been “unduly formalistic” not to hold a judgment of Slovakia’s Constitutional Court, in which the legality of the impugned measure was considered, as capable of qualifying as a ruling for the purposes of a BIT expropriation provision, in spite of the fact that the Constitutional Court was not applying the BIT.⁵² In fact, in the peculiar circumstances of the case, it did not even matter to the Tribunal that the Claimant had not been party to the proceedings before the Constitutional Court. The latter’s judgment had namely an *erga omnes* effect, in the sense that, once having been reviewed by the Constitutional Court, the legality of the impugned measure could not have been raised in other proceedings before Slovak Courts.⁵³

7.2.5. The *Chevron* Case: Free-Standing Treaty Obligation to Provide “Effective Means for Asserting Claims and Enforcing Rights”

An example of a provision that has increasingly been put to good use in actions predicated upon judicial conduct can be found in the free-standing treaty clauses requiring “effective means of asserting claims and enforcing rights”. Contrary to other standards of treatment from which obligations to maintain judicial systems of a certain kind were construed, the “effective means” provision is not a very common one. Apart from the ECT,⁵⁴ it is predominantly found in BITs concluded by the US;⁵⁵ however, through operation of MFN clauses that are otherwise present in the large majority of investment treaties, the reach of “effective means” provisions could potentially be extended to unanticipated situations.⁵⁶ The chance for claimants attempting such extension increased considerably after the Tribunal in *Chevron v. Ecuador I* (2010) interpreted one such clause as creating “an independent treaty standard” which, as such, “constitutes a *lex specialis* and not a mere restatement of the law on denial of justice” and which purportedly sets out “a distinct and potentially less-demanding test” when compared to the high threshold required for

⁴⁹ *ADC v Hungary* (n 46), [435].

⁵⁰ *ibid* [417], [419].

⁵¹ *ibid* [438].

⁵² *European American Investment Bank AG (EURAM) v Slovak Republic (Award on Jurisdiction)* (UNCITRAL, 22 October 2012), [395]-[396].

⁵³ *cf* [390]-[391].

⁵⁴ Art 10(12) ECT provides: ‘Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.’

⁵⁵ See eg art 2(7) of the US-Ecuador BIT, which stipulates: ‘Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.’

⁵⁶ See eg *White Industries Australia Limited v The Republic of India (Final Award)* (UNCITRAL, 30 November 2011) [11.2.1]-[11.2.9], where Claimant was entitled to rely, pursuant to an MFN obligation contained in the underlying India-Australia BIT, on the ‘effective means’ clause from a differently drafted India-Kuwait BIT. *cf Apotex Holdings Inc and Apotex Inc v United States of America (Award)* (ICSID Case No ARB(AF)/12/1, 25 August 2014) [9.66]-[9.71], where an attempt was made to import the effective means clause in art II(2)(b) of the Jamaica-USA BIT into a NAFTA arbitration by way of the MFN provision in art 1103 NAFTA; however, the Tribunal refrained from deciding whether or not that MFN provision could have the effect of modifying the content of other NAFTA provisions.

establishing a denial of justice under customary international law.⁵⁷ This was certainly not how the clause was previously understood by other tribunals. In *Duke v. Ecuador* (2008), the same provision was considered “to implement and form part of the more general guarantee against denial of justice”, and was not seen as requiring more than “guarantee[ing] the access to the courts and the existence of institutional mechanisms for the protection of investments”.⁵⁸ Nor were similar provisions in other earlier cases applied in a way suggesting that the “effective means” standard imposed requirements on domestic judicial systems more onerous than those laid down in customary international law.⁵⁹ Yet, the tide may have changed, as *Chevron I* Tribunal’s reading of the clause found further endorsement in *White Industries v. India* (2011), where the Tribunal further clarified the content of the “effective means” standard.⁶⁰

In accordance with the *Chevron* Tribunal’s understanding, the “effective means” standard, though directed at many of the same potential wrongs as the customary international law standard of denial of justice, differed from the latter in several ways;⁶¹ though, most significantly, in the threshold relevant for establishing a breach. Thus, if the standard of denial of justice was deemed to require the showing of a particularly serious shortcoming and egregious conduct on the part of judicial organs, the “effective means” standard engaged the responsibility of the State for “a failure of domestic courts to enforce rights ‘effectively’” – a condition which, in the view of the Tribunal, was not always sufficient for a finding of denial of justice under customary international law.⁶² Apart from noting that the standard of “effectiveness” was one that applied to “a variety of State conduct that has an effect on the ability of an investor to assert claims or enforce rights,”⁶³ the Tribunal did not find it necessary to set out general criteria that were to be used to determine whether a particular judicial means was to be considered effective.⁶⁴ Instead, considering that the subject of the complaint in that case concerned the delays that Claimant’s subsidiary TexPet experienced in having its contract disputes with the Ecuadorian government adjudicated in the courts of Ecuador, the Tribunal satisfied itself with explaining that, for any

⁵⁷ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (Partial Award on the Merits) (UNCITRAL, PCA Case No 34877, 30 March 2010) [242]–[244].

⁵⁸ *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* (Award) (ICSID Case No ARB/04/19, 18 August 2008) [391].

⁵⁹ See eg *Petrobart Limited v The Kyrgyz Republic* (Award) (SCC Case No 126/2003, 29 March 2005), where the ‘effective means’ clause of Art 10(12) ECT was held to have been violated on account of the interference on the part of the Executive in judicial proceedings involving the Claimant. Given that an independent judiciary is an essential component of a fair system of justice that states are to maintain pursuant to customary international law, there is no indication that the Tribunal understood the clause as imposing more onerous standards. cf also *Limited Liability Company AMTO v Ukraine* (Final Award) (SCC Case No 080/2005, 26 March 2008) [87], where the same art 10(12) ECT was interpreted as demanding the existence of legislation for the recognition and enforcement of property and contractual rights, as well as secondary rules of procedure allowing that the principles and objectives of that legislation be translated by the investor into effective action in the domestic tribunals – though, both sets of rules were merely required to meet ‘minimum international standards’.

⁶⁰ *White Industries* (n 56).

⁶¹ An important difference, in the view of the Tribunal, is that a claim of a breach of the ‘effective means’ provision did not demand a ‘strict exhaustion of local remedies’ as in the context of a denial of justice; for the claim to be made, it was sufficient that Claimants had ‘adequately utilized’ the means made available to them to assert claims and enforce rights in Ecuador. *Chevron* (Contractual Claims) (n 57), [268]. This will be further discussed in Chapter 8.

⁶² *ibid* [244]; emphasis added.

⁶³ *ibid*, [248].

⁶⁴ In this respect, the decision differed from that in *AMTO v Ukraine* (n 59), [88], where the Tribunal proceeded to interpret the term ‘effective’ in art 10(12) ECT as implying that the ‘effective means’ standard was a ‘systematic, comparative, progressive and practical’ one, and applied those criteria in its assessment of the effectiveness of Ukrainian bankruptcy legislation.

means to be considered effective, they must not be subject to indefinite or undue delay, for undue delay in effect amounts to a denial of access to those means.⁶⁵

Yet, in the specific circumstances of the *Chevron I* case, the lower threshold supposedly applicable to the “effective means” standard was not immediately obvious. Due to its conceptual closeness with the standard of denial of justice, the Tribunal was namely of the opinion that the interpretation and application of the “effective means” standard was to be “informed” by the law on denial of justice.⁶⁶ In the context of that decision, this resulted in the Tribunal using the same factors for determining the reasonableness of judicial delays under the effective means provision as those that had previously been developed by other tribunals in the context of denial of justice claims relating to judicial delays – namely, the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case, and the behaviour of the courts themselves.⁶⁷ Hence, on the facts of the case, the delays of 13 to 15 years were found to be undue, insofar as they resulted from prolonged periods of complete inactivity of the judiciary that were inexplicable otherwise than by the apparent unwillingness of the Ecuadorian courts to decide the cases. As such, they amounted to a breach of the “effective means” obligation under the BIT.⁶⁸ Since the latter provision was deemed to constitute “a *lex specialis* with greater specificity”, the Tribunal refrained from considering whether the same judicial delays could also have given rise to a denial of justice.⁶⁹ Considering that similar periods of delays were actually sufficient in some other cases for a finding of denial of justice under customary international law,⁷⁰ the added value of the newly interpreted standard were not directly apparent.

It was only in the *White Industries v. India* (2011) case, which similarly arose out of domestic judicial inaction, that it became clear how potential claimants can capitalize on the supposedly less demanding standard applicable to the “effective means” clause. The subject of complaint in that case were the judicial delays that White Industries, an Australian mining company, had experienced in its attempt to enforce in Indian courts a foreign arbitral award previously rendered in its favour in a commercial arbitration with state-owned mining company, Coal India. The proceedings dragged for over nine years, after the White Industries’ attempt at enforcement before the Delhi High Court was stayed as a result of India Coal’s attempt to set aside the award in separate proceedings before the Calcutta High Court, and subsequently the Supreme Court of India. While finding no treaty breach with respect to delays experienced in proceedings before the Delhi High Court, the Tribunal held that the inability of the Indian judicial system to deal with White’s jurisdictional claim in the set-aside proceedings, and specifically, the failure of India’s Supreme Court to hear Whites jurisdictional appeal for over five years, amounted to undue delay and constituted a breach of the “effective means” obligation.⁷¹ This in spite of the Tribunal’s initial finding that the same delay did *not* amount to a denial of justice.⁷²

The most interesting aspect of the *White Industries* case is that it clearly demonstrates, in relation to the same facts, how the “distinct and potentially less demanding” test – which the Tribunal, in following the *Chevron* award, considered to be applicable to determining breaches of the “effective means” obligation – operates when compared to what was considered to be the

⁶⁵ *Chevron (Contractual Claims)* (n 57), [250].

⁶⁶ *ibid* [244].

⁶⁷ *ibid* [250].

⁶⁸ *ibid* [254]-[262].

⁶⁹ *ibid* [275].

⁷⁰ *cf supra* 6.2.2.1.

⁷¹ *White Industries* (n 56). See [11.4.15] and [11.4.19], respectively.

⁷² *ibid* [10.4.22]-[10.4.24].

“stringent” standard of denial of justice.⁷³ Particularly so, since the Tribunal considered the same factors to determine whether judicial delays amounted to, respectively, a denial of justice under customary international law, or a breach of the effective means standard – namely, the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case and the behaviour of the courts themselves.⁷⁴ The difference between the standards materialised particularly in the assessment of India’s Supreme Court’s inability to hear White’s jurisdictional appeal for over five years. When examined in relation to denial of justice, the behaviour of that court, although “certainly unsatisfactory in terms of efficient administration of justice” and otherwise “regrettable”, was not deemed to amount to “a particularly serious shortcoming” or “egregious conduct that ‘shocks or at least surprises, a sense of judicial propriety’”, and thus to have “reached the stage of constituting a denial of justice”.⁷⁵ In coming to that conclusion, the Tribunal considered it relevant “to bear in mind that India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary.”⁷⁶ Conversely, the Tribunal had “no difficulty” concluding that the same delays breached the “effective means” standard.⁷⁷ As briefly explained in a footnote, “with respect to a forward looking promise by a State to provide ‘effective means’ of enforcing rights and making claims, the relevance of the State’s population or the current operation of its court system(s) (in assessing the undueness of a delay) is limited. This is because the focus of such a *lex specialis* is whether the system of laws and institutions work effectively at the time the promisee seeks to enforce its rights / make its claims.”⁷⁸

Apart from clarifying the weight to be given to certain systemic conditions in determining the reasonableness of a delay pursuant to the “effective means” standard, the *White Industries* decision further clarified the extent to which individual instances of judicial conduct engage the responsibility of the state under the “effective means” obligation. Whereas the *Chevron* Tribunal somehow left it open whether or not a single failure on the part of domestic courts to enforce particular rights would amount to a breach of the “effective means” standard,⁷⁹ the *White Industries* Tribunal considered the standard to require “both that the host State establish a proper system of laws and institutions and that those systems work effectively *in any given case*”.⁸⁰ Such a reading, of course, converts the “effective means” standard into an exacting one, and – as I shall explain in the next section – it is doubtful whether this accords with the intent of the treaty drafters. Such reading at any rate departs from the views expressed by the Tribunal in *AMTO v. Ukraine* (2008), which interpreted the “effective means” standard as not entailing an obligation to offer guarantees in individual cases, and which therefore considered that individual failures, though perhaps amounting to evidence of systematic inadequacies, were not themselves a breach of the “effective means” obligation.⁸¹ Eventually, such reading does not sit comfortably with the *Chevron*

⁷³ *ibid* [11.3.2] and [10.4.5]/[10.4.8], respectively. The Tribunal endorsed the ‘comprehensive analysis of the meaning and application’ of that standard by the *Chevron* Tribunal and considered it ‘equally appropriate’ for application in the case ([11.3.2]-[11.3.3]). This was not surprising since Judge Brower sat as arbitrator on both tribunals.

⁷⁴ *ibid* [10.4.10] / [11.3.2.(i)].

⁷⁵ *ibid* [10.4.22]-[10.4.23].

⁷⁶ *ibid* [10.4.18].

⁷⁷ *ibid* [11.4.19].

⁷⁸ *ibid* fn 78 to [11.4.16].

⁷⁹ The *Chevron* Tribunal spoke of ‘a failure’ of domestic courts to enforce rights effectively; *Chevron (Contractual Claims)* (n 57), [244]. But in applying the standard to the specific context of that case, the Tribunal found that ‘delay with respect to each of the seven court cases had become unreasonable, and a breach of Article II(7) was completed’; *ibid* [251]); emphasis added.

⁸⁰ *White Industries* (n 56), [11.3.2]; emphasis added.

⁸¹ *AMTO v Ukraine* (n 59), [88]. Such view finds also support in *Charanne BV and Construction Investments SARL v Spain (Award)* (SCC Case No 062/2012, 21 January 2016) [470], where it was held that, to verify whether the requirements of the “effective means” obligations are met, ‘tribunals must examine the legal system in question *as a whole*.’ Emphasis added.

Tribunal's observation that the threshold of "effectiveness" requires "...that a measure of deference be afforded to the domestic justice system" and that an arbitral tribunal is not "empowered [...] to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*."⁸²

7.2.6. One and the Same Systemic Obligation?

Taking account of the evolution of today's most common investment treaty standards, and their conceptual origins in the minimum standard of treatment, it is of course not surprising that tribunals considered it possible to construe more or less the same systemic obligation on the basis of such a variety of different treaty standards.⁸³ This is but the logical consequence of the fact that the duty to provide adequate judicial remedies is equally central to the different elements of protection provided by each of these separate treaty standards. In that sense, it would have little merit to discuss which of the treaty standards above is better disposed for being used as a basis to construe a positive obligation to provide an adequate system of justice.

Much more debatable, on the other hand, is the correctness of the *Chevron* Tribunal's reading of the "effective means" provision as one setting out, as a matter of *lex specialis*, a more onerous standard in relation to investors' access to courts – rather than merely incorporating the prescriptions of the minimum standard of treatment in this regard. The *Chevron* Tribunal's reading appears to have been influenced by the narrative sketched out by one of the leading commentators on US BITs, Kenneth J. Vandeveld, about the origin and purposes of such clauses.⁸⁴ In his monograph on US investment treaty practice, Vandeveld explains that, though it was undisputed that customary international law guaranteed an alien the right of access to the courts of the host State,⁸⁵ it was because of "disagreement among publicists" concerning the *content* of this right that the United States was prompted to seek treaty protection.⁸⁶ While Vandeveld does not expound upon the exact points of contention between the publicists, a former leading commentator on US treaty practice, Robert R. Wilson (and on whose views Vandeveld also relied in support of his proposition), had previously explained that the disagreement essentially revolved around the question whether the foreigners' right to judicial remedies was solely governed by the national treatment standard, or whether the right to such remedies was also predicated upon the existence of a system measuring up to civilized standards.⁸⁷ If the "effective means" clause was therefore intended to clarify any points of contention, this was more likely to confirm that the foreigners' right to judicial remedies had to conform to the minimum standard of treatment under customary international law, and to dispel the argument that the basis on which access to courts could be demanded for foreign investors was merely the same as that applicable to nationals of the forum State. Support for the view that the "effective means" clause did not purport to incorporate more onerous standards than that required by the minimum standard of treatment can further be found in the fact that the "effective means" provision was deleted from the 2004 model BIT, precisely because "US drafters believed that the customary international law principle prohibiting denial of

⁸² *Chevron* (Contractual Claims) (n 57), [247].

⁸³ See *OAO Tazneft v Ukraine (Award on the Merits)* (UNCITRAL, 29 July 2014), [427], noting that "[i]ssues concerning the role of the judiciary are particularly difficult to distinguish as to whether they should be treated under one standard or the other [ie. FET or FPS], or both".

⁸⁴ *ibid*, [243].

⁸⁵ Indeed, also Freeman observed in his 1938 treatise on denial of justice that the principle of rendering justice to foreigners was "so well established in the modern practice of States that literature on the law of nations is marked by a total absence of dissent from the proposition that foreigners must be granted access to court in order to defend their rights." Freeman (n 1), 215-16.

⁸⁶ KJ Vandeveld, *U.S. International Investment Agreements* (OUP, 2009), 411.

⁸⁷ See RR Wilson, *United States Commercial Treaties and International Law* (Hauser 1960), 214, 242. See also his earlier 'Access-to-Courts Provisions in United States Commercial Treaties' (1953) 47 AJIL 20, at 23-24.

justice provides adequate protection and that a separate treaty obligation was unnecessary.”⁸⁸ It is unlikely that customary international law recently evolved so much so as to rise to the more onerous standard that the *Chevron* Tribunal read into the “effective means” clause.

Commentators remain divided as to whether the effective means clause is additive and autonomous, or merely equivalent to the standard of denial of justice.⁸⁹ And so do apparently arbitral tribunals, at least given that some appear to treat the standards as substantially the same.⁹⁰

7.3. The Obligation not to Expropriate without Compensation and the Problem of Judicial Takings

Another category of investment treaty obligations, which have commonly been invoked as basis for host State liability in relation to judicial conduct, are those geared specifically towards providing legal and economic security to the investment as such. Three types of clauses would appear to be relevant in this respect: the expropriation clause, which prohibits uncompensated takings of proprietary rights; the umbrella clause, which aims at ensuring respect of commitments entered into by the host State in relation to an investment; and the fair and equitable treatment standard, in the part where it aims at protecting the economic value of the investment through the specific protection of investor’s legitimate expectations. The object of these clauses is ultimately to preserve the economic value of the investment. But in order to achieve that, the standards necessarily protect the proprietary rights forming the basis of the investment (as in the case of the expropriation and umbrella clauses), or the integrity of the legal framework in which the investment is imbedded (as in the case of the legitimate expectations component of the FET standard). That these standards are therefore susceptible of becoming engaged on account of judicial conduct is rather obvious. As part of their adjudicatory function, courts have namely the power to conclusively determine legal relationships when these are at dispute, and in the exercise of that function, they not only have the capacity, but also the propensity to confirm, amend, or extinguish legal rights. Since many of such rights are capable of falling within the definition of protected assets under an investment treaty, any judicial modification of such rights can technically be construed as an interference with an investment, and thus provide the predicate of a treaty claim based on such clauses.⁹¹ The main challenge in determining violations of this category of investment standards is therefore in distinguishing what constitutes a normal exercise of judicial functions, from what amounts to an unjustified interference with the investment itself or the legal framework in which the investment is embedded.

⁸⁸ Vandevelde (n 86), 415.

⁸⁹ See eg MD Goldhaber, ‘The Rise of Arbitral Power Over Domestic Courts’ (2013) 1 *Stanford Journal of Complex Litigation* 373, 400–401 (rejecting the idea that the effective means clause would imply that judicial action should be assessed against standards more intrusive than denial of justice); O Garibaldi, ‘Effective Means to Assert Claims and Enforce Rights’ in Kinnear, Fischer, Mínguez Almeida, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer, 2015), 359–374 (considering the effective means standard to be one autonomous from, and more stringent than the denial of justice standard); or B Demirkol, *Judicial Acts and Investment Treaty Arbitration* (CUP 2018), 54, at 42–50 (considering the effective means standard as indistinguishable from the denial of justice standard).

⁹⁰ *He & H Enterprises Investments, Inc. v. Arab Republic of Egypt (Award)* (ICSID Case No. ARB 09/15, 6 May 2014) [406] (rejecting the effective means claim, on the ground that the same reasoning was applicable to both denial of justice and denial of effective means claims). cf *OAO Tazneft* (n 83), [441] (being somewhat unclear – the Tribunal, having found liability under FET and FPS standards, saw no need to examine the question of effective means separately, on the ground that the effective means standard was ‘to a large extent subsumed’ under the former).

⁹¹ See in this respect specifically Z Douglas, ‘Property, Investment, and the Scope of Investment Protection Obligations’ in Z Douglas, J Pauwelyn and JE Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (OUP, 2014), discussing the difficulties arising out of different conceptual understandings of the rights and interests that form the basis of an investment.

The purpose of the present section is to identify, specifically, the circumstances under which a judicial measure could qualify as a compensable expropriation under international law. The reason for this is a practical one, as there is already a significant body of arbitral jurisprudence concerning expropriation claims grounded in the acts or omissions of the judicial arm of the State. To complete the analysis, section 7.4. looks instead at the conditions for judicial conduct serving as a predicate for claims concerning violations of umbrella clauses or violations of legitimate expectations under the FET standard.

7.3.1. Predicating an Expropriation Claim upon Judicial Conduct

Clauses prohibiting uncompensated takings of proprietary rights are among the key provisions of modern investment treaties.⁹² While their primary purpose is to secure that the investor is not deprived of all, or substantially all, of the value of its investment,⁹³ their effect is not to prohibit expropriations as such – to the contrary, investment treaties invariably recognize the host State’s power to expropriate investments. Expropriation clauses merely impose conditions on the exercise of that power, such as that the taking be for a public purpose, non-discriminatory, in accordance with due process of law, and accompanied by adequate compensation.⁹⁴

Given that a host State can expropriate not only by taking title to, or possession of, the investment, but also by depriving the investor of the economic benefit of the investment, most expropriation clauses are formulated capaciously. They apply both to outright expropriations or nationalizations (which are deemed to cover situations involving a legal transfer of the title to the property or its outright physical seizure), and to measures having effect equivalent thereto (a formula that is intended to cover measures that permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way). Albeit primarily concerned with the protection of investments against governmental abuses of legislative or executive power,⁹⁵ the clauses’ capacious formulation makes them clearly susceptible for being used also for claims grounded in judicial conduct. Judicial interferences with particular rights – especially rights that are only incorporeal, such as rights granted under public concessions which are invalidated by a judicial decision – can namely be presented as instances of direct or indirect expropriation.⁹⁶

Yet, the possibility of predicating expropriation claims upon the acts of the State’s judicial arm does not come without conceptual difficulties. These difficulties do not only relate to the very nature of judicial measures, as described above. In the context of expropriation claims, the challenges lie particularly in international tribunals’ strong reliance on the “sole effects” doctrine when it comes to determining the occurrence of an expropriation. For, when judged solely by its effects, any judicial measure resulting in the extinction of a legal right constituting a protected

⁹² cf Section 2.2.5 where I explain how the challenges mounted against traditional investment protection standards by developing countries, and particularly against the standards for compensation in the event of expropriation, have actually been the primary drivers for the introduction of bilateral investment treaties.

⁹³ On the structure and policy of expropriation provisions, see further Vandevelde (n 86), 271-82.

⁹⁴ cf UNCTAD, *Expropriation: A Sequel* (Series on Issues in International Investment Agreements II, 2013).

⁹⁵ cf *OAO Tazneft* (n 83), [459].

⁹⁶ In practice, whether a particular judicial measure may qualify as a direct or indirect taking will very much depend on the circumstances of each case. Most of the proprietary interests that are susceptible to being affected by judicial decisions – such as rights to property *in rem*, shareholding rights in companies, contractual rights, concessionary and other rights granted under public law, intellectual property rights – are usually each individually capable of constituting a protected asset and thus an investment within the meaning of the applicable investment treaty. Considering that judicial interferences with investor’s rights normally affect the title to the proprietary interest, such interferences may in many cases qualify as instances of direct expropriations. Where, on the other hand, the legal right affected will not separately qualify as a protected investment, a judicial interference with such a right may be presented as an instance of indirect expropriation, to the extent that such interference may have possibly destroyed nearly all the value of the investment operation.

assed could nominally be brought up as a substantial deprivation of an investor's investment and thus used as a basis for an expropriation claim, no matter how justified such judicial measure might have been.⁹⁷ That this may lead to absurd results has not infrequently been recognized by arbitral tribunals. In *Saipem v. Bangladesh* (2009), for example, the Tribunal had no doubt that, as a matter of fact, the setting aside by Bangladeshi courts of a commercial award had substantially deprived the investor of its rights under the award.⁹⁸ Yet, as a matter of law, the Tribunal was hesitant to accept that such actions automatically translated into an expropriation, because "if this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds."⁹⁹ In a similar way, the Tribunal in *Swisslion v. Macedonia* (2012) did not find it possible to accept that a judicial termination of a contract between a State entity and an investor could be "equated to an expropriation of contractual rights simply because the investor's rights have been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State's being found to be in breach of its international obligations."¹⁰⁰

This eventually raises the question as to how legitimate judicial actions could be distinguished from improper interferences with investors' rights in the context of an expropriation claim. For, when a concession is judicially annulled because it had been obtained by fraud, or when a contract is terminated by court decision on account of investor's default, it would seem counterintuitive to accept expropriation claims predicated upon such conduct. But it is equally clear that a State should not be put in a position which would allow it to abuse its domestic judicial procedures for the purpose of avoiding its responsibility under international law. The problem cannot be resolved through resort to established exceptions, such as the police powers doctrine.¹⁰¹ The principle underlying this doctrine – that compensation is not required for injuries resulting from *bona fide*, non-discriminatory regulation within the police power of the State – cannot be meaningfully applied to all claims predicated upon judicial conduct. Assessing individual judicial decisions by reference to whether or not they can be justified on the basis of the State's sovereign right to protect order, public safety, health, and morals or promote the general welfare – which is, essentially, what police powers are understood to be¹⁰² – would namely require distinguishing impugned judicial acts on the basis of their nature and purpose. This would clearly provide too artificial a measure to adequately distinguish expropriatory judgments from normal exercises of judicial functions.

Given the limitations of the traditional "sole effects" approach, as well those of the "police powers" doctrine, it is unsurprising that investment tribunals have adopted a different approach in deciding expropriation claims predicated upon judicial conduct. As the following sections will demonstrate, with a view to distinguishing proper from improper judicial interferences with investors' proprietary interests, tribunals by and large required that the impugned judicial conduct be itself wrongful so as to amount to an expropriation.

⁹⁷ On this concern, see V Been and JC Beauvais, 'The global fifth amendment? NAFTA's investment protections and the misguided quest for an international 'regulatory takings' doctrine' (2003) 78 New York University Law Review 30, at 82-83.

⁹⁸ In that case, the commercial award was not an investment itself; the object of expropriation, instead, were the Claimant's residual contractual rights under the investment as crystallized in the commercial award. See *Saipem SpA v The People's Republic of Bangladesh* (Decision on Jurisdiction and Recommendation on Provisional Measures) (ICSID Case No ARB/05/07, 21 March 2007) [125]-[128].

⁹⁹ *Saipem SpA v The People's Republic of Bangladesh* (Award) (ICSID Case No ARB/05/07, 30 June 2009) [133].

¹⁰⁰ *Swisslion v Macedonia* (Award) (ICSID Case No ARB/09/16, 6 July 2012), 314.

¹⁰¹ See generally Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (Award) (ICSID Case No. ARB/10/7, 8 July 2016), [290]-[301].

¹⁰² See further C Titi, 'Police Powers Doctrine and International Investment Law', in F Fontanelli, A Gattini, and A Tanzi (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018), 323-43.

7.3.2. Wrongfulness of Judicial Conduct as a Predicate of Expropriation Claims

If any agreement can be discerned from the practice of investment treaty tribunals, it is certainly for the proposition that, in circumstances where the expropriation claim is predicated upon injuries that originate in the conduct of the judiciary, such conduct must itself be reproachable in order to amount to an act of expropriation. This proposition appears in fact so well established that one can consider it a general principle for determining the existence of judicial expropriations.¹⁰³ Two caveats apply to it, however. First, the proposition attaches solely to those expropriation claims that are predicated upon injuries originating *primarily* or *essentially* in the conduct of the judiciary; and second, it applies only insofar as the domestic legislation applied by the courts is not itself contrary to international law. I shall address these conditions more closely in 7.3.2.

The principle has sometimes been stated in general terms. The Tribunal in *Saipem* thus postulated that the “unlawful character” of the impugned judicial decisions was “a necessary condition” to establish a claim of expropriation based on the conduct of the judiciary – even if immediately adding that such a requirement was only “due to the particular circumstances of this dispute and to the manner in which the parties have pleaded their case”, while emphasizing that its analysis “should not be understood as a departure from the ‘sole effects doctrine’”.¹⁰⁴ Apart from statements of principle, however, the strongest authority for the principle can actually be derived from the reasoning adopted by investment tribunals in rejecting expropriation claims predicated upon judicial conduct.

7.3.2.1. Judicial Expropriations Predicated Upon the Existence of a Denial of Justice

The standard most commonly applied by investment tribunals to determining whether an act of the judiciary gave rise to an expropriation was that of denial of justice (applied either as part of the minimum standard of treatment under customary international law, or as an element of the fair and equitable treatment standard). This is, after all, logical given that denial of justice constitutes a delict that is specifically concerned with judicial acts.¹⁰⁵

In practice, of course, it was chiefly because claimants failed to establish that the domestic judicial decisions, or the process leading to them, amounted to a denial of justice that investment tribunals rejected expropriation claims predicated upon judicial interferences in the claimants’ proprietary interests. In *Loewen v. USA* (2003), the Tribunal categorically rejected the claim that the discriminatory conduct of the US judge, the excessive verdict rendered in the proceedings, the denial of Loewen’s right to appeal, and the coerced settlement violated Article 1110 of NAFTA barring the uncompensated appropriation of investments of foreign investors. According to the Tribunal, in such circumstances, a claim alleging an appropriation in violation of Article 1110 “can succeed only if Loewen establishes a denial of justice under Article 1105 [NAFTA]”.¹⁰⁶ In *Ares v. Georgia* (2008), the Claimants’ investments could not be deemed to have been expropriated by reason of a decision of a Georgian court annulling the Claimants’ contractual rights under a share-purchase agreement, with the consequential extinction of Claimants’ shareholding interests in a local production plant, since the evidentiary record did not bear out Claimants’ allegations that they had not been afforded fair treatment, or otherwise faced

¹⁰³ This wealth of jurisprudence notwithstanding, some commentators, adhering to the sole effects doctrine, dismiss the question of illegality as conceptually relevant to the appraisal of judicial expropriations. Demirkol (n 89), 54.

¹⁰⁴ *Saipem* (n 99), [134].

¹⁰⁵ cf *AO Taffneft* (n 83), [460] (noting how judicial expropriations are ‘inevitably intertwined’ with denial of justice and violations of other standards governing court conduct).

¹⁰⁶ *Loewen Group, Inc and Raymond L Loewen v United States of America* (Award) (ICSID Case No ARB(AF)/98/3, 26 June 2003) [141].

a denial of justice by, or at the hands of, that court.¹⁰⁷ The Tribunal was of the opinion that there could be no expropriation where contractual rights are brought to an end “by a series of decisions of the Georgian Courts, which decisions we find cannot properly be faulted under international law.”¹⁰⁸ In *Liman Caspian v. Kazakhstan* (2010), the decisions of Kazakh courts invalidating an assignment agreement through which Claimant obtained an oil exploration licence were similarly held not to constitute an expropriation on the ground that impugned decisions “were not arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking due process”, which meant that the licence transfer was not wrongfully annulled.¹⁰⁹ In *Swisslion v. Macedonia* (2012), the fact that the decisions of Macedonian courts terminating a share purchase agreement, through which the Claimant acquired shareholding interests in a Macedonia-based food producer, have not been successfully challenged before the Tribunal meant “...that the argument that the court effected an expropriation must fail.”¹¹⁰ In *Arif v. Moldova* (2013), a string of decisions of Moldovan courts resulting in the annulment of Claimant’s concession contract relating to the building and management of a duty-free store network and a related lease agreement were found not to have given rise to an expropriation, as Claimant failed to establish that there had been “collusion between the courts and the investor’s competitors in the proceedings before the Moldovan courts over these agreements”, that the Moldovan courts “have acted in denial of justice in any way”, or that “the Moldovan judiciary has not applied Moldovan law legitimately and in good faith”.¹¹¹ In *Ryan & Schooner Capital v. Poland* (2015), Claimant’s expropriation claim failed insofar as the Polish courts’ decisions, which upheld the decisions of Polish tax authorities concerning Claimants’ VAT entitlements, and which served as the predicate of the claim, “were not the result of denial of justice or abuse of process”.¹¹² And in *Anglia Auto Accessories v. Czech Republic* (2017), the expropriation claim premised upon the alleged deprivation of Claimant’s contractual right to damages under a commercial award, which was said to result from the Czech Courts’ purported inactivity in the process of its enforcement, equally failed in the circumstances where Claimant could not establish “‘excessive obstacles’ in its enforcement attempts, or ‘arbitrary, discriminatory and unreasonable’ conduct by the Respondent’s courts, or a sweeping refusal to act.”¹¹³

It is worth noting that this type of reasoning was not applied solely in cases where the rights affected by judicial decisions were incorporeal, but was also extended to cases where judicial decisions resulted in interferences with physical property. Hence, in *Garanti Koza v. Turkmenistan* (2016), the claim of direct expropriation, which the investor mounted on the fact that its factory and equipment had been seized by Turkmen courts after it abandoned work on a construction project, was rejected on the ground that the actions of the Turkmen courts followed as a matter of normal legal process under Turkmen law from the investor’s default under the construction contract.¹¹⁴ The Tribunal explained that “[a] seizure of property by a court as the result of normal

¹⁰⁷ *Ares v Georgia Ares International SrL and MetalGeo SrL v Georgia* (Award) (ICSID Case No ARB/05/23, 28 February 2008) [8.3.5]-[8.3.7].

¹⁰⁸ *ibid* [8.3.9]; *Italics in the original, underlining mine.*

¹⁰⁹ *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan* (Award) (ICSID Case No ARB/07/14, 22 June 2010) [431]-[432].

¹¹⁰ *Swisslion v Macedonia* (n 100), [312]. Elsewhere, the Court already established that the judicial decisions did not amount to a denial of justice. See [265]-[275].

¹¹¹ *Arif v Moldova* (n 7), [415].

¹¹² *Vincent J Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Republic of Poland* (Award) (ICSID Case No ARB(AF)/11/3, 24 November 2015) [490]-[491].

¹¹³ *Anglia Auto Accessories Ltd v Czech Republic (Final Award)* (SCC Case No. V 2014/181, 10 March 2017) 301; cf 291-303.

¹¹⁴ *Garanti Koza LLP v Turkmenistan (Award)* (ICSID Case No ARB/11/20, 19 December 2016) [364]-[366].

domestic legal process does not amount to an expropriation under international law unless there was an element of serious and fundamental impropriety about the legal process.”¹¹⁵

Furthermore, the reasoning has been extended to cases where the injurious acts, while predicated on a preceding judicial act, were eventually afflicted by some other State organ or private party – such as where a court has ordered the seizure of property and the executive organ has subsequently taken it. In the *Liman* case discussed above, an order by the Ministry of Energy, by which the exploration licence was re-transferred to another entity, was not considered capable of constituting an expropriatory measure in itself, since the order only executed the court decision invalidating a previous licence transfer and a governmental authority “cannot be reproached for acting in accordance with a decision taken by the state’s own courts” where such court decisions “are irreproachable and have to be accepted from the perspective of international law.”¹¹⁶ At the level of principle, however, the principle was already espoused earlier in *Middle Eastern Cement v. Egypt* (2002) where, in the context of an administrative (and not judicial) seizure and action, the view was taken that “normally, a seizure and auction ordered by the national courts do not qualify as a taking”, but can amount to a measure the effects of which would be tantamount to expropriation if not taken “under due process of law”.¹¹⁷ The principle was implicitly confirmed in other cases.¹¹⁸

7.3.2.2. *Judicial Expropriations Predicated Upon Other Violations of International Law*

Arguably, as denial of justice is not the only standard that can possibly applied to determining the propriety of judicial conduct, the non-observance of some other international obligation which ought to have been respected through the medium of specified conduct on the part of domestic courts could equally serve as a predicate of an expropriation claim.

Attesting to his proposition is the award in *Saipem v. Bangladesh* (2009), where the propriety of the impugned judicial conduct was tested, instead of by reference to denial of justice, against Bangladesh’s obligations under the 1958 New York Convention and general principles of (international) law. And in fact, in the circumstances of that case, the interferences on the part of the Bangladeshi courts with an ongoing commercial arbitration were held to have given rise to an unlawful expropriation, on the ground that: (1) the Bangladeshi courts had exercised their supervisory jurisdiction over the arbitration process for an unjustified end when revoking the authority of the local arbitral tribunal, and thereby violated the internationally accepted principle of prohibition of abuse of rights; and (2) by revoking the arbitrators’ authority and subsequently annulling the commercial award, the Bangladeshi courts directly violated Article 2 of the New York Convention (1958), which obliged them to recognize arbitration agreements.¹¹⁹ Of course, one may wonder whether in the circumstances of that case, it may not have been more appropriate to determine the propriety of the courts’ interferences with the local arbitration process by reference to the denial of justice standard.¹²⁰ At the level of principle, however, there is

¹¹⁵ *ibid*, [365].

¹¹⁶ *Liman Caspian* (n 109), [433]-[434].

¹¹⁷ *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (Award) (ICSID Case No ARB/99/6, 12 April 2002) [139].

¹¹⁸ See *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger* (Award) (ICSID Case No ARB/11/11, 15 July 2013), [125]-[126] (finding that an expropriation of Claimant’s investment occurred, on the ground that the denunciation of Claimant’s concession contract was annulled by the Supreme Court of Niger and that therefore there was ‘in any case no legal basis which could justify the requisitions of assets, materials and personnel’ of the Claimant’s subsidiary).

¹¹⁹ *Saipem* (n 99), [145]-[173].

¹²⁰ The Tribunal deemed that it could not undertake such an inquiry in view of jurisdictional limitations directing it solely to determine whether an expropriation has occurred. But then one may wonder on what basis the Tribunal deemed itself nonetheless competent to pronounce itself on violations of the New York Convention.

nothing which would suggest that the New York Convention could not be violated by means of inappropriate conduct on the part of the local courts.

As suggested by the award in *ATA Construction v. Jordan* (2010), it may actually be possible for particular judicial acts to engage the responsibility of the State because of their non-conformity with the obligations under the New York Convention even in circumstances where the impugned judicial acts would not otherwise amount to a denial of justice.¹²¹ Hence, the fact that Jordanian courts annulled a local commercial award previously rendered in favour of the investor, and thereby also extinguished the underlying contractual arbitration clause, was held to have “deprived an investor such as the Claimant of a valuable asset in violation of the Treaty’s investment protections.”¹²² Such conclusion was based on the finding that, by failing to respect Claimant’s right to invoke the contractual arbitration agreement and to refrain from exercising their own jurisdiction on the substance of the commercial dispute, the courts directly violated Jordan’s obligation under Article 2 of the New York Convention (1958)¹²³ – but notwithstanding the fact that the Tribunal considered that otherwise no claim of denial of justice, whether substantive or procedural, could possibly have been sustained in relation to the actions of the Jordanian courts.¹²⁴

Predicating expropriation claims upon judicial violations of other obligations than the prohibition of denial of justice will often have an advantage in that it will obviate the need for satisfying the high threshold that is required for establishing denial of justice, including the requirement of judicial finality which, as I shall discuss in chapter 8, otherwise demands the exhaustion of local remedies. Invoking violations of other obligations than those arising under the applicable investment treaty does give rise, however, to an important jurisdictional question: are investment tribunals actually empowered to make pronouncements on such violations?

The *Saipem* case itself provides a rather curious example of how this question may (not) play a role. In the circumstances of that case, the applicable Italy-Bangladesh BIT restricted the Tribunal’s jurisdiction solely to claims for expropriation. Since the Tribunal presumably did not have jurisdiction over claims pertaining to violations of other treaty standards, the Claimant also decided not to present its claim as one grounded in denial of justice.¹²⁵ Against this backdrop, it is all the more surprising that the *Saipem* Tribunal nonetheless felt confident to assessing whether the domestic courts’ conduct was in conformity with Bangladesh’s obligations under the 1958 New York Convention. For, it did not enjoy any more competence to consider violations of the latter than it would have over potential denial of justice claims. Arguably, the making of such pronouncements may be less of a problem where the jurisdiction of investment tribunals rests on broadly-formulated dispute settlement clauses, which extend to any or all disputes concerning an

¹²¹ *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan* (Award) (ICSID Case No ARB/08/2, 18 May 2010) [121]-[132].

¹²² *ibid* [125]-[126]. Notably, the Tribunal failed to specify which treaty standard had actually been breached. It merely noted that the preamble to the BIT provided that fair and equitable treatment of investment was desirable ([125]) and mentioned in the accompanying footnote that the Respondent ‘had assumed the obligation’ to accord to the Claimant’s investment fair and equitable treatment and treatment no less favourable than that required by international law by virtue of the MFN clause contained in Art II(2) of the BIT. On the other hand, the Tribunal’s use of the term ‘deprivation’ seemed to imply that the result of the domestic courts’ decisions amounted to an expropriation. Yet, the Tribunal did not explicitly characterize it as such. The lack of substantiation in this respect may have something to do with the Tribunal’s ‘restorative’ approach to resolving the underlying investment dispute. Namely, instead of awarding compensation to the Claimant, the Tribunal restored the Claimant’s right to arbitration in relation to the dike dispute in accordance with the terms of the original arbitration agreement. See [131]-[132].

¹²³ *ibid* [124].

¹²⁴ *ibid* [123]. The Tribunal expressed such opinion despite jurisdictional constraint *ratione temporis*, which otherwise prevented it from fully reviewing the propriety of Jordanian courts’ conduct. cf [94]-[120].

¹²⁵ cf *Saipem* (n 99), [121].

investment. But even in such circumstances, some investment tribunals considered themselves without jurisdiction to determine violations of the 1958 New York Convention as a predicate of expropriation claims.¹²⁶ The solution to this conundrum may be in accepting that, by determining the conformity of courts' conduct with specific international obligations binding upon the State, an investment tribunal is in fact not exercising jurisdiction over claims based on such violations, but is only taking such other violations "into account" as a necessary legal predicate of the treaty claims that do fall within its jurisdiction. Arguably, however, the tribunals in such cases could then equally examine whether the impugned judicial conduct conforms to other standards prescribed by international law, including international standards pertaining to the administration of justice.

7.3.2.3. *Judicial Expropriations Predicated Upon Violations of Domestic Law*

The question eventually arises as to whether the wrongfulness of a particular judicial act must necessarily be established by reference to international law, or whether this could also be by reference to its illegality as a matter of domestic law. As discussed in chapter 6, it is true that *mere* errors in the application of domestic law are essentially insufficient to establish a denial of justice. Yet, whether egregiously wrong or merely wrong, a judicial decision extinguishing an investor's proprietary rights will still be wrongful. This issue has not received much treatment in the jurisprudence of investment tribunals and their approach to the question of domestic legality has been somewhat varied.

In *Liman v. Kazakhstan* (2010), for example, the Tribunal emphasized that the judicial decisions invalidating the investor's licence, being acceptable under international law for not amounting to a denial of justice, "even if they might have been incorrect as a matter of Kazakh law", could not amount to an expropriation.¹²⁷ And so did other tribunals, too, suggest in their analysis that whether or not judicial decisions were in conformity with the applicable domestic law or with contractual stipulations was not determinative for the expropriation claim.¹²⁸ In *Saipem* (2008), in contrast, the Tribunal did explore as part of the expropriation claim whether the court intervention in the local arbitration could also have been regarded as illegal on account of the courts lacking jurisdiction under the Bangladeshi Arbitration Act. In the circumstances of that case, however, the unlawful character of the intervention could not have been established on those grounds.¹²⁹ Similarly, the Tribunal in *Al-Bahloul v. Tajikistan* (2009) rejected an expropriation claim predicated on the alleged illegality of the courts' dissolution of the Claimant's venture and the reduction of its shareholding interests in another joint venture, on the ground that both of those decisions appeared to have resulted from the application of Tajik law and the courts' position in both cases was not found to be "manifestly in contradiction with the Tajik legislation."¹³⁰ In other words, the expropriation claim was rejected by reference to the legality of the judicial acts as a matter of domestic law.

Conversely, there is at least one precedent attesting to the possibility that the domestic illegality of a judicial decision can be sufficient for a finding of expropriation. In *CCL v. Kazakhstan* (2004), a court-ordered termination of a concession agreement granting Claimant the

¹²⁶ See eg *Kaliningrad Region v Lithuania (Final Award)* (ICC, 28 January 2009) (where the claim for expropriation arising out of the Lithuanian courts' handling of the enforcement of an earlier commercial award was purportedly rejected on the ground of alleged lack of competence to review the conformity of the host State's conduct with obligations under the 1958 New York Convention).

¹²⁷ *Liman Caspian* (n 109), [431]-[432].

¹²⁸ See eg *Schooner Capital v Poland* (n 112) [491] (It is not for this Tribunal to rule on the correctness of those decisions as a matter of Polish law.); or *İçkele İnşaat Limited Şirketi v Turkmenistan (Award)* (ICSID Case No ARB/10/24, 8 March 2016) [355].

¹²⁹ *Saipem* (n 99), [139]-[144].

¹³⁰ *Al-Bahloul v Tajikistan (Partial Award on Jurisdiction and Liability)* (SCC Case No V 064/2008, 2 September 2009) 284.

right to use and manage a previously state-owned oil refinery in Kazakhstan was found to have amounted to expropriation in breach of customary international law merely because it was not effected in conformity with the provisions of the contract. The termination was ordered by the Kazakh City Court following an application by the General Prosecutor of Kazakhstan, and later confirmed by the Supreme Court of Kazakhstan, pursuant to which the Committee for State Property and Privatization also proceeded to termination. The Tribunal held that the conduct of the Prosecutor General and subsequently by the Kazakh courts was tantamount to expropriation, because “the legal and factual effect” of their actions was that the agreement was terminated and that this was an act of Kazakhstan.¹³¹ This conclusion was premised on the finding that the termination of the contract did not follow the terms of the contractual bargain.¹³²

Nonetheless, one may wonder whether focusing the inquiry on the domestic legality of a judicial act is the proper way to proceed in the context of an expropriation claim predicated upon judicial conduct. An assessment of the domestic legality of a judicial measure could at the end of the day entail a correctness test, which investment tribunals may not be able to properly engage in. Indeed, when it comes to the *CCL* case, one may question the soundness of the Tribunal’s conclusions, which ignored to examine the question whether the termination of the contract could have been valid as a matter of the applicable domestic law in the circumstances where such termination was purportedly provided for by the Civil Code of Kazakhstan in the event of a material breach.¹³³ In this respect, a sounder approach was that of the *Saipem* Tribunal, which refused to conclusively determine the issue of legality under domestic law where Claimant had not procured an expert opinion to rebut the Respondent’s expert opinion on the contrary, considering the issue simply as “not established”.¹³⁴

Given the difficulties that investment tribunals may have with assessing impugned judicial conduct for conformity with domestic standards, a viable alternative may be to assess the propriety of such conduct by reference to general principles of law, such as that of proportionality. Attesting to such a possibility is the award in *İçkale İnşaat v. Turkmenistan* (2016), where the Tribunal proceeded to examine whether a Supreme Court’s directive was “excessive and as such expropriatory”, because – by preventing all Claimant’s machinery and equipment from being removed from Turkmenistan – it may have gone beyond what would have been necessary for the purpose of recovering certain contractual penalties to which the Claimant’s contractual counterparty was entitled.¹³⁵ In the circumstances of that case, the expropriation claim failed as the judicial measure was not found to have been excessive. But while the Tribunal failed to elaborate on the source of the standard it was applying, the approach will certainly prove attractive, especially in cases where the tribunals’ jurisdiction will be limited to expropriation claims, and tribunals will have reservations to reviewing the propriety of judicial conduct from the perspective of denial of justice standards.¹³⁶

7.3.2.4. *Factual or Legal Predicate?*

Before moving to considering the exceptions to the requirement of wrongfulness just discussed, it is necessary to briefly inquire whether the wrongfulness of the impugned judicial conduct must be considered a *legal* or a *factual* predicate of expropriation claims grounded in the conduct of judicial organs.

¹³¹ *CCL v Republic of Kazakhstan (Final Award)* (SCC Case 122/2001, 1 January 2004)174-175.

¹³² *ibid*, 165.

¹³³ *ibid*, 159.

¹³⁴ *Saipem* (n 99), 143-144.

¹³⁵ *İçkale İnşaat v Turkmenistan* (n 128), 371-75.

¹³⁶ *cf ibid*, 355.

It must be noted that the question of propriety of judicial conduct can be relevant to determining whether the conditions for a lawful expropriation have been complied with. In some treaties, this link is even expressly spelled out. Pursuant to Article 1110(1) NAFTA, expropriatory measures are thus prohibited “except: [...] (c) in accordance with due process of law *and Article 1105(1)* [on the minimum standard of treatment]”. According to the Tribunal in *Eli Lilly* (2017), the relationship between the two provisions will hence be “engaged most acutely in circumstances in which the allegations at issue go to acts of the judiciary, inter alia, for the reason that an alleged breach of the minimum standard of treatment requirement of Article 1105(1) informs an alleged breach of Article 1110(1).”¹³⁷ One must not lose sight of the fact, however, that the requirement of due process, which is common to most expropriation clauses, is but one of the conditions for the lawfulness of an expropriation under international law. It does not have a bearing on the *existence* of an expropriation as such. One can therefore question the soundness of the reasoning adopted by the Tribunal in the *Middle Eastern Cement* case, according to which a seizure and auction ordered by a national court could “qualify” as a taking if they were not taken under due process of law, as required by the applicable BIT.¹³⁸

An altogether different argument was raised in *RosInvest v. Russia* (2010). There, the treaty clause prohibiting uncompensated expropriations was considered in relation to the acts of the courts to be synonymous with the obligation not to deny justice, with the Tribunal arguing that the “obligation provided for in Article 5(1) IPPA [i.e. the expropriation clause] for measures which might be considered expropriatory implies that there is also no discrimination or taking without compensation by denial of justice.”¹³⁹ The argument is not without merit, given that under customary international law, the prohibition of denial of justice and the prohibition of uncompensated expropriations were at a certain point considered both to be part of the same minimum standard of treatment.¹⁴⁰ Nonetheless, in the context of investment treaties, both obligations find their basis in different treaty standards and must conceptually be treated separately.

For analytical purposes, it seems in the end more appropriate to treat the element of wrongfulness as a factual, rather than legal predicate of expropriation claims based on judicial conduct – just as the finding of a breach or non-observation of a contractual obligation will be the necessary factual predicate of claims based on umbrella clauses.

This leads eventually to the question as to why an inquiry into the propriety of judicial measures *is* actually relevant to expropriation claims based on such measures. Arguably, there are two possible ways to look at this. One is to consider the issue of propriety relevant to determining whether or not the impugned judicial measure is *expropriatory in character*. This type of reasoning is implicit in the statements such as that of the Tribunal in the *Middle Eastern Cement* case (and subsequent decisions relying on that precedent, such as *Ares* or *Garanti Koza*) to the effect that “a seizure and auction ordered by the national courts *do not qualify as a taking*” as long as they are taken under due process of law.¹⁴¹ It is also implicit in observations such as that of the Tribunal in *Swisslion* that a court’s termination of the contract “*cannot be equated to an expropriation of contractual rights simply because the investor’s rights have been terminated*”.¹⁴²

¹³⁷ *Eli Lilly* (n 7), 417. cf also [225] (“As regards decisions of the national judiciary, the interplay between obligations under NAFTA arts 1105(1) and 1110 will be a matter for careful assessment in any given case, subject to the controlling appreciation that a NAFTA Chapter Eleven tribunal is not an appellate tier with a mandate to review the decisions of the national judiciary”).

¹³⁸ *Middle East Cement Shipping* (n 117), [139].

¹³⁹ *RosInvest Co UK Ltd v The Russian Federation* (Final Award) (SCC Case No V079/2005, 12 September 2010), [273].

¹⁴⁰ See *supra* 2.2.2.

¹⁴¹ *Middle East* (n 117), [139]; *Garanti Koza* (n 114), [365].

¹⁴² *Swisslion* (n 100), [314]; emphasis added.

Another way is to consider the issue of propriety as one that is relevant to determining the *existence of a proprietary interest* that could possibly have been subject to a taking. This approach was followed for example in *Azinian v. Mexico*, where the Tribunal took the view that “if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law” – a complaint which would essentially require proving that the Mexican courts committed a denial of justice, or a pretence of form to achieve an internationally unlawful end – “there is by definition no contract to be expropriated.”¹⁴³ The approach was later endorsed in *Arif v. Moldova*, with the Tribunal taking the view that:

“In light of the fact that the agreements have been found to be invalid under Moldovan law this Tribunal *is not persuaded that there can be deprivation of invalid rights*. The invalidity of these agreements (and hence of the rights recognised under these agreements [...]) resulting from the application of Moldovan law by the Moldovan courts as a result of lawsuits filed by private competitors cannot be interpreted as an expropriation of Mr. Arif’s rights, as Claimant pretends. No wrongful taking results from the legitimate application of Moldova’s legal system (which the Tribunal notes has not changed since the time the investment was made) and the subsequent invalidity of the rights at stake.”¹⁴⁴

In the end, which approach will be chosen may depend on the circumstances of the case. In the case of judicial annulment of contractual rights, for example, it may be more appropriate to approach the question as one concerning the existence of a proprietary interest that is the object of protection, whereas in the case of judicial termination of contractual rights, it may be more appropriate to pursue the inquiry into whether the judicial measure is expropriatory in character, given that the original validity of such rights has never been at issue.

7.3.3. The Relevance of the Origin of the Injury

In the context of many expropriation claims predicated upon judicial conduct, the cause of the injury will often lie in the wrongful treatment at the hands of domestic courts themselves. However, there may also be situations where the impugned judicial treatment will not *in itself* be inadequate from the perspective of international legal standards, yet the outcome still capable of being characterized as an internationally wrongful act. This can be the case, for example, because such outcome results from the application of domestic legislation that is itself confiscatory in character, or because the outcome legalizes interferences with the investors’ proprietary rights that had already occurred at the hands of other State organs and that were wrongful on their own account. In such cases, the basis of the judicial injury will have been laid, not by the courts themselves, but, respectively, by the legislative (e.g. as a result of the enactment of inadequate laws) or the executive (e.g. on account of the failure of administrative organs to treat the investor fairly and equitably). Alternatively, the impugned judicial treatment may form part of a composite wrongful act – by being part of a series of actions or omissions, none of which necessarily wrongful on its own account, which in the aggregate qualify as wrongful.¹⁴⁵

For the purpose of establishing the responsibility of the State for a particular judicial outcome, it is of course irrelevant whether the international wrong is one proceeding from the deficiencies of the judges, or from the failures of other State organs to abide by international obligations. The distinction concerns only the internal origins of responsibility. This is not to say, however, that the question of the origin of the injury is without analytical relevance. On the

¹⁴³ *Azinian, Davitian and Baca v The United Mexican States* (Award) (ICSID Case No ARB(AF)/97/2, 1 November 1999), [100].

¹⁴⁴ *Arif v Moldova* (n 7), 417; original footnotes omitted; emphasis mine.

¹⁴⁵ cf ARSIWA, art 15(1).

contrary, the question will be determinative to the tribunal's scope of inquiry.¹⁴⁶ Specifically, it will be decisive as to whether the tribunal will have to assess the propriety of the impugned judicial act from the perspective of international legal standards as a predicate of the expropriation claim.¹⁴⁷

7.3.3.1. *Judicial Injuries resulting from Legislative Failure*

Just as an international wrong can emerge if the domestic judges apply domestic laws *in a way* that gives rise to a violation of international law, it can also emerge because the laws applied are *in themselves* contrary to international law. In such a case, the international wrong is not one proceeding from the deficiencies of the judges, but from the failure of the legislature to enact laws that are compatible with the State's international obligations. Since the latter condition is sufficient to establish the responsibility of the State, there is no need to establish impropriety on the part of the judicial treatment as such.

In practice, arguments pertaining to inadequacies of domestic legislation have rarely been advanced in the context expropriation claims predicated upon judicial conduct. The issue was mostly considered at the level of principle. In *Azinian v. Mexico* (1999), for example, the question was touched upon in the context of determining whether the annulment of Claimant's concession contract as an act of expropriation. The Tribunal rejected such claim, on the ground that (1) the annulment was found by domestic courts to be consistent with the Mexican law governing the validity of public service concessions, that (2) Claimants neither contended nor proved that the Mexican legal standards for the annulment of concessions or the Mexican law governing such annulments were themselves expropriatory, and that (3) the conduct of the courts themselves (which the Tribunal examined *proprio motu*) was not reproachable at the international level.¹⁴⁸ Though the expropriation claim in *Azinian* was not in fact predicated upon the decisions of the domestic courts, the holdings attest to the possibility of a judicial measure amounting to an expropriation on account of legislation which is expropriatory in character, even where the conduct of the courts may not be reproachable as a matter of international law. The possibility of such a scenario was later also contemplated in *Arif v. Moldova* (2014). In evaluating a judicial expropriation claim, the Tribunal thus considered it "significant" that the Claimant did "not allege that there is any flaw in Moldovan law or that it is unfair in any way *per se*."¹⁴⁹

Arguably, the prospects of judicial wrongs arising on account of the application of domestic legislation that itself fails to satisfy international standards may be more hypothetical than real, since in many legal systems, domestic courts retain some freedom in how they apply domestic laws. In many cases, courts will generally have the ability – and possibly be even bound by a duty – to reach decisions that are in conformity with, rather than contrary to, international law. Nonetheless, such prospects are not necessarily remote.¹⁵⁰

¹⁴⁶ See especially H Urbanek, 'Das völkerrechtsverletzende nationale Urteil' (1958–59) 9 ÖZöR 213, 226, considering that any international adjudicatory body will have to take into account in their inquiry, as a practical matter, the distinction between injurious and non-injurious judgments of domestic courts. According to his view, a judgment that merely confirms an internationally wrongful act of another organ is irrelevant from the perspective of international law.

¹⁴⁷ The relevance of the distinction was noted in some cases. See particularly *Ares v Georgia* (n 107), [8.3.9], where the judicial expropriation claim was rejected precisely because the domestic rights affected 'had been brought to an end, *not by reason of any legislative, administrative, police or other action*, whether proper or improper, but by a series of decisions of the Georgian Courts, which decisions we find cannot properly be faulted under international law.' Emphasis in the original.

¹⁴⁸ *Azinian v Mexico* (n 143), [97]-[101].

¹⁴⁹ *Arif v Moldova* (n 7), [415].

¹⁵⁰ cf *Belokon* (n 40), [263]-[266], where the Respondent was found liable under the applicable BIT on account of decisions of Kyrgyz courts which merely resolve that the deposed former managers of the Claimant's bank had no standing in accordance with Kyrgyz law to challenge the imposition of temporary administration on the bank. While the way those decisions were reached was not in itself reproachable as a matter of international law, the Tribunal nonetheless concluded

7.3.3.2. *Judicial Injuries resulting from Wrongful Acts of other Organs*

In practice, it is perhaps more common for an injurious judicial act to proceed from the failure of executive organs to conform to the standards of treatment required by international law. This can be the case where domestic courts retrospectively validate interferences with an investor's property that had occurred as a result of improper actions of, say, an administrative agency or an enforcement body – such as where a judgment declares that the occupation of the investor's premises by the police has been legal, for example. It can also be the case, however, where interferences with an investment are directly attributable to the courts, yet the causes of such interference lie at the hands of some other organ – such as where a court terminates an investment contract on account of the investor's non-performance, but where the reason for the latter's default can be wholly or partly attributable to the conduct of, say, a municipality or a State-owned entity. Admittedly, the two scenarios are somewhat distinguishable, to the extent that, in the former case, the *source* of the injury itself will lie with the other organs, whereas in the latter case, the conduct of the other organs will be the *cause* of the judicial injury. In both cases, however, the impugned judicial conduct will be one proceeding from the conduct of other State organs that will itself be reproachable as a matter of international law. Since the latter condition will normally be sufficient to establish the responsibility of the State, there will again be no need to establish impropriety on the part of the courts as such.

The above proposition is supported by arbitral practice. In several cases where the impugned conduct of the courts formed part of a broader pattern of conduct involving different State organs, investment tribunals either refrained from making determinations on the propriety of judicial conduct itself, or upheld an expropriation claim despite the lack of any evidence of wrongdoing on the part of the judicial organs. In *AMCO v. Indonesia* (1984), where the expropriation claim was premised on the fact that Claimant's investment license was wrongfully revoked by the Indonesian Foreign Investment Board, the Tribunal actually excluded judicial acts from the inquiry altogether, even though it were the courts of Jakarta that actually terminated the lease and management contract that constituted the investment in that case. While finding that AMCO's investment was expropriated, the Tribunal did not consider that the infringement of Indonesia's obligations under international law could be imputed to the judiciary, since "it was not the Jakarta Courts which revoked the investment license; such Courts merely took into account the fact that the revocation had been decided by the proper administrative authority."¹⁵¹ The main injury in that case was found to have been inflicted by the Foreign Investment Board, which revoked the license without affording AMCO the process that it was due.

Arbitral tribunals in later cases, however, did not exclude the conduct of the courts from the expropriation analysis, but equally did not require proof of impropriety on the part of the courts to uphold an expropriation claim. An example on point is the award in *Rumeli/Telsim v. Kazakhstan* (2008). In the circumstances of that case, the compulsory redemption of Claimants' shares in a Kazakh mobile telecommunications company, which was effected by a decision of the Presidium of the Supreme Court of Kazakhstan, was found to constitute a final act of taking and one amounting to an unlawful expropriation within the meaning of the applicable BIT,¹⁵² in spite of there being no evidence of any wrongful conduct on the part of the courts: the Supreme Court judges were not found to have been involved in any conspiracy against the Claimant;¹⁵³ and there

that the failure to provide for a practicable means to challenge the imposition of such administration amounted to an unreasonable impairment of the investment prohibited by the applicable BIT.

¹⁵¹ *AMCO Corporation and others v Republic of Indonesia* (Award) (ICSID Case No ARB/81/1, 20 November 1984) [151].

¹⁵² *Rumeli AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan* (Award) (ICSID Case No ARB/05/16, 29 July 2008) [705]-[708].

¹⁵³ *ibid* [709]-[715].

was no evidence that judicial decision was not made “in accordance with due process of law”,¹⁵⁴ or else that it was “so egregiously wrong as to be inexplicable other than by a denial of justice”.¹⁵⁵ What mattered, instead, was that the court process had been brought about as a result of a collusion between the Claimant’s local partner and Kazakhstan’s Investment Committee, which improperly terminated the Claimant’s investment contract, so as to provide the ground for ordering the compulsory transfer of Claimants’ shareholding. As in the *AMCO* case, the cause of the injury lay in the improper conduct of another State organ: the Tribunal established that the termination of the investment contract on the part of the Investment Committee itself breached the fair and equitable treatment standard on account of being arbitrary, unfair, unjust, lacking in due process, and not respecting the investor’s legitimate expectations.¹⁵⁶

7.4.3.3. *Judicial Decisions Forming Part of Composite Wrongful Acts*

A similar approach has generally been followed in situations where particular judicial decisions formed part of a broader set of acts of omissions involving various domestic organs, which only in the cumulative were held to amount to an expropriation of the investors’ assets. In such cases, tribunals not only did not require proof of impropriety on the part of the courts to uphold an expropriation claim, but at times did not even engage in separately evaluating the propriety of the judicial procedures from the viewpoint of international standards. The overall approach has generally been the same, but the argumentation has somewhat varied, as shown in the following examples.

In *Sistem Mühendislik v. Kyrgyz Republic* (2009), the judicial invalidation of a contract through which Claimant obtained sole ownership of a Kirgiz hotel was held to be tantamount to an expropriation of property by the State, without the Tribunal expressing any opinion as to the propriety of the judicial process resulting in such invalidation.¹⁵⁷ While the Tribunal limited itself to observing that “[t]he Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree”,¹⁵⁸ the situation was clearly one entailing a composite wrongful act, as noticeable also from the Tribunal’s reasoning. Although the relevant judicial decisions did not actually deprive the Claimant of the whole of its interest in the hotel, but only of that part which it acquired through the (subsequently invalidated) contract from the local partner, the Tribunal namely considered “the only realistic characterisation of the position” to be that Claimant was deprived of all of its property rights, given that the investor’s staff was ousted from the hotel by a group of armed men led by the chairman of the former local partner, and given that the hotel had been run since then by a new joint venture which was acting as the owner of the hotel and which was recognized as such by the Kyrgyz Ministry of Economy and Finance.¹⁵⁹

More faithful in applying the logic of composite wrongful acts was the Tribunal in *Laboud & Laboud v. Congo* (2014), which dealt with a similar situation where interferences with investor’s property, though originating in the conduct of third-parties, occurred with the acquiescence or collaboration of State organs. In the circumstances of that case, the expropriation claim was grounded in a court-ordered eviction of claimants’ business from their leased premises in the DRC. Yet, while the judicial proceedings leading to the eviction did give rise to certain due process issues, the source of the injury was not concentrated solely in the conduct of the courts. Rather, the eviction was the combined result of acts and omissions of different Congolese organs

¹⁵⁴ *ibid* [705].

¹⁵⁵ *ibid* [619].

¹⁵⁶ *ibid* [708]; cf [612]-[615].

¹⁵⁷ *Sistem Mühendislik v Kyrgyz Republic (Anard)* (ICSID Case No ARB(AF)/06/01, 9 September 2009) [117]-[118].

¹⁵⁸ *ibid* [118].

¹⁵⁹ *ibid* [121]-[128].

– including the Land Registry, the Office of Ill-Gotten Goods, and Congolese Courts – which improperly permitted that ownership of the premises reverted to a third-party which later set aside a long-term lease agreement. Hence, the Tribunal also concluded that it was not the eviction order itself, but the totality of the circumstances in which the eviction was ordered and executed that had an effect equivalent to an expropriation.¹⁶⁰ Indeed, the same circumstances gave rise, in their totality, also to a breach of the FET standard, whilst a claim of denial of justice was expressly dismissed.¹⁶¹

Further illustrations of investment tribunals desisting from separately evaluating the propriety of the courts' conduct can be found in the string of cases brought against the Russian Federation by various former shareholders of the Yukos oil company in relation to the demise of the latter. Though brought under different treaties, these cases were all premised upon the same series of events, and in large part, involved same or similar contentions: the abusive tax reassessments, inspections, and other proceedings initiated by the Russian tax authorities against the Yukos company, which ultimately culminated in the latter's liquidation, were claimed to have been confiscatory measures that indirectly expropriated the Claimants' investments in the company. While the injury in that case was primarily attributable to the conduct of the tax authorities, the Russian courts, too, bore their share of responsibility: by imposing a wide-ranging asset freeze; by upholding the claims of tax authorities and subsequently allowing the enforcement of the judgments against the company; by endorsing the auctions of the company's assets; by accepting the company's bankruptcy; as well as by entertaining criminal proceedings against Yukos' shareholders, managers, and employees, the courts validated and compounded the measures that adversely affected the investment.

The three different treaty tribunals deciding the relevant expropriation claims essentially all followed the same approach – in that they evaluated the conduct of the courts in the context of the conduct of other State organs. The first of the three, the Tribunal in *RosInvest v. Russia* (2010), did contemplate the possibility of there being a “taking without compensation by denial of justice”.¹⁶² The Tribunal, however, considered that, regardless of whether the conduct of the courts had by itself breached the applicable BIT, it was not precluded from examining the decisions of the Russian Courts as part of the “totality of Respondent's measures in their cumulative effect.”¹⁶³ Hence, without otherwise opining on the propriety of the judicial conduct as such, the Tribunal ultimately took the relevant judicial decisions into account when concluding that, on the whole, Respondent's measures amounted to an unlawful expropriation.¹⁶⁴ Likewise, in *Quasar de Valores v. Russia* (2012), the Tribunal took the courts' decisions into account in determining whether the steps that were taken by the Russian authorities, when viewed against the broader chronology of events, could “properly and fairly be characterised as part of an ordinary process of collecting taxes”.¹⁶⁵ Similarly, in the consolidated cases of *Veteran Petroleum / Yukos Universal / Hulley Enterprises v. Russia* (2014), the treatment of Yukos by Russian courts was considered as part of the “totality of the evidence”, on the basis of which the Tribunal concluded that the primary objective of the Russian Federation was, not to collect taxes, but to bankrupt Yukos and appropriate its valuable assets,¹⁶⁶ a

¹⁶⁰ Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v Democratic Republic of the Congo (Award) (ICSID Case No ARB/10/4, 7 February 2014) [501]-[505].

¹⁶¹ *ibid* [466].

¹⁶² *RosInvest v Russia* (n 139), [273]-[275].

¹⁶³ *ibid* [280].

¹⁶⁴ *ibid* [603]-[633].

¹⁶⁵ *Quasar de Valores v Russia* (SCC No 24/2007, 20 July 2012), [141].

¹⁶⁶ See identical awards in *Hulley Enterprises Limited (Cyprus) v The Russian Federation (Final Award)* (UNCITRAL, PCA Case No AA 226, 18 July 2014) [755]-[760]; *Veteran Petroleum v Russia (Final Award)* (UNCITRAL PCA Case No AA 226, 18 July 2014) [755]-[760]; and *Yukos Universal Limited (Isle of Man) v The Russian Federation (Final Award)* (UNCITRAL, PCA Case No AA 227, 18 July 2014) [755]-[760].

conclusion which supported the finding that the measures taken in respect of Yukos had an effect equivalent to nationalization or expropriation.¹⁶⁷ In determining whether the conduct of the Russian authorities amounted to an indirect expropriation, the Tribunal expressed no opinion as to the propriety of the judicial decisions as such.¹⁶⁸

Finally, reference needs to be made to the *OAO Tatneft v. Ukraine* (2014) award, where the Tribunal in a somewhat unusual way refused to pass upon an expropriation claim which was brought with respect to a series of actions and omissions of the executive and judicial branches that purportedly assisted third-parties with the takeover of a Ukrainian refinery. The Tribunal accepted that “[t]o the extent that a judicial decision forms an integral part of a chain of acts that, taken together, might qualify as a composite act and result in a wrong inflicted on the affected individual, such acts can justify a finding of liability [...] even if each of such acts individually might not be sufficient for that finding of wrongful conduct.”¹⁶⁹ Yet, though finding that it were the judicial decisions that ultimately resulted in that case in the total deprivation of Claimant’s shareholdings in the refinery, and though holding that those decisions even formed “an integral part of acts of greater complexity”, the Tribunal concluded that there were “too many uncertainties” that made a finding of expropriation unwarranted.¹⁷⁰ In the circumstances of that case, of course, such a finding was in the end not necessary, as the Tribunal had already found that the impugned judicial acts violated other standards of treatment under the applicable BIT.

7.3.3.4. *What Role for the Sole Effects Doctrine?*

As attested to by the precedents just discussed, in circumstances where the impugned judicial acts are just an intermediary or final step in a series of acts or omissions adversely affecting an investment, tribunals are likely to revert to the traditional “sole effects” doctrine to establish the occurrence of an expropriation – by either avoiding the question of propriety of the judicial measures altogether, or even proceeding to upholding an expropriation claim in the absence of any indications of impropriety on the part of the courts.¹⁷¹

Particularly prone to such approach are cases where judicial decisions turn out to be nothing but *ex post facto* attempts to legalize or validate interferences that already physically affected the investor’s property. Indeed, tribunals in such cases have frequently emphasized that they will not be stumped by domestic judicial characterizations, but will exercise their judgment in determining whether a taking of property has occurred. As the *AMCO* Tribunal was adamant to pointing out, “no matter how the legal position of a party is described in a national judgment, an international arbitral tribunal enjoys the right to evaluate and examine this position without accepting any *res judicata* effect of a national court.”¹⁷² Even more resolute was the *Quasar de Valores* Tribunal in highlighting that it was “not bound to accept such decisions to the extent that they sanction ‘actions [that] breached international law by depriving the claimants of adequate

¹⁶⁷ *ibid* [1575]-[1580].

¹⁶⁸ In contrast, the Tribunal did opine on the propriety of the Russian judicial processes with a view to establishing that the measures in question failed to meet the requirements for a lawful expropriation under the applicable treaty: the treatment accorded to Yukos managers in Russian court proceedings attested to the conclusion that the expropriation of Yukos was not carried out under due process of law. *ibid* [1583].

¹⁶⁹ *OAO Tatneft* (n 95), [462].

¹⁷⁰ *ibid* [464]-[472].

¹⁷¹ *cf. Sistem Mühendislik v Kyrgyz Republic* (n 157), [118] (“[i]f the Claimant has been deprived of its property rights by an act of the State, it is irrelevant whether the State itself took possession of those rights or otherwise benefited from the taking.”); *Rumeli AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan (Annulment)* (ICSID Case No ARB/05/16, 25 March 2010) [116] (“The treaty protection from expropriation supplies an independent standard which must also be met, whether or not the [judicial] decision was the result of a fair procedure or was in compliance with national law”).

¹⁷² *AMCO* (n 151), 177.

compensation for the dispossession of which they complain.”¹⁷³ Of course, one can immediately notice the stark contrast between the pronouncements such as the above and assertions such as that of the *Liman Caspian* Tribunal, which held that the effect of domestic courts decisions “has to be accepted under international law”,¹⁷⁴ or that of the *Arif* Tribunal, which saw “no compelling reason that would justify a new legal analysis” of a legal issue that “has already been repeatedly, consistently and irrevocably decided by the whole of the Moldovan judicial system.”¹⁷⁵ What is that makes investment tribunals prone to accept the findings of domestic courts in one case, and disinclined to accept their pronouncements in others?

Arguably, the divergent attitude can best be explained by the degree of freedom available to investment tribunals in reaching a finding on the expropriation claim without having to conclusively determine the correctness of the impugned domestic judicial decision(s). As investment tribunals have often been keen to emphasize in the context of expropriation claims predicated upon judicial conduct, they are not sitting as courts of appeal.¹⁷⁶ The fact that the conduct of judicial organs can be contextualized within the broader pattern of conduct involving other organs of the State seemingly provides investment tribunals with the opportunity to determine the propriety of the domestic judicial outcome without slipping into a form of appellate review; indeed, possibly even without having to perform any review of the conduct of the courts as such. Where, on the other hand, an expropriation claim hinges solely on the impugned conduct of the courts, the only way for investment tribunals to avoid sitting as courts to appeal is by reviewing the propriety of domestic courts decisions by reference to external standards, such as that of denial of justice. Given that the latter imposes a high threshold for a finding of impropriety – indeed, one that goes far beyond mere misapplication of domestic law – investment tribunals will essentially accept domestic judicial outcomes as long as the underlying judicial conduct will not reached the required level of impropriety.

7.4. Other Treaty Obligations Aimed at Providing Legal and Economic Security to Investments

Having discussed the rich jurisprudence on expropriation claims predicated upon judicial conduct, what follows is a brief examination of claims equally predicated upon the actions of the judiciary but presented as violations of umbrella clauses (7.4.1.), or as breaches of legitimate expectations under the fair and equitable treatment standard (7.4.2.).

7.4.1. Umbrella Clauses

Securing protection of contractual obligations arising out of agreements that they have entered into with host States has been of lasting concern to foreign investors. The annulment of contractual rights was, under circumstances, capable of constituting an expropriation, for which the host State was liable to pay compensation. But regular breaches of contract did not violate international law, unless the State failed to provide a remedy for such breaches in domestic courts, in which case that failure itself could have amounted to a denial of justice.¹⁷⁷ To address the problem of enforceability of contractual obligations, many investment treaties therefore include what are known as “observance of obligations”-, or more commonly “umbrella” clauses, which require nothing more

¹⁷³ *Quasar de Valores* (n 165), [94].

¹⁷⁴ *Liman Caspian* (n 109), [431].

¹⁷⁵ *Arif* (n 7), [416].

¹⁷⁶ See eg *RosInvest v Russia* (n 139), [280], [603]; *Arif* (n 7), [416].

¹⁷⁷ Vandevelde (n 86), 256-57; FA Mann, ‘State Contracts and State Responsibility’ (1960) 54 AJIL 572; and RY Jennings, ‘State Contracts in International Law’ (1961) 37 BYBIL 156.

and nothing less than the State to observe any obligation into which it has entered into with respect to an investment.¹⁷⁸ Their purpose is therefore to secure that the investors' entitlements arising out of proprietary rights and interests are respected.

Though the intended object of protection are primarily obligations created by contracts between the host State and the investor or investment, depending on the language of the concrete provision, the protection can also extend to obligations unilaterally assumed by the host State in relation to the investment, such as through the enactment of legislation. Either way, such obligations are unavoidably susceptible of being affected by judicial actions. State contracts are commonly governed by domestic law (which not infrequently is also the law of the host State), and thus also enforceable to the extent provided by such law. Domestic courts, on their part, not only possess primary competence over the interpretation and application of domestic law, but in many State contracts are also granted exclusive jurisdiction over contractual matters. It has therefore not been uncommon for claims of violations of the umbrella clause to be predicated upon the conduct of domestic courts involved in contractual disputes.

Most of such cases thus far concerned situations where the contracts in question have either been annulled or terminated by means of judicial intercession. And in all of those cases, the claims for umbrella clauses were flatly dismissed on the ground that they were premised on rights that had effectively been extinguished by means of judicial decisions. In *Liman v. Kazakhstan* (2010), the Tribunal for example concluded that Claimant lacked standing to invoke breaches of a licence contract as a basis for an umbrella clause claim, insofar as the Kazakh courts had lawfully invalidated a previous transfer of the License from another entity to the Claimant.¹⁷⁹ Likewise, the Tribunal in *Arif v. Moldova* (2013) found the claim for violation of the umbrella clause “inadmissible”, insofar as the Claimant’s concession contracts relating to the exploitation of a network of duty free stores at the border with Romania had been irrevocably annulled by the whole of the Moldovan judicial system.¹⁸⁰ In a similar way, the tribunals in *Bosh v. Ukraine* (2012) and *Swisslion v. Macedonia* (2012) dismissed the claims under the umbrella clause in circumstances where the relevant contractual rights – in the former case, rights arising under an property renovation and redevelopment project; in the latter case, those arising under a share purchase agreement – were validly terminated by domestic courts.¹⁸¹ In all of the cases, the decision of the investment tribunals to give effect to the domestic courts’ judgments was premised, explicitly or implicitly, on their previous findings that the domestic judicial treatment of the contractual issues conformed to the international standards of administration of justice.¹⁸² Most vocal in this respect was the tribunal in *Arif*, which “persuaded that there has been no denial of justice towards the investor and that the judiciary has applied Moldovan law legitimately and in good faith”, considered that it “cannot and should not act as a court of appeal of last resort” and therefore “it does not consider appropriate to decide on Claimant’s ‘specific undertakings’ claim to the extent it implies analysing *ex novo* the validity of these instruments under Moldovan law.”¹⁸³

The above cases concerned situations where the relevant contracts were annulled or terminated and could thus have been – and in some of the cases actually had been –also presented as expropriation claims. The purpose of the umbrella clause, however, is to also protect

¹⁷⁸ For examples, see 3.2.3.6.

¹⁷⁹ *Liman Caspian* (n 109), [442]-[443].

¹⁸⁰ *Arif* (n 7), [398].

¹⁸¹ *Bosh International, Inc and Be&P Ltd Foreign Investments Enterprise v Ukraine (Award)* (ICSID Case No ARB/08/11, 25 October 2012) [258]-[259]; and *Swisslion* (n 100), [265]-[275], and [323]-[325].

¹⁸² cf *Liman Caspian* (n 109), 442; *Arif* (n 7), [398]; *Bosh* *ibid*, 258-259 and 276-286; and *Swisslion* (n 100), [265]-[275], and [323]-[325].

¹⁸³ *Arif* (n 7), [398].

contract breaches that do not necessarily constitute a repudiation of the contract.¹⁸⁴ Thus far, the situation where a domestic court had already pronounced upon contract breaches has not yet been presented to an investment tribunal under the heading of an umbrella clause claim. The jurisdictional award in *SGS v. Philippines* (2004) suggests, however, that investment tribunals may be prone to accept domestic court findings on contractual issues, as long as the court's pronouncements in question were irreproachable from the perspective of international law. In the circumstances of that case, the Tribunal namely accepted that the umbrella clause claim was subject to "the factual predicate of a determination" by the Regional Trial Court of Manila with respect to the amounts still owed to the Claimant by the Philippines pursuant to the concession contract.¹⁸⁵ Though the Tribunal in that case did not indicate under which conditions, if any, it would have revisited the findings of domestic courts, the Dissenting Arbitrator, Professor Crivellaro, held that the claims which were otherwise found inadmissible under the umbrella clause could only return to the treaty tribunal in case of a denial of justice by the Philippine courts; for, "they cannot certainly return in case of a wrong judgment in the merits; we are not a Court of Appeal in respect of domestic courts."¹⁸⁶

Those umbrella clause claims that are predicated upon alleged non-observance of obligations unilaterally undertaken in domestic legislation would appear to be subject to similar considerations. In *Liman v. Kazakhstan* (2010), the Tribunal dismissed umbrella clause claims premised on alleged breaches of the Kazakh Foreign Investment laws, on the ground that the Kazakh courts had already decided on the application of those laws, and since the judicial decisions in question were found to be irreproachable as a matter of international law, the Tribunal considered it had to accept them as valid.¹⁸⁷ Practice at any rate suggests that in circumstances where umbrella claims hinge upon questions concerning the interpretation or application of domestic law, investment tribunals may show deference to domestic judicial decisions. In *Micula v. Romania* (2013), for example, where the question arose as to whether the withdrawal of financial incentives provided for under an emergency government ordinance relating to certain of Romania's "disfavoured" regions amounted to a breach of the umbrella clause, the Tribunal was "far from certain" whether it should revisit the validity of a Constitutional Court's decision, which found that similar incentives provided by Romania's Law on Foreign Investment did not provide beneficiaries with a vested right to such incentives, nor give them a right to compensation once such incentives are withdrawn.¹⁸⁸ In the circumstances of that case, though, the judicial decision in question did not directly concern the ordinance on which the umbrella clause claim was premised.

7.4.2. Protection of Legitimate Expectations

Apart from providing security to contractual commitments through the device of umbrella clauses, and to proprietary rights and interests by means of clauses prohibiting uncompensated expropriations, investment treaties also provide security to investors' legitimate expectations – such as those that could have possibly arisen on the basis of promises or assurances that a host States has made with a view to attracting investments, but also generally in relation to the state of the law and the totality of the business environment existing at the time of the investment. The

¹⁸⁴ Vandevelde (n 86), 258-259.

¹⁸⁵ *SGS Société Générale de Surveillance SA v Republic of the Philippines* (Decision on Objections to Jurisdiction) (ICSID Case No ARB/02/6, 29 January 2004), 174.

¹⁸⁶ *SGS v Philippines*, *ibid.* Dissenting Opinion of Professor Crivellaro, [12].

¹⁸⁷ *Liman Caspian* (n 109), [450].

¹⁸⁸ *Micula v Romania (Final Award)* (ICSID Case No ARB/05/20, 11 December 2013), [450]-[451].

protection of such expectations, alongside the maintenance of regulatory stability, belongs to the core elements of the FET standard.¹⁸⁹

In the case of legitimate expectations, the scope of protection are not proprietary rights and interests as such, but the economic value of the investment more broadly, which can be reduced as a result of changes introduced by the State in the regulatory environment. Although such changes will typically be the consequence of legislative and administrative measures, they may equally be induced by particular judicial interventions – such as where courts pronounce as unconstitutional the legislative framework underpinning an investment, or where they annul the specific instruments underlying an investment. Investment tribunals thus readily accepted that, as a matter of principle, an investor's legitimate expectations can be frustrated on account of the conduct of the courts themselves.¹⁹⁰ The issue, however, is not in the courts' ability to frustrate such expectations, but rather in the possibility of an investor actually holding expectations in relation to whether or not the regulatory environment may be subject to change on account of courts' conduct – bearing in mind the fundamental characteristics of the judicial function. As a matter of general proposition, it is well established that not any adverse change may give rise to a breach of the FET standard, for investors cannot legitimately and reasonably expect that host State laws will never change. Whether or not an expectation is a legitimate one will depend on the circumstances of each case, and be heavily influenced by specific representations or commitments made by the State to the investor, on which the latter must have necessarily relied. The investor is expected to be aware of the general regulatory environment in the recipient country of its investment, and its expectations will at any rate have to be balanced against legitimate regulatory activities of the host country.¹⁹¹

Nonetheless, when it comes to the question of whether judicially-introduced changes into the regulatory environment could form the predicate of an FET claim based on a breach of legitimate expectations, two approaches have thus far arisen in the practice of investment tribunals. In *Arif v. Moldova* (2013), the Tribunal found that the suspension and subsequent annulment of the investor's lease agreement on the part of Moldovan courts *in itself* breached the investor's legitimate expectation of a secure legal framework to operate its duty free store in Moldova.¹⁹² In the Tribunal's logic, in circumstances where the lease agreement had been entered into by a State entity, and been approved by a regulatory authority, the investor had a legitimate expectation that there was a secure legal framework for his investment. And this expectation was then breached as a "direct result" of the intervention of a State organ – i.e., the judgments of Moldovan courts – the Respondent incurred liability under the FET standard.¹⁹³ Curiously, in arriving at this finding, it mattered little to the Tribunal that the conduct of the courts was not

¹⁸⁹ UNCTAD, *Fair and Equitable Treatment: A Sequel* (Series on Issues in International Investment Agreements III) 63. There is discussion whether the concept of legitimate expectations is a standalone element of the fair and equitable treatment standard in circumstances where the latter is linked to the minimum standard of treatment. P Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), 154-71. In other contexts, however, the legitimate expectation principle has become a recurrent, independent basis for a claim under the FET standard. K Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in Reinisch (ed) *Standards of Investment Protection* (2008), 111-130, 124.

¹⁹⁰ See *OAO Tazneft* (n 83), [407] ('A predictable, consistent and stable legal framework is a FET requirement which ought to be safeguarded in its integrity irrespective of which organ of the State might compromise its availability [...] It does not matter [...] whether such breach originates in the executive branch of government, which is the most common occurrence in contemporary practice given the sweeping powers of administration, or in autonomous services, such as the Public Prosecutor, or eventually in the courts themselves').

¹⁹¹ cf *Saluka (Partial Award)* (n 39), [305]-[306]; *SD Myers, Inc v Canada (First Partial Award)* (UNCITRAL, November 13 2000), [263]; *Parkerings-Compagniet* (n 26), [332]; and *EDF (Services) Limited v Romania (Award)* (ICSID Case No ARB/05/13, 8 October 2009), [217]-[219].

¹⁹² *Arif* (n 7), [547].

¹⁹³ *ibid* [541] and [547(a)].

otherwise reproachable as a matter of international standards. Indeed, the fact that the courts were merely exercising their regular judicial function was not considered to be of any relevance at all. The Tribunal expressly acknowledged that the agreement “was subject to Moldovan law and the proper jurisdiction to determine its legality were the Moldovan courts”, as well as that “judicial review of administrative action is a normal occurrence in any State, and of course the administrative authorities of Moldova, [...] have to respect and comply with the judicial decisions at the domestic level.”¹⁹⁴ In the view of the Tribunal, however, “at the international level, the State has a unitary nature, and a contradiction in the actions of the State cannot be resolved on the international plane by reference to its internal legal order. It is well established that a State cannot rely on its internal law to justify an internationally wrongful act.”¹⁹⁵

A different approach was taken in *Hassan Awdi v. Romania* (2015), where the conduct of the courts was not taken to be the reason for the breach of the investor’s legitimate expectations. In the circumstances of that case, the Romanian Constitutional Court declared as unconstitutional the Law by which the Claimant’s companies were granted the right to conclude concession contracts with local municipalities in relation to land plots for the placing of kiosks used by the Claimant’s press distribution business. The specific Law was adopted as part of an “all reasonable efforts” commitment that Romania had contractually undertaken in the privatization agreement it entered into with the Claimant. The Tribunal found that the judicial repeal of the Law was effected by an act that was valid under Romanian law and “not invalid or so egregiously wrong under international law as to leave room for a finding of a denial of justice or of an arbitrary or discriminatory treatment”.¹⁹⁶ Unlike the *Arif* Tribunal, it did not hold, however, that the judicial repeal itself had breached the investor’s legitimate expectations. Such breach occurred rather on account of Respondent’s *failure to remedy the repeal* of that Law, such as by enacting a new organic law or an alternative normative act to the same effect.¹⁹⁷

The approach adopted by the *Awdi* Tribunal appears to be better fitted to assessing violations of legitimate expectations predicated upon judicial acts. Given the nature of the judicial function, investors cannot possibly hold legitimate expectations as to whether and how domestic courts review the validity of domestic legal acts – be it particular pieces of legislation, be it individual legal instruments adopted in the investor’s favour. Where legislative or executive organs act *ultra vires*, domestic courts cannot be faulted for annulling such acts. This is not to say that judicially-induced changes to the regulatory environment cannot frustrate the investor’s expectations; it is merely to say that judicial measures alone cannot give rise to violations of such expectations in the absence of the conduct of some other State organ that must also be impugned – provided, of course, that the courts’ conduct is not otherwise reproachable from the perspective of international standards. Furthermore, as demonstrated by the *Awdi* case, when the court conduct does affect the regulatory environment, the host State will be under an obligation to take steps so as to offset the adverse impact of the judicial intervention, or else its responsibility may be engaged.

This eventually begs the question whether expectations can legitimately arise also specifically in relation to how the courts will treat particular claims. Some investment tribunals were rather dismissive of any particularly demanding expectations as to the substantive treatment that investors’ claims were to receive in domestic courts. In *Eli Lilly v. Canada* (2017), the Tribunal thus held, for example, that the investor “should have, and could have, anticipated that the law would change over time as a function of judicial decision-making” and thus rejected the claim based on

¹⁹⁴ *ibid* [547(c)].

¹⁹⁵ *ibid*.

¹⁹⁶ *Hassan Awdi v Romania (Awadi)* (ICSID Case No ARB/10/13, 2 March 2015) [326].

¹⁹⁷ *ibid* [332]-[333].

the breach of legitimate expectations on account of the courts' alleged departure from previous case law.¹⁹⁸ In *White Industries v. India* (2011), the Tribunal even dismissed the idea that the investor could have legitimately expected that Indian courts would have applied the New York Convention properly and in accordance with international standards, in the circumstances where these courts were known for regularly entertaining set-aside applications in respect of foreign awards, in spite of such applications probably not being in conformity with the said Convention.¹⁹⁹

Somewhat contrary to this practice, however, the Tribunal in the same *Hassan Awdi* case did find in relation to a different domestic case, that the investor could legitimately have expected a particular judicial outcome. In the circumstances of that case, the ownership of a historical estate, which the Claimants acquired and developed into a luxury hotel, was eventually returned to the original heirs by force of a decision of the Romanian Supreme Court. Though finding no trace of denial of justice in relation to that decision,²⁰⁰ and in spite of considering that the Claimants were aware of uncertainties relating to the property's ownership and the possibility of it ultimately being restituted to the original owner, the Tribunal still found that the investor had "a legitimate expectation that had the risk in question materialised, they should be returned the price agreed for the purchase" and hence, "[f]air and equitable treatment guaranteed by the BIT [...] demands that the amount of the price originally paid be reimbursed to them."²⁰¹

One can wonder, however, whether the protection of legitimate expectations under the FET standard can really lend itself to such applications, for this could imply that investors may be granted substantive rights that may not otherwise exist under domestic laws. Furthermore, it could easily transform investment tribunals into regular courts of appeal.

7.5. Other Obligations Potentially Requiring Judicial Treatment of a Defined Kind

Having examined in the previous sections the categories of investment treaty provisions most commonly engaged by the conduct of the judiciary, it is appropriate to complete the inquiry by discussing several other investment treaty obligations that can, under circumstances, be read as dictating the kind of treatment that domestic courts are to accord to foreign investors. The notion of "treatment" can obviously refer to the particular manner in which a judicial measure has been applied to the investor, as well as the results obtained through application of the judicial measure. Both aspects are sometimes difficult to distinguish, particularly in relation to certain treaty standards that are relevant to both aspects of treatment. This notwithstanding, the present section discusses the effect that certain treaty standards may have on the procedural treatment that a foreign investor ought to be accorded in domestic judicial proceedings. The following section (7.6.), in turn, discusses the demands that treaty standards may have in relation to specific judicial outcomes.

Of central interest to the issue of procedural treatment due to foreign investors is the question whether specific treaty standards add anything to the obligation not to deny justice (applied either as part of customary international law, or through the fair and equitable treatment standard). It is argued here that, in relation to judicial conduct, some treaty standards essentially replicate the protections already afforded by the prohibition of denial of justice (7.5.1.), while others, in contrast, require treatment that goes beyond what is required by the obligation not to deny justice (7.5.2.). This eventually also leads to the question as to whether, in relation to the

¹⁹⁸ *Eli Lilly* (n 7), [384].

¹⁹⁹ *White Industries* (n 56), [10.3.12]-[10.3.13].

²⁰⁰ *Hassan Awdi* (n 196), [436].

²⁰¹ *ibid* [436]-[440].

administration of justice as such, the FET obligation imposes the same requirements as the customary international law obligation prohibiting denial of justice (7.5.3.).

7.5.1. More of the Same? Clauses Prohibiting Discriminatory and Arbitrary Treatment

A type of a treaty provision that in many cases will add little or nothing to what is already available to an investor as part of the prohibition of denial of justice pursuant to the fair and equitable treatment standard (or under customary international law), are clauses prohibiting the impairment of specific rights arising out of an investment – such as the management, operation, maintenance, use, enjoyment, acquisition, or disposal thereof – through the imposition of arbitrary/unreasonable and/or discriminatory measures.²⁰² Together with the obligations to provide fair and equitable treatment and full protection and security, the non-impairment obligation is one of the three fundamental rules through which the general principle of international law pertaining to the respect and protection of the property of foreign nationals was supposed to find expression in modern investment treaties.²⁰³ Despite its ubiquity in present day investment treaties, the non-impairment obligation has not played a particularly prominent role in practice; mostly because liability pursuant to the clause was considered engaged by the same set of acts that separately had already amounted to a violation of fair and equitable treatment standard.²⁰⁴

In the context of judicial proceedings, the obligation would often be of little added value, since two of its normative elements – the prohibition of discrimination and arbitrariness – are already inherent to the doctrine of denial of justice itself.²⁰⁵ Indeed, the prohibition against nationality-based discrimination in the administration of justice is probably one of the foundational elements of the doctrine,²⁰⁶ just as is the absence of arbitrariness.²⁰⁷ In the context of judicial proceedings, the free-standing treaty obligation not to impair the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of their investments by arbitrary

²⁰² See eg Art 10(1) ECT ('no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal' of an investment); or Art 2(6) US-Poland BIT (1990) ('Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments').

²⁰³ OECD 1967 Draft Convention, Commentary, 8.

²⁰⁴ cf *Saluka* (n 39); *Belokon* (n 40), 257 ('257. The Tribunal notes that there is a considerable overlap between the provision of protections under the FET standard and the prohibition against unreasonable or discriminatory measures enshrined in Article 2(3) of the BIT.')

²⁰⁵ See eg *Waste Management, Inc v United Mexican States (II) (Award)* (ICSID Case No ARB(AF)/00/3, 30 April 2004) [98], holding that 'a manifest failure of natural justice in judicial proceedings' would result from conduct which is 'arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety'; emphasis added. See generally also S. Montt, *State Liability in Investment Treaty Arbitration* (Hart, 2012), 302, suggesting there is no separate standard of arbitrariness additional to that provided under the FET standard.

²⁰⁶ See C Eagleton, *The Responsibility of States in International Law* (NYU Press 1928), 84-85; EM Borchard, *The Diplomatic Protection of Nationals Abroad* (1919); 333-34; as well as Weiler (n 16), 296ff. See also art VI of Draft on 'International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners' prepared by the Institute of International Law (1927) and reproduced in (1956) Ybk ILC, vol. II, 227; and a similarly formulated Basis or Discussion No. 5 of the 'Bases of Discussion', drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law, reproduced at ibid 223, defining a judgment as manifestly unjust, and amounting to denial of justice 'if it has been inspired by ill-will towards foreigners as such or as citizens of a particular State'. See also *Loeven* (n 106), [135], confirming that a decision which is in breach of domestic law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.

²⁰⁷ The description of arbitrary conduct formulated by ICJ's Chamber in the *ELSI* case (at 76) as conduct that displays 'a willful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety', has frequently been applied by investment tribunals in defining denial of justice. See *Mondev v USA (Award)* (ICSID Case No ARB(AF)/99/2, 11 October 2002), 127; *Loeven* (n 106), 131-134

and discriminatory measures is therefore necessarily subsumed under the more general obligation to treat investors fairly and equitably by not denying them justice. This is not to say, however, that the non-impairment obligation cannot make a difference in certain contexts. As attested to by the *Belokon v. Kyrgyz Republic* (2014) award, the obligation can be of added value where the investment itself is not the subject of the impugned judicial proceedings. In the circumstances of that case, the Tribunal considered that, insofar as the applicable BIT required FET to be accorded to “investments of investors of either contracting party”, it did not have authority to consider the purportedly abusive criminal proceedings that the Respondent’s authorities commenced against the former directors and managers of the Claimant’s-owned bank. In the Tribunal’s view, however, those actions could be considered as – and on the facts of that case have amounted to – a violation of the non-impairment obligation provided for by the BIT.²⁰⁸

Another instance where the non-impairment obligation could make a difference as opposed to the more general treatment standards is perhaps in the context of some US BITs, which contain language specifying that “[f]or the purposes of dispute resolution under Article VI and VII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party.”²⁰⁹ Such language could namely have the effect of relaxing the judicial finality requirement, which is otherwise a prerequisite to any claim of denial of justice. Yet, stipulations of this kind are rather exceptional and do not allow for generalizations.

7.5.2. No-Less-Favourable-Treatment Obligations – Value-Added Standards?

A specific set of treaty standards that, in contrast, would appear to impose more onerous obligations in relation to judicial treatment than those provided under the general FET standard, and would consequently appear to make a difference as to the treatment that an investor or its investment may expect in the course of judicial proceedings, are the relative standards requiring treatment “no less favourable” to that accorded to national investors and their investments (i.e. the national treatment (NT) standard), or to other foreign investors and investments (i.e. the most-favoured-nation treatment (MFNT) standard). Though belonging to the category of non-discrimination standards, the NT and MFNT obligations are contingent standards whose aim is in creating a level playing field between different investors in general, and therefore eliminating *any* difference in treatment as such (and not just proscribing nationality-based discrimination).²¹⁰ In that, the NT and MFNT obligations differ from the non-discrimination obligation that is considered to be inherent to the FET standard (or otherwise spelled out in the non-impairment clauses). This latter is not contingent upon differences of treatment received by others, but is based on an absolute or minimum standard prohibiting the abusive or discriminatory exercise of governmental authority that would cause loss or harm to an investor because (s)he is a foreigner.²¹¹ That is, while the FET and non-impairment obligations prohibit the State to treat an investor differently merely because (s)he is foreign, they do not demand from the State to grant the investor the best treatment available to any of the investor’s competitors operating in like circumstances.²¹² Such treatment is only required by the NT and MFNT standards.

²⁰⁸ *Belokon* (n 40), [244]-[247]; [268].

²⁰⁹ Art II(3)(b), US-Ecuador BIT.

²¹⁰ See on this *Pope & Talbot v Canada* (2nd Phase Merits Award) (UNCITRAL, 10 April 2001) [79].

²¹¹ On this, see T Weiler, ‘Saving Oscar Chin’ in Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 180-181.

²¹² cf specifically art 1(2) 1967 OECD Draft Convention, which expressly stipulated that “[t]he fact that certain nationals of any State are accorded treatment more favourable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter.”

That the distinctive scope of the two types of non-discrimination obligations can play a role in the administration of justice is attested by the *Loewen v. US* award (2003). In the circumstances of that case, the treatment accorded to the Canadian investor by a Mississippi court in the form of a procedurally unsound conduct of the jury trial was considered to have *prima facie* risen to a denial of justice, and thus to a violation of Article 1105 NAFTA.²¹³ In that, the fact that the proceedings before the Court of Mississippi were permeated with bias because of Loewen's Canadian origin were central to the Tribunal's finding that the whole trial and its outcome could not be squared with minimum standards of international law and fair and equitable treatment.²¹⁴ In contrast, the finding of discriminatory treatment was not in itself sufficient to establish a breach of the national treatment standard under Article 1102 NAFTA, which the Tribunal dismissed on account of the lack of materials that would enable it to compare the treatment that had been accorded to Loewen with treatment accorded to investors and investments of the United States in like situations.²¹⁵ By dismissing that claim for want of appropriate comparator, the Tribunal confirmed that the national treatment standard imposed a different type of obligations, which then necessarily entailed a different kind of inquiry.

At the practical level, the *Loewen* award underscores the difficulty in finding appropriate comparators in the assessment of potentially differential judicial treatment in situations where the investor is involved in disparate, non-recurring judicial proceedings. The *Loewen* Tribunal namely ruled out the possibility that the Loewen's local competitor could be treated as an appropriate comparator merely because it had been the litigant in the same case. As a matter of principle, such proposition is certainly valid, even though on the facts of the *Loewen* case, one may wonder whether the competitive position between the litigants was not actually evident from the nature of the civil suit.²¹⁶ In general, however, the problem encountered by the Claimant in *Loewen* will usually be less pronounced in circumstances where multiple investors are involved in similar judicial actions, such as those that frequently arise in the context of challenges of adverse regulatory measures.

7.5.3. Judicial Violations of the FET Standard Otherwise than Through Denial of Justice

Claims alleging unfair and inequitable treatment at the hand of the judiciary have almost axiomatically been considered through the prism of denial of justice.²¹⁷ But if courts violate the standard of fair and equitable treatment *through* denial of justice, the question eventually arises as to whether the denial of justice standard then also "exhausts" the FET obligation in relation to the acts of the judiciary. The problem has presented itself in two facets – as a question pertaining to the content of the FET standard (1) and as a question pertaining to its application to the conduct of the courts (2).

7.5.3.1. Can the FET Standard be Engaged on Account of Lesser Judicial Improprieties than those Required for Denial of Justice?

The question whether courts can violate the FET standard in other ways than through a denial of justice is itself a multifaceted one. In the first place, it is about whether or not the FET standard

²¹³ *Loewen* (n 106), [124]-[137].

²¹⁴ *ibid* [135]-[136].

²¹⁵ *ibid* [140].

²¹⁶ For a criticism of the *Loewen* award on that account, see Weiler (n 211), 170.

²¹⁷ See eg *Rumeli (Award)* (n 152), 427 ("The Arbitral Tribunal considers that these violations are better qualified and dealt with as issues falling under the fair and equitable treatment standard which also includes in its generality the standard of denial of justice.")

can be taken to impose requirements additional to, and substantively different from, the prohibition of denial of justice. In practice, however, it often revolves around the possibility that judicial conduct not otherwise meeting the high threshold of denial of justice could still amount to a violation of the FET standard. These questions have been touched upon in several awards, but received divergent answers so far.

In some cases, tribunals proceeded on the assumption that denial of justice must be taken as the only standard applicable to assessing whether a judicial decision conforms to the FET guarantee.²¹⁸ In others, the standards of denial of justice and FET were held to be distinguishable, but the conduct of the courts was nonetheless reviewed against a comparable threshold. According to the Tribunal in *Iberdrola v. Guatemala* (2012), for example, the fact that the investment treaty included the obligation of giving the investor a fair and equitable treatment did not “mean, *per se*” that the standard of denial of justice of the treaty was broader than that of customary international law.²¹⁹ In *Arif v. Moldova* (2013), on the other hand, the Tribunal first rejected the proposition that both standards could be taken to “have merged into one and that the prerequisites as well as the consequences of a claim for denial of justice and for the violation of a treaty standard of fair and equitable treatment have become identical”.²²⁰ At the same time, the Tribunal considered two “caveats” to apply when it comes to considering alleged breaches of the FET standard occasioned by the judiciary: first, that a large degree of deference had to be accorded to domestic courts on issues of application and interpretation of national law, and second, that before a potential breach of FET could be found, the judiciary had to have rendered a final and binding decision.²²¹ Eventually, the Tribunal proceeded to examining claims pertaining to judicial misconduct pursuant to the same high standard and subject to the same conditions that are normally applicable to denial of justice.

Yet, investment tribunals have increasingly begun to take the position that denial of justice is not the only way in which the conduct of the courts can give rise to a violation of the FET standard. In *OAO Tatneft v. Ukraine* (2014), for example, the Tribunal concluded that, in spite of there being “no sufficient reasons” to justify a finding of denial of justice, the FET standard had been “compromised” in that case by a number of court actions which deprived the investor of its management and control, and ultimately of its ownership rights in Ukraine’s largest oil refinery.²²² The Tribunal took the view that the FET standard had “a broader meaning than the strict denial of justice as understood under traditional customary international law.”²²³ It interpreted the standard as one aiming “to ensure that the legal process governing the protected rights as a whole, including its judicial manifestations, is fair and reasonable, devoid of arbitrariness, discrimination or manipulation to the detriment of those rights.”²²⁴ In the circumstances of that case, that standard had been breached since the various Ukrainian court decisions invalidating the share purchase agreements through which Claimant previously acquired shareholding interests in the company could not be considered fair and equitable, and furthermore suffered from procedural defects, were found to be discriminatory, and frustrated the investors legitimate expectations to a predictable, consistent and stable legal framework.

²¹⁸ *OI European Group BV v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB/11/25, 10 March 2015) [522] (“Aunque las Partes no lo señalan expresamente, el estándar internacional para valorar si una decisión judicial es conforme con la garantía de TJE es la denegación de justicia”). See also *Liman Caspian* (n 109), [268].

²¹⁹ *Iberdrola Energía SA v Guatemala (Award)* (ICSID Case No ARB/09/5, 17 August 2012) [427].

²²⁰ *Arif* (n 7), [433]; emphasis added.

²²¹ *Arif* *ibid.*, [440]–[442].

²²² *OAO Tatneft* (n 83), [481].

²²³ *ibid.*

²²⁴ *ibid.* [395].

Furthermore, the aggregate of the events could only be considered as amounting to arbitrariness and unreasonableness.²²⁵

In a somewhat similar fashion, the Tribunal in *Eli Lilly v. Canada* (2017) did not wish to “shut the door” to the possibility for judicial conduct not otherwise amounting to a denial of justice to be nonetheless capable of qualifying as a violation of the minimum standard of treatment under Article 1105 NAFTA.²²⁶ The Tribunal considered it “evident” that distinctions could be made “between conduct that may amount to a denial (or gross denial) of justice and other conduct that may also be sufficiently egregious and shocking”, just as it deemed it “apparent” that “concepts of manifest arbitrariness and blatant unfairness are capable, as a matter of hypothesis, of attaching to the conduct or decisions of courts.”²²⁷ What needs to be borne in mind, however, is that these propositions were premised on the content of the international minimum standard as articulated in the *Glamis Gold* award. According to the latter, a breach of that standard required an act that is “sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons”.²²⁸ Yet, the *Glamis Gold* standard purports to be nothing more than a modern restatement of the *Neer* standard²²⁹ – the general standard conventionally treated as one ostensibly applicable to all governmental acts and as one that, on its part, had actually been developed from the traditional rules relating to denial of justice.²³⁰ Therefore, the discussion in that case boiled down to a question of labelling. As the *Eli Lilly* Tribunal itself noted, the debate about whether the State’s liability for the decisions and actions of its courts is restricted to conduct that amounts to a denial of justice turned on how denial of justice was defined.²³¹

In the end, the *Eli Lilly* Tribunal ended up examining the “promise utility doctrine” in patent law, developed by Canadian courts through a series of cases, against the yardsticks of arbitrariness and discrimination, without otherwise detailing whether the inquiry was pursued under the rubric of denial of justice or pursuant to some other test.²³² This notwithstanding, the *Eli Lilly* Tribunal did not suggest that a much less stringent test than that for a finding of denial of justice would otherwise apply to determining whether judicial misconduct would be violative of the minimum standard of treatment. According to the Tribunal, only in “very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct” it will be appropriate for a NAFTA Tribunal to assess judicial conduct against the obligations of the respondent State under Article 1105(1) NAFTA.²³³ The same cannot be said, however, about the standard applied by the *Tatneft* Tribunal, which clearly interpreted the FET obligation as one that was additive to the minimum standard of treatment. As the Tribunal explained, in the present protection of rights under the FET standard, “[c]onduct which might not be as grave as to amount to egregiousness or bad faith but which nonetheless interferes with the legitimate exercise of rights of the protected individual might equally qualify as a kind of conduct resulting in liability” (albeit still adding that “mere misapplication of domestic law is not enough to give rise to liability absent some kind of adverse intention”).²³⁴ The lower threshold ultimately played

²²⁵ *ibid* [403]-[413].

²²⁶ *Eli Lilly* (n 7), 223.

²²⁷ *ibid*.

²²⁸ *Glamis Gold Ltd v US (Award)* (UNCITRAL NAFTA, 8 June 2009) [627].

²²⁹ *cf ibid* [616].

²³⁰ Paparinskis (11), 48-54.

²³¹ *Eli Lilly* (n 7), [218].

²³² *ibid* [416]-[442].

²³³ *ibid* [224].

²³⁴ *AO Tatneft* (n 83), [411].

out differently on the facts of the case, as attested to by the Tribunal's findings on the issues of due process and discrimination. Hence, while certain procedural defects (in the form of *ex parte* decisions, and decisions not being properly served) were considered not to "necessarily" constitute a denial of justice, the same procedural defects were found to "cast important doubt on the degree of compliance with the FET standard".²³⁵ Similarly, while the absence of evidence on nationality-based discrimination was reason not to find a denial of justice, the fact that there was a clear intent to force the exit of the interests originally associated with the foreign investor was "ground for an additional claim concerning the breach of FET".²³⁶

The *Tatneft* and *Eli Lilly* cases were not the only instances where alleged violations of the FET standard predicated upon the conduct of the courts were not examined through the lens of denial of justice. Earlier in the *Deutsche Bank v. Sri Lanka* (2012), the Tribunal already found that an interim injunction granted by Sri Lanka's Supreme Court on an *ex parte* application constituted a breach of the FET obligation "in form of a due process violation", without otherwise discussing conceptual distinctions between the FET standard and denial of justice.²³⁷ In *Laboud & Laboud v. Congo* (2014), in contrast, the Tribunal did note that an eventual denial of justice claim would have failed (on account of the Claimants' failure to exhaust available judicial remedies), but eventually concluded that the violations of due process that occurred in domestic judicial proceedings (relating essentially to domestic courts' failure to provide the investor with adequate time and possibility to present its case), when combined with other actions attributable to the State, nonetheless gave rise to a violation of the FET standard.²³⁸ It is of course difficult to speculate whether or not the due process failures which were at issue in the *Deutsche Bank* and *Laboud & Laboud* cases would in themselves have been sufficiently grave to meet the threshold of denial of justice, had this been pleaded. At least insofar as the *Deutsche Bank* is concerned, however, it would seem that the threshold applied by the Tribunal that led to the finding of due process violation was a lower one than the one usually applied in the context of denial of justice claims.²³⁹ Arguably, if appraised through the lens of the denial of justice standard, there would have probably been nothing particularly unusual or shocking in the fact that the interim injunctions in that case had been granted on *ex parte* applications. Furthermore, in view of the temporary nature and reversibility of those injunctions, these could have hardly amounted to a serious due process violation under the denial of justice standard in the circumstances where the Claimant, albeit having had the chance, never attempted to challenge them.²⁴⁰

At the end of the day, the question whether or not courts shall be deemed capable of violating the FET standard in other ways than through denial of justice very much depends on one's understanding of the content of the FET standard. Academics, as well as tribunals, have long been divided on whether the latter must be seen as one that is equivalent or one that is additive to the minimum standard of treatment and it would serve little purpose to revisit this debate here.²⁴¹ Those treating the FET standard as additive to the minimum standard will be predictably less hesitant to accept that wrongful treatment by the judiciary can amount to a

²³⁵ See respectively, [351] and [406].

²³⁶ See respectively, [351] and [408].

²³⁷ *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (Award) (ICSID Case No ARB/09/2, 31 October 2012) [478].

²³⁸ *Laboud* (n 160), [466]-[475], [488].

²³⁹ cf *supra* 6.2.3.

²⁴⁰ cf *Deutsche Bank* (n 237), [480]. See also the criticism expressed in this respect in the Dissenting Opinion of Arbitrator Makhdoom Ali Khan. Dissenting Opinion of Makhdoom Ali Khan of 23 October 2012, [102]-[118].

²⁴¹ For cogent reasons why the FET cannot be considered as additive to the minimum standard, see Paparinskis (11), 160-167; as well as Montt (n 205), 293-306, who considers the idea of an autonomous FET standard to be 'far too dismissive of the history of state responsibility in international law.' *ibid*, 306.

violation of the FET aside from the case of denial of justice.²⁴² However, as it is not disputed that the central tenets of denial of justice – arbitrariness, discrimination, and failure of due process – are commonly taken to be proscribed under both understandings of the FET standard,²⁴³ the issue seems ultimately to be only one of degree: Is a *simple* due process violation sufficient to engage the responsibility of the State under this standard, or must the violation be a *serious* one? And can the standard be engaged on account of an individual instance of procedural irregularities, or is there more required to that end? The answers to these questions hinge strongly on how investment tribunals perceive themselves in relation to domestic courts, and specifically, how extensively they wish to engage in substantive review of domestic judicial processes without digressing into the role of courts of appeal.

7.5.3.2. *Is Divergent Application of the Same Standard to Different State Organs Possible?*

This, however, is not the end of the problems with the application of the FET standard to the conduct of domestic courts. If one takes as a starting point that it is only through denial of justice that courts can violate the FET standard, this is likely to introduce a distinction as to how the standard is applied to the conduct of different State organs.

The problem was touched upon in *Liman Caspian Oil v. Kazakhstan* (2010), where the Claimant contended that the standards of denial of justice and fair and equitable treatment could not be taken to be synonymous with regard to acts of courts “because this would introduce a distinction between acts of courts and acts of other State entities for which no support is provided by the ECT”.²⁴⁴ The Tribunal did see some “merit” in the Claimant’s argument, but held that it was important “to take into account the different functions held by administrative organs and judicial organs of a state and the resulting differences in their discretion when applying the law and in the appeals available against their decisions”.²⁴⁵ Ultimately, the Tribunal did not deem it necessary to deal with the relationship between the FET standard and denial of justice “in general or, if that were at all possible, to make a clear-cut ruling in the abstract on this matter”, and thus proceeded from the conventional proposition that denial of justice was “an example” of the FET standard in the sense that “fair treatment implies that there is no denial of justice”.²⁴⁶ As a consequence, the Tribunal also considered a judicial act capable of breaching FET only if the act attains the “high threshold” that is usually necessary for a finding of denial of justice.²⁴⁷

The suggestion that different considerations may apply to the appraisal of the conduct of different State organs was not a novel one. Already in the *Mondev* case (2002), the argument had been made that, in applying the international minimum standard, it was “vital to distinguish the different factual and legal contexts presented for decision”, and in particular, that it was “one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State.”²⁴⁸ Along the same lines, other tribunals suggested that administrative and judicial organs may be held up to differing standards of

²⁴² For an example of such an approach, see Demirkol (n 89), 39. See also R Dolzer, ‘Local Remedies in International Treaties: a Stocktaking’ in DD Caron, SW Schill, A Cohen Smutny & EE Triantafyllou, *Practising virtue: inside international arbitration* (OUP, 2015), 280-291.

²⁴³ See P Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), 231-32, who accordingly does not distinguish substantively between denial of justice and due process.

²⁴⁴ *Liman Caspian* (n 109), [268]. The same proposition was subsequently repeated in *RosInvest v Russia* (n 139), [274].

²⁴⁵ *Liman Caspian* (n 109), [268].

²⁴⁶ *Ibid.*

²⁴⁷ See *ibid.*, [285].

²⁴⁸ *Mondev* (n 207), [126].

conduct, particularly when it comes to due process requirements.²⁴⁹ Then again, not all tribunals were equally willing to accept such distinctions, nor the consequences that could potentially flow from them. In *Rompetrol v. Romania* (2013), for example, the Tribunal was unable to see “valid grounds” for distinguishing between the conduct of public prosecutors and that of the courts “on the basis that the courts enjoy judicial independence whereas prosecutors are in a more direct sense the agents of the executive power” as international law made “no distinction between executive, legislative or judicial organs for the purpose of attributing State responsibility”.²⁵⁰ The Tribunal was equally unable to find “any warrant” for reading into the treaty “an implied term that would subject some claims for breach of ‘fair and equitable treatment’ to conditions or restrictions, even of a purely temporal kind, that would not apply to other claims to the same standard of protection.”²⁵¹

The problem in the end boils down to the question whether the FET standard represents a homogenous standard which applies in one and the same way to the conduct of different State organs, or whether it is not but a composite standard that potentially imposes different obligations upon different State organs.²⁵² The problem is not just a conceptual one, but as evidenced by the issues raised in the *Rompetrol* award, does also have practical consequences when one is to take into account that denial of justice claims are subject to the condition of judicial finality, whereas other claims grounded in the FET standard are generally not. These are issues which I further discuss in chapter 8.

7.6. Obligations Requiring a Particular Judicial Result

Depending on the treaty language and the context of application, specific treaty standards can eventually be construed as imposing obligations to guarantee a determinate judicial result. At the most elementary level, the obligation of fair and equitable treatment already demands through the prohibition of denial of justice that domestic courts reach decisions which are not arbitrary, grossly unfair, or discriminatory. But there are also standards of treatment that can impose more concrete demands in relation to the substantive outcome of domestic proceedings. Among the treaty standards that would appear most susceptible to concrete materialization in a judicial decision are the various non-discrimination provisions (7.6.1.), compensation provisions (7.6.2.), transfers provisions (7.6.3.), as well as provisions relating to the operation of the investment (7.6.4.) – to remain limited to perhaps just the most obvious ones.

7.6.1. Provisions Requiring Non-Discriminatory Outcomes

A category of treaty obligations that is particularly prone to being construed as requiring a specific judicial outcome are the non-discrimination standards, which can be found in a variety of forms in most investment treaties.

In the first place, there are clauses such as those barring discriminatory impairment of investments, which essentially replicate the absolute non-discriminatory standard that is inherent to the FET obligation and is directed at ferreting out any nationality-based discrimination in the exercise of governmental authority. An example where one such clause has been applied to

²⁴⁹ See especially *International Thunderbird v Mexico (Award)* (UNCITRAL, 26 January 2006) [200] (holding that the ‘administrative due process requirement is lower than that of a judicial process’); and *Apotex v USA* (n 56), [9.22] (suggesting that certain due process requirements only make sense in the context of adjudicatory proceedings but not in the context of regulatory decision-making).

²⁵⁰ *The Rompetrol Group NV v Romania (Award)* (ICSID Case No ARB/06/3, 6 May 2013) [164].

²⁵¹ *ibid* [160].

²⁵² On the different conceptualizations of the standard, see also Dumberry (n 243), 225-228.

reviewing the outcome of domestic judicial procedures is the award in *Noble Ventures v. Romania* (2005). The investor in that case claimed that the proceedings for judicial reorganization that resulted in it losing control of the steel mill that it had previously acquired from the Romanian State, were contrary to Article 2(2)(b) of the US-Romania BIT which prohibited discriminatory impairment of investments. The Claimant's grief was directed primarily against the budgetary creditors (i.e. various local employment, pension, social security, and health insurance agencies) that purportedly initiated the judicial reorganization proceedings for reasons other than those relating to ordinary commercial purposes. In determining whether the investment suffered from discriminatory impairment, however, the Tribunal took also into account the treatment that Claimant received through the Romanian court declaring the company insolvent and appointing a judicial administrator. On the facts of the case, the discrimination claim was dismissed (1) because Claimant failed to prove that there were other investors with debt problems as grave as that plaguing its own investment, but which were not subjected to judicial proceedings (which related to the question of deferential treatment by the budgetary creditors); and (2) because Claimant had not demonstrated that there were other investors that were left unaffected by judicial proceedings although they were in similar situations (which thus more directly related to the question of deferential treatment by the courts).²⁵³ Apart from demonstrating that clauses prohibiting discriminatory impairments may under circumstances dictate specific outcomes, the *Noble Ventures* award above all attests to the difficulties that an investor may face in finding appropriate comparators to sustain its discrimination claim. The more recent award in *Eli Lilly v. Canada* (2017), where Claimant failed to prove on the facts that the promise utility doctrine applied by Canadian courts is discriminatory in its effects, attests to exactly the same problem.²⁵⁴ A further difficulty in the context of discrimination claims will lie in the fact that arbitral tribunals will generally lack access to the evidentiary record on which the comparator cases had been decided. As the outcome of particular proceedings frequently depends on specific documentary evidence adduced by the parties, in the absence of this evidence, investment tribunals will have difficulties establishing that domestic cases involving similar issues were in reality also decided differently.²⁵⁵

As already mentioned above, among the non-discrimination provisions, a particular type are the NT and MFNT clauses, which prescribe treatment that is no less favourable to, respectfully, that accorded to national investors/investments, and that granted to other foreign investors/investments. As noted above, these contingent standards essentially demand from the State to grant the investor the best treatment available to any of the investor's competitors operating in like circumstances. This, of course, relates not only to the procedural treatment in courts, but also to the outcome of judicial proceedings. Whereas the former aspect stood more central in the *Loewen* award discussed above, the latter aspect was more directly considered in *International Thunderbird Gaming v. Mexico* (2006). In the circumstances of that case, the investor sought damages for injuries allegedly resulting from the regulation and closure of its gaming facilities by Mexican authorities. Part of the claims was based on the NT standard of Article 1102 NAFTA, which the Mexican authorities supposedly have breached in the enforcement of gambling laws. In support of the argument that the relevant investments were treated worse than those of Mexican nationals, Claimant relied on the fact that some Mexican gambling facilities had been able to gain temporary injunctive relief in Mexican courts, which thus allowed the competitors to continue their operations, whereas Claimant's challenges against the enforcement measures were generally denied.²⁵⁶ The Respondent argued that the investor was not "in like

²⁵³ *Noble Ventures v Romania (Award)* (ICSID Case No ARB/01/11, 12 October 2005) [180].

²⁵⁴ *Eli Lilly* (n 7), [431]-[441].

²⁵⁵ See *Ryan & Schooner Capital v Poland* (n 112), [494], where the investor for this reason failed to establish discrimination by Polish Tax courts.

²⁵⁶ *Thunderbird v Mexico* (n 249), see [75]-[84].

circumstances” with the operators of facilities that had been granted temporary injunctive relief precisely because it was not granted such injunctive relief and because it eventually abandoned recourse to judicial proceedings for relief in Mexico.²⁵⁷ Ultimately, the Tribunal found no violation of the national treatment standard of Article 1102 NAFTA, concluding that the Mexican authorities acted uniformly and consistently in pursuing the closure of gambling facilities. But to arrive at such conclusion, the Tribunal reviewed solely the conduct of the administrative authorities, which it found not to be discriminative, because the authorities invariably challenged all relevant court decisions in which injunctive relief had been granted. Curiously, however, it did not separately assess whether the Mexican courts themselves had accorded less favourable treatment through the granting of injunctions to other plaintiffs, and not the Claimant.²⁵⁸ Therefore, the *International Thunderbird* case may not be the best example of the application of the NT standard to the judicial context – although, given that the emphasis was placed on the fact that the appeals in the cases involving the Claimant’s Mexican competitors were still pending, the Tribunal might have just been suggesting that a violation of the NT standard could only be determined once judicial finality was achieved.

Apart from the more common types of non-discrimination provisions, there are also more specific ones, such as those granting national or MFN treatment solely in matters like taxation or compensation for losses resulting from war. The former are not particularly ubiquitous, as States frequently tend to exclude taxation matters from the ambit of their investment treaties. They are, however, a frequent occurrence in the BITs concluded by the Netherlands which aim to secure, by means of a separate treaty clause, that investors are granted national treatment and MFN treatment with regard to taxes and fiscal advantages in general.²⁵⁹ This type of self-standing clauses have been interpreted as constituting *lex specialis* in relation to general standards of treatment, with the consequence that matters of taxation, fees, charges and fiscal deductions and exemptions were held to be subject only to the NT and MFN obligations as required under the separate provision, and not to the general standards, such as the FET obligation.²⁶⁰ Just as the general NT and MFN obligations, these specific standards demand from the courts to grant the investor in taxation matters the best treatment available to any of the investor’s competitors operating in like circumstances.

A more common occurrence are so-called “war clauses”, which aim at ensuring non-discriminatory treatment in relation to losses arising from war, civil strife, or other type of emergencies. In most investment treaties, clauses of this kind do not grant foreign investors an absolute right to compensation for such losses, but require NT and/or MFN as regards restitution, indemnification, compensation or other settlement.²⁶¹ As with the general non-discrimination standards, the effect of such clauses would be to demand from domestic courts – in the event that the matter comes within their purview, such as where judicial appeal is made possible

²⁵⁷ *ibid* [174].

²⁵⁸ *ibid* [179].

²⁵⁹ See eg art 4 Netherlands–Nigeria BIT, which stipulates that ‘[w]ith respect to taxes, fees, charges and fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who have investments in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned.’ Similar or identical provisions can be found in a great number of the Netherlands’ BITs.

²⁶⁰ *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela* (Decision on Jurisdiction and Merits) (ICSID Case No ARB/07/30, 3 September 2013) [291]–[317]; and *Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v Bolivarian Republic of Venezuela* (Award of the Tribunal) (ICSID Case No ARB/07/27, 9 October 2014) [239]–[248].

²⁶¹ See eg art 1105(2) NAFTA; or art 7 Netherlands–Armenia BIT (2005).

in case of dissatisfaction with the awarded compensation – that any host State measures directed at offsetting or minimizing losses are applied in a non-discriminatory manner.

7.6.2. Compensation Provisions

Another type of treaty provisions that are capable of being construed as demanding a specific judicial outcome are those relating to compensation. Stipulations relating to the latter are most commonly found in expropriation provisions, which permit States to expropriate investments as long as the taking in question is effected, among other conditions, against the payment of compensation. The majority of investment treaties impose in this respect the standard of prompt, adequate and effective compensation (or what is commonly known as the Hull standard), while some treaties also explicitly spell out the investment's fair market value as being the appropriate measure for determining what constitutes an adequate compensation.²⁶² Insofar as judicial conduct is concerned, these provisions are directly relevant especially in situations where a formal transfer of title is effected by means of judicial decision. Failure to award in such cases adequate compensation by courts will engage the responsibility of the host State.²⁶³

Furthermore, stipulations concerning compensation are in some investment treaties found in “war clauses”. While most such provisions, as discussed above, merely require non-discriminatory treatment in relation to compensation or other measures of reparation, some go a step further by granting investors an absolute right to restitution or compensation for a specific category of losses – most frequently those resulting from the requisitioning or unnecessary destruction of their investments by the armed forces or other authorities of the host state.²⁶⁴ This concrete right is one that would have to be respected also by judicial organs in the event that they become involved, for example, in deciding entitlements to such compensation, or the quantum thereof.

7.6.3. Transfers Provisions

Another type of provisions that may in specific circumstances be capable of being construed as one imposing a determinate judicial result are those granting covered investors or investments freedom of monetary transfers. The right of transfers guaranteed by such provisions, which are otherwise present in nearly all investment treaties,²⁶⁵ is often-times subject to specific exceptions and/or limitations, particularly as States want to retain regulatory autonomy in relation to balance-of-payments and other monetary matters.²⁶⁶ In some investment treaties, however, the right is fairly unqualified.²⁶⁷ In those situations, domestic courts will be bound to respect, and give effect to that right when its exercise becomes subject of domestic judicial proceedings. Of course, the unfettered exercise of such right can in itself obstruct the normal administration of domestic justice, which is why some investment treaties, such as the US-Uruguay BIT, provide for exceptions to the right to transfer when this is necessary to “ensuring compliance with orders or judgments in judicial or administrative proceedings.”²⁶⁸

²⁶² For an overview, see UNCTAD, *Expropriation: A Sequel* (Series on Issues in International Investment Agreements II, 2013).

²⁶³ cf *Rumeli (Annulment)* (n 171), [116].

²⁶⁴ See eg art 12(2) ECT; or art 4 UK–Albania BIT (1994).

²⁶⁵ On this standard of treatment, see generally Salacuse (n 23), 256–70.

²⁶⁶ See eg art 17 Korea-Japan BIT (2002).

²⁶⁷ See eg art 6 UK-Albania BIT (1994); art 5 Netherlands-Armenia BIT (2005).

²⁶⁸ Art 7(4)(e).

7.6.4. Specific Provisions relating to the Operation of the Investment

Further examples of treaty obligations that may dictate specified judicial outcomes can be found in provisions imposing specific conditions, or granting specific rights, in relation to how the investment is operated. One category of such provisions are those relating to performance requirements, which can occasionally be found in some BITs, particularly those concluded by the US.²⁶⁹ These frequently contain stipulations that can be directly invoked in domestic proceedings and will have to be respected by judicial organs. An example of such commitments can be found in Article 8(1) of the US-Rwanda BIT, which prohibits a party to “impose or enforce any requirement or enforce any commitment or undertaking” relating to matters such as the export of a particular level of goods or services, the achievement of a particular level of domestic content in production, the purchase or use of particular domestic goods, but also relating to restrictions of sales of goods or services, as well as the transfer a particular technology, a production process, or other proprietary knowledge. Similar provisions are present in NAFTA,²⁷⁰ and other US investment treaties, as well as in investment treaties concluded by other states.²⁷¹ That such requirements must be respected by judicial organs is confirmed by the exception in Article 1106(1)(f) NAFTA, which carves out from the prohibition requirements relating to the transfer of technology, production processes, or other proprietary knowledge when these are “imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement.”

Another example in this category are provisions relating to the personnel associated with an investment. Provisions dealing with the entry and sojourn of foreign nationals associated with an investment are not a common occurrence in investment treaties; to the extent that they are present at all, they are usually formulated in language that is non-obligatory in nature.²⁷² In particular, very few treaties grant the right of entry to foreign investors or their employees; and to the extent that they do so, this right remains subject to the host country’s immigration laws.²⁷³ Some investment treaties do, in contrast, grant investors or their investments the right to employ key personnel of their choice, regardless of nationality or citizenship. Though such right is usually conditioned by the requirement that the persons in question had been granted permission to enter, stay, and work in the host State,²⁷⁴ it nonetheless has the capacity of overriding domestic employment legislation, such as that limiting the ability of foreigners to work in certain sectors. In the event that the investor’s treaty right to engage personnel of its choice becomes subject of domestic proceedings,²⁷⁵ domestic courts will be bound to give effect to those provisions.

7.7. Standards of Review Applied to Determining Violations of Discrete Treaty Standards

As a final matter, it is necessary to consider the standards of review applied by investment tribunals in scrutinizing individual domestic decisions against the requirements imposed by

²⁶⁹ cf Salacuse (n 23), 331-33.

²⁷⁰ NAFTA, art 1106(1).

²⁷¹ See eg Korea-Japan BIT (2002), art 9.

²⁷² On this provisions generally, see Salacuse (n 23), 333-36.

²⁷³ See eg art 8(1) Korea-Japan BIT (2002).

²⁷⁴ See eg art 11(2) ECT; or art 8(3) Korea-Japan BIT (2002). See also art 1107(2) NAFTA, which grants such right to the appointment of senior management positions, but provides for exceptions in relation to appointments to governing boards.

²⁷⁵ cf *Sumitomo Shoji America, Inc v Avagliano*, 457 US 176 (1982), concerning the right of a US subsidiary of a Japanese company under the US-Japan FCN Treaty to employ executive personnel and technical experts of their choice.

discrete treaty standards. The focus here is on three specific types of claims, where scrutiny of individual judgments may be necessary with a view to establishing a treaty breach; namely, in relation to expropriation claims (7.7.1), claims relating to violations of variously construed obligations to provide a system of adequate judicial protection (7.7.2), and claims of purported arbitrariness of judicial conduct (7.7.3).

7.7.1. Standards of Review Applied to Establishing the Wrongfulness of Judicial Conduct as a Predicate of Expropriation Claims

As noted in 7.3.2., in relation to most expropriation claims predicated upon judicial conduct, the wrongfulness of such conduct was grounded in denial of justice. As the standards of review applicable to determining the propriety of judicial conduct in the context of denial of justice claims has already been subject of extensive discussion in 6.3., the present section concentrates on those cases where the wrongfulness was assessed by reference to other yardsticks; namely, domestic law and specific international obligations, respectively.

Where the propriety of judicial interferences with the investor's rights was assessed by reference to domestic law, investment tribunals adopted a variable approach. In *Saipem* (2008), the Tribunal was deferential, in that it refrained from conclusively establishing whether, under the applicable Bangladeshi law, the revocation of an arbitration agreement lay exclusively within the authority of a local arbitral tribunal, or whether such authority was one shared with the local courts.²⁷⁶ In *Al-Bahloul v. Tajikistan* (2009), in contrast, judicial decisions were scrutinized against the test of manifest incorrectness, leading the Tribunal to conclude that the impugned decisions were not "manifestly in contradiction with the Tajik legislation."²⁷⁷ In *CCL v. Kazakhstan* (2004), in turn, the test applied was one of correctness, resulting the Tribunal in finding the decision improper because the impugned termination of the contract did not follow the terms of the contractual bargain.²⁷⁸

Non-deferential were tribunals also in assessing the conformity of judicial decisions with international obligations other than those relating to the prohibition on denial of justice. In the same *Saipem* case, the Tribunal moved to assess whether the decisions of Bangladeshi courts amounted to an abuse of rights. This assessment proceeded on the basis of a *de novo* review of the matters decided by domestic courts. This resulted in the finding that there was not a "slightest trace of error or wrongdoing" on the part of the local arbitral tribunal and that, therefore, the Bangladeshi courts' decision to revoke that tribunal's authority "lack[ed] any justification", was based on "an ill-founded finding", and drew consequences that were "unfounded".²⁷⁹ The Tribunal recognized that national courts have substantial discretion in ordering the revocation of an arbitrator's authority in case of misconduct, but nonetheless concluded that the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process.²⁸⁰

The same findings subsequently informed the *Saipem* Tribunal's conclusion in that case that the courts' conduct violated the obligation to respect arbitration agreements under Article 2 of the 1958 New York Convention. Though acknowledging that Bangladeshi courts only revoked the authority of the arbitrators, and not the arbitration agreement as such, the Tribunal took the view that their conduct *de facto* frustrated the arbitration agreement, and was further of the opinion that, in light of the abusive way in which the courts exercised their supervisory

²⁷⁶ *Saipem* (n 99), [143]-[144].

²⁷⁷ *Al-Bahloul v Tajikistan* (n 130), [284].

²⁷⁸ *CCL v Kazakhstan* (n 131), [165].

²⁷⁹ *Saipem* (n 99), [155].

²⁸⁰ *ibid* [159].

jurisdiction, it would have been unrealistic for the arbitration to be successfully pursued with a newly appointed arbitral tribunal.²⁸¹ Equally non-deferential was the Tribunal in *ATA Jordan* when it came to determining the Jordanian courts' compliance with the same obligations under Article 2 of the 1958 New York Convention. In the circumstances of that case, the courts annulled a pre-existing commercial award, as well as extinguished the underlying contractual arbitration clause, in accordance with the requirements of the then newly adopted Jordanian Arbitration Law. In finding that the Tribunal violated Article 2, the Tribunal applied a correctness test by taking the view that the Jordanian Court of Appeal and Court of Cassation could have complied with their duty in this case by refusing to apply retroactively the extinguishment rule introduced by the new law.²⁸²

7.7.2. Standards of Review Applied to Determining Failures to Provide a System of Adequate Judicial Protection

It is worth examining, next, the standards of review applied to the scrutiny of specific judgments in the process of determining whether the host State failed to provide a system of adequate judicial protection. While not all investment tribunals considered an inquiry into the propriety of individual judicial decisions to be relevant to establishing a failure of the system, those that did generally suggested that a review would have to be a deferential one.

Some tribunals thus maintained that the relevant assessment was at any rate not based on a test of correctness. The Tribunal in *Chevron I* thus explained that the test for establishing “effectiveness” in relation to the “effective means” provision required “that a measure of deference be afforded to the domestic justice system”, and that accordingly a tribunal was not “empowered [...] to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*.”²⁸³ The Tribunal in *Unglaube*, similarly posited that the test for establishing a failure to provide “adequate legal remedies” pursuant to the FET standard entailed proving more than that the court simply arrived at “the wrong result”.²⁸⁴ In other cases, investment tribunals formally endorsed the test of reasonableness. Thus, according to the Tribunal in *Frontier Petroleum*, the test for establishing a violation of the FPS standard was whether the court has acted in good faith and the decisions reached were “reasonably tenable”.²⁸⁵

7.7.3. Standards of Review Applied to Determining the Arbitrariness of Judicial Decisions

The last instance of practice that must be considered is the standard of review applied by the Tribunal in *Eli Lilly v. Canada* in determining arbitrariness of judicial conduct – to the extent that the Tribunal may purportedly have assessed arbitrariness under a different heading than that of denial of justice. In reality, the standard was not any less deferential than that applied by investment tribunals in assessing the propriety of judicial decisions in the context of denial of justice claims, which was discussed in 6.3.

In the circumstances of the *Eli Lilly* case, Claimant alleged that the promise utility doctrine applied by Canadian courts in the context of patent applications was arbitrary because it was unpredictable and incoherent, as well as lacking a legitimate public purpose. The Tribunal evaluated the doctrine overall against a test of reasonableness. The interpretive process

²⁸¹ *ibid* [166]–[169].

²⁸² *ATA Construction v. Jordan* (n 121), [128].

²⁸³ *Chevron (Contractual Claims)* (n 57), [247].

²⁸⁴ *Unglaube v. Costa Rica* (n 18), [272].

²⁸⁵ *Frontier Petroleum Services* (n 26), [273].

undertaken by Canadian courts was thus found to fall “well within the scope of duties that courts are asked to perform every day”, while the purportedly inconsistent determinations were deemed to be “expected, especially in an adversarial system in which courts are presented with different evidence and expert testimony across cases”.²⁸⁶ Overall, the doctrine as such had a “legitimate public policy justification” and the Tribunal did not deem it necessary to opine on whether it was “the only, or the best, means of achieving these objectives”, for what mattered was that the doctrine was “rationally connected to these legitimate policy goals.”²⁸⁷ Likewise, a specific rule under the doctrine preventing the post-filing of evidence of utility was held to have “a rational connection” with the stated goal of preventing patents from being granted on the basis of speculation, whereas a rule requiring applicants to disclose the basis of a sound prediction of utility in the patent was deemed “whether or not [...] the preferred approach”, to be “plainly not an irrational one.”²⁸⁸ Eventually, the Tribunal’s conclusion that the doctrine was not an arbitrary one had found support in the judicial decisions involving the Claimant. In the circumstances where those decisions were found to have a foundation in Canadian law and were coherent and consistent with the policy justifications stated by Respondent, the Tribunal did not deem it appropriate to “question the correctness of the policies or the courts’ decisions.”²⁸⁹

7.8. Conclusions

Based on the preceding discussion, it is thus possible to conclude that domestic courts are capable of violating concrete standards of treatment prescribed by investment treaties also in other ways than through denial of justice, and that such view finds sufficient support in the ever growing practice of investment tribunals. The chapter identified different categories of investment treaty obligations susceptible of being violated through the intermediary of domestic courts – each of which, however, giving rise to their own conceptual problems when it comes to their application to judicial conduct.

The first category of obligations that have appeared most susceptible of being engaged on account of judicial conduct are those imposing the maintenance of an adequate system of justice. Admittedly, none of the conventional standards of treatment presently found in investment treaties specifically addresses the question of the investors’ right of access to domestic judicial procedures, or more concretely prescribes the treatment that the investor is entitled to receive at the hands of the judiciary. In following the customary international law requirement demanding the maintenance of a system of justice that adequately protects the rights of foreigners, however, many investment tribunals began to extrapolate a positive duty to provide and maintain an adequate system of justice from existing treaty standards, such as the fair and equitable treatment standard, the standard of full protection and security, the non-impairment standard, or even the due process obligation that commonly conditions the legality of expropriations. In most cases, the nature and scope of the obligation thus construed did not differ in their nature from the traditional duty under customary international law: the standard was not considered to be a particularly strenuous one, and certainly not one that would specifically prescribe as to how the domestic judicial system was to be organized, let alone dictate how this system was expected to perform.

Departing from this approach was the interpretation of the more specific treaty clauses demanding the provision of “effective means of asserting claims and enforcing rights”, a provision which can otherwise be found with less frequency in the investment treaty landscape. In *Chevron* and *White Industries* cases, the tribunals interpreted such provisions as providing an

²⁸⁶ *Eli Lilly* (n 7), [420]-[421].

²⁸⁷ *ibid* [423].

²⁸⁸ *ibid* [425], [428].

²⁸⁹ *ibid* [430].

independent treaty standard – one that was held to impose a distinct and potentially less-demanding test for assessing the performance of the host State’s judicial system. In both cases, the Respondent State was thus found liable for violating such provisions on account of judicial delays, and as demonstrated by the *White Industries* case, even in circumstances where such delays have not otherwise met the threshold for a denial of justice. It can be seriously debated whether construing the “effective means” clause in a way that imposes a more exacting standard than that demanded by customary international law, really accords with the intention of treaty drafters. Yet, given the *Chevron* and *White Industries* precedents, it is not surprising that the “effective means” clause has since become a particularly appealing alternative to denial of justice claims. In practice, it remains yet to be seen how the clause will be applied in circumstances other than those pertaining to judicial delays. However, in accordance with the *Chevron* award, where the test of “effectiveness” of a remedy was held to apply to a variety of State conduct, the clause may be capable of broader application. It remains to be seen whether investors will seize on this proposition in attempting to obtain redress for judicial misconduct.

Another category of treaty obligations that were deemed capable of being engaged on account of judicial conduct are those that are generally intended to provide legal and economic security to the investment as such – namely, the expropriation clause, the umbrella clause, and the fair and equitable treatment standard in its protection of investor’s legitimate expectations. As explained in the chapter, with a view to preserving the economic value of the investment, these standards protect the proprietary rights forming the basis of the investment operation (as in the case of the expropriation and umbrella clauses), or the integrity of the legal framework in which the investment is imbedded (as in the case of the legitimate expectations component of the FET standard). Due to the fact that the courts, in their ordinary exercise of judicial functions, are susceptible of interfering in the rights that form the object of protection of those obligations, it is not surprising that violations of these standards have often been invoked in the face of purportedly improper judicial conduct. Yet, establishing violations of these standards has not proven any less difficult. This is because, in practice, the wrongfulness of the impugned judicial conduct will usually form the factual predicate that will be relevant to establishing such violations, and in order to establish such wrongfulness, investment tribunals have not infrequently had the habit of resorting to the demanding standards for denial of justice.

Admittedly, as also argued in this chapter, denial of justice is not the only measure on the basis of which such wrongfulness can be established. The impugned courts’ conduct can arguably also fail to conform to other international obligation of the State. Hence, in the notorious *Saipem* case, the prerequisite wrongfulness was found in the courts’ violations of specific obligations under the 1958 New York Convention. And as the latter was considered to impose a more exacting standard of conduct than that required by the prohibition of denial of justice, the *Saipem* case has allowed for the inference that recasting a challenge against improper judicial conduct in the form of an expropriation claim may provide an alternative to the demanding standard of denial of justice. But the alternative may be more apparent than real. The less demanding standard did not follow from the fact that the claim was brought as one concerning a judicial expropriation, but from the more exacting nature of the obligation that had been applied to determining the wrongfulness of the judicial conduct. The approach taken in the *Saipem* case may, conceptually, not be fundamentally incorrect when it comes to the question of how the propriety of judicial conduct could be measured. Where this approach can be questioned, though, is in the Tribunal’s competence to determine the propriety of such conduct by reference to the 1958 New York Convention in circumstances where the Tribunal’s jurisdiction was limited solely to expropriation claims. The viability of judicial expropriation claims being presented in other ways than through the lens of denial of justice ultimately depends on the extent to which investment tribunals will be competent and able to pronounce themselves on violations of such other obligations.

The chapter eventually discussed also other investment treaty provisions; some capable of being construed as requiring judicial treatment of a particular kind, others as possibly demanding particular judicial outcomes. These provisions, as the analysis has shown, have thus far not proven particularly successful as a basis on which to bring claims predicated on judicial conduct. For one, the various claims concerning discrimination or non-equal treatment at the hands of the judiciary have turned out to be difficult to establish on the facts. Besides, quite a few of these specific treaty obligations – such as various treaty prohibitions prohibiting discriminatory or arbitrary treatment – seem to already form part of the general denial of justice standard, and to the extent that they have been applied as separate standards, they have not been interpreted as demanding a more exacting standard of treatment. The test of arbitrariness, for example, has been applied pursuant an equally deferential standard of review as the standard applied to assessing denial of justice claims. The question, in such cases, may then not necessarily be so much whether these additional standards hold the judiciary against more exacting standards of conduct, but whether their violations could be easier to establish. One key issue in that respect concerns the question whether individual judicial decision that are injurious to an investor will in itself be sufficient to hold the State responsible under international law, or whether such responsibility can only be engaged once the judicial system as a whole is tested, as in the case of denial of justice. This is a question that will be further addressed in the next chapter.

8. THE JUDICIAL FINALITY REQUIREMENT

One of the key questions that continue to permeate the discussions on host State liability for judicial conduct concerns the extent to which an individual decision of a domestic court, which on account of its content or the process through which it has been rendered is contrary to a State's obligation under international law, is *ipso facto* sufficient to engage that State's responsibility. As explained in the present chapter, the question has initially arisen in the context of denial of justice claims, where the principle has eventually been accepted that responsibility can only arise once judicial finality had been achieved – that is, once the investor had exhausted all available local remedies (8.1.). But this has soon led to the question whether judicial finality may also be applicable in relation to other claims premised on the conduct of judicial organs (8.2.). Furthermore, it has given rise to discussions whether a certain degree of resort to, or even exhaustion of local remedies could also constitute a necessary factual predicate of claims arising out of the conduct of non-judicial organs (8.3.). As this chapter intends to demonstrate, none of the currently advanced rationales for the judicial finality rule provides a sufficiently solid conceptual underpinning that would allow for a consistent application of the rule in relation to violations of investment treaty standards occurring through the medium of domestic courts but not in the form of denial of justice (8.4.). This notwithstanding, with a view to provide a comprehensive overview of the tribunal's approach to this issue, the chapter concludes by looking at how the judicial finality rule has been applied in practice (8.5.).

8.1. Judicial Finality as a Substantive Condition of Claims of Denial of Justice

As noted already in chapter 2, in the traditional law on the espousal of international claims, it was fairly uncontroversial that an injured foreigner had to first resort to the courts of the injuring State and exhaust the local remedies available before the foreigner's State of nationality could take up the claim in the exercise of diplomatic protection.¹ In the context of the latter, the local remedies requirement controlled the admissibility of an international claim. It was also more or less accepted that, where the foreigner would experience a denial of justice in the pursuit of those local remedies, such a denial of justice would compound an initial international wrong where such wrong already existed, or perpetrate an actionable international wrong where the initial wrong did not *per se* give rise to international responsibility.² As a matter of general proposition, what was also established was that at least some recourse to domestic remedies was necessary in order to substantiate a claim for denial of justice,³ and that – except in extraordinary situations⁴ – the mere existence of supposedly defective judicial procedures was not in itself sufficient to incur responsibility in the absence of such procedures being first tested.⁵ What was not entirely

¹ See also E Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publishing 1915), 817ff.

² C Eagleton, *The Responsibility of States in International Law* (NYU Press 1928), 98-99; see also CF Amerasinghe, *Local Remedies in International Law* (2nd ed CUP 2004), 92-97.

³ *Mexican Union Railway (Ltd) (Great Britain) v United Mexican States February* (V UNRIIA 115, 1930), 122 ('there can be no question of denial of justice or delay of justice, as long as justice has not been appealed to').

⁴ This would arguably include situations where there is a state of anarchy or previously established instances of denials of justice manifesting a total absence of justice in a State. See C Durand, 'La responsabilité internationale des États pour déni de justice' (1931) 5 *Revue Générale de Droit International Public* 694, at 721.

⁵ For a general discussion, see AV Freeman, *The International Responsibility of States for Denial of Justice* (Longman 1938), 436-41, concluding on the basis of an examination of practice that 'as a general proposition, no defects in judicial procedure or organization can be invoked by the State of the alien except to support a demand based upon a judicial decision already handed down' at 441.

established, on the other hand, was whether responsibility for denial of justice arose only after the local remedies had been fully *exhausted*, or whether it already existed as soon as a lower court had committed an act of denial of justice.⁶ At that time, however, the issue was without much consequence in practice as claims of denial of justice could at any rate only be espoused upon the exhaustion of local remedies.⁷

The conundrum began to have practical implications in the context of investment arbitration. Insofar as recourse to local remedies has generally been dispensed with as a procedural requirement conditioning access to such arbitration,⁸ the question arose whether exhaustion of such remedies was necessary to establish a State's responsibility on account of judicial misconduct. In face of the dispensation of the requirement, some have come to suggest that recourse to the domestic judicial system became "ancient history" with respect to denial of justice claims.⁹ As the following sections will demonstrate, the latter suggestion has not materialized, as the obligation to exhaust domestic remedies has largely been maintained as a substantive element of claims of denial of justice and potentially other claims predicated upon the wrongful conduct of domestic courts.

8.1.1. The *Loewen* Case and the Endorsement of the Judicial Finality Rule

Notwithstanding the important procedural changes that investment arbitration brought about in the settlement of investment disputes, when the responsibility of a State for the conduct of its courts was invoked before an investment tribunal in the *Loewen* case, the view was eventually taken that responsibility for denial of justice could only arise if there was *final action of the judicial system as a whole*.¹⁰ This conclusion was premised on the distinction – initially introduced by the Respondent, but eventually accepted by the Tribunal – between the "substantive requirement" that allegedly existed under customary international law and demanded finality of judicial action if acts of the judiciary were to rise to a breach of international law, on the one hand; and the requirement of exhaustion of local remedies that was purportedly merely a procedural condition precedent to invoking the responsibility of a State, on the other.¹¹ The substantive requirement – opportunely described as the rule of "judicial finality", to emphasize its distinction with the traditional local remedies rule – was claimed to derive from the alleged absence of any "instance [...] in which an international tribunal has held a State responsible for a breach of international

⁶ For the latter view, see especially CC Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little Brown and Co 1922), at 509 ("when an inferior court, like any other authority of a State, denies justice, national responsibility is established, but the reasonableness of interposition seems to depend upon the opportunity for redress obtainable by appeal to the court of last resort"); and E Kaufmann, 'Règles générales du droit de la paix' (1935) 54 Recueil Des Cours 309, at 457. Some contemporary writers seemingly adhered to the same view. See Amerasinghe (n 2), 101. For a general discussion of the different views, see Freeman (n 5), 445-46; H Urbanek, 'Das völkerrechtsverletzende nationale Urteil' (1958-59) 9 ÖZöR 213, 235-46.

⁷ Discussions on denial of justice were so tightly interwoven with the rule of exhaustion of local remedies as a condition of a claim that many arbitral precedents lend themselves to different interpretations. See eg *Spanish Zone in Morocco (Claim LIII, Ziat, Ben Kiran)* (II UNRIIA 729, 29 December 1924), 731 speaking of an established principle, but formulating it in terms of admissibility ('c'est un principe reconnu du droit international que celui suivant lequel [...] une réclamation d'ordre international présentée sur la base d'une allégation de déni de justice, n'est recevable que si les différentes instances de la juridiction locale compétente ont été au préalable épuisées'; emphasis added).

⁸ See *infra* III.2.

⁹ D Wallace, 'State Responsibility for Denial of Substantive and Procedural Justice under NAFTA Chapter Eleven' (1999-2000) 23 Hastings Int'l & Comp L Rev 393, at 397.

¹⁰ *Loewen Group, Inc and Raymond L Loewen v United States of America (Award)* (ICSID Case No ARB(AF)/98/3, 26 June 2003) [142]-[154], [158]-[159].

¹¹ *ibid* [143]-[144].

law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system".¹²

Once the finality rule was thus conceived as forming part of the primary obligation itself, the *Loewen* tribunal could not uphold a presumption that the rule may have been dispensed with in the context of the NAFTA, either expressly or implicitly – not even in the face of Article 1121(1)(b) NAFTA which otherwise required a waiver of domestic proceedings as a condition of making a claim to a NAFTA tribunal. According to the Tribunal,

"If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law."¹³

Thus, while presented in a different guise, the *Loewen* decision effectively re-imposed the local remedies requirement with respect to a specific class of claims.

Expectedly, the decision was not met with uniformly positive reactions. While some have praised it for being the correct confirmation of well-established jurisprudence,¹⁴ others have criticized it for resting on an unwarranted distinction between the substantive and procedural aspects of the local remedies rule,¹⁵ questioning the policy implications of requiring exhaustion with respect to the conduct of courts and not with respect of other State organs,¹⁶ and doubting about the validity of some of its conceptual underpinnings.¹⁷ Indeed, the Tribunal itself appeared not entirely convinced that the principle of judicial finality could be distinguished from the local

¹² *ibid* [154].

¹³ *ibid* [162].

¹⁴ See eg C Greenwood, 'State Responsibility for the Decisions of National Courts' in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart 2004), 61; J Paulsson, *Denial of Justice in International Law* (CUP 2005), 101 (asserting that the correctness of the principle was not open to doubt); or N Rubins, *Loewen v United States: The Burial of an Investor State Arbitration Claim* (2005) 21 *Arbitration International* 1, at 16 (noting that the idea of judicial finality appears to be 'solidly grounded in customary law').

¹⁵ See eg BK Gathright, 'A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven' (2005) 54 *Emory Law Journal* 1093, at 1115-29 (arguing that there is no precedent for distinguishing the exhaustion requirement that applies in denial of justice claims from that of other claims for state responsibility, and that the purposes advanced by the *Loewen* Tribunal for the finality requirement are already included in the local remedies rule); or C McLachlan, L Shore and M Weininger, *International Investment Arbitration* (OUP 2009), at 232 (criticizing the decision's reliance upon 'cases which predate the advent of investor-State arbitration, and were therefore predicated on a system of remedies which that system was [...] designed to supersede.')

¹⁶ See especially AK Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2005) 45 *Virginia Journal of International Law* 809, at 858 (arguing that from a policy perspective 'it is difficult to distinguish the desirability of requiring a decision of the highest body within a court system from requiring a final decision from the highest official in an administrative system'); and Gathright (n 15), 1108-17 (criticizing the *Loewen* decision specifically for being inconsistent with the modern understanding that denial of justice can also be committed by other organs than courts).

¹⁷ See eg M Sattorova, 'Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct' (2012) 61 *ICLQ* 223, 228-33 (questioning the soundness of construing the obligation not to deny justice as one resting on the duty to provide a fair system of justice). See also U Kriebaum, 'Local Remedies and the Standards for the Protection of Foreign Investment', in C Binder et al. (ed), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 417-462, at 443 (criticizing the tribunal for having failed to provide a meaningful distinction between the requirement to exhaust local remedies and the finality requirement).

remedies rule. While first admitting in its Decision on jurisdiction (2001) that the finality rule was “no different from the local remedies rule”,¹⁸ the Tribunal eventually backtracked from this proposition in its Final Award (2003), suggesting that regardless of the similarities in their content, each rule served “different purposes”¹⁹ – only to admit in another part of the Final Award that the purpose of the finality rule was essentially the same as that of the local remedies rule – which was “to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.”²⁰

8.1.2. The Rationale for the Judicial Finality Rule in the Context of Denial of Justice

Nonetheless, if one is to follow the reasoning of the *Loewen* Tribunal, the main explanation why an aberrant decision of a lower court was capable of occasioning merely an inchoate breach of international law (which was to become complete when judicial finality is fully achieved), was to be found in the *very nature* of the duty that is violated through denial of justice. Relying on the views expressed by James Crawford in the context of his work with the ILC, the *Loewen* Tribunal namely endorsed the proposition that the duty incumbent upon States under customary international law was to provide “a fair and efficient *system* of justice”.²¹ This being an obligation to maintain “a system of a certain kind”, it followed that “systematic considerations” enter into the question of breach, with the consequence that “an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act”.²²

Loewen’s rationale for the judicial finality rule in the context of denial of justice claims has subsequently been endorsed by academic commentators without much questioning.²³ In his now famous modern treatise on the topic, Paulsson endorsed the judicial finality rule by reference to the fact that it is “in the very nature of the delict that a state is judged by the final product – or at least a *sufficiently* final product – of its administration of justice.”²⁴ As the following section will further demonstrate, investment tribunals accepted the finality rule by reference to the same proposition. But it is worth noting that, in earlier writings, one can find other rationales as to why exhaustion of remedies was necessary to establish a denial of justice. In considering whether a judgment emanating from a court of first instance was capable of violating international law in such a way, Freeman, for instance, queried whether “in a realistic sense, justice can be considered as *denied* when in fact justice has not finally spoken”.²⁵ Others related it to the natural fallibility of judges.²⁶

¹⁸ *Loewen Group, Inc and Raymond L Loewen v United States of America* (Decision on Hearing of Respondent's Objection to Competence and Jurisdiction) (ICSID Case No ARB(AF)/98/3, 5 January 2001) [71]. Elsewhere in its decision on jurisdiction, the Tribunal identified support for the view that ‘no distinction should be drawn between the principle of finality and the local remedies rule’ [66] and considered that the ‘content of the two rules is similar, if not the same’ [67].

¹⁹ *Loewen (Award)* (n 10), [159].

²⁰ *ibid* [156].

²¹ *ibid* [153], relying on UN Doc A/CN.4/498, [75]; emphasis added.

²² *ibid*.

²³ See LC Delanoy and T Portwood, ‘La responsabilité de l’Etat pour déni de justice dans l’arbitrage d’investissement’ 2005(3) *Revue de l’Arbitrage* 603, at para 29; C Focarelli, ‘Denial of Justice’ *Max Planck Encyclopedia of Public International Law* (online, October 2013), [29]; M Stevens and RD Bishop, ‘Fair and Equitable Treatment: Denial of Justice’ in MN Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 295, at 295; H Haeri and R Dağli, ‘Fairness and the Final Word: State Responsibility for Court Action in Investment Arbitration’ (2016) 2(1) *Turkish Commercial Law Review* 3, at 7-9.

²⁴ J Paulsson, *Denial of Justice* (CUP 2005), 108. For a similar argument, see Greenwood (n 14), 61.

²⁵ Freeman (n 5), 445; emphasis in original. Though perhaps semantically an interesting one, the argument overlooks the fact that even a single wrongful decision, once it obtains *res judicata* effect as a matter of domestic law, in its effects *finally* denies justice.

8.1.3. Application of Judicial Finality to All Claims of Denial of Justice

Following the *Loewen* decision, the judicial finality rule has subsequently been accepted by a great majority of investment treaty tribunals as constituting a *substantive* component of claims of denial of justice, regardless of whether such claims have been based on the customary international law standard of denial of justice, or on the treaty-based fair and equitable treatment standard.²⁷ This general acceptance of the finality rule in practice appears to have been based on the understanding that the State's international obligation is to ensure an adequately functioning system of justice, with the necessary consequence that liability could arise only once the whole system is put to test.²⁸ The Tribunal in *Waste Management* (2004) thus held that, with respect to a claim of denial of justice,

“...what matters is the system of justice and not any individual decision in the course of proceedings. The system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim.”²⁹

This is not to say that the judicial finality rule has also consistently been applied as a constitutive component of the international wrongful act. In some cases, judicial finality was actually considered a prerequisite of an inquiry into the denial of justice claim.³⁰ In others, the principle appears to have been used more as an admissibility criterion, as tribunals proceeded with the inquiry into whether the impugned judicial conduct passed the threshold of denial of justice, before eventually dismissing the claim for lack of exhaustion of local remedies.³¹ In either

²⁶ See E Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’ (1978) 159 *Recueil des Cours* 1, at 282, seeing the reason for the exhaustion of local remedies requirement in denial of justice claims in the need for States to ‘provide in their judicial organization remedies designed to correct the natural fallibility of its judges.’

²⁷ *Jan De Nul NV and Dredging International NV v Arab Republic of Egypt* (Award) (ICSID Case No ARB/04/13, 6 November 2008) [195], [255], [258]; *Pantehniki SA Contractors & Engineers (Greece) v The Republic of Albania* (Award) (ICSID Case No ARB/07/21, 31 July 2009), 96; *Toto Costruzioni Generali S.p.A. v Lebanon* (Decision on Jurisdiction) (ICSID Case No ARB/07/12, 11 September 2009) [164]; *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan* (Award) (ICSID Case No ARB/08/2, 18 May 2010) [107]; *Frontier Petroleum Services Ltd v The Czech Republic* (Final Award) (UNCITRAL, 12 November 2010) [293]; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (Partial Award on the Merits) (UNCITRAL, PCA Case No 34877, 30 March 2010) [321]; *Alps Finance and Trade AG v The Slovak Republic* (Award) (UNCITRAL, 5 March 2011) [251]; *Spyridion Roussalis v Romania* (Award) (ICSID Case No ARB/06/1, 7 December 2011) [472]; *Oostergetel v Slovak Republic* (Award) (UNCITRAL, 23 April 2012) [225], [275]; *Arif v Moldova* (Award) (ICSID Case No ARB/11/23, 8 April 2013), [442]-[43]; *The Rompetrol Group NV v Romania* (Award) (ICSID Case No ARB/06/3, 6 May 2013) [165]; *ECE Projektmanagement v The Czech Republic* (Award) (UNCITRAL, PCA Case No 2010-5, 19 September 2013), [4.746]; *Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v Democratic Republic of the Congo* (Award) (ICSID Case No ARB/10/4, 7 February 2014), [466]; *Flughafen Zurich AG v Venezuela* (Award) (ICSID Case No ARB/10/19, 18 November 2014), [392], [600], [628], [635]; *OI Group v Venezuela* (Award) (ICSID Case No ARB/11/25, 10 March 2015), [524], [526]. cf also *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* (Award) (ASEAN ID Case No ARB/01/1, 31 March 2003), [40].

²⁸ See eg *Jan de Nul* (n 27), [258]-[259]; *Pantehniki* (n 27), [94], [96]; *Spyridion Roussalis* (n 27), [472]; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan* (Award) (ICSID Case No ARB/07/14, 22 June 2010) [279]; *Alps Finance* (n 27), [250]; *Oostergetel* (n 27), [225]; *Arif* (n 27), [434], [443]; *Apotex Inc v The Government of the United States of America* (Award on Jurisdiction and Admissibility) (UNCITRAL, 14 June 2013), [282]-[284]; *Flughafen v Venezuela* (n 27), [392], [635]; implicitly also *Parkerings-Compagniet AS v Republic of Lithuania* (Award) (ICSID Case No ARB/05/8, 11 September 2007) [317].

²⁹ *Waste Management Inc v United Mexican States (II)* (Award) (ICSID Case No ARB(AF)/00/3, 30 April 2004), [97].

³⁰ See eg *Alps Finance v Slovakia* (n 27), [251]; *OI European Group v Venezuela* (n 27), [533]-[536].

³¹ See particularly *Loewen* (Award) (n 10), [119]-[137], [142]-[157], and [207]-[217]. cf *Rubins* (n 14), 15 (suggesting that ‘[a]s addressed in the final award, the question of ‘finality’ or ‘exhaustion of remedies’ appeared to be primarily one of admissibility’). For the same approach, see eg *Jan De Nul v Egypt* (n 27) [255] (considering that the inquiry into the requirement of exhaustion of local remedies ‘supported’ its previous conclusions that the local judicial proceedings did not give rise to a denial of justice) and [256] (explaining that the requirement of exhaustion of local remedies would not have

type of cases, however, judicial finality was accepted as determinative for a potential finding of denial of justice.

Admittedly, there were a few cases where judicial finality was seemingly rejected as a substantive component of a denial of justice claim. Most of those holdings, however, are either *obiter dicta*, or explicable by the specific circumstances of each case, or simply the result of semantic inaccuracy. An example of the former is certainly the somehow perplexing assertion in the *Mondev* award (2002) that “under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule ‘are interlocking and inseparable’.”³² The reasons for this argument are not entirely evident and were certainly not dictated by the circumstances of the case, since the exhaustion of local remedies was not an issue given that the investor pursued all possible appeal mechanisms, including by petitioning the US Supreme Court for certiorari.³³ Yet, it is precisely by reference to the *Mondev* award that the Tribunal in *Binder v. Czech Republic* (2011) later considered that the investor was “not required” to have attempted and exhausted all local remedies, even if otherwise acknowledging that a claim of denial of justice necessitated that the State’s judicial system as a whole is tested.³⁴

According to the *Binder* Tribunal, sufficient for the purpose of establishing a denial of justice, instead, was “evidence of failure of the judicial or administrative system as a whole”, which could be gathered from “a set of decisions or procedures in relation to the same investor (or class of investors) or in relation to the same issue” revealing “a state of a manifestly defective judicial or administrative process, *irrespective of whether all local avenues for redress have been pursued*.”³⁵ Though formulated as a statement of principle, the suggestion that the exhaustion of local remedies was not required to establish denial of justice seems to have been influenced by the particular circumstances of the case: the investor was involved in “hundreds of cases”, whereby not all of which were pursued up to the highest available judicial instance.³⁶ Moreover, that statement was qualified by the Tribunal’s own admonition that an isolated instance of a judicial organ committing a gross error would not otherwise have been sufficient for a denial of justice to arise where an adequate and effective remedy to redress such error existed.³⁷ In the end, the *Binder* Tribunal’s approach would seem to be consistent with some of the early arbitral precedents,

been a ‘bar’ to a claim of denial of justice on the basis of excessive delays); *Peter Franz Vocklinghaus v Czech Republic (Final Award)* (UNCITRAL, 19 September 2011) [207]-[209] (finding that the Claimant did not avail himself of all available local remedies, but ultimately rejecting complaints of denial of justice on the merits); *Oostergetel v Slovakia* (n 27), [275], [298] (considering it appropriate to first analyze the Claimant’s allegations of denial of justice and ‘[d]epending on the outcome of this analysis’ only subsequently reviewing whether local remedies were exhausted) and [298] (after already rejecting the denial of justice claims on the merits, holding that the determination whether the local remedies rule was met could be ‘dispensed with’); and *Flughafen v Venezuela* (n 27), [627]-[721]. cf also *Saipem SpA v The People’s Republic of Bangladesh (Award)* (ICSID Case No ARB/05/07, 30 June 2009), [133]-[184] (using the same approach in the context of a judicial expropriation).

³² *Mondev International Ltd v United States of America (Award)* (ICSID Case No ARB(AF)/99/2, 11 October 2002) [96].

³³ *ibid* [1].

³⁴ *Binder v Czech Republic (Final Award)* (UNCITRAL, 15 July 2011) [449]-[450].

³⁵ *ibid* [451]; emphasis added. Applying its analytical approach, however, the Tribunal found no denial of justice ([461]-[467]). This analytical approach resembled that taken in *Limited Liability Company Amto v Ukraine (Final Award)* (SCC Case No 080/2005, 26 March 2008) where the Tribunal explained it would examine whether the treatment of the investor in various domestic judicial proceedings ‘cumulatively’ met the standard of denial of justice ([78]), but later found that Claimant ‘has failed to demonstrate any denial of justice in the handling by the Ukrainian courts of the bankruptcy proceedings or any series of circumstances that cumulatively amount to a denial of justice’ ([84]). In contrast to the *Binder* Tribunal, however, the *AMTO* Tribunal made clear that the exhaustion of domestic means was ‘relevant to the assessment of the propriety of the outcome’ and that ‘[t]he investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law’ ([76]).

³⁶ cf *ibid* [433].

³⁷ *ibid* [451].

where proof of courts not being able to offer the guarantees indispensable to the proper administration of justice was in very exceptional circumstances accepted to be furnished in other forms than through recourse to local courts.³⁸

Apart from the awards in *Mondev* and *Binder*, no other investment treaty tribunal appears to have *explicitly* discarded the duty to exhaust local remedies as a substantive precondition of denial of justice claims. Admittedly, some awards categorically stated that the requirement of exhaustion of local remedies does not apply to claims of procedural denial of justice arising from delays in the proceedings.³⁹ But this appears to be more a consequence of inaccurate formulation. It has long been accepted that undue delays constitute a good reason for not exhausting local remedies – yet, this is not an issue of non-application of the local remedies rule, but of the application of one of the exceptions to the rule traditionally recognized by the rule itself. Somewhat unusual, however, is the decision in *Deutsche Bank* (2012), in which an injunction of the Supreme Court of Sri Lanka was found to constitute a violation of the fair and equitable treatment standard in the form of a due process violation, in spite of the temporary nature of the measure, and notwithstanding the fact that the Claimant, albeit having had the chance, never attempted to appeal it. Then again, peculiar to the case was that, although affecting the contractual payments to the Claimant, the injunction was not specifically addressed to it, but to the national petroleum company of Sri Lanka, which was the Claimant’s contractual partner. This might explain why neither the Claimant nor the Respondent attempted to plead the case as one concerning a denial of justice.⁴⁰

8.2. Judicial Finality for Violations of other Treaty Standards premised on Judicial Conduct

While there is in fact considerable consistency in the application of the finality rule as a substantive component of claims concerning denial of justice, there is greater divergence of views on the question whether the obligation is equally applicable to other claims predicated on the conduct of judicial organs. The question is certainly a valid one, since – as the previous chapter demonstrated – modern investment treaties provide aggrieved investors with a whole array of legal standards that are not the same as the customary prohibition of denial of justice. In arbitral practice, the question has thus far been considered in three specific contexts: in relation to claims under the NAFTA, which can generally only be made in relation to “measures adopted or maintained” by a Party relating to an investor or an investment; in relation to the “effective means” provision; and in relation to expropriation claims.

8.2.1. Judicial Finality, NAFTA, and Measures “Adopted or Maintained”

It is perhaps a lesser known fact, but in the *Loewen* case, the Tribunal actually considered the finality rule to be applicable to all causes of action founded on the impugned conduct of domestic courts, including therefore those pertaining not only to violations of Article 1105 NAFTA (minimum standard of treatment), but also of Articles 1102 NAFTA (non-discrimination) and 1110 NAFTA (expropriation).⁴¹ But if, in the *Loewen* Tribunal’s own logic, the finality requirement made sense in the context of denial of justice claims, where it was due to the nature of the primary obligation itself that finality of action by the State’s judicial system was purportedly required, the same logic did not necessarily apply in relation to other NAFTA

³⁸ Freeman (n 5), 440-441.

³⁹ *Jan de Nul* (n 27), [195], [256]; *Oostergetel v Slovakia* (n 27), [275]; *Flughafen* (n 27), [642]; *OI Group v Venezuela* (n 27), [527].

⁴⁰ *Deutsche Bank v Sri Lanka (Award)* (ICSID Case No ARB/09/2, 31 October 2012) [478]-[480].

⁴¹ *Loewen (Award)* (n 10), [156].

obligations. The *Loewen* Tribunal omitted to explain why the finality rule would equally be applicable to the claims of discrimination and expropriation as well.

Possibly, the reasons for the *Loewen* Tribunal's unqualified holdings may lie in the manner in which the finality rule was originally introduced by the Respondent. Relying on the threshold requirement under Article 1101 of the NAFTA that there be a measure "adopted or maintained by a Party", the US argued that judicial action had to be considered "a single action from beginning to end so that the State has not spoken until all appeals have been exhausted", and that therefore, only judicial decisions that were accepted or upheld by the judicial system as a whole could be said to possess that degree of finality justifying the description "adopted or maintained".⁴² This would possibly explain why the Tribunal concluded that the finality requirement had "application to breaches of Articles 1102 and 1110 as well as Article 1105."⁴³ Admittedly, however, the Tribunal did not expressly endorse the measure "adopted or maintained" argument. The proposition that finality was required with regard to all causes of action was seemingly advanced, instead, as a general proposition under customary international law.

The issue received consideration again in *Apotex v. USA* (2013). In the context of that case, both disputing parties asserted that the finality rule applied to all causes of action premised upon judicial acts, inferring such requirement not only from Article 1101 NAFTA, but also customary international law.⁴⁴ Save from noting that the scope of the judicial finality rule was a "live issue in the context of NAFTA", the Tribunal did not wish to take a firm position on the matter in light of the concurrence of the parties' opinions.⁴⁵ At the end of the day, however, it effectively adopted the same position as the *Loewen* Tribunal when it ultimately held that Apotex's claims for judicial breaches of Articles 1102, 1105, and 1110 of the NAFTA should have been dismissed for failure to exhaust available judicial remedies.⁴⁶

Within the limits of the NAFTA, the finality rule has thus been accepted as applicable to all causes of action premised upon judicial acts. It is not clear, however, whether such acceptance had been premised on the understanding that this was the general position under customary international law, or merely because of the specific requirement under Article 1101 NAFTA that there be a measure which is "adopted or maintained".

8.2.2. Judicial Finality and the "Effective Means" Provision

Outside the NAFTA context, in contrast, there has been lesser willingness on the part of investment tribunals to uphold an extensive application of the finality rule. Yet, one of the contexts where the requirement of exhaustion of local remedies was considered to be applicable, was in the application of treaty standards that are similarly deemed to impose an obligation to provide for a system of a certain kind. Thus, the Tribunal in *Chevron v. Ecuador* (2010) found that a "qualified" requirement of exhaustion of local remedies applied to claims pertaining to breaches of the "effective means" provision; for, a failure on the part of the Claimant to use the means placed at its disposal could otherwise prevent a proper assessment of the "effectiveness" of the system for asserting claims and enforcing rights.⁴⁷ While the requirement was held not to be applicable in the same way as in the context of denial of justice claims, which was seen as imposing a "strict" requirement of exhaustion, it was still held that a claimant was required to "make use of all remedies that are available and might

⁴² *ibid* [143]-[144].

⁴³ *ibid* [156].

⁴⁴ *Apotex v USA* (n 28), [280]-[282].

⁴⁵ *ibid* fn 139 to [282].

⁴⁶ *ibid* [298].

⁴⁷ *Chevron (Contractual Claims)* (n 27), [323]-[324].

have rectified the wrong complained of”.⁴⁸ Since in the circumstances of that case, the wrong complained of related to undue delays that Claimant experienced in Ecuadorian courts, the remedies comprised particularly those procedural mechanisms that could have expedited domestic court proceedings, such as requests for recusals for delay.⁴⁹

Similar considerations would seem to be applicable to claims of breaches of the full protection and security standard on account of the conduct of the judiciary. The Tribunal in *Frontier Petroleum* (2010), which interpreted the standard as imposing upon the State an obligation to make a functioning system of courts and legal remedies available to the investor, did not expressly consider the question of exhaustion. Yet, that some degree of exhaustion would be expected from the Claimant is implicit in the Tribunal’s observation that a decision which might be “wrong” in the eyes of an outside observer “would not automatically lead to state responsibility”, as well as in its ultimate finding that Respondent made a functioning system of courts and legal remedies available to Claimant.⁵⁰

8.2.3. Judicial Finality and Expropriation Claims

A matter on which tribunals have come to hold different opinions was the extent to which the finality rule was applicable to expropriation claims predicated upon judicial conduct. In *Saipem* (2008), the Tribunal queried whether the local remedies requirement could be applicable “by analogy” to a claim concerning a judicial expropriation, but “tended” to consider that not to be the case (without ultimately making a final determination on the issue), essentially agreeing with the Claimant that a denial of justice claim was not to be treated as being one and the same illegality as expropriation carried out by domestic courts.⁵¹ Less hesitant to express its opinion, in contrast, was the Tribunal in *Arif* (2013), which held that “[a] court may violate a BIT standard directly and this breach will be attributable to the respondent State without there being any requirement to exhaust local remedies, unless it is a breach for denial of justice”.⁵² It therefore rejected Respondent’s objections that the investor’s claims for expropriation and breach of specific undertakings were not ripe for arbitration due to their still being the subject of judicial proceedings in Moldova.⁵³ Insofar as expropriations occurring by dint of judicial decisions were concerned in particular, the *Arif* Tribunal advanced three reasons why the judicial finality rule ought not to be applied as a substantive requirement to such claims. First, unlike in a claim for denial of justice where the conduct of the whole judicial system was relevant, “decisive” for a claim for expropriation was the “individual action” of a State organ. Second, “according to ICSID case law” (as the single decision in the *Saipem* case was conveniently branded), no substantive requirement was considered applicable to expropriation claims. And third, “as a matter of principle”, court decisions were capable of engaging the responsibility of a State in accordance with Article 4 of the ILC Articles on State Responsibility without there being any requirement to exhaust local remedies (except in relation to claims for denial of justice).⁵⁴

⁴⁸ *ibid*, [321], [326]. As explained elsewhere, the Tribunal required proof that Claimants had ‘adequately utilized’ the means made available to them to assert claims and enforce rights in Ecuador. See *ibid* [268].

⁴⁹ *ibid* [330]-[331].

⁵⁰ *Frontier Petroleum* (n 27), [273] and [466].

⁵¹ *Saipem* (n 31), [176]-[182]. Similarly hesitant was the Tribunal in *Chevron (Contractual Claims)* (n 27), [323], which decided to express no view on whether or to what extent the requirement of exhaustion of local remedies might apply under other provisions of the BIT.

⁵² *Arif* (n 27), [334].

⁵³ *ibid* [348].

⁵⁴ *ibid* [345]-[347].

Given the complexity of the legal issues raised by situations of so-called “judicial expropriations”,⁵⁵ one cannot categorically reject the substantive requirement of judicial finality as simply being inapplicable to expropriation claims predicated upon judicial conduct. What matters, as the *Arif* Tribunal validly pointed out, is indeed the “individual action” of a State organ, and in particular, the origin of the actual injury. Take for example the situation where the courts apply a statute which is itself confiscatory in nature. The result of its application would amount to an expropriation, without there necessarily being any fault on the part of the judiciary. In such cases, little purpose would arguably be served to require from the investor to exhaust local remedies, for the superior courts deciding on the investor’s appeals would likely remain bound by the relevant legislation, probably rendering a revised outcome that would still be confiscatory in effect. In the absence of any flaws of that kind in domestic legislation, however, the situation changes. As set out in 7.3, where an expropriation claim is premised solely on an injury attributable to the conduct of judicial organs themselves, the wrongfulness of the impugned conduct becomes a necessary predicate of the claim.⁵⁶ Since this predicate is most commonly provided through the medium of denial of justice,⁵⁷ judicial finality will necessarily be required as an intermediate step to sustain an expropriation claim. The situation may be different where the prerequisite wrongfulness can be based on a violation of another concrete international obligation, which may not require judicial finality as an element essential to proving its breach. In the *Saipem* case, for example, the impugned judicial interferences were deemed contrary to Respondent’s obligations under the 1958 New York Convention,⁵⁸ which arguably imposes discrete obligations that are directly binding on individual courts – a matter, to which I revert in 8.4.

Last but not least, there are also alternative reasons for considering (some form of) judicial finality applicable as a substantive condition of expropriation claims premised upon judicial conduct. Where one is to approach the question of judicial expropriations through the lens of the sole effects doctrine, the question whether the investor had pursued available judicial remedies may become a factor relevant to determining whether the judicial interference with investor’s rights was sufficiently permanent to be treated an expropriation. The view that merely ephemeral judicial interferences – such that could easily be overturned by way of judicial appeal – will not be sufficient to establish an expropriation is not only in advanced in academic writings,⁵⁹ but finds also some limited support in arbitral practice.⁶⁰

8.3. Judicial Finality and Claims Premised on the Conduct of Non-Judicial Organs

As opposed to the conduct of judicial organs, the idea that the finality rule could also be applicable to claims predicated upon the conduct of other State organs has not garnered support by investment tribunals. On the contrary, attempts to demand any form of exhaustion of local

⁵⁵ See discussion *supra* 7.3.

⁵⁶ Following the discussion in 7.4.1, more or less the same considerations attach to the application of the judicial finality rule in relation to claims concerning breaches of the umbrella clause grounded in purportedly wrongful judicial decisions.

⁵⁷ Indeed, it was due to Claimant’s failure to establish a denial of justice on the part of the Moldovan judiciary that the *Arif* Tribunal in rejected the expropriation claims. *ibid* [415]-[417].

⁵⁸ *Saipem* (n 31), [145]-[173].

⁵⁹ B Demirkol, Judicial Acts and Investment Treaty Arbitration (CUP 2018) 103-6.

⁶⁰ See *Achmea B.V. v. The Slovak Republic (Anward)* (UNCITRAL, PCA Case No. 2008-13, 7 December 2012), [292] (the Tribunal considering that ‘[w]hile there is no duty to exhaust local remedies under the Treaty, there is no reason to ignore such remedies as have in fact been obtained’, and further explaining that, since the impugned measure was quashed by the Constitutional Court, it was thus ‘not to be regarded as having resulted in a permanent deprivation of the investor of its investment’, such analysis being ‘consistent with the approach adopted by other tribunals to the question of the necessary characteristics of an expropriation and the significance of the permanence of interference with property right’).

remedies for the purpose of challenging the conduct of non-judicial organs were usually opposed, even in circumstances where the impugned conduct would have otherwise been capable of being characterized as amounting to a denial of justice, such as in the event of irregularities occurring in the context of administrative decision-making procedures.⁶¹ This is not to deny, however, that there were a number of cases where the omission on the part of the investor to make recourse to domestically available remedies ultimately had – or was considered capable of having⁶² – a bearing on the finding of a violation of the relevant treaty standard. Thus, in a number of cases, the treaty claims failed, as in the absence of any attempt on the part of the investor to resort to domestic remedies – in order to challenge impugned administrative decisions,⁶³ or inactions of the local administration;⁶⁴ to obtain pronouncements from the contractually-agreed forum with respect to contractual breaches relevant to the treaty claim;⁶⁵ or else, to conclusively establish the enjoyment of rights allegedly being interfered with⁶⁶ – the conduct complained of was not considered sufficiently grave to give rise to a treaty breach. But while resort to domestic remedies was thus an element relevant to the analysis of the treaty claim, it must also be added that in most of these cases Claimants were not unsuccessful solely because of their negligence in pursuing them.⁶⁷

In most of these cases, investment tribunals expressly disclaimed that there would have been any obligation on the part of the investor to exhaust available local remedies.⁶⁸ They did, however, differ in their justifications as to why in the circumstances of the specific case, the investor's neglect of such remedies was relevant to the question of treaty breach. In many of these precedents, the omission to seek a ruling from domestic courts was thus suggested to constitute one of the "relevant" circumstances that had been taken into account in finding the absence of a treaty breach.⁶⁹ In some cases, instead, the suggestion was made that the issue was one of due diligence and that the investor's failure to attempt available local remedies had the

⁶¹ See eg *Rompotrol* (n 27), [160]; or *ECE Projektmanagement* (n 27), [7.473]. Tribunals in such cases considered that it was for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit.

⁶² *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* (Award) (ASEAN ID Case No ARB/01/1, 31 March 2003) [40]; *Jan De Nul v Egypt* (Decision on Jurisdiction) (ICSID Case No ARB/04/13, 16 June 2006) [121]; *Abengoa SA y COFIDES SA v United Mexican States* (Award) (ICSID Case No ARB(AF)/09/2, 18 April 2013) [626]-[635]; or *ECE Projektmanagement* (n 27), [4.747]. See also *Rompotrol* (n 27), [245].

⁶³ *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador* (Award) (ICSID Case No ARB/03/6, 31 July 2007) [297], [301]-[302], [349]; *Helnan International Hotels A/S v Arab Republic of Egypt* (Award) (ICSID Case No ARB/05/19, 3 July 2008) [148], [162].

⁶⁴ *Generation Ukraine, Inc v Ukraine* (Award) (ICSID Case No ARB/00/9, 16 September 2003) [20.30]-[20.33].

⁶⁵ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (*Vivendi I*) (Award) (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v Argentine Republic*) (ICSID Case No ARB/97/3, 21 November 2000), [78]; *Waste Management II* (n 29), [174]-[177]; or *Parkerings-Compagniet* (n 28), [319], and [449]-[454].

⁶⁶ *Marvin Roy Feldman Karpa v United Mexican States* (Award) (also known as *Marvin Feldman v Mexico*) (ICSID Case No ARB(AF)/99/1, 16 December 2002) [113], [111]; or *EnCana Corporation v Republic of Ecuador* (Award) (UNCITRAL, LCIA Case No UN3481, 3 February 2006) 194; see also fn 138.

⁶⁷ With the exception of *Vivendi I* (n 65).

⁶⁸ *Feldman*, ibid [140]; *Vivendi I* (Award) (n 65), [81]; *Generation Ukraine* (n 64), [20.33]; *Waste Management II* (n 29), [116]; *EnCana*, ibid fn 138; *Abengoa* (n 62), [626]; *ECE Projektmanagement* (n 27), [4.745]-[4.747].

⁶⁹ *Feldman*, ibid [111], [134] (the fact that it was not clear that Claimant had a right under Mexican law to tax rebates and that Claimant omitted to seek a formal administrative and judicial ruling in that respect was held to be one of the factors, none of them alone 'necessarily conclusive', but which taken together tipped the expropriation / regulation balance away from a finding of expropriation); *Waste Management II* (n 29), [116] ('the availability of local remedies to an investor faced with contractual breaches is nonetheless relevant to the question whether a standard such as Article 1105(1) has been complied with by the State'); *EnCana* (n 66) fn 138 ('The question is not whether the claim is admissible but whether the relevant rights have been expropriated as a matter of substance.');

and *ECE Projektmanagement* (n 27), [4.745] ('the extent to which an investor pursued available domestic remedies (and to which it in fact obtained a remedy for its complaint) has been treated as constituting one element which is relevant for the assessment of whether the investor has been treated in a manner which constitutes a breach of the respondent State's obligations for the protection of the investment.').

effect of disqualifying a particular treaty claim,⁷⁰ or otherwise indicating that the investor acquiesced in the impugned measures.⁷¹ Most notable in this respect is the admonition of the Tribunal in *Generation Ukraine v. Ukraine* (2003) that

“it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction.”⁷²

Then again, in other cases, the suggestion was made that the investor may even be under an obligation to resort to (albeit not necessarily exhaust) available local remedies. In *Vivendi v. Argentina I* (2000), the Tribunal thus contended that, by dismissing the claim on account of the investor’s failure to resort to the contractually stipulated forum, it did “not impose an exhaustion of remedies requirement”, but that the “*obligation* to resort to the local courts” was “compelled” by the mandatory forum selection clause and by the “impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts.”⁷³ Along similar lines, the Tribunal in *Parkerings-Compagniet* (2007) argued that, in relation to treaty claims premised on contractual breaches, “a preliminary determination” by a competent domestic court would have been “necessary” or “a prerequisite” for determining the treaty claim.⁷⁴

Not unexpectedly, the practice of placing emphasis on investors’ efforts to obtain redress against the impugned misconduct in the host State’s legal system has attracted strong criticism – not only in academic writings,⁷⁵ but also in arbitral decisions and opinions of individual arbitrators.⁷⁶ Most forceful in this respect have been the decisions of the ICSID Annulment Committees in the *Vivendi* and *Helnan* cases, which ultimately annulled the respective awards on ground of manifest excess of powers.

⁷⁰ See eg *Helnan* (n 63), [162] (speaking of a potential ‘disqualification’ of an international claim in the absence of a reasonable effort to obtain correction in domestic courts); or *Abengoa* (n 62), [627] (explaining that the failure to attempt available local remedies could be considered as ‘negligence’ that might have the effect of ‘depriving the investor of its right to compensation’).

⁷¹ *MCI Power Group LC v Ecuador* (n 63), [297], [301]–[302] (failure to challenge the revocation of its operating permit was seemingly viewed as proof that the revocation was a legitimate one and attesting to fact that the subsidiary actually acquiesced in such measure).

⁷² *Generation Ukraine* (n 64), [20.30]; emphasis in the original.

⁷³ *Vivendi I (Award)* (n 65), [81]; emphasis added.

⁷⁴ *Parkerings-Compagniet* (n 28), [316] and [448].

⁷⁵ See eg C Schreuer, ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’ (2005) 4(1) LPICT 1, at 15–16 (arguing that ‘[o]nce it is accepted that the investor should make an attempt at local remedies it is only a small step to require that the attempt should not stop at the level of the lowest court’ and warning that, while it is ‘not inherently unreasonable to require that the investor make some efforts domestically to obtain redress before seizing an international tribunal’, the decision to do away with the domestic remedies rule ‘was made consciously and for good reason’); Kriebaum (n 17), 457, 460 (considering such practice to ‘deprive the arbitral procedure of its character as an alternative to local remedies’, and as preventing arbitral tribunals to ‘function as the neutral alternative dispute settlement forum they were meant to be’ and to ‘exercise a subsidiary control function’, respectively);

⁷⁶ See eg *EnCana Corporation v Republic of Ecuador* (LCIA Case No UN3481, UNCITRAL) Partial Dissenting Opinion of Horacio A Grigera Naón of 30 December 2005, [28]–[36], who considered that such practice amounted to re-imposing, although in a different guise, the exhaustion of local remedies rule.

In the *Vivendi* case (2002), the Annulment Committee thus concluded that, by dismissing the claims on the ground that the investor was purportedly obliged to first resort to local courts, the Tribunal effectively failed to decide the treaty claims.⁷⁷ According to the Committee, the question whether particular conduct violated the treaty was not dependent upon the showing of a breach of the concession contract, for the treaty set an independent standard. Accordingly, it was “open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT” and faced with such a claim, the Tribunal “was obliged to consider and to decide it.”⁷⁸ The Committee acknowledged that, by having failed to challenge “various factual components” of its treaty cause of action in local courts, the Claimant “took the risk” that the Tribunal would have found that the acts complained of neither individually nor collectively rose to the level of a treaty breach; but this was a risk that the Claimant was entitled to take, with its associated burden of proof.⁷⁹ The Committee eventually conceded that the availability of local courts might have been “a relevant circumstance in determining whether there has been a breach of international law”, but as such it was “not dispositive” and it did “not preclude an international tribunal from considering the merits of the dispute.”⁸⁰

Building on that proposition, the Annulment Committee in the *Helnan* case (2010) later reiterated that “[a]n ICSID tribunal may not decline to make a finding of breach of treaty on the ground that the investor ought to have pursued local remedies or otherwise validated the substance of its claims by recourse to the courts of the host State”.⁸¹ In finding that the Tribunal for that reason had manifestly exceeded its powers, the Committee did also not miss out on the opportunity to mount a wholesale critique against the practice of considering the pursuit of local remedies as a factual element relevant for the assessment of a treaty breach.⁸² The Committee’s primary point of criticism was that such a requirement would be contrary to the express provisions of Article 26 of the ICSID Convention, for this would have the effect of substituting domestic courts for the remedy provided under the applicable investment treaty, and thus effectively “do by the back door that which the Convention expressly excludes by the front door”.⁸³ Allowing such practice would arguably “empty the development of investment arbitration of much of its force and effect” and “would inject an unacceptable level of uncertainty” into the way in which an investor ought to proceed in relation to an adverse administrative decision.⁸⁴

Furthermore, the *Helnan* Committee expressly rejected the idea that a treaty claim concerning an alleged failure on the part of executive organs to afford fair and equitable treatment would necessitate some form of “judicial finality” as in the case of judicial organs. The Committee conceded that, in a general sense, “a claimant’s prospects of success in pursuing a

⁷⁷ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Decision on Annulment)* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) (ICSID Case No ARB/97/3, 3 July 2002) [111].

⁷⁸ *ibid.*, [112].

⁷⁹ *ibid.*, [113].

⁸⁰ *ibid.*

⁸¹ *Helnan International Hotels A/S v Arab Republic of Egypt (Decision of the ad hoc Committee)* (ICSID Case No ARB/05/19, 14 June 2010), see [9]; cf [55]. It is debatable whether this conclusion logically follows from the award of the Tribunal, given that the latter did not decline to make a finding, but instead found on the facts that the conduct of the executive did not breach the relevant standards of treatment prescribed by the treaty. In spite of the finding of a manifest excess of powers, the Committee did not set aside the award since the impugned part was not essential to the Tribunal’s decision to dismiss Helnan’s claims ([56]-[57]).

⁸² See *ibid.* [34] (the Committee found itself compelled to deal with ‘a question of importance to the arbitration of investment treaty claims under the ICSID Convention, namely the extent to which an investor may be required, as a matter of substance rather than jurisdiction, to pursue local remedies in order to sustain a valid claim for breach of treaty’).

⁸³ *Helnan*, *ibid.* [47].

⁸⁴ *ibid.*, [52].

treaty claim based on the decision of an inferior official or court, which had not been challenged through an available appeal process, should be lower, since the tribunal must in any event be satisfied that the failure is one which displays insufficiency in the system, justifying international intervention.”⁸⁵ But these were essentially questions of probative value, which in the Committee’s view were not to be confused with the “entirely different matter” whether the investor was actually under a “requirement” to pursue local remedies to prove a violation of the fair and equitable treatment as a result of an administrative decision.⁸⁶ Referring to the principle that the characterisation of an act as unlawful under international law was not affected by its characterisation as lawful under internal law, the Committee did not see the application to local courts as potentially determinative – for, “a decision by a municipal court that the Minister’s decision was lawful (a judgment which such a court could only reach applying its own municipal administrative law) could not preclude the international tribunal from coming to another conclusion applying international law.”⁸⁷

Still, treating recourse to local courts as a factual element relevant to the assessment of a treaty breach is not the same as imposing such recourse as a legal requirement. Common to most of the precedents discussed is that, in the circumstances of those cases, the impugned conduct of executive organs simply did not rise to the level of a treaty breach.⁸⁸ Hence, it could only have been on account of the potentially adverse treatment that the investor would have received in seeking local redress against such conduct that the responsibility of the State could have therefore arisen. Obviously then, the investors’ efforts to seek redress for their grievances in domestic court will frequently be a factor of relevance in determining potential treaty breaches, particularly where such grievances originate in the conduct of private parties, or do not clearly transcend “mere breaches” of domestic law. Indeed, behind the stance taken by many of the investment tribunals has been a general understanding that investment treaty arbitration was intended to provide redress only against the more serious instances of misconduct on the part of administrative organs, and not to form an international form of administrative appeal.⁸⁹ Then again, it is also clear that any more firm expectations of investors’ pursuit of local remedies will run against the assumption of investment arbitration being an alternative to domestic judicial procedures and be ultimately difficult to reconcile with treaty provisions demanding a concrete choice for any of the two procedures (as in the case of fork-in-the-road and no U-turn clauses).⁹⁰

⁸⁵ *ibid.*, [48]. In that respect, the Committee took the position that the fair and equitable treatment standard was ‘concerned with consideration of the overall process of the State’s decision-making’, was therefore ‘unlikely’ to be breached by ‘a single aberrant decision of a low-level official’ – unless the investor was capable of demonstrating that such decision ‘was part of a pattern of state conduct applicable to the case or that the investor took steps within the administration to achieve redress and was rebuffed in a way which compounded, rather than cured, the unfair treatment.’ [50] The Committee added, on the other hand, that even a single decision of a low-level administrative official could amount to a breach of FET.

⁸⁶ *ibid.* [48], [51].

⁸⁷ *ibid.* [51].

⁸⁸ See also O Spiermann, ‘Premature Treaty Claims’, in C Binder et al. (ed), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 463-489, suggesting that the tribunals’ emphasizing of neglect of effective local remedies has not been only a ‘rhetorical device’ for dismissing marginal treaty claims, but equally noting that the weight to be given to the investor’s neglect of such remedies is ultimately determined by the specific standards of protection.

⁸⁹ See *Generation Ukraine* (n 64), 20.33 (in the absence of any acts or omissions transcending the threshold of a treaty breach, it was not for the Tribunal to ‘exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. That function is within the proper domain of domestic courts and tribunals that are cognisant of the minutiae of the applicable regulatory regime.’); or *Waste Management II* (n 29), [116] (The Tribunal emphasizing the importance of the contractually-agreed remedy being resorted to in the event of regular contractual breaches, for ‘[w]here it not so, Chapter 11 would become a mechanism of equal resort for debt collection and analogous purposes in respect of all public (including municipal) contracts, which does not seem to be its purpose.’).

⁹⁰ See on this specifically *EnCana Corporation v Republic of Ecuador* (LCIA Case No UN3481, UNCITRAL) Partial Dissenting Opinion of Horacio A Grigera Naón of 30 December 2005, [30] (suggesting that the applicable treaty ‘cannot offer the possibility of obtaining substantive relief under international law in case of expropriation, require a waiver of legal actions

8.4. Judicial Finality – Is a Consistent Approach Actually Possible?

The divergent practice just discussed gives rise to the question of whether a consistent and sound approach to the application of the judicial finality rule can actually be achieved in practice. The answer to this question is closely associated with one's understanding of the theoretical rationale for the judicial finality rule. In following the reasoning of the *Loenen* award, one could thus model the application of the rule by reference to the nature of the primary obligation in question (1). The alternative, on the other hand, is to link its application to the specific nature of the judicial function as such, as some commentators have suggested (2). Each of the approaches raises its own difficulties and will be considered in turn.

8.4.1. Judicial Finality as a Condition Relating to Determining Breaches of the Primary Obligation

One way to determine the rule's applicability is by reference to the content of the primary obligation: whether or not the achievement of judicial finality should apply as a substantive requirement for the emergence of a violation of the particular treaty obligation on account of judicial conduct could therefore depend on the nature of that obligation.⁹¹ Here, the underlying logic is that, in being organs of the State as any other, courts are capable of violating concrete obligations that a State owes to investors under an investment treaty and that claims grounded in violations of the latter, unlike claims of denial of justice, may not necessarily require judicial finality in order to be proven. This was also the logic that seemingly underpinned the reasoning in the *Saipem* and *Arif* cases.

In giving effect to this logic, some have proceeded to suggest that the applicability of the finality rule therefore depends on the type of the *claim*.⁹² Such a formal approach, however, stumbles upon the problem that some undertakings under distinct treaty standards overlap in their application to the conduct of the judiciary and may essentially be equivalent to those underpinning the prohibition of denial of justice.⁹³ Conditioning the applicability of the finality rule on the formal head of the claim runs therefore the danger of leading to artificial outcomes. More faithful to the logic of the *Loenen* award is rather an approach that considers whether the

before national courts of the respondent State as a condition for seeking and obtaining such substantive relief, and in the same breath deny such relief because the investor would have failed to obtain first a final determination from the courts of such State on whether there is merit or not for the interpretation of the local law on which the State relies upon to deny the existence of the grievances on which the investor bases its expropriation Treaty claim. Otherwise, if the national courts would reach the conclusion that the conduct of the State is in keeping with the national legal system, and have done so without incurring a denial of justice, there would be no room left for an international expropriation claim under the Treaty.)

⁹¹ For a recent restatement of this proposition, see B Demirkol, *Judicial Acts and Investment Treaty Arbitration* (CUP 2018) 82 and 103.

⁹² See eg A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009) 243, approaching the question of exhaustion of local remedies as one pertaining to the 'type of claim being made', distinguishing thereby denial of justice from other standards of treatment that can be violated by a court 'as a direct breach of the IIA attributable to the respondent state with no requirement to exhaust local remedies.' cf *Arif* (n 27), at 334 ('there is no general requirement to exhaust local remedies for a treaty claim to exist (unless such a claim is for denial of justice). [...] A court may violate a BIT standard directly and this breach will be attributable to the respondent State without there being any requirement to exhaust local remedies, unless it is a breach for denial of justice.').

⁹³ The same Newcombe and Paradell, for example, hold the judicial finality rule to be applicable to breaches of protection or security arising out of deficiencies in the administration of justice by considering such deficiencies to be equivalent to the delict of denial of justice. *ibid*, 314. But they have problems with the treaty standard prohibiting impairment of legally acquired rights by arbitrary, unreasonable or discriminatory measures, admitting that '[w]hat remains unclear is whether arbitrariness or discrimination by a judicial authority, would automatically breach the standard, or whether, as in claims involving denial of justice, there would be a requirement to exhaust local remedies before the action of judicial authorities would be considered arbitrary or discriminatory for the purposes of the IIA.' *ibid*, 301.

concrete obligation alleged to be violated is one of those where systematic considerations enter into the question of breach.⁹⁴ It can be recalled that such considerations derive from the conceptual distinction between obligations of conduct and obligations of result. The latter are distinguishable from the former, insofar as their breach does not occur at the moment where a State's conduct diverges from that required by the primary norm, but only after the State fails to take any of the opportunities available to it to produce the required result.⁹⁵

The problem, however, is that there is no simple formula for determining to which of the two categories particular obligations under investment treaties belong. One solution is to apply the distinction in categorical terms. Hence, Judge Schwebel's dissent in the *ELSI* case provides some authority for the proposition that treaty obligations concerning the protection of aliens and their interests "normally" belong to obligations of result.⁹⁶ Indeed, in the circumstances of that case, both the ICJ's Chamber and Judge Schwebel treated as falling into that category the obligation proscribing "arbitrary or discriminatory measures".⁹⁷ Along the same lines, Demirkol more recently suggested that, as a matter of principle, investment treaty undertakings do not require host states "to guarantee a specific outcome for specific circumstances" but "to establish a system of a certain kind that functions in compliance with certain standards."⁹⁸ This conclusion supposedly follows from that fact that an investment treaty undertaking is "a so-called *standard of treatment*" which as such "entails that the misconduct of the relevant state organ has reached a certain threshold of wrongfulness."⁹⁹ The term "treatment", in his view, refers to "something in the nature of a course of action",¹⁰⁰ and therefore implies "the position or stance of the system vis-à-vis the investor".¹⁰¹

Yet, insofar as the conduct/result distinction is concerned, it is debatable whether one can really treat all investment treaty obligations as belonging to the category of obligations of result. As argued already in Chapter 7, many treaty standards are susceptible of being concurrently construed as demanding both specific results and specific conduct, rendering the distinction often difficult to sustain in practice.¹⁰² Furthermore, investment treaty jurisprudence is replete with examples where

⁹⁴ This was seemingly also the Chevron tribunal's approach in considering the applicability of the rule in the context of claims pertaining to the 'effective means' standard. cf *Chevron (Contractual Claims)* (n 27), [323]-[327].

⁹⁵ On this distinction, see ILC, 'Report on the Work of the Twenty-ninth Session' (9 May–29 July 1977) UN Doc A/32/10, 11-9.

⁹⁶ *Elektronika Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 94, Dissenting opinion of Judge Schwebel at 117.

⁹⁷ The consequence of this treatment was that, in the analysis of the Chamber, the impugned requisition of ELSI's plant was not an arbitrary act, because in the circumstances where the order for the requisition was 'consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts', albeit found illegal by Italian courts on the ground of excess of power, such order could not even be considered as arbitrary in the first place. *Elektronika Sicula SpA (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Rep 15 (20 July 1989), [129]. In contrast, in Judge Schwebel's analysis, the requisition violated the obligation, but not because the order of requisition was itself found by him to be 'unreasonable and capricious and hence arbitrary', but by reason of the fact that the administrative and judicial proceedings, which followed the requisition, did not relieve ELSI of the requisition's effects. Schwebel, Dissent, *ibid* 115, 118. In spite of the requisition order as such not being a judicial measure, both Judge Schwebel and the ICJ's Chamber applied something akin to a judicial finality rule in determining violations of the treaty on that ground.

⁹⁸ Demirkol (n 91), 103.

⁹⁹ *ibid* 75.

¹⁰⁰ *ibid* 76.

¹⁰¹ *ibid* 107.

¹⁰² See also Delanoy and Portwood (n 23), at [30], citing instances of where a host State, contrary to its obligations under an investment treaty, refuses an investor the right to enter into its territory to manage his investment, prohibits the investor from repatriating the benefits of his investment, or expropriates an investment without compensation, as pertaining to those types of obligations where a single judicial decision will commit a definitive and instantaneous violation of the

individual instances of injurious conduct were sufficient to establish violations of concrete treaty obligations,¹⁰³ suggesting that at least some obligations under investment treaties prescribe obligations of conduct. More fundamentally, it can be debated whether international obligations *in general* are capable of being meaningfully distinguished between those demanding particular conduct and those requiring a particular result.¹⁰⁴ In the human rights context, for instance, the distinction has been considered unworkable as a means for establishing concrete violations of treaty standards.¹⁰⁵ Indeed, though treating the obligation to provide a fair and efficient system of justice as one belonging to the category of obligations of result, Crawford himself admitted that “on further analysis” the obligation in reality contained diverse elements, some possibly qualifying as obligations of result, others of conduct.¹⁰⁶ It is not without reason that the distinction has ultimately been abandoned by the ILC in the final set of rules on State responsibility.¹⁰⁷ Given these problems, it is thus questionable whether the distinction is capable of providing a convincing basis for the application of the judicial finality rule.¹⁰⁸

Demirkol’s approach is not without problems either. First, it is debatable whether investment treaty undertakings take *all* the form of “standards”. And second, it is debatable whether the concept of “treatment” itself presupposes that the obligation is one to establish a system of a certain kind. To one tribunal the entire concept may admittedly be “one that can and often does envisage something in the nature of a course of action”, with the consequence that a failure to accord to the investor fair and equitable treatment would have to be the product of more than one item of conduct taking the form of an action or omission.¹⁰⁹ Yet, to others, in turn, the concept can be taken to refer in its ordinary meaning to “behavior in respect of an entity or a person”,¹¹⁰ or to include “the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty”,¹¹¹ or “the manner in which the officials direct conduct to a specific investor or claimant.”¹¹²

Irrespective of the difficulties with classifying concrete investment treaty obligations according to their nature, the question further arises about the extent to which judicial finality needs to be actually achieved for the purpose of establishing a breach. That is, where systematic considerations enter into the question of breach, do such considerations always entail that the system as a whole needs to be tested, or is it possible that some treaty standards require that a lower threshold be applied? The question, which itself raises a number of problems, has not

applicable investment treaty, for which the investor will be immediately entitled to complain of, without having to exhaust domestic remedies.

¹⁰³ cf *Helnan* (n 81), [48].

¹⁰⁴ For further discussion, see E Wyler, *L illicite et la condition des personnes privées* (Pedone 1995), 17-43.

¹⁰⁵ For the same reason, the distinction has proven unworkable in determining violations of human rights obligations. See C Tomuschat, ‘What is a ‘Breach’ of the European Convention on Human Rights?’ in Lawson & Blois (eds), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G Schermers* vol 3 (Brill 1994), 315-35.

¹⁰⁶ ‘Second report on State responsibility, by Mr. James Crawford, Special Rapporteur’ UN A/CN.4/498 and Add.1–4, fn 158, 26.

¹⁰⁷ See ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’, (2001) ILC Ybk, vol. II, Pt. 2, 56-57, [11].

¹⁰⁸ This has not escaped commentators. For an elaborate criticism on this point, see M Sattorova, ‘Denial of justice disguised? Investment arbitration and the protection of foreign investors from judicial misconduct’ (2012) 61 ICLQ 223, at 231ff.

¹⁰⁹ *Victor Pey Casado and President Allende Foundation v Republic of Chile (Award)* (ICSID Case No ARB/98/2, 13 September 2016), [209].

¹¹⁰ *Siemens AG v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/02/8, 3 August 2004) [85].

¹¹¹ *Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua SA v Argentina (Decision on Jurisdiction)* (ICSID Case No ARB/03/17, 16 May 2006) [55].

¹¹² *Canfor Corporation v United States and Terminal Forest Products Ltd v United States (Decision on Preliminary Question)* (Consolidated Proceedings, UNCITRAL, 6 June 2006) [150].

received much treatment. The *Chevron* case – in which a “qualified” requirement of exhaustion of local remedies was found to apply to claims pertaining to breaches of the “effective means” standard that was purportedly not the same “strict” requirement applicable to denial of justice claims¹¹³ – suggests the latter may be the case. And so does Demirkol, which posits that each particular obligation may possibly require a different threshold to be reached in order for it to be breached on account of judicial misconduct. His starting point is that

“the allegation that the host state has breached an investment treaty undertaking, or a so-called *standard of treatment*, entails that the misconduct of the relevant state organ has reached a certain threshold of wrongfulness. The question is not how incorrect is the state organ’s conduct. The threshold of wrongfulness rather relates to the rigorousness (severity), endurance (continuity), determinacy (finality) and efficacy (influence) of this conduct. Thus, the threshold tests the maturity of the misconduct. The question is whether the misconduct qualifies as a complete breach instead of being a merely isolated action.”¹¹⁴

In accordance with this understanding, the extent to which domestic judicial remedies will have to be tested or exhausted essentially applies on a sliding scale.¹¹⁵ So far, so arguable. Yet, due to the vagueness of many standards of treatment, one can wonder whether it is possible to devise an objective test for determining the exact point on the scale where a violation has been completed. Especially in the case of standards which have been found capable of being violated through individual instances of improper conduct, the question is whether one can actually move beyond a fact- and context-specific approach. Attesting to this are the difficulties into which Demirkol’s sliding scale model stumbles upon once it comes to the fair and equitable treatment standard. Initially, Demirkol posits that “[w]hat should be taken into account and qualified in respect of the breach of the fair and equitable treatment standard is the whole record throughout the process of state function” and that, as a result, “a single action, ruling or decision” will “mostly” be insufficient to establish its breach.¹¹⁶ Yet, he eventually comes to the conclusion that the breach of the standard can arise even in case where further effective remedies are available, arguing that “[c]ompleteness of the breach is rather an issue of whether the misconduct can be imputable to the system established by the state” and that “[a]n improper ruling or decision would become a treatment imputable to the system through the investor’s resort to remedies, such as objections, complaints, appeals.”¹¹⁷ Accordingly, he concedes that single instances of due process violations may constitute an independent internationally wrongful act and a separate basis for a fair and equitable treatment claim, despite the existence of further effective remedies that have remained unutilized.¹¹⁸ Ultimately, he admits that “[i]t is very difficult to define an objective and general test for the

¹¹³ *Chevron (Contractual Claims)* (n 27), [323]-[26].

¹¹⁴ Demirkol (n 91), 75.

¹¹⁵ According to Demirkol, in following this approach, denial of justice claims require strict exhaustion of all effective local remedies because the failure to provide judicial protection becomes manifest only at the moment when there remains no remedy within the judicial system (ibid, 84). Claims concerning breaches of the ‘effective means’ standard, in turn, require an attempt on the part of the investor to use the means available within the host State’s legal system, but the test and threshold applied for the completeness of such breaches may not necessarily be the same as the one required for denial of justice (ibid, 110-113). Then again, in the case of expropriation, the completeness of the breach does not depend on the system being tested, but on the effects of the expropriatory judicial acts, which hence requires that such acts be challenged if the investor is to establish that the judicial conduct has given rise to an irrevocable and definitive deprivation (ibid, 55, 105).

¹¹⁶ ibid 107.

¹¹⁷ ibid 110.

¹¹⁸ ibid 195-96.

completeness of a breach of the fair and equitable treatment standard”, which according to him has to do with “the vague content of this particular investment treaty standard.”¹¹⁹

The difficulties that Demirkol encounters in his application of the finality rule to the FET standard, of course, derive primarily from ambiguities concerning the application of that standard to judicial acts. Specifically, they relate to the question whether violations of that standard can also materialize through the intermediary of the courts in other forms than through denial of justice – a question on which I touched upon in 7.5.3. Proceeding from the assumption that in such cases, the FET standard is not consummated in the delict of denial of justice, Demirkol thus argues that a violation of the FET standard must be capable of being completed despite existence of further effective remedies, for “[o]therwise, this breach would have been equivalent to denial of justice.”¹²⁰ The problem that this creates, however, is that it allows investors to avoid the application of the judicial finality requirement by simply re-characterizing the impugned judicial decision as an arbitrary or discriminatory violation of the FET standard.

This in the end discloses the key problem with the application of the judicial finality rule in the event that its application is to depend on the content of the primary norm in question: as long as uncertainty will exist with regard to the norm, a consistent approach to the application of the judicial finality rule will be difficult to achieve. Especially in the case of the standards of treatment that entail similar protections as those comprised under the prohibition of denial of justice – namely, the FET and non-impairment standards – difficulties will continue to arise in practice. Hence, it is not surprising that, in opposing the practice of challenging acts of administration of justice on the basis of other investment treaty standards as a way of circumventing the judicial finality rule, some have suggested replacing overlapping treaty provisions by a unified standard of treatment.¹²¹

8.4.2. Judicial Finality as a Condition Attaching to the Special Nature of Judicial Activity

The alternative is to treat judicial finality as a condition attaching to the exercise of the adjudicative function as such, and thus apply it to every claim predicated upon an injurious act or omission resulting from the exercise of that function, regardless of the content of the primary obligation purportedly violated by such act or omission.

The idea that the adjudicative process by domestic courts may have to be judged with greater circumspection than the conduct of other State organs is not a new one and has historically appeared in a variety of guises. It underpins the arguments such as that advanced by Borchard, that only the highest court may involve the responsibility of a State,¹²² or the argument once made by De Visscher that judicial action has to be viewed as “a single action from beginning to end”, with the consequence that a State could not be said to have “spoken finally until all appeals had been exhausted”¹²³ – an argument later relied upon by the US in the *Loewen*

¹¹⁹ *ibid* 110.

¹²⁰ *ibid*.

¹²¹ Sattorova (n 108), 241-44.

¹²² See Borchard (n 1), 197-98, where the author refers to a ‘fundamental principle’ that the acts of inferior judges or courts do not render the State internationally liable absent the exhaustion of local judicial means of redress, ‘for only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state.’ This principle was supposedly applicable, not only to cases of denial of justice, but with respect to judgments ‘in violation of a treaty or of international law’ as well.

¹²³ Borchard, ‘Responsibility of States, at the Hague Codification Conference’ (1930) 24 AJIL 517, at 532. This argument was reportedly first advanced at the 1930 Hague Codification conference where an attempt was made at the codification of the subject of Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners. Article 9 of the proposed Convention, which stipulated that the international responsibility could be incurred by a State on

case,¹²⁴ and recurrently appearing in the context of NAFTA cases.¹²⁵ As De Visscher at one point explained, the purpose is purportedly not to distinguish, from the point of view of the principle of responsibility, between the wrongful act committed in the exercise of the judicial function and that committed by any other organ of the State, but merely that

“...in the field of evidence, the very nature of the judicial function will not be without influence. In fact, the general presumption of conformity with international law will often be less easy to undermine here than in other areas. The allegation of miscarriage of justice will, particularly if it relates to the content of the sentence, encounter particular difficulties of proof. These difficulties can be explained by the complexity of the questions submitted to the judges and by the freedom of appreciation which is inseparable from the exercise of their functions. It is not, strictly speaking, an obstacle in principle; it is merely a greater difficulty than expected.”¹²⁶

Nonetheless, some contemporary commentators advance the argument that it is precisely in the nature of the judicial function that the rationale for the application of the judicial finality rule must be sought. Sattorova thus considers the “central tenet” of the judicial finality rule to lie in the “special nature of the judicial activity” and, positing that the exercise of judicial power ought to be subject to special treatment in international law, argues in favour of extending the rule to “all forms of judicial function”.¹²⁷ Douglas develops the argument further, by suggesting that the additional burden of the finality rule finds justification in the *specific character of adjudication*, as a particularly exacting but also most vulnerable form of decision-making.¹²⁸ According to Douglas, who borrows on his part from Fuller’s theory on adjudication, it is the “particular ‘burden’ of rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, that sets adjudication apart from other institutions of social ordering within the State.”¹²⁹ The finality rule is thus one of the ways in which international law is “deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces.”¹³⁰

Not insignificantly, these arguments find some resonance in the practice of investment tribunals. As noted in 7.5.3., some tribunals already drew distinctions in their assessment of the conduct of State organs on the basis of the functions that these perform in the application of the

account of damage sustained by a judicial decision that was clearly incompatible with the international obligations of the state, thus required that the impugned decision be ‘not subject to appeal’. The latter phrase was then objected by the Swiss delegate, who apparently believed that a court decision in first instance, if contrary to an international obligation, would already entail international responsibility. With a view to induce withdrawal of this objection, the Belgian delegate, De Visscher, therefore made the suggestion that judicial action be viewed as a single action from beginning to end.

¹²⁴ *Loeven (Award)* (n 10), 143.

¹²⁵ cf *supra* 8.1.3.1.

¹²⁶ C. De Visscher, ‘Le Dénî de justice en Droit International’ (1935) 52(II) *Recueil des Cours* 365, 381 (‘Nous avons dit qu’il n’y a pas de raison pour distinguer, au point de vue du principe de la responsabilité, entre l’acte illicite commis dans l’exercice de la fonction juridictionnelle et celui commis par tout autre organe de l’Etat. Telle est bien la règle. Toutefois, sur le terrain des preuves, la nature même de la fonction juridictionnelle ne sera pas sans influence. En fait, la présomption générale de conformité avec le droit international sera souvent moins facile à ébranler ici que dans d’autres domaines. L’allégation de déni de justice rencontrera, surtout si elle vise le contenu de la sentence, des difficultés particulières de preuve. Ces difficultés s’expliquent par la complexité même des questions soumises à l’examen des juges et par la liberté d’appréciation qui est inséparable de l’exercice de leurs fonctions. Ce n’est donc pas, à proprement parler, un obstacle de principe; c’est simplement une difficulté plus grande de prévue.’)

¹²⁷ Sattorova (n 108), 235, 241.

¹²⁸ Z Douglas, ‘International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed’ (2014) 63 *ICLQ* 867, 869 and 875-78.

¹²⁹ *ibid* 876; original footnote omitted.

¹³⁰ *ibid* 877.

law. According to the *Mondev* Tribunal, in applying the international minimum standard, it was thus “vital to distinguish the different factual and legal contexts presented for decision”; and hence, it was “one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State.”¹³¹ Similarly, in the view of the *Liman* Tribunal, in the application of the FET standard, it was equally important “to take into account the different functions held by administrative organs and judicial organs of a state and the resulting differences in their discretion when applying the law and in the appeals available against their decisions”.¹³²

Admittedly, one is tempted to ask oneself whether the theory of the “special nature” of adjudicatory activity does not effectively result in judicial acts ultimately being judged with a different yardstick than the conduct of other domestic organs.¹³³ Such distinction would find little support in the secondary rules of the Law of State Responsibility, where no differentiation is made in relation to the function or position that an organ holds in the organization of the State,¹³⁴ or, for that matter, in the primary norms prescribed in the applicable investment treaties. Then again, it is also possible to argue that the distinction does not pertain to the different organs, but to the different functions performed by them. If judicial finality necessary attaches to all forms of exercise of adjudicative functions, it also applies in circumstances where such functions are performed by non-judicial organs, such as in the context of administrative appeals. Hence, the theory may not necessarily be inconsistent with rules on State responsibility,¹³⁵ and potentially also explains why investment tribunals may insist on the necessity of some limited exhaustion of local remedies in relation to claims predicated upon the conduct of administrative organs – an issue I touched upon in 8.3.

Nonetheless, justifying the application of the judicial finality rule in the special protection of the adjudicative function is not without complications either. Most significantly, it raises the question as to what one must understand under the scope of this function. Since the functions performed by courts are by definition adjudicative ones, should the finality rule then not apply to establishing just any violation of international law occurring through the medium of domestic courts – such as where a Court fails to respect the jurisdictional immunities of a foreign State by permitting attachment of its assets? Or should the application of the rule be limited solely to those violations occurring in the treatment of foreign nationals/investors by such courts? Douglas does not directly address these questions; though, the solution that he adopts – in the form of the theory of procedural rights as the object of international protection through the delict of denial of justice¹³⁶ – would suggest that judicial finality would only be applicable in the latter case. Pursuant to his theory, denial of justice should namely be taken to represent “the sole form of international delictual responsibility towards foreign nationals for acts or omissions within an adjudicative procedure for which the State is responsible”, whereby such denial of justice should be taken to occur where “a foreign national has suffered a procedural injustice, according to the standards of international law, in seeking to vindicate a substantive right within an adjudicative procedure for which the State is responsible in international law” and only where this substantive right “has been finally denied within the adjudicative procedure”.¹³⁷ This theory is perhaps an appealing one since,

¹³¹ *Mondev* (n 32), [126].

¹³² *Liman* (n 28), [268]. For a similar statement, see also *RosinvestCo UK Ltd v Russia (Award)* (SCC Case No V079/2005, 12 September 2010), at 274.

¹³³ cf Freeman (n 5), 446, who similarly pointed to the artificial distinction that such arguments necessarily create between lower courts and other low-level officials, whose conduct instead would immediately be taken to produce acts of international consequence.

¹³⁴ cf ARSIWA, Art 4.

¹³⁵ See also Douglas’ distinction between adjudicatory and prescriptive / enforcement functions, (n 128), 875-84.

¹³⁶ *ibid* 888.

¹³⁷ *ibid* 900.

by excluding the possibility that improprieties occurring in the adjudicative process could engage a State's responsibility otherwise than through denial of justice, it prevents that such improprieties be presented as violations of specific treaty standards. Following Douglas, the procedural treatment in the adjudicative process can thus only be appraised through the standard of denial of justice, to which the condition of judicial finality attaches.

Where Douglas' theory is less convincing, however, is in his argument that it is supposedly irrelevant whether the substantive right denied through the domestic adjudicative procedure has its source in domestic law or international law.¹³⁸ Based on this view, substantive rights granted to individuals under international treaties, such as the right to have one's agreement to arbitrate respected in accordance with the 1958 New York Convention, would accordingly be subject to the finality rule whenever such rights were denied through an adjudicative procedure.¹³⁹ Somewhat surprisingly, Douglas' argument in this respect is that "[a] decision of a national adjudicatory body that is simply inconsistent with a rule or norm of international law does not, without more, entail the international responsibility of the State in question."¹⁴⁰ Yet, there is not much authority for a proposition of such kind. Already in the classic writings of the early twentieth century, the view had been accepted that the responsibility of a State could be engaged because of a single judgment that is contrary to a norm of international law binding upon the State, even where the norm is misapplied by a lower court.¹⁴¹ Modern writers follow the same view.¹⁴² Moreover, the proposition finds support in the practice of adjudicatory bodies. Most significantly perhaps, in the practice of both the PCIJ and the ICJ, one can find nothing to suggest that individual judicial decisions would not be capable of engaging the responsibility of the State. In fact, one can find in that practice no indication of anything akin to judicial finality being considered applicable in the circumstances where individual substantive rights provided for under international law – such as various rights concerning the employment conditions of railway workers that were governed by a bilateral treaty,¹⁴³ the right to consular communication pursuant to Article 36(1)(b) of the Vienna Convention of Consular Relations,¹⁴⁴ or the right to personal immunities under customary international law¹⁴⁵ – had been denied in the context of an adjudicative process.

¹³⁸ *ibid* 893-900.

¹³⁹ *ibid* 896-900.

¹⁴⁰ *ibid* 896.

¹⁴¹ See GG Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 BYBIL 93, 110 (considering it 'generally admitted' and supported by 'ample authority' that 'the judgments of municipal courts applying international law will, if they misapply international law, *ipso facto* involve the responsibility of the state (at any rate if acted upon) even though rendered in perfect good faith by an honest and competent court.'). See also Strupp, *Das Völkerrechtliche Delikt* (1920), 81-82 ('Begründet ist die völkerrechtliche Haftung für Handlungen von Gerichten, die völkerrechtlichen verpflichtungen zuwiderlaufen, in dem Augenblicke, in dem jene Handlung begangen wurde. [...] Es macht dabei nach früheren Ausführungen keinerlei unterschied, ob die Handlung von einem Gerichte erster (mittlerer) oder höchster Instanz begangen wurde.'). Eagleton (n 2), 72 ('Responsibility, however, may have appeared with the internationally illegal action of the lower court, though the establishment of such responsibility is not decisive of the procedure to be followed in securing redress.'). For a similar conclusion, H Urbanek (n 6), 242-43.

¹⁴² See eg R Jennings and A Watts, *Oppenheim's international law* (9th ed, OUP, 1992), 545; Paulsson (n 24), 72; or Demirkol (n 91), 25-26.

¹⁴³ *Jurisdiction of the Courts of Danzig (Advisory Opinion)* PCIJ Series B No 15, at 24. The PCIJ acknowledged the possibility of a right of action arising where "a judgment of the Courts of Danzig were in conflict with any of these rules [ie. the rules of the Bearnterabkommen, the bilateral treaty that regulated the employment conditions of Danzig railway employees who had passed into the service of the Polish Railways Administration]".

¹⁴⁴ *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12 (31 March 2004), at [40]. The ICJ acknowledged that the rights to consular communication were rights that were 'to be asserted, at any rate in the first place, within the domestic legal system of the United States'. The Court held that in order to espouse the individual claims of its nationals through the procedure of diplomatic protection, Mexico would generally have to await that local remedies were exhausted. However, as Mexico was submitting a claim in its own name with respect to the violation of

Ultimately, the better view would thus be to apply judicial finality to all instances of *procedural treatment* of an investor's claim in domestic courts, but not to situations where a judicial outcome is contrary to an international obligation granting specific substantive rights. Admittedly, however, this brings the discussion back to distinction between obligations of result and of conduct, raising again the question whether obligations entered into under investment treaties grant investors specific substantive rights that have to be given effect in the outcome of specific judicial decisions.¹⁴⁶

* * *

To sum up the analysis up to this part, investment tribunals have generally accepted the judicial finality rule as constituting a substantive component of claims concerning denial of justice and claims pertaining to those treaty standards that can be taken to impose an obligation to provide for a judicial system of a certain kind. With regard to other types of claims predicated upon the conduct of domestic courts, judicial finality has generally not been endorsed as a condition relevant to establishing a claim – at least not as a matter of principle. In practice, of course, achievement of judicial finality may nonetheless be necessary, to the extent that the showing of a denial of justice may in such cases be a precondition for establishing such claims. Taking account of the rule's current conceptual underpinnings, however, it can be expected that its application in practice will continue to give rise to problems.

8.5. The Application of the Judicial Finality Rule in Practice

To conclude the analysis, it is worth briefly examining how the judicial finality rule was actually also applied in the context of claims predicated upon the conduct of the judiciary. In general, the practice exhibits considerable variation. One of the issues, on which investment tribunals have adopted different approaches, concerns the scope of the obligation to achieve judicial finality, both in relation to the types of local remedies that the investor is supposed to resort to, and the procedural devices that the investor is expected to use (8.3.1). Furthermore, investment tribunals took different views as to the circumstances under which resort to local remedies can be dispensed with (8.3.2), while in determining the applicability of exceptions to the local remedies rule, they also differed in their standard of review (8.3.3).

rights which it purportedly suffered both directly and through the violation of individual rights conferred on Mexican nationals under Art 36(1)(b) VCCR, the duty to exhaust local remedies was deemed not to apply. While it is clear that the Court considered the application of the local remedies rule in that case as a condition of the admissibility of the claim, it is also clear that the Court did not otherwise consider exhaustion of local remedies as a substantive element necessary to prove concrete violations of individual rights under Art 36(1)(b) VCCR.

¹⁴⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgment)* [2002] ICJ Rep 3 (14 February 2002), where an arrest warrant issued by a Belgian investigating judge was sufficient to engage the responsibility of Belgium on account of the failure to respect the personal immunities to which the Congolese Minister of Foreign Affairs was entitled under customary international law, regardless of the fact that the warrant was still open to appeal and judicial finality in challenging the warrant has not been achieved.

¹⁴⁶ cf also Demirkol (n 91), 76 who considers the 'judicial function' distinguishable from the outcome in a particular judicial decision, and takes the view that such a judicial decision, even when taking the form of a single act, can result in a violation of a norm of international law when such norm calls for application in the particular dispute. In his view, however, the outcome of the judicial proceeding matters solely where the international norm imposes an obligation of result. Accordingly, a breach of an investment treaty standard of treatment by domestic courts will arguably be different from the breach of a specific rule in an international convention, because the standard concerns the functioning of domestic courts in their adjudicatory process and not directly the outcome in the judicial decision.

8.5.1. Scope of the Judicial Finality Requirement

In the practice of investment treaty tribunals, the obligation to achieve judicial finality has been understood as a comprehensive one. It was primarily the question of effectiveness that seemed to be determinative of the types of remedies that the investor was expected to use. Claimants were thus expected to make use not only of regular forms of appeal, but where necessary also have recourse to extraordinary procedures – such as the *amparo* which is commonly used in certain Latin American jurisdictions,¹⁴⁷ or petitions for constitutional review.¹⁴⁸ Furthermore, the achievement of judicial finality was not considered to be a mere formality, as tribunals were prepared to take into account the Claimant’s own diligence in the pursuit of domestic remedies.¹⁴⁹

Admittedly, the scope of the remedies that the investor was expected to use might occasionally have been construed too broadly, particularly in relation to the extent to which recourse should have been made to indirect remedies. Particularly demanding in this regard was the Tribunal in *Loewen*, which not only expected the Claimant to have recourse to remedies that were capable of directly redressing the underlying judicial wrong (in that case, this was in the form of an ordinary appeal against the Trial Judges decision before the Mississippi Supreme Court), but since such recourse proved unavailing in the circumstances of the case (since Claimant was facing a genuine risk of immediate execution on its assets as it could not afford the *supersedeas* bond required under Mississippi law to stay execution of the judgment pending appeal), also to remedies that would have indirectly enabled it to have access to the direct remedies. The Claimant was thus expected to have resorted to US Federal Courts – by either petitioning the US Supreme Court for *certiorari*, or alternatively, by seeking to obtain collateral review before a Federal District Court – where it could have challenged the bonding requirement on the ground that it prevented, inconsistently with due process, appellate review in the Mississippi courts.¹⁵⁰ Not any less demanding appeared to be the Tribunal in *Alps Finance v. Slovakia* (2011) which would have accepted (had it not already lacked jurisdiction over the claims) that Claimant had failed to exhaust local remedies, not because of failing to appeal the impugned judgment (the Claimant in fact brought an appeal to the Supreme Court, but this was denied), but essentially because of failing to commence judicial procedures that would have mitigated its adverse effects.¹⁵¹ In *Pantechniki*, however, Sole Arbitrator Paulsson expressed scepticism about the reasonableness of requiring resort to indirect remedies, considering that “[i]t may not be necessary to initiate actions which exist on the books but are never in fact used” and that “[o]blique or indirect applications to parallel

¹⁴⁷ See *Abengoa* (n 62), [635] (discussing the possibility of an *amparo* appeal against the revocation of an operating license); cf also *Waste Management II* (n 29), [118]-[140].

¹⁴⁸ See eg *Alps Finance* (n 27), [157], [251] (accepting as ‘convincing’ the Respondent’s argument that remedies were still available; among the latter, Claimant mentioned the possibility of petition to the constitutional court). cf also complaints to the Chairman of the court.

¹⁴⁹ See eg *Peter Franz Vocklinghaus v Czech Republic (Final Award)* (UNCITRAL, 19 September 2011) [207] (“There can be no doubt that PV [Claimant] was afforded very wide access to the Czech civil and criminal judicial system. However, it is equally clear from the record in this Arbitration that he did not avail himself of all available local remedies – or else to the extent that he did so, submissions were, on occasion, later or incomplete or both.”)

¹⁵⁰ *Loewen (Award)* (n 10), [210]-[217].

¹⁵¹ *Alps Finance* (n 27). The Tribunal concluded that Respondent had ‘convincingly objected’ that other remedies were still available and that non-exhaustion of local remedies was therefore *per se* sufficient to exclude the State’s responsibility for the conduct of the judiciary ([251]). The claim of denial of justice concerned a decision of a regional court that was alleged to have unjustifiably overruled a previous bankruptcy declaration of a district court. While the relevant company was later declared bankrupt anew, the second bankruptcy trustee rejected the recognition of Claimant’s claims to debts on the ground that these became statute barred. The essence of Respondent’s defence was that Claimant could have challenged the bankruptcy trustee’s non-recognition of the debt, or could have commenced ordinary civil action against the bankrupt company to claim the receivables and thus interrupt statute of limitation (see [156]-[158]).

jurisdictions [...] may similarly be held unnecessary” – although also cautioning that such determinations “must perforce be made on a case-by-case basis.”¹⁵²

Investment tribunals also differed in their treatment of procedural resources that Claimant was expected to use. Divergence of opinion is notable especially on the question of remedies that should be used in circumstances where claims of denial of justice concern delays in judicial proceedings. While some have categorically stated that the requirement of exhaustion of local remedies was not applicable to such claims at all,¹⁵³ others expected that Claimant made use of procedural devices that could have accelerated domestic court proceedings. In *Toto v. Lebanon* (2009), the Claimant was expected to have shown diligence in making use of local remedies to speed up its contractual suits before the Lebanese *Conseil d'Etat* – by petitioning that court to issue its report on the case or review the matter quickly, or by requesting the President of that court's Chamber to cause prompt issuance of the decision of the relevant Juge-Rapporteur.¹⁵⁴ Similarly, in *Chevron v. Ecuador* (2010), the exhaustion requirement was found to extend to any procedural devices that could have expedited Claimants' domestic court proceedings. Of the various procedures invoked by the Respondent (such as motions for “hearing in stands”, requests for written closing arguments, or disciplinary and monetary sanctions against judges), the Tribunal considered only applications for recusals of judges to have had the potential of resolving delay, but was eventually satisfied that in the specific circumstances of the case such applications would have made no difference.¹⁵⁵ The Tribunal explained that “[p]roving the availability of remedies extends to proving a direct and objective relationship between the proposed device and the resolution of the wrong”; but this did not imply that the pursuit of indirect remedies might necessarily be exempted from the exhaustion requirement “due simply to their indirect nature” – determinative was whether the remedies could have had a “significant effect” on the expediency of the court proceedings.¹⁵⁶

8.5.2. Exceptions to the Judicial Finality Requirement

While investment tribunals largely recognized “futility” as a circumstance discharging a claimant from the obligation to achieve judicial finality, there has been considerable divergence in the way the exception has been applied in practice. Conceptually, there has been some confusion in the use of terms since futility may relate, on the one hand, to the *availability* of a remedy, but it may also concern, on the other hand, its *adequacy and effectiveness*.¹⁵⁷ As to the former aspect, there has been no doubt that a Claimant is not expected to exhaust remedies that are non-existent, or to which it is formally barred access.¹⁵⁸ The difficulty, however, is with local remedies that, albeit formally available, are practically foreclosed. The test adopted by investment tribunals has therefore been that of *reasonable availability* of a remedy.¹⁵⁹ The issue was extensively considered in the *Loewen* case, where the question of availability arose, not only in relation to the potential appeal to the Mississippi Supreme Court against the verdict and judgment of the trial court, but

¹⁵² *Pantechniki* (n 27), [96].

¹⁵³ See *Jan de Nul* (n 27) [195], [256]; *Oostergetel v Slovakia* (n 27), [275]; *Flughafen* (n 27), [642]; *OI Group v Venezuela* (n 27), [527].

¹⁵⁴ *Toto v Lebanon (Jurisdiction)* (ICSID Case No ARB/07/12, 11 September 2009), [167].

¹⁵⁵ *Chevron* (Contractual Claims) (n 27), [329]-[31].

¹⁵⁶ *ibid* [329].

¹⁵⁷ See thus *Loewen (Award)* (n 10), [168], identifying the inquiry as one concerning whether a remedy was ‘effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated.’

¹⁵⁸ See eg *Flughafen* (n 27), [642]; and *OI Group v Venezuela* (n 27), [527] (acknowledging that the claimant is not required to pursue local remedies when it is refused access to justice).

¹⁵⁹ See eg *ATA Construction* (n 27), [107] (holding that ‘a denial of justice occasioned by judicial action occurs when the final judicial instance, which is *plausibly available*, has rendered its decision’; emphasis added).

also in relation to the alternative local remedies that Loewen could have pursued, particularly about the possibility of petitioning the US Supreme Court for *certiorari*. The Tribunal considered that availability was “not a standard to be determined or applied in the abstract” but meant “reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy.”¹⁶⁰ In particular, a remedy was thus not available if conditions were attached to it that rendered its exercise impractical, or if the exercise of the remedy exposed the complainant to severe financial consequences.¹⁶¹ This seemingly implied an objective test. And indeed, in the view of the Tribunal, the exercise of the right of appeal before the Mississippi Supreme Court would not have been considered “a reasonably available remedy” in circumstances where Claimant was facing a genuine risk of immediate execution on its assets as it could not afford the *supersedeas* bond required under Mississippi law to stay execution of the judgment pending appeal.¹⁶² In subsequently applying the same test to the alternative local remedies that Loewen could have pursued, however, the Tribunal did not inquire anymore whether the alternative remedy was reasonably available, but whether Claimant believed that the alternative remedy was reasonably available – thus turning the objective test into a subjective one. In the end, the claim failed because Loewen purportedly failed to present evidence disclosing the reasons for entering into a settlement agreement with its local competitor instead of pursuing other options (especially resort to the Supreme Court which it had seriously considered).¹⁶³ The *Loewen* Tribunal’s approach stumbled upon much criticism,¹⁶⁴ and was also challenged during the Claimant’s unsuccessful attempt to have the award vacated.¹⁶⁵ It was generally also not followed by other investment tribunals, which generally preferred to assess reasonableness by reference to the objective circumstances of each case.¹⁶⁶

In the practice of investment tribunals, however, it was more often the adequacy and effectiveness of a specific remedy that had to be considered. The approaches adopted in this regard suffer from some conceptual confusion, as the same notions seem to be used to denote what in effect are different tests for determining inadequacy/ineffectiveness of a remedy.¹⁶⁷ Nonetheless, one can roughly identify three approaches that have been used in practice, each of which imposing differently stringent requirements on the investor.¹⁶⁸

¹⁶⁰ *Loewen (Award)* (n 10), [168]-[169].

¹⁶¹ *ibid* [170].

¹⁶² *ibid* [208].

¹⁶³ *ibid* [215]-[216]. Only if ‘entry into the settlement agreement was the only course which Loewen could reasonably be expected to take’ would have allowed the conclusion that Loewen had no reasonably available remedy.

¹⁶⁴ See eg N Rubins, ‘Loewen v. United States: the Burial of an Investor-State Arbitration Claim’ (2005) 21 *Arbitration International* 1; or See Paulsson (n 24), 120-124.

¹⁶⁵ See *Motion to Vacate and Remand Arbitration Award*, dated 25 February 2004, available at <<http://www.italaw.com/sites/default/files/case-documents/ita0473.pdf>>, 21-27 (arguing that by applying the subjective test the Tribunal manifestly disregarded the law that it had deemed controlling). The petition was dismissed because the motion was time barred. Memorandum Opinion (dismissing Claimant’s Motion to Vacate Award) of 31 October 2005.

¹⁶⁶ But see *Saipem* (n 31), [184], where the Tribunal considered that, had that been relevant, it would have been legitimate for the Claimant to take any threats to its security into account when deciding whether or not to appeal from the two disputed court decisions, implying that the inquiry could have included whether or not ‘Saipem could reasonably have relied on its perception of hostility’ to justify its failure to exhaust the local remedies.

¹⁶⁷ Particularly the notion of *probability* of a remedy has in some cases been used in relation to *prospect of success* (eg *Saipem* (n 31), [182]-[183]), while in others as the possibility of an effective remedy (eg *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador (Award)* (ICSID Case No ARB/04/19, 18 August 2008 [400]-[401]).

¹⁶⁸ The practice accords with the different approaches traditionally taken in the application of exceptions to the local remedies rule in the context of diplomatic protection. See ‘Third report on diplomatic protection, by Mr. John Dugard, Special Rapporteur’ UN Doc A/CN.4/523 and Add1, 56-61.

8.5.2.1. Reasonable Prospect of Success

The first, and least demanding is the criterion of *reasonable prospect of success*. The concept of “reasonable prospect” was formally adopted as a criterion determining the potential futility of a remedy in several cases,¹⁶⁹ but it was only in *Saipem* that it was actually applied in practice. Recalling that Claimant had “already litigated the issue of the arbitral misconduct for more than two and a half years in front of different courts in Bangladesh”, the Tribunal deemed Saipem to have exerted “reasonable local remedies”, since it “spent considerable time and money seeking to obtain redress without success although the allegation of misconduct was clearly ill-founded” and that therefore, “[r]equiring it to do more and file appeals would amount to holding it to ‘improbable’ remedies.”¹⁷⁰

8.5.2.2. Reasonable Possibility of an Effective Remedy

On the second approach, remedies have been considered as futile if offering no *reasonable possibility of an effective remedy*. This approach, which is concerned with the existence of a possibly effective remedy in the circumstances of the case, and not the possibility of the claimant actually obtaining that remedy, is also one that is probably most commonly applied in practice.¹⁷¹ In *Duke Energy* (2008), the inquiry was focused on whether the Ecuadorian courts would have annulled a commercial award by assimilating an erroneous dismissal of jurisdiction to an excess of power. Since Claimants had not established that it was improbable that the Ecuadorian courts would have made such assimilation (for, the Claimant was not obliged “to pursue ‘improbable’ remedies”), the Tribunal concluded that they have failed to show that no adequate and effective remedies existed, rejecting the claim of denial of justice.¹⁷² In *Pantechniki* (2009), the sole Arbitrator Paulsson similarly focused the inquiry (whether expecting the Claimant to have pursued a remedy would have been “beyond a point of reasonableness”), not on whether the Claimant would have succeeded with its appeal before the Supreme Court of Albania, but onto the narrower question whether the Supreme Court, being a court of cassation rather than a full court of appeal, could have done “no more than to send the case back to the appellate level”.¹⁷³ In *Abengoa v. Mexico* (2013), in turn, the futility question was considered in relation to the practical effects of a potential judgment. Recourse to the *amparo* remedy would have been completely futile because it would have taken several weeks to obtain any kind of interim decision, by which time the situation of the facility would not have been economically viable.¹⁷⁴ Finally, in *Chevron v. Ecuador* (2010), the test of reasonable possibility of an effective remedy was seemingly used to determining the futility of procedural remedies. Thus, a “high likelihood of success” of a

¹⁶⁹ See eg *Jan de Nul* (n 27), [258] (“An exception to this rule may be made when there is no effective remedy or “*no reasonable prospect of success*”; emphasis in the original); *Flughafen v Venezuela* (n 27), [642] (“el recurrente no está obligado a agotar los recursos internos [...] cuando ulteriores recursos prometen ser fútiles, por existir *dudas razonables* sobre su existencia o sobre su *posibilidad de éxito*”); or *OI Group v Venezuela* (n 27), [527] (“el recurrente no está obligado a agotar los recursos internos [...] cuando ulteriores recursos prometen ser fútiles, por existir *dudas razonables* sobre su existencia o *sobre su posibilidad de éxito*”).

¹⁷⁰ *Saipem* (n 31), [183].

¹⁷¹ The approach was sometimes adopted also on the formal level. See eg *Flughafen v Venezuela* (n 27), [642]; and *OI Group v Venezuela* (n 27), [527], both considering that domestic resources would have been futile because there was ‘reasonable doubt about their existence’. However, in both cases this approach was combined with that of *reasonable prospect of success*, which is a different test.

¹⁷² *Duke Energy* (n 167), [400]-[402].

¹⁷³ *Pantechniki* (n 27), [96], [101]-[102]. This is not surprising since Paulsson has also supported in his such understanding of the futility exception. See Paulsson (n 24), 118.

¹⁷⁴ *Abengoa* (n 62), 635.

procedural device was not required in order to expect a Claimant to attempt it; of relevance was solely whether the remedy could have had a “significant effect” on the resolution of the wrong.¹⁷⁵

8.5.2.3. *Obvious Futility*

The third, most stringent approach to determining the inadequacy of a remedy has been that of *obvious futility*, which requires that ineffectiveness of the remedy be clearly shown. While it was the Tribunal in *Loeven* that identified a body of opinion supporting the view that a complainant was bound to exhaust any remedy that was “adequate and effective” so long as it was not “obviously futile”,¹⁷⁶ it was only the Tribunal in the *Apotex* case (2013) to actually apply it. According to that Tribunal, determining the “obvious futility” of a remedy turned on the “*unavailability* of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief.”¹⁷⁷ Unavailability in this sense implied “an actual unavailability of recourse, or recourse that is proven to be ‘manifestly ineffective’”, whereby manifest ineffectiveness required “more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued.” Therefore, it was not enough for the Claimant “to allege the ‘absence of a reasonable prospect of success or the improbability of success, which are both less strict tests’”; what was necessary, instead, was to demonstrate that there “was no justice to exhaust.”¹⁷⁸ This was admittedly a high threshold to meet, but as explained by the Tribunal, such high threshold “necessarily follows” from the nature of the judicial finality rule to which it is an exception; and as an exception, it “must be construed narrowly.”¹⁷⁹

In applying this stringent test, however, the Tribunal conflated the question of effectiveness with that of availability of a remedy, by failing to distinguish between the Claimant’s chances of being granted *certiorari* by the Supreme Court and its chances of succeeding with the constitutional appeal, in case *certiorari* had been granted.¹⁸⁰ The Tribunal eschewed the issue of availability, by arguing that “even if the chance of the U.S. Supreme Court agreeing to hear Apotex’s case was remote, the availability of a remedy was certain.”¹⁸¹ Arguably, however, its availability was far from certain, taking into account, as also noted by Apotex, the very small number of cases in which *certiorari* is granted each year by the Supreme Court.¹⁸² It may be that determining the effectiveness of a remedy by reference to merely the Claimant’s chances of a successful outcome might not be the correct enquiry, but there is no reason why a tribunal should avoid embarking on a prediction whether or not *certiorari* would have been granted for the purpose of determining whether a remedy was “actually unavailable”. Indeed, in determining the “reasonable availability” of a remedy, the Tribunal in *Loeven* previously looked not only at practical considerations relating to its exercise, but took also account of the likelihood of obtaining relief. Namely, the absence of any certainty about the outcome of petitioning the US Supreme Court for *certiorari* or seeking collateral review in a Federal District Court was held to be “a significant consideration” in deciding whether either of the options was a reasonably available remedy.¹⁸³

¹⁷⁵ *Chevron* (Contractual Claims) (n 27), [326], [329].

¹⁷⁶ *Loeven* (n 10), [165], [168].

¹⁷⁷ *Apotex* (n 28), [276]; emphasis in the original.

¹⁷⁸ *ibid* [284]-[288]. Support for the ‘no justice to exhaust’ test was found in *Robert E Brown Case (US v UK)* (23 November 1923).

¹⁷⁹ *ibid* [279] [284].

¹⁸⁰ *ibid* [288]-[289].

¹⁸¹ *ibid* [287].

¹⁸² *ibid* [274] and fn 132.

¹⁸³ *Loeven* (n 10), [212].

8.5.3. Standard of Review Adopted in Determining the Applicability of Exceptions to the Judicial Finality Requirement

To complete the picture, it must be mentioned that investment tribunals, not only differently defined the conditions under which a Claimant would be exempted from the obligation to achieve judicial finality, but also adopted different approaches in assessing whether the relevant factual circumstances satisfied those conditions. In most cases where the inquiry turned on questions of domestic law (which was usually relevant for determining the availability of a particular remedy), tribunals have frequently adopted a deferential approach, as attested to by their tendency to avoid making conclusive decisions as to points of domestic law, and generally to resolve uncertainties in Respondent's favour. In *Duke Energy*, for example, the Tribunal refused to accept the argument that resort to the local judiciary would have been futile because it was improbable that Ecuadorian courts would have annulled a commercial award on the ground of an erroneous dismissal of jurisdiction. The Tribunal noted that none of the grounds for annulment provided for under Ecuador's Mediation and Arbitration Law expressly addressed jurisdiction. Yet, it was not willing to assume that the award could not be challenged in Ecuadorian courts on that ground, noting that "lack of clarity" was "not sufficient to demonstrate that a remedy is futile."¹⁸⁴ In *Pantechniki*, the Tribunal did not wish to conclusively establish whether or not pursuant to the Albanian Civil Code, the Supreme Court of Albania had the option of rendering a final judgment, as argued by the Respondent, or whether it was bound to send the Claimant's contractual dispute back to the appellate court, rendering recourse to the Supreme Court an exercise in futility. The Tribunal was satisfied by noting that "[i]ndeed the practice of *renvoi* does not appear to be an inevitable feature of cassation systems."¹⁸⁵ Then again, differing from this is the award in *Apotex*. In embarking for the sake of completeness on a prediction as to the likely outcome of the domestic judicial ruling, the Tribunal resolved without reluctance that the US Supreme Court could "obviously" have heard a case relating solely to procedural matters, finding support for such conclusion in academic commentary and the Rules of the Supreme Court themselves.¹⁸⁶

As on the question of availability of a domestic remedy, divergent approaches have also been adopted by investment tribunals in determining the effectiveness of a remedy. Such determinations were not difficult in cases where the effectiveness of a domestic remedy turned on specific factual circumstances on which courts had little or no influence. In *Abengoa v. Mexico* (2013), for example, the Tribunal concluded that recourse to domestic judicial procedures would have been completely futile, among other reasons, because it was evident that due to the overwhelming opposition of the municipal government against the Claimants waste processing facility, the execution of any judicial decision would have been impossible in practice.¹⁸⁷ In contrast, difficulties have arisen in circumstances where the assessment of a remedy's effectiveness necessitated an inquiry into domestic law, which might require the drawing of inferences from past domestic court proceedings and potentially stepping into the shoes of the domestic courts. The approach of investment tribunals on these issues has varied. A somewhat deferential approach was noticeable in *Loewen*, for example, where the Tribunal was provided with competing opinions on the part of the parties' experts as to the prospects of success of an application for *certiorari* before the US Supreme Court and the availability of collateral review in a Federal District Court. The Tribunal considered it was "not in a position" to decide whether the opinion of the Claimant's expert, which had described such prospects as being "very unlikely",

¹⁸⁴ *Duke Energy* (n 167), [400]-[401].

¹⁸⁵ *Pantechniki* (n 27), [102].

¹⁸⁶ *Apotex* (n 28), [290] and fns 158 and 159.

¹⁸⁷ *Abengoa v Mexico* (n 62), [635].

were to be preferred over the opinion of the Respondent's expert, which had claimed there was "a reasonable opportunity" of obtaining review. In the end, the Tribunal clung on the fact that even the Respondent's expert had not asserted that either of the courts would have granted the relief, which tended to confirm that none of them was a reasonably available remedy.¹⁸⁸ Deferential was also the sole Arbitrator Paulsson's decision in *Pantechniki* in its appraisal whether the Claimant's further pursuit of local remedies was bound to be an exercise in futility, due to the possibility that the Supreme Court of Albania, being a court of cassation rather than appeal, might have sent its case back to the appellate level where the Claimant could allegedly not have expected due process. The sole Arbitrator was not willing to assume that the Supreme Court "invariably sends censured cases back to the appellate level", nor was it able to assume that the appellate courts "would always be unable or unwilling to conduct themselves in accordance with the minimum international standard."¹⁸⁹ Especially in relation to the latter, though, the Arbitrator could well have assumed a different stance, given that in an earlier part of the award he expressed concern about the "clear violation of fair procedure" that had apparently occurred in proceedings before the Court of Appeal when this had rejected a claim on a ground which the Claimant had not invoked and had no occasion to address.¹⁹⁰

Contrary to sole Arbitrator Paulsson in *Pantechniki*, the Tribunal in *Saipem* proved more inclined to drawing inferences as to the potential outcome of the Claimant's pursuit of local remedies from the previous conduct of domestic courts. The question in that case was whether Saipem had exhausted available local remedies, given that two degrees of appeals were still available from the contested domestic court decision that revoked the authority of arbitrators in the commercial arbitration that Saipem brought against the State-owned company Petrobrangla. The ICSID Tribunal considered that Saipem had exerted "reasonable local remedies" by spending considerable time and money seeking to obtain redress without success against a "clearly ill-founded" decision, which the Tribunal already determined had constituted an abuse of supervisory jurisdiction and a direct violation of Bangladesh' obligations under the 1958 New York Convention. Saipem, indeed, litigated the issue of alleged arbitral misconduct for more than two and a half years in front of different courts in Bangladesh. On the face of it, such duration of local proceedings did not appear outrageously excessive. Nonetheless, the Tribunal held that requiring Saipem to lodge further appeals would amount "to holding it to 'improbable' remedies," particularly so "knowing that Saipem's case was precisely that the local courts should never have become involved in the dispute."¹⁹¹ The Tribunal's conclusion as to the lack of probability seems to have been premised on the fact that the Supreme Court had previously issued injunctions restraining Saipem from pursuing the commercial arbitration,¹⁹² which could have been interpreted as suggesting that the Supreme Court would likely not have overturned the lower court's decision.

A similar willingness on the part of an investment tribunal to assess the potential futility of a remedy by reference to the previous conduct of domestic courts could also be noted in *Flughafen Zürich v. Venezuela*. In the circumstances of that case, the Tribunal had to consider whether Claimant, as concession-holder of an airport on the Venezuelan Isla Margarita, should have further pursued the appeals it had brought before a lower administrative court against certain actions taken by the local government of Nueva Esparta in relation to the airport, considering that the Supreme Court of Venezuela in the meanwhile transferred the administration and control of the airport to the Central Government. Having found that the

¹⁸⁸ *Loewen* (n 10), [210]-[211].

¹⁸⁹ *Pantechniki* (n 27), [102].

¹⁹⁰ *ibid* [100].

¹⁹¹ *Saipem* (n 31), [183].

¹⁹² *ibid* [37]-[39].

Supreme Court's decision of 2009 ordering such transfer amounted to a denial of justice, the majority of the Tribunal concluded that future pursuit of the administrative appeal would have been futile inasmuch as there was "no reasonable expectation" that those proceedings could result in a reversal of the transfer. According to the Supreme Court's decision, the transfer was not intended to be permanent and was said to depend on the ultimate resolution of the underlying dispute in the administrative court. However, the Tribunal viewed the transfer as irreversible, since the Central Government had already assumed factual control over the airport and, by means of an Executive Decree, included the airport among the assets held by a newly created state airport company.¹⁹³ According to the Tribunal, it was not reasonable to assume that the administrative court could have decided against the Supreme Court that control over the airport should revert to the Claimants, nor would the court actually have the power to order a transfer in circumstances where neither the Government nor the state airport company were party to the proceedings.¹⁹⁴ The Tribunal's lack of confidence in the successful pursuit of domestic remedies seemed to have been attributable to the perceived bias of the Supreme Court in favour of the Central Government. The legal basis for the Government's taking over of the airport was actually made possible by the Supreme Court's novel interpretation of certain constitutional provisions in 2008 that expanded the Central Government's powers in the field of airport management. Furthermore, the 2009 decision ordering the temporary transfer already anticipated in an *obiter dictum* on the possibility that the transfer would have become permanent, in spite of the lack at that time of a legal basis for the Central Government to assert control over the airport. The Tribunal seemed disturbed by the fact that nowhere had the Supreme Court questioned the competence of the Central Government to take such steps, and the fact that the Court anticipated on any decisions that the Government might issue regarding the airport, in circumstances where the Government was not even party to the proceedings before the Supreme Court, demonstrated that the Court's bias.¹⁹⁵

8.6. Concluding Observations

The applicability of the judicial finality rule in investment treaty arbitration is certainly one of the main fault lines in the discussion on the relationship between domestic courts and investment treaty tribunals. While largely dispensed with as a procedural precondition for the presentation of claims, the obligation to exhaust local remedies has been reintroduced in the guise of the judicial finality rule, which is now accepted to operate as a substantive requirement in relation to some claims premised on judicial conduct – essentially those concerning denial of justice, but potentially also certain others. Conceptually, the finality rule has usually been linked to the specific nature of the international obligation at issue: where this obligation is taken to entail the maintenance of a system of a particular kind, or more broadly the achievement of a particular result – such as may be the case with the customary international law obligation to provide an adequate system of justice – judicial finality applies as a substantive condition of a claim, for only when the system as a whole has been tested, and the required result not achieved, can one say that the violation of the obligation has materialized. Pursuant to such understanding, the application of the finality rule becomes then contingent on whether one interprets the concrete treaty standard to demand a defined conduct, or to require a defined result. As many treaty standards are capable of being interpreted either way, the imposition of the finality rule becomes then dependent on the circumstances of each case, and the opinion of each individual tribunal. Most problematic perhaps, the application of the rule under such conditions essentially permits claimants to re-categorize their claims, so as to avoid the rule altogether.

¹⁹³ *Flughafen* (n 27), [709]-[721].

¹⁹⁴ *ibid* [718]-[719].

¹⁹⁵ *ibid*, [700]-[706].

The alternative view, which is to treat judicial finality as a condition applicable to the exercise of adjudicatory functions as such, resolves some of these problems by requiring exhaustion of local remedies in relation to all claims predicated upon the conduct of judicial (and other adjudicative) organs. When applied in this way, however, the condition of judicial finality creates the impression that injuries resulting from one type of State activities should be seen as less reprehensible than those resulting from other types. Eventually, it also leads to the situation where the same treaty standard may be taken to impose different requirements upon different state organs – a proposition which was usually resisted in the practice of investment tribunals.¹⁹⁶ Unless, of course, one sees judicial organs to be fundamentally different from others, so that the judiciary could only be understood to act as a whole (in the sense of one single conduct comprising the lowest to the highest judicial decision). But this proposition has not received much support either. The necessary consequence of either of these propositions is that domestic courts turn out to be treated with greater deference than other state organs. Albeit difficult to accept, such a consequence may not necessarily lack rationale, at least if one takes the admonition seriously that investment tribunals are not courts of appeal.

Ultimately, it is on the question of deference that the judicial finality rule ultimately turns. With the benefit of hindsight, it is clear that in devising its litigation strategy in the *Loewen* case, the US was well aware that the approach that they would have taken could “not only have significant implications on the nature and extent of investor protections afforded by the NAFTA, but may also affect the long-term viability of the NAFTA itself.”¹⁹⁷ In particular, the US Justice Department was concerned that a negative outcome of the case would likely have generated a political hostility toward the NAFTA, “particularly if the NAFTA is construed to effect a waiver of sovereignty that would permit an international tribunal effectively to sit in review of decisions of United States courts at the election of foreign investors.”¹⁹⁸ The issue was therefore one of ensuring a trade-off between preventing NAFTA tribunals from turning into courts of appeal, while retaining the ability of US investors to challenge arbitrary, expropriatory, or otherwise unfair court judgments abroad. As to the latter, the Department of State and the US Trade Representative deemed it especially important not to undermine the protection of US investors in Mexico, where there remained evidence of judicial corruption.¹⁹⁹ Framing the objection in relation to the lack of judicial finality seemed crucial to achieving that aim. At the same time, the US Justice Department was aware of the conceptual weaknesses of the finality argument, warning that it will be “difficult to argue that a final trial court judgment – which is a fully executable action – is less ‘final’ for purposes of state responsibility than a statute or regulation that has not been challenged in court”. Furthermore, the Department realized that “since the NAFTA explicitly waived the traditional requirement that a claimant must first exhaust domestic legal remedies before proceeding to arbitration, it would be difficult to persuade the tribunal that exhaustion of the judicial process is required before a court judgment becomes a measure under the NAFTA.”²⁰⁰

¹⁹⁶ See eg *Rompotrol* (n 27), [160] (not finding any warrant to read into the treaty ‘an implied term that would subject some claims for breach of “fair and equitable treatment” to conditions or restrictions, even of a purely temporal kind, that would not apply to other claims to the same standard of protection’) and [164] (suggesting it would ‘defy logic to suppose that international law lays down a more demanding standard for the actions of prosecutors than it does for the operation of the courts before which their prosecutions are brought’). But see *Liman Caspian* (n 28), *Loewen* (n 10).

¹⁹⁷ See Memorandum for John D Podesta from Beth Nolan, et al, regarding ‘Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration’ dated 10 February 2000, at 1, available at <www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=13377>.

¹⁹⁸ *ibid.*, 3.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*, 5.

As if aware of the US concerns, and of the relatively thin reasoning sustaining its re-introduction of the judicial finality rule, the *Loenen* Tribunal sought to justify its decision in a postscript at the end of its award by expressing the following opinion:

“Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.”²⁰¹

In its origins, therefore, the case for the judicial finality rule has been a case for preventing international treaty tribunals from sitting as regular courts of appeal from decisions emanating from domestic courts, and for preserving the integrity of the domestic legal system, without at the same time preventing such tribunals from ultimately exercising some form of external control. Its occasional semi-extension to non-judicial conduct – though not in the sense of a legal obligation, but as a circumstance relevant to proving a juridical fact – pursues the same underlying logic: confirming that investment treaty tribunals are not a new form of administrative appeal against mistakes of executive organs.

As in the case of the traditional local remedies requirement, the finality rule thus operates in its essence as a balancing principle. But this balancing obviously does not sit well with the system of investor-State arbitration where the requirement to exhaust local remedies has been precisely dispensed with as a condition for resorting to the international forum. Indeed, it is frequently by reference to the functional argument – i.e., that fact that investment arbitration was introduced precisely as a functional alternative to domestic litigation – that the extension of the finality rule has generally been resisted.²⁰² Yet, the finality rule is not any less about substance – the question whether the concrete treaty standards, to which States agreed in their investment treaties, shall be deemed to impose more onerous demands upon courts than in the case of denial of justice, meaning that such standards would have to be equally complied with at the level of each individual judicial decision.

Ultimately, the application of the finality rule seems also to revolve around trust. This can be seen in the distinction between cases brought against States possessing a developed judicial system such as that of the US, where the exceptions to the rule have been construed narrowly,

²⁰¹ *Loenen* (n 10), [242].

²⁰² See Schreuer (*Calvo's Grandchildren*) (n 75), 16 (‘It is not inherently unreasonable to require that the investor make some efforts domestically to obtain redress before seizing an international tribunal. But then neither is the domestic remedies rule inherently unreasonable. The decision to do away with it in investor-State investment arbitration was made consciously and for good reasons. Therefore, we should think twice before making the use of local remedies a constitutive element or substantive requirement of a violation of international standards.’)

and capital-importing States, where exceptions to the rule have been applied more liberally. The distinction is obvious when one compares the *Apotex* decision involving the US, where the very high threshold of “obvious futility” was applied, to the *Saipem* decision rendered against Bangladesh, where the lack of “reasonable prospect of success” was sufficient for the dispensation of the local remedies requirement. At the end of the day, the dynamic behind the strict or loose application of the finality rule is again one dependent on the proper scope of arbitral intervention.²⁰³ It is therefore not surprising that discrepancies in how strictly the rule has been applied will beg questions as to whether investment-treaty arbitration has really been functioning as a genuinely neutral international forum, or instead simply as a means of enabling investors from developed states to bypass judicial and administrative procedures in less-developed treaty partners.²⁰⁴

* * *

Reflecting more broadly on situations in which domestic courts performed the roles of *suspects*, a two-fold development can be observed. On the one hand, an unaltered tendency to review domestic courts conduct with great deference and restraint in the context of denial of justice claims; and on the other hand, the increasing inclination to review their conduct against other treaty standards of treatment that, on their part, are frequently construed as imposing more rigorous and demanding obligations than those imparting upon courts’ pursuant to a State’s duty to provide an adequate system for the administration of justice. The lesser deference thus accorded to domestic courts when their conduct is scrutinized against these standards, however, is still nothing compared to the investment tribunals’ defiance towards them in the context of jurisdictional competition – that is, when courts are in the position where they compete with investment tribunals for adjudicatory authority. This latter will be the subject of the last part of the present inquiry.

²⁰³ See *Apotex* (n 28), [278] (justifying strict construction of the ‘futility exception’ by reference to the need to preclude an international tribunal ‘to act as a supranational appellate court’).

²⁰⁴ For this critique, see in particular M Sattorova, ‘Return to the Local Remedies Rule in European BITs? Power (In)equalities, Dispute Settlement, and Change in Investment Treaty Law’ (2012) 39 *Legal Issues of Economic Integration* 223.

PART III

Domestic Courts as Competitors:

Jurisdictional Interactions between Domestic Courts and Investment Tribunals

III. INTRODUCTION INTO PART III

The focus of the final three chapters of the present inquiry is on that aspect of the relationship between domestic courts and investment tribunals where the former can be seen as competitors of the latter. Of interest here is not the competition between both types of adjudicatory bodies for human and capital resources (in the form of some rivalry for competent judges and adequate funding), but competition for adjudicatory authority – the latter understood here as the struggle over which legal order has or should have the most legitimate claim to adjudicate a particular controversy.¹ The focus, specifically, is on the investment tribunal's response to such adjudicatory competition, and thus to determine whether they treated domestic courts on terms of mutual equality or inferiority, and whether they accorded deference or ignorance.

For adjudicatory bodies to be in a position of competition, there needs to be overlap in the matters falling within the ambit of their adjudicative authority. The existence of such overlap is a matter of degree. In some cases, overlaps can only occur in a partial way, such as where different adjudicatory bodies have competence to decide on substantively the same *issue* (e.g. the interpretation of the same rule of the applicable law). In other cases, the overlap can be a complete one, such as where different adjudicatory bodies have the authority to decide the same *claim* – a situation that, pursuant to what is commonly known as the triple-identity test, exists where an action arises between the same litigants (*personae*), has the same object (*petitum*), and is based on the same grounds (*causa petendi*). But in between these two extremes, overlap can broadly happen to occur in relation to the same *dispute* – that is, in relation to controversies having their source in the same set of events, which are brought to resolution by materially the same parties, but are possibly formulated in terms of different claims.² The present study adopts this looser understanding of jurisdictional overlap and considers jurisdictional competition to arise as between domestic courts and investment tribunals when there is overlap at the level of a specific dispute.³

This is not to say that the problem of jurisdictional competition could not be studied solely from the perspective of overlapping claims. In contrast to some other areas of international law, in the field of investment arbitration concurrency between the jurisdiction of investment tribunals and domestic courts can certainly emerge with respect to a specific claim. On the one hand, an investment tribunal may itself be vested with jurisdiction to pronounce upon claims relating to obligations other than those arising under the instrument on which their jurisdiction is based, including claims based on a contract or claims based on domestic law in general (to the extent that such claims relate to a dispute concerning an investment). Conversely, domestic courts may themselves be endowed with jurisdiction over treaty claims, either because the

¹ On the notion of adjudicatory authority, see eg A Von Mehren, *Adjudicatory Authority in Private International Law: A Comparative Study* (Brill/Nijhoff 2007), 1.

² For this looser understanding, see eg Y Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP 2007) 2, where jurisdictional overlaps are defined as 'interactions taking place between national and international courts with respect to disputes between the same parties (or, closely related sets of parties) over essentially identical issues, potentially or actually brought, simultaneously or consecutively, before national and international courts'. See also C McLachlan, *Lis Pendens in International Litigation* (Brill/Nijhoff 2009) 14, where the object of the inquiry are the rules or principles that 'properly govern the cases where exercises of adjudicatory authority in different jurisdictions over aspects of the same, or closely related, disputes run into conflict with each other'.

³ See eg C Giorgetti, 'Horizontal and Vertical Relationships of International Courts and Tribunals - How Do We Address Their Competing Jurisdiction?' (2015) 30(1) ICSID Review 98, at 99-100, who similarly speaks of jurisdictional competition to exist 'when two or more forums are competent to hear a dispute between parties', and distinguishes such competition from 'decisional competition' which arises in circumstances of issue overlap.

domestic legal system in general allows domestic courts to decide claims in accordance with international law, or because the litigating parties specifically agreed, in the context of a contractual relationship, that the domestic courts granted with exclusive jurisdiction to decide disputes arising out of the such contract will apply the provisions of investment treaty to the extent necessary.⁴ This notwithstanding, enlarging the scope of the study to the interaction between domestic courts and investment tribunals in relation to the dispute as such fits better into the hybrid nature of investment arbitration, in which both domestic and international law play important and complementary roles.

The present study proceeds on the assumption that regulation of jurisdictional competition between domestic courts and investment tribunals is not only desirable, but to a certain extent also necessary. It is generally desirable because the duplication of proceedings that have more or less the same objective is costly, because the potential incompatibility of decisions rendered by different adjudicatory bodies creates difficulties for parties to comply with such decisions, and because allowing the same dispute to be litigated before different fora could put one of the litigating parties in unjustified advantage by allowing it to obtain double recovery for the damage it might have suffered. Regulation between domestic courts and investment tribunals is also necessary, given that the alternative of no regulation is not really an alternative at all. In some contexts, the possibility of their interaction being left unregulated may seem attractive, to the extent that problems arising out of conflicting outcomes can ultimately be resolved at the stage of an award's enforcement.⁵ But such a solution would not be particularly effective in the context of the still prevailing type of investment arbitrations – those taking place under the ICSID Convention – considering the obligation of the states to recognize any ICSID award and enforce pecuniary obligations imposed by it “as if it were a final judgment of a court in that State.”⁶ Regulation is furthermore necessary in view of the particular design of the system of investment arbitration, which, as pointed by some, contains features that have the potential for provoking greater incidence of parallel litigation than in relation to other forms of international arbitration: first, the bilateral and *ad hoc* nature of investment arbitration, where every dispute is decided by separately constituted tribunals deciding claims arising under different legal instruments; second, the very fact that the system of investment arbitration has been created to provide an alternative to, but not a replacement of, domestic courts; third, the specific design of investment treaties, which allow for the multiplication of potential claimants as a result of the extended definition of what constitutes a protected investment; and fourth, the exclusion of the local remedies rule as procedural requirement conditioning access to international procedures.⁷ This last, procedural feature, which makes recourse to domestic courts optional rather than compulsory, is probably the most important factor influencing the interaction between domestic courts and international tribunals in the field of investment arbitration, and also one that distinguishes such interaction from similar interactions occurring in other fields of international law, where the local remedies rule performs the function of a general ordering principle.⁸

⁴ On domestic courts' general entitlement to adjudicate international claims, see A Nollkaemper, *National Courts and The International Rule of Law* (OUP 2011) 27ff. Specifically on their jurisdictional entitlement to adjudicate investment disputes, including claims grounded in international law, see T Jardim, 'The Authority of Domestic Courts in Investment Disputes: Beyond the Distinction Between Treaty and Contract Claims' (2013) 4(1) JIDS 175, 178-179. For examples of claims concerning violations of investment treaties decided by domestic courts, see specifically W Ben Hamida, 'Investment Treaties and Domestic Courts: a Transnational Mosaic Reviving Thomas Wälde's Legacy' in J Werner et al (eds), *A Liber Amicorum Thomas Wälde: law beyond conventional thought* (Cameron May, 2009), 69-85, at 72-75. See further *infra* Section 9.1.1.

⁵ See eg McLachlan (n 2), 60.

⁶ ICSID Convention, art 54(1).

⁷ See McLachlan (n 2), 254-55.

⁸ The very notion of “exhaustion” implies that domestic remedial procedures had ended, so that there can be no issue of concurrence or duplicity of domestic and international proceedings.

III.1. The Demise of the Local Remedies Rule as a General Ordering Principle

As already explained in chapter 2, in the context of the traditional law on State responsibility for injuries to aliens, before a State could espouse a claim on behalf of one of its nationals in the exercise of diplomatic protection, the national had to exhaust all available local remedies. In the context of the emerging practice of contract-based investor-State arbitrations, in contrast, arbitral remedies were generally treated as exclusive and as obviating the need to exhaust other local remedies before a claim be maintained. It was by reference to this practice that the drafters of the ICSID Convention proceeded then to incorporate in its Article 26 a general presumption against the requirement of exhaustion of local remedies. But was such presumption also valid in relation to dispute settlement clauses provided under bilateral investment treaties that incorporated only standing offers of consent to arbitrate all grievances with unspecified investors, even in the absence of specific contracts concluded with the particular complainant? Broches himself conceded that the interpretative presumption might normally not be applicable outside the context of contractual arbitration clauses.⁹ But more significantly perhaps, the ICJ itself in the *ELSI* case (1989) took the position that the local remedies requirement – as an important principle of customary international law – should not “be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so”.¹⁰ Though criticized for contradicting clear treaty language,¹¹ the ICJ’s proposition was reason to argue that the capital exporting states better spare their investors from having to comply with the obligation to resort to domestic procedures, by incorporate drafting changes to their investment treaties¹² – especially because by then, most of these treaties already desisted from specifically demanding prior recourse to domestic procedures.¹³

Such concerns have not materialized, however. As cases begun to be brought against States pursuant to the open-ended offers to arbitrate in bilateral investment treaties, the view has prevailed that the duty to exhaust local remedies was dispensed with as a *procedural precondition* for the presentation of claims. Perhaps expectedly, in the context of arbitrations conducted on the basis of the ICSID Convention, most investment treaty tribunals relied for that purpose on the interpretative presumption provided by the Convention itself, readily rejecting objections based on the alleged lack of exhaustion of domestic remedies by simple reference to the clear language of Article 26 of the ICSID Convention.¹⁴ Less expectedly, however, other treaty-based tribunals,

⁹ cf *supra* 2.1.4.

¹⁰ Elettronica Sicula SpA (ELSI) (United States of America v Italy) (Judgment) [1989] ICJ Rep 15, at 31, [50].

¹¹ SD Murphy, ‘The ELSI Case: An Investment Dispute at the International Court of Justice’ (1991) 16 Yale J. Int’l L. 391, at 408-9 (considering the ICJ’s interpretative approach as likely to have frustrated an otherwise clear treaty provision specifically establishing jurisdiction).

¹² See MH Adler, ‘The Exhaustion of the Local Remedies Rule after the International Court of Justice’s Decision in *ELSI*’ (1990) 39 ICLQ 641, at 653 (suggesting in the aftermath of the ELSI decision that States should ‘endeavour to carve out a specific exception to the exhaustion rule in any future investment treaties’).

¹³ See P Peters, ‘Exhaustion of Local Remedies: ignored in most bilateral investment treaties’ (1997) 44 Netherlands International Law Review 233.

¹⁴ See inter alia: Lanco International Inc v The Argentine Republic (Award on Jurisdiction) (ICSID Case No ARB/97/6, 8 December 1998) [39]-[40]; Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Award) (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic) (ICSID Case No ARB/97/3, 21 November 2000) [81], and (Decision on Annulment) 3 July 2002 [52]; CMS Gas Transmission Company v The Republic of Argentina (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/01/8, 17 July 2003) [72]-[73]; Generation Ukraine, Inc v Ukraine (Award) (ICSID Case No ARB/00/9, 16 September 2003) [13.4]-[13.6]; IBM World Trade Corporation v República del Ecuador (Decision on Jurisdiction and Competence) (ICSID Case No ARB/02/10, 22 December 2003) [80]-[84]; LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic (Decision of the Arbitral Tribunal on Objections to Jurisdiction) (ICSID

too, invariably adopted the same interpretative presumption despite the absence of equivalent language in UNCITRAL, ICSID Additional Facility, or other sets of arbitral rules. Thus, already in *Saar Papier v. Poland* (1995) – probably the first arbitration conducted pursuant to a bilateral investment treaty under the UNCITRAL rules – the local remedies requirement was interpreted as being dispensed with on the ground that the applicable BIT did not expressly require prior recourse to domestic courts.¹⁵ Indeed, it is precisely the absence of specific language in the applicable investment treaty that has most often been used as an indication that prior recourse to local remedies was not required,¹⁶ occasionally considered in conjunction with arguments pertaining to the “special regime” of investment treaty arbitration,¹⁷ or else in combination with arguments based on policy considerations relating to the effectiveness of investment treaty arbitration as a dispute settlement mechanism.¹⁸ Admittedly, such interpretative presumptions might be difficult to reconcile with the stance of the ICJ in the *ELSI* case.¹⁹ On the other hand, the fact that investment treaties now grant investors the procedural capacity to invoke the

Case No ARB/02/1, 30 April 2004) [75]-[77]; *AES Corporation v The Argentine Republic* (Decision on Jurisdiction) (ICSID Case No ARB/02/17, 26 April 2005) [69]; *Gas Natural SDG, SA v The Argentine Republic* (Decision of the Tribunal on Preliminary Questions on Jurisdiction) (ICSID Case No ARB/03/10, 17 June 2005) [30]; *Saipem SpA v The People's Republic of Bangladesh* (Award) (ICSID Case No ARB/05/07, 30 Jun 2009) [175]; *Helnan International Hotels A/S v Arab Republic of Egypt* (Decision of the ad hoc Committee) (ICSID Case No ARB/05/19, 14 June 2010) [42]-[47]; *Hochtief AG v The Argentine Republic* (Decision on Jurisdiction) (ICSID Case No ARB/07/31, 24 October 2011) [47]; and *Mr Franck Charles Arif v Republic of Moldova* (Award) (ICSID Case No. ARB/11/23, 8 April 2013), 333-334. For an implicit recognition of the principle, see also *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/01/13, 6 August 2003) [151]; and *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (Award) (ICSID Case No ARB/04/13, 6 November 2008) [255].

¹⁵ *Saar Papier Vertriebs GmbH v Poland (Final Award)* (UNCITRAL, 16 October 1995) [72] (‘Poland claims that Saar Papier could bring an action before the Arbitral Tribunal only once the legal remedies in the host country were exhausted. As a matter of law, the *Arbitral Tribunal does not see such a requirement in the Treaty.*’ (emphasis in the original)).

¹⁶ See eg *CME Czech Republic BV v The Czech Republic (Partial Award)* (UNCITRAL, 13 September 2001) [416] (‘It is generally accepted that claims under investment treaties can be and shall be dealt with separately from the judicial process in local courts, unless otherwise specifically provided for in the respective Treaty. Such a requirement to exhaust local remedies is not found under this Treaty and the initiating of a judicial process in the Czech Republic does not bear upon proceedings under the Treaty.’); *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar (Award)* (ASEAN ID, Case No ARB/01/1, 31 March 2003) [40] (‘The 1987 [ASEAN] Agreement nowhere provides that a Claimant must exhaust domestic remedies, whether against the host State or any specific entity within the host State, before proceedings are commenced under Article X.’); or *RosInvestCo UK Ltd v The Russian Federation (Award on Jurisdiction)* (SCC Case No V079/2005, 1 October 2007) [155] (arguing that the exclusion of the principle of exhaustion of local remedies ‘gives primacy to the text of the treaty provisions and provides an interpretation in good faith’). However, see also *Waste Management v United Mexican States (II) (Award)* (ICSID Case No ARB(AF)/00/3, 30 April 2004) [133], where such inference was made on the basis of the specific waiver requirement pursuant to art 1121 of the NAFTA.

¹⁷ See eg *RosInvestCo*, *ibid* [153] and [155] for the argument that consent to investor-state arbitration *per se* amounts to a waiver of the principle of exhaustion of local remedies, such a waiver being ‘conclusively’ established by the ‘special regime established for investor-state arbitration’.

¹⁸ See *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia (Partial Award on Jurisdiction)* (UNCITRAL, 8 September 2006) [222] (‘The result that BITs granting private investors direct access to international arbitration do not require local remedies to be exhausted is also confirmed by underlying policy reasons. A requirement for the exhaustion of local remedies as a general precondition to mixed investment arbitration would seriously undermine the effectiveness of this form of dispute settlement.’). For a similar argument of effectives, see also *Saar Papier v Poland* (n 15), [76] (‘The Arbitral Tribunal is of the opinion that the Treaty does not provide for the exhaustion of the host country remedies. On the contrary, anticipating that in the host country the administrative procedure might be extremely slow, it provides only for a six months cooling period’).

¹⁹ But see *American International Group, Inc. v. Islamic Republic of Iran* (1983) 4 Iran-USCTR 96, at 102, where the Iran-US Claims Tribunal accepted that the Algiers Declaration had waived the local remedies rule by negative implication.

responsibility of the host State directly, without the intervention of its home state, might perhaps justify a different interpretative approach.²⁰

At the end of the day, one has therefore been left with the absence of a general principle that could provide the basis for regulating jurisdictional competition between domestic courts and investment tribunals. This requires then looking into alternative ways to achieve regulation.

III.2. Ways to Regulate Jurisdictional Competition

The premise of the present analysis, which also informs the organization of the discussion in the following chapters, is that the interaction between domestic courts and investment tribunals *can be*, and in practice often *is* regulated at different levels.²¹ First of all, regulation can be left to the *investment tribunals* themselves. Chapter 9 therefore discusses the various legal techniques employed by arbitrators in dealing with situations of actual or potential jurisdictional overlap, and the problems ensuing from such situations. Second, regulation can be pursued by *States* in their capacity of contracting parties to the investment treaties. Chapter 10 thus proceeds to discuss various ways in which States have attempted to regulate jurisdictional interactions through specific treaty provisions. Third, and finally, regulation can be pursued at the level of each specific *investor*. Hence, Chapter 11 discusses various possibilities for an investor itself to affect the way in which various dispute settlement bodies will interact in the event that they are presented with the same underlying investment dispute.

What the next three chapters intend to demonstrate, however, is that attempts at meaningfully regulating interactions between investment tribunals and domestic courts have largely been ineffective, as investment tribunals persistently refused to abrogate their adjudicatory authority in favour of domestic courts, instead constituting themselves as “autonomous decision-makers”.²² Hence, in the process of adjudicatory competition, they did not merely assert themselves as functional alternatives to domestic courts, but as the dominant forum for the resolution of investment disputes.

²⁰ See also *Mytilineos Holdings v Serbia & Montenegro*, ibid [224], where the distinction was drawn between the type of treaty at issue in the *ELSI* case, which provided only for the espousal of private party claims by the home State in the context of an inter-State dispute settlement mechanism and therefore justified the presumption in favor of the local remedies rule, and modern BITs providing for direct access to dispute settlement.

²¹ A point worth pointing at is the fact that jurisdictional interactions can be regulated at different stages. Before a dispute has arisen, parties may already consider restricting the range of available dispute settlement bodies before which they will be able to bring potential, future disputes for resolution. The problem is then dealt with by way of a *choice of forum*. In the event that a dispute has already arisen and one of the parties has brought it before an adjudicatory body, the other party may attempt to bring it before another dispute settlement body, from which it expects to obtain a more favorable decision. The problem then turns into one concerning the regulation of *parallel proceedings*. Finally, a dispute may already have been decided, but a party dissatisfied with the outcome of the first proceedings wishes to initiate new proceedings, though in relation to the same dispute. The problem then changes into one concerning the regulation of *successive proceedings*. Various aspects of this last problem have already been discussed in chapter 4 (which looked at the legal effects of existing domestic judicial decisions on proceedings pending before investment tribunals) and chapters 6 and 7 (which dealt with investment tribunals exercising review over domestic courts’ conduct for the purposes of determining the conformity of the latter with international legal standards). The focus of the ensuing three chapters, instead, is on how to prevent duplication of litigation, both at the stage when there is already concurrency of proceedings, and at the prior stage, when concurrency can still be prevented through a *choice of forum*.

²² G Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP, 2013), 155.

9. REGULATION AS A QUESTION OF ARBITRAL TECHNIQUE: THE APPROACH OF INVESTMENT TRIBUNALS TO REGULATING JURISDICTIONAL COMPETITION

This chapter discusses the techniques¹ used by investment tribunals in resolving problems arising out of jurisdictional competition between domestic courts and investment tribunals. In contrast to the next two chapters, which focus essentially on the possibility of regulating jurisdictional interactions through various drafting techniques, and through the conduct of the litigating parties and the State contracting parties in general, the focus of the present chapter is on the repertoire of argumentative techniques that arbitrators themselves have so far deployed in resolving jurisdictional conflicts, both actual or potential. In this regard, the analysis is predicated on the assumption that there are, broadly speaking, two ways for resolving such conflicts: either by eliminating the conflict altogether (which is usually by means of denying the existence of a jurisdictional overlap); or by actually regulating the conflict through the application of jurisdiction-regulating principles. While the former relates more to the process of interpretation and application of the relevant norms, the latter is more concerned with the exercise of adjudicatory powers. Fundamental to both is, of course, the exercise of discretion on the part of the adjudicator. Of interest to the present chapter is not the existence of such discretion, but the way it is exercised. Specifically, the attention is on the reasoning and argumentative techniques employed by investment in justifying particular outcomes. As the chapter intends to demonstrate, such outcomes in most cases entailed the path leading to international arbitration – the dispute settlement mechanism considered superior to litigation before local courts.

The discussion proceeds in the following way. The first two sections look at two specific strategies that have most often been employed to eliminate jurisdictional overlaps: the more general strategy of narrowly construing and applying pertinent norms (9.1.), and the more specific strategy of distinguishing claims on the basis of cause of action; that is, the technique of claim splitting (9.2.). The third section looks at the various ways through which conflicts resulting from actual jurisdictional concurrence have actually been resolved in practice (9.3.).

9.1. Avoiding Jurisdictional Overlaps through the Exercise of Discretion in the Process of Interpretation and Application of Relevant Norms

Jurisdictional overlaps can be eliminated at two stages of the adjudicating process: at the stage of interpretation of the applicable norm (abstract phase), or at the stage of its application to the specific circumstances of the case (concrete phase). The removal of overlaps at both stages depends on the exercise of discretion on the part of the investment tribunal.² As the ensuing

¹ I use the term technique here loosely as a shorthand for various forms or methods of argumentation adopted in the adjudication of particular claims.

² Modern legal doctrines generally acknowledge that there is a certain range of discretion that is left to adjudicatory bodies even in relatively clear cases. See M Koskeniemi, *From Apology to Utopia* (CUP 2005), 34. The exercise of such discretion is then tolerated provided it takes place within the existing legal framework, i.e. *infra legem*. For the purposes of the present analysis, adjudicatory discretion will be taken to denote the specific legal condition in which the arbitrator, when required to determine the meaning of a particular legal provision, or to establish whether a particular provision applies to a specific set of facts, has the freedom to choose among a number of alternative options, none of which capable of being clearly identified as the “correct” legal answer to the issue in question. On such an understanding of the of judicial discretion, see

discussion will demonstrate, in exercising this discretion, tribunals have frequently opted for solutions that were aimed at avoiding direct jurisdictional conflicts with domestic courts, while still remaining faithful to the purported *raison d'être* of the system of investment arbitration: the provision of an alternative to litigation in local courts.

9.1.1. Removing Potential Jurisdictional Overlaps at the Stage of Interpretation of the Applicable Norm

A particularly effective way for removing any jurisdictional overlaps potentially existing between investment tribunals and domestic courts is by interpreting such overlaps away. The technique has essentially been a simple one: in circumstances where pursuant the ordinary meaning of the text a provision could be constructed as allowing an investment tribunal to exercise jurisdiction over the same type of claims as those falling within the ambit of domestic courts, a narrower construction of the provision has instead been adopted, which has had the effect of excluding any concurrence of jurisdiction. Support for such narrower construction has usually been sought in extra-textual, policy considerations. Common to this technique has also been the employment of interpretative presumptions, even though the attempt has commonly been made to remain within the canons of treaty interpretation prescribed by Articles 31-33 VCLT. Instances where the technique has successfully been put to use were particularly common in the interpretation of umbrella clauses (1) and treaties' dispute-settlement clauses (2), as well as in the interpretation of contractual disputes-settlement provisions (3).

9.1.1.1. Interpretation of Umbrella Clauses

The interpretation of umbrella clauses has given rise to considerable controversy in practice. As is known, such clauses have been designed to bring under the protective “umbrella” of an investment treaty all obligations that a host State may have entered into with a foreign investor, including those assumed in the context of a contractual relationship or under domestic law in general. However, by turning the observance of such obligations into an obligation under international law, umbrella clauses have necessarily also the potential of bringing within the jurisdictional ambit of investment tribunals claims which would ordinarily fall – in some cases even exclusively – within the jurisdiction of domestic courts or some other dispute settlement body. Concerned about the potentially disruptive effects that such clauses could have on the traditional distinction between the domestic and international legal orders and on the relationship between the various adjudicatory bodies, some tribunals therefore deemed it appropriate to adopt a restrictive approach to their interpretation. The leading precedent in that respect is the award in *SGS v. Pakistan* (2003), which happened to be also the first occasion on which the effects of umbrella clauses were properly considered.³ In the circumstances of that case, the Tribunal faced a provision in Article 11 of the Switzerland-Pakistan BIT (1995) requiring the State to “constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party”. The Tribunal, as is well known, refused to interpret the provision as entailing that the breaches of SGS's contract with Pakistan would be elevated into breaches of the treaty itself.

eg CA Ford, 'Judicial discretion in international jurisprudence: art 38(1)(C) and “general principles of law”' (1994) 5 Duke Journal of Comparative & International Law 35, at 44ff. Applied to the context of the present analysis, adjudicatory discretion therefore entails that an investment tribunal, when facing the possibility that its jurisdiction may overlap with that of domestic courts, chooses such an interpretation of the applicable provisions, or applies those provisions in such a way, that denies the existence of an overlap in the first place.

³ The first reported case to consider an umbrella clause was actually *Fedax v. Venezuela*. But while the Tribunal held that the Respondent's failure to honor payments under several promissory notes had violated the umbrella clause in art 3(4) of the Netherlands-Venezuela BIT (1991), it did not actually discuss the operation of the clause in question. *Fedax NV v. Venezuela (Final Award)* (ICSID Case No ARB/96/3, 9 March 1998) [29].

According to the *SGS* Tribunal, pursuant to a textual reading, the scope of the provision would be susceptible to an “almost indefinite expansion”.⁴ Such an expansive reading would then have three important implications: first, the clause would amount to “incorporating by reference” an unlimited number of State contracts, as well as other municipal law obligations, into the treaty; second, by allowing breaches of those obligations to be treated as breaches of the treaty, it would make other substantive treaty standards “substantially superfluous”; and third, by allowing contractual claims to be advanced in the context of treaty arbitration, it would make it possible for an investor to “at will, nullify any freely negotiated dispute settlement clause in a State contract.”⁵ According to the Tribunal, a broad reading of the clause would therefore entail legal consequences that were “so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party” that could only be accepted if “clear and convincing evidence” had been adduced that this was indeed the shared intent of Switzerland and Pakistan in concluding the BIT.⁶ In other words, the Tribunal advanced what was in effect a presumption⁷ against a broad interpretation of umbrella clauses – a presumption that it further deemed to follow from the principle that, under general international law, a violation of a contract entered into by a State with a foreign investor was not by itself a violation of international law – and advocated, instead, an approach to interpretation that should “enhance mutuality and balance of benefits in the inter-relation of different agreements located in differing legal orders.”⁸

This restrictive approach to the interpretation of umbrella clauses was later strongly criticized by the Tribunal in *SGS v. Philippines*, which saw no reason for the meaning of such provisions to be determined by any presumptions, preferring instead to give full effect to the ordinary meaning of the umbrella clause applicable in the circumstances of that case.⁹ In retrospect, the solution adopted in *SGS v. Pakistan* of giving no effect at all to an umbrella clause has generally remained an isolated one.¹⁰ But the technique of relying on systemic considerations extraneous to the actual treaty language has occasionally been used by other investment tribunals, even in circumstances where the umbrella clause under interpretation was formulated perhaps more categorically than the clause at issue in *SGS v. Pakistan*. By virtue of such considerations, for example, a number of investment tribunals deemed it appropriate to limit the protective scope of the umbrella clause to breaches of contract resulting from host State’s conduct in its capacity as sovereign.¹¹ This, again, because of the potentially disruptive effects that a literal interpretation of

⁴ *SGS v Pakistan* (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/01/13, 6 August 2003) [166].

⁵ *ibid* [168].

⁶ *ibid* [167].

⁷ This was, indeed, merely a presumption. The Tribunal did not otherwise reject, as a matter of principle, that States could agree in a BIT that such contractual breaches were converted into and treated as a breach of the BIT. Nor did the Tribunal otherwise preclude the possibility of a claim being asserted under the umbrella clause in the exceptional circumstances where the breach complained of would be one transcending the threshold of a normal contractual breach, such as where the host State would be taking action that materially impedes the ability of the investor to prosecute its claims before the arbitration tribunal stipulated by the contract, or where the State would refuse to go to such arbitration at all and leave the investor only with the option of going before its ordinary courts. *ibid* [172]-[173].

⁸ *ibid* [168].

⁹ *SGS v Philippines (Jurisdiction)* (ICSID Case No ARB/02/6, 29 January 2004) [161], [115]-[125].

¹⁰ In this regard, one must distinguish the case of *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan* (Decision on Jurisdiction) (ICSID Case No ARB/02/13, 9 November 2004) [126], where jurisdiction was refused because the provision at issue did not constitute a proper umbrella clause. That Tribunal did not rely on any extra-textual concerns, but in fact construed the clause in light of the ordinary meaning of the text.

¹¹ See eg *Joy Mining Machinery Limited v Arab Republic of Egypt* (Award on Jurisdiction) (ICSID Case No ARB/03/11, 6 August 2004) [81]; *CMS Gas Transmission Company v The Republic of Argentina* (Award) (ICSID Case No ARB/01/8, 12 May 2005) [299]-[303]; *El Paso Energy International Company v The Argentine Republic* (Decision on Jurisdiction) (ICSID Case No ARB/03/15, 27 April 2006) [82]-[84]; *Pan American Energy LLC and BP Argentina Exploration*

an umbrella clause could have on the traditional distinction between the domestic and international legal orders, and because of the fear that allowing even simple violations of a contract to engage the responsibility of the State under international law would result in a flood of contractual claims.¹² Though, surprisingly, not because of the disruptive effects that a more expansive reading of umbrella clauses could have on contractual forum selection clauses that may be present in the underlying contracts.¹³

9.1.1.2. Interpretation of Treaty Dispute Settlement Clauses

Just as in constructing the scope of umbrella clauses, a restrictive approach has occasionally been adopted also in the interpretation of treaties' dispute settlement clauses, particularly where the question was one of determining whether a tribunal established pursuant to an investment treaty could pronounce upon claims that are based solely on a contract and do not relate to a breach of the treaty's substantive provisions. The language through which States express their consent to arbitrate disputes with investors can vary considerably among investment treaties. In some treaties, consent is limited to disputes concerning violations of the substantive rights under the treaty,¹⁴ or even a specific category of those rights;¹⁵ in others, it is expressed broadly, often extending to any or all disputes concerning, relating to, arising out of, or being in connection with an investment,¹⁶ or simply to any dispute between an investor and a host State.¹⁷ In view of the breadth of the language used in this latter type of clauses, the view has thus been taken – both by investment tribunals, and commentators alike – that such clauses should, in principle, provide treaty tribunals with jurisdiction over claims other than those based on the investment treaty, and particularly over contract claims.¹⁸

Company v The Argentine Republic (Decision on Preliminary Objections) (ICSID Case No ARB/03/13, 27 July 2006) [97]-[103]; or Semptra Energy International v The Argentine Republic (Award) (ICSID Case No ARB/02/16, 28 September 2007) [310]-[311].

¹² See eg *El Paso v Argentina*, ibid [82] (noting the 'far-reaching consequences [...] quite destructive of the distinction between national legal orders and the international legal order').

¹³ In fact, in those decisions where the umbrella clause was considered to apply only to breaches of contract committed by the host State in the exercise of sovereign authority, the Tribunals did not consider such claims to be further affected by the presence of a contractual forum selection clause. See eg *El Paso v Argentina*, ibid, where the Tribunal concluded it had jurisdiction over claims relating to the breaches of the umbrella clause ([79]-[86]), regardless of Argentina's objection that all the claims arose out of concessions and contracts and therefore had to be submitted to the consented forum, the national courts of Argentina, as freely agreed upon by the parties ([49], [63]).

¹⁴ See eg Egypt-Belgo-Luxemburg Economic Union BIT (1977), art IX ('any dispute relating to a measure contrary to this Agreement'); Canada-Egypt BIT (1996), art XIII(1) ('any dispute [...] relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach'); or Egypt-Chile BIT (1999), art 8(1) ('disputes, which arise within the terms of this Agreement').

¹⁵ See eg Egypt-Bulgaria BIT (1991), art 9(1) ('Any dispute [...] concerning the amount of the compensation for expropriation'); or Egypt-Cyprus BIT (1998), art 9(1) ('Any dispute [...] concerning expropriation of an investment').

¹⁶ See eg France-Egypt BIT (1974), art 7 ('les différends qui pourraient l'opposer à un res-sortissant ou à une société de l'autre Partie contractante'); UK-Egypt BIT (1975), art 8(1) ('any legal dispute [...] concerning an investment'); Italy-Egypt BIT (1989), art 9(1) ('All kinds of disputes or differences [...] concerning an investment'); Egypt-China BIT (1994), art 9(1) ('Any dispute [...] in connection with an investment'); Australia-Egypt BIT (2001), art 13(1) ('a dispute [...] relating to an investment'); Austria-Egypt BIT (2001), art 9(1) ('Any dispute arising out of an investment'); or Egypt-Germany BIT (2005), art 9(1) ('Disputes concerning investments').

¹⁷ Pakistan-Egypt BIT (2000), art 8(1) ('any dispute').

¹⁸ Such views were expressed in several cases as *obiter*. See eg *Consortium RFCC v Royaume du Maroc (Decision on Jurisdiction)* (ICSID Case No ARB/00/6, 16 July 2001) [67]-[69], and *Salini v Jordan* (n 10) [59]-[62]; *Vivendi v Argentina (Decision on Annulment)* (ICSID Case No ARB/97/3, 3 July 2002) [55]; *Generation Ukraine Inc v Ukraine (Award)* (ICSID Case No ARB/00/9, 16 September 2003) [8.12]; *Siemens AG v The Argentine Republic (Award)* (ICSID Case No ARB/02/8, 17 January 2007) [205]; *SGS v Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/07/29, 12 February 2010) [129]; *Teinver SA, Transportes de Cermias SA and Autobuses Urbanos del Sur SA and the Argentine Republic (Decision on Jurisdiction)* (ICSID Case

Departing from such views is again the decision in *SGS v. Pakistan*, where the proposition was rejected that the applicable dispute settlement clause, which provided for arbitration in the event of “disputes with respect to investments”, could extend the Tribunal’s jurisdiction over the claims advanced by SGS that were based solely on alleged breaches of the contract. While recognizing at the outset that both treaty claims and pure contract claims were capable of being described as “disputes with respect to investments”, the Tribunal considered such apparent conclusion not necessarily giving rise to the implication that the clause would thereby also apply to claims grounded solely in the contract; for, the relevant phrase, “while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims.”¹⁹ Instead of giving effect to the ordinary meaning of the dispute settlement clause, the Tribunal therefore again adopted a presumption against a broad interpretation of treaty’s dispute settlement clauses.²⁰ And also here, the presence of the contractual forum selection clause – which provided for local arbitration in accordance with Pakistani law, and had purportedly been crucial for Pakistan to enter into the contractual arrangement with SGS in the first place – provided an important rationale for the restrictive approach to interpretation: the Tribunal was namely concerned that a broad reading “would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent.”²¹

As the construction of the umbrella clause, the Tribunal’s restrictive approach to the interpretation of the dispute settlement clause was subsequently heavily criticized by the arbitrators in *SGS v. Philippines*, which refused, on their part, to read into the treaty any non-textual limitations and thus saw no reason to decline jurisdiction over the Claimant’s contract claims – even if it ultimately rejected such claims as inadmissible.²² This is not to say that the arbitrators disagreed with the concerns expressed in *SGS v. Pakistan* that the general provisions of an investment treaty should in principle not override specific and exclusive dispute settlement arrangements made in the contract itself; yet, the arbitrators in *SGS v. Philippines* considered that such concerns should be divorced from the issue of treaty interpretation.²³ Furthermore, the arbitrators, among other issues, questioned the propriety of drawing “technical distinctions” between causes of action under the treaty and under the contract, since such distinctions were capable of giving rise to overlapping proceedings and jurisdictional uncertainty, which in their view was to be avoided “in the interests of the efficient resolution of investment disputes by the single chosen forum.”²⁴

Some tribunals subsequently endorsed the approach of *SGS v. Philippines* that favours the giving of full effect to the ordinary meaning of the treaty language – and thus either accepted jurisdiction over claims based on contract or domestic law in circumstances where the dispute settlement clauses were broadly formulated,²⁵ or rejected jurisdiction over such claims precisely

No ARB/09/1, 21 December 2012) [112]; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Decision on Jurisdiction)* (ICSID Case No ARB/10/7, 2 July 2013) (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos SA v Oriental Republic of Uruguay*) [107].

¹⁹ *SGS v Pakistan (Jurisdiction)* (n 4), [161].

²⁰ This was not more than a presumption, since the Tribunal on the other hand did not rule out the possibility that the parties could, by way of special agreement, vest it with jurisdiction to pass upon and decide claims arising solely under the contract; it merely did not believe that the parties had done so by accepting arbitration on the basis of the BIT. See *ibid* [162].

²¹ *ibid* [161].

²² *SGS v Philippines (Jurisdiction)* (n 9), [131]-[132].

²³ *ibid* [134].

²⁴ *ibid* [132].

²⁵ See eg *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova (Award)* (SCC, 22 September 2005) 4, 7, accepting jurisdiction over the sole claim concerning the violation of the principle of non-retroactivity in relation to the

because the clauses limited arbitration to treaty causes of action.²⁶ Yet, the decision in *SGS v. Pakistan* has not remained an isolated one. The technique of interpreting away a potential jurisdictional overlap has found application in some other cases. An example is the decision in *LESI-DIPENTA v. Algeria* (2005), where an ICSID Tribunal similarly decided not to adopt a literal construction of the dispute settlement clause in the Algeria-Italy BIT (1991), which otherwise provided for arbitration with regard to any dispute concerning an investment (“ogni controversia relativa ad investimento”). The Tribunal interpreted the clause as not providing for consent that is general in scope and that establishes the basis of jurisdiction for any violation that the Claimant might invoke, but as one that is “of limited scope” and relates solely to violations of the treaty. Support for such narrow construction was not sought in general policy rationales, but in the text of the treaty itself: first, in the treaty’s objective of protection, which was considered to be to ensure that investments at all times enjoy full protection and security and be subject to any unreasonable or discriminatory measures; and second, in the fact that the treaty did not contain an umbrella clause, which was seen as *a contrario* confirming that the Tribunal has not been granted jurisdiction to consider violations of the contract.²⁷ The arguments may not be particularly convincing,²⁸ but the *LESI-DIPENTA* Tribunal at least sought to provide a rationale for the narrow reading of the clause.

9.1.1.3. Interpretation of Contractual Dispute Settlement Clauses

A third example of how a specific construction of terms can be used to remove jurisdictional overlaps can be found in treaty tribunal’s interpretation of contractual dispute-settlement provisions on the issue whether such provisions could vest the contractual forum with jurisdiction over treaty claims.²⁹ An instance of a restrictive approach to the interpretation of such provisions can again be found in *SGS v. Pakistan* (2003). The Claimant’s concession contract in

Moldovan Foreign Investment Act and another domestic regulation, by virtue of the broadly-formulated dispute settlement clause in the applicable BIT, which the Tribunal considered as permitting the Tribunal to extend its jurisdiction to ‘any dispute between qualified parties [...], as long as it arises in connection with an investment as defined in the BIT, and irrespective of whether the dispute is based on an alleged breach of the BIT, and alleged breach of a contract between the parties, or other alleged breach of obligation’ (7). *Impregilo v Pakistan (Decision on Jurisdiction)* (ICSID Case No ARB/03/3, 22 April 2005) [196ff]. Essentially accepting that it could exercise jurisdiction over pure contract claims, provided that the contract had been entered into directly with the host State – a condition which was not present in circumstances where the contract was concluded with a separate state entity.

²⁶ See eg *Crystallex International Corporation v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB(AF)/11/2, 4 April 2016) [471], expressly relying on the wording of the dispute settlement clause in confirming that its jurisdiction was limited to disputes relating to alleged breaches of the treaty. *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey (Award)* (ICSID Case No ARB/11/28, 10 March 2014) [348]; *Khan Resources v Mongolia (Decision on Jurisdiction)* (UNCITRAL, 25 July 2012) [437].

²⁷ *Consortium Groupement LESI- DIPENTA v People’s Democratic Republic of Algeria (Award)* (ICSID Case No ARB/03/08, 10 January 2005) [25].

²⁸ Especially the argument based on the absence of an umbrella clause was a *non sequitur*, particularly as reference was made to the Energy Charter Treaty as an example of a treaty providing for such a clause. The problem with the argument, of course, is that arbitral jurisdiction under the ECT is limited to violations of the treaty, which could rather suggest the opposite; that the umbrella clause has been inserted precisely because of the limited scope of consent to arbitrate.

²⁹ Such possibility has been implicitly accepted by several investment tribunals. See eg *Joy Mining v Egypt* (n 11), [89] (“There is no question here of either exclusive ICSID jurisdiction or of concurrent jurisdiction”); *Salini v Jordan* (n 10), 96 (“the Tribunal will note that the dispute settlement procedures provided for in the Contract could only cover claims based on breaches of the Contract. Those procedures cannot cover claims based on breaches of the BIT”); *Aguas del Tunari, S.A v Republic of Bolivia (Decision on Respondent’s Objections to Jurisdiction)* (ICSID Case No ARB/02/3, 21 October 2005) [111], where the Tribunal considered ‘as a threshold matter’ that for a contractual forum selection clause in a separate document to be in conflict with the treaty tribunal’s exercise of jurisdiction, ‘that document must both deal with the same matters and Parties and contain mandatory conflicting obligations’ and that only ‘if a true conflict exists, there then arises the question of what effect such a document has on the Tribunal’s jurisdiction’; or *BIVAC v Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/07/9, 29 May 2009) [127] (“The issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the courts of Asunción. The treaty issue is therefore not one for that forum”).

that case required that “[a]ny dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination or invalidity thereof” be resolved through domestic arbitration.³⁰ In spite of the breadth of the language employed in this clause, the ICSID Tribunal decided that the jurisdiction of the contractually-designated forum did not extend to treaty claims, on the following grounds. First, the applicable investment treaty did not provide for alternative dispute settlement mechanisms other than recourse to a tribunal constituted under the ICSID Convention, which therefore warranted the presumption that jurisdiction over treaty claims lay exclusively with the treaty tribunal. Second, the contract predated the treaty and could therefore not be presumed that the contractual forum was vested with competence over treaty claims. And third, no claims of treaty breaches had actually been submitted to the contractually agreed forum (which at the time the investor commenced arbitration under the investment treaty was already seized with a contractual claim brought against the SGS by Pakistan); nor was the contract forum found to be competent, as a matter of the applicable domestic law, to consider treaty claims.³¹

There is no doubt that the arguments advanced in favour of such an interpretation are quite plausible. Yet, one can notice the restrictiveness of the approach when comparing it to the more liberal interpretation of a similarly-formulated contractual dispute settlement provision in *BIVAC v. Paraguay* (2009), which in that case vested the local courts with exclusive jurisdiction over “any conflict, controversy or claim which arises from or is produced in relation to” the Claimant’s contract. In contrast to the *SGS* Tribunal, the *BIVAC* Tribunal noted that, “[o]n its face”, the text was “very broad” and “capable of being interpreted to include not only disputes relating directly to alleged breaches of the Contract but also disputes concerning acts that may be connected with the Contract which may give rise to claims under other instruments, including the BIT.”³² In the circumstances of the *BIVAC* case, however, the potential jurisdictional overlap was eliminated because the local courts did not possess competence under domestic law to interpret and apply the treaty. In both cases, therefore, the contractually-designated forum was found not to share jurisdiction over treaty claims with the investment tribunal in question.

9.1.2. Removing Potential Jurisdictional Overlaps at the Stage of Application of Specific Treaty Terms – The Problem of Counterclaims

Potential jurisdictional overlaps can be eliminated not only through a more or less expansive construction of particular treaty provisions, as discussed in the preceding section, but also at the stage of application of specific treaty terms. Especially in circumstances where such terms have an open-ended character, arbitrators may be left with a good deal of room in their appreciation as to how those terms are to be applied to the specific facts of a case. Also at the stage of application, therefore, arbitrators are in a position to exercise judicial discretion by choosing among various outcomes that could conceivably be defended as falling within the scope of the provision as such.

One of the instances where investment arbitrators exercised their discretion in a way that effectively led to the elimination of potential jurisdictional overlaps with domestic courts has been on the issue of counterclaims. In the context of counterclaims, of course, such overlap is not unlikely to occur, given that the law governing the investor’s conduct, and thus the law on which the counterclaim will most often be based, is that of the host State. The assumption of authority over counterclaims necessarily raises the question of the extent to which investment tribunal should enforce domestic laws of the host State, and particularly its public laws, to entities and transactions which may not otherwise fall within the adjudicative jurisdiction of domestic

³⁰ *SGS v Pakistan* (n 4), [15].

³¹ *ibid* [151]-[154].

³² *BIVAC v Paraguay* (n 29), [145].

courts.³³ Furthermore, it necessarily raises questions concerning the proper allocation of authority as between investment tribunals and domestic courts.³⁴ Investment tribunals have not been oblivious to such concerns; the latter in fact seem often to have influenced decisions as to whether or not specific counterclaims should be heard. In the context of investment arbitration, of course, counterclaims are generally permissible to the extent that they fall within the scope of the parties' consent to arbitrate (and, if applicable, within the jurisdiction of the ICSID Centre), and provided that they arise "directly out of the subject-matter of the dispute" or else exhibit a "close connection" with the primary claim to which they are a response.³⁵ Therefore, when faced with counterclaims that were predominantly centred upon questions of local law, investment tribunals frequently found it convenient to conclude that a particular counterclaim does not fall within the scope of consent to arbitrate, or to determine that a counterclaim lacks sufficient nexus with the primary claim.

The specific structure of investment treaty arbitration – and specifically, the fact that investment treaties, as a rule, impose no obligations on investors, but only on the State contracting parties – provided occasionally a convenient argument for dismissing respondents' counterclaims based on investor's purported violations of contractual or other obligations under domestic law. In *Spyridon Roussalis v Romania* (2011), for example, the latter type of counterclaims were found to lie outside the scope of the parties' consent to arbitration, insofar as arbitration was limited in that case to disputes concerning breaches of the host State's obligations under the treaty in question.³⁶ Then again, even in the event of broadly formulated dispute settlement clauses, some tribunals were not necessarily willing to accept jurisdiction over counterclaims grounded solely in domestic law either. Thus, in *Urbaser v. Argentina* (2016), where the treaty dispute settlement clause otherwise applied to all disputes concerning an investment, counterclaims "based on domestic law only" were equally not deemed susceptible of falling within the scope of the arbitration agreement – in the circumstances of that case, however, out want of specific obligations demanding the investor's compliance with domestic law in the applicable investment treaty.³⁷ Pursuant to such an approach,

³³ This problem is sometimes called the 'public law taboo'; a phenomenon which is taken to explain the frequent refusal of courts to recognize foreign public law in enforcement proceedings. See on this, FD Strebler, 'The Enforcement of Foreign Judgments and Foreign Public Law' (1999) 21 Loy LA Int'l & Comp LJ 55.

³⁴ See on this in particular AK Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 Lewis & Clark Law Review 461, at 465-66, making the important point that the investment tribunals' assumption of authority to hear counterclaims can alter the balance of power between domestic courts and international tribunals and that a reasonable trade-off needs to be made between, on the one hand, the assertion of such authority, and on the other hand, the encouragement of recourse to local courts and tribunals.

³⁵ See ICSID Convention, art 46, requiring a counter-claim to be one 'arising directly out of the subject-matter of the dispute'; and *Saluka Investments BV v Czech Republic (Decision on Jurisdiction over the Czech Republic's Counterclaim)* (UNCITRAL, 7 May 2004) [61]–[76], and *Sergei Pashok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (Award on Jurisdiction and Liability) (UNCITRAL, 28 April 2011) [689]–[693], requiring in the context of UNCITRAL arbitrations that counter-claims have a "close connection with the primary claim to which they are a response".

³⁶ See *Spyridon Roussalis v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/1, 7 December 2011) [868]–[71]. Though not entirely indefensible, the solution seems to remain oblivious of other instruments that may potentially have implications on a tribunal's jurisdiction, such as the ICSID Convention. See on that point the dissent of Arbitrator Reisman, who argued that, when a State contingently consents in an investment treaty to ICSID jurisdiction, the consent component of Article 46 of the ICSID Convention "is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue". *Spyridon Roussalis v. Romania (Declaration of W. Michael Reisman)* (ICSID Case No. ARB/06/1, 28 November 2011). Indeed, not all tribunals facing similarly narrow dispute settlement clauses were equally dismissive of their jurisdiction over counterclaims. Cf *Gustav F W Hamster GmbH & Co KG v Ghana (Award)* (ICSID Case No ARB/07/24, 18 June 2010) [353]–[354], and *Oxus Gold v. Republic of Uzbekistan (Award)* (UNCITRAL, 17 December 2015) [948]–[958].

³⁷ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (Award)* (ICSID Case No. ARB/07/26, 8 December 2016), [1143]–[1155] and [1182]–[1192]. Cf. *Saluka* (Jurisdiction) (n 35) and *Pashok* (n 35) where similar counterclaims were found to fall within the scope of the tribunal's jurisdiction, as the applicable BITs provided for arbitration with respect to 'all disputes [...] concerning an investment' and '[d]isputes [...] arising in connection with realization of investments', respectively.

of course, counterclaims grounded in pure domestic law would practically never be capable of falling within a jurisdiction of an investment tribunal, given that investment treaties, as a rule, do not impose obligations upon investors.

Yet, the practice of invoking jurisdictional hurdles with a view to avoiding pronouncements on respondent's counterclaims is not entirely uncommon even in contract-based investment arbitration, where the link with the applicable domestic law is generally much more direct. In the resubmitted *Amco v. Indonesia* (1988) case a counterclaim concerning the investor's purported evasion of corporate tax and the commission of tax fraud thus equally failed, as the Tribunal found it not to be a claim arising directly out of the investment within the meaning of Article 25(1) ICSID Convention.³⁸ In arriving at this conclusion, the Tribunal believed it was "correct" to draw a distinction between rights and obligations that were "applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law", and those that were "applicable to an investor as a consequence of an investment agreement entered into with that host state", holding that only legal disputes relating to the latter would fall under Article 25(1) of the ICSID Convention, whereas legal disputes concerning the former would "in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention".³⁹ To the Tribunal, the obligation not to engage in tax fraud was "clearly" a general obligation of law in Indonesia, and not one "specially contracted for" in Amco's investment agreement.⁴⁰ The *Amco* Tribunal's argument appears at first sight to be a reasonable one; but the legal relationship between Amco and Indonesia in that case would have arguably supported the assumption of jurisdiction over the counterclaims, given that Amco's foreign investment application provided for ICSID arbitration with respect of "a disagreement and dispute" in general,⁴¹ while Indonesia's Foreign Investment Law of 1967, on which that application was based, required foreign investors "to manage and control their enterprises in accordance with the principles of good business administration without harming the interests of the State",⁴² and thus implicitly prohibited fraudulent tax practices. The narrowness of *Amco* Tribunal's approach becomes quite evident when compared to the much more flexible approach assumed by the ICSID Tribunal in *Perenco v. Ecuador* (2015) towards counterclaims relating to alleged breaches of obligations under Ecuadorian environmental law that the investor purportedly committed in relation to its oil exploitation activities. In the circumstances of that case, the Tribunal's competence to hear such counterclaims was not even considered. The tacit assumption of jurisdiction was seemingly premised on the fact that consent to ICSID jurisdiction was broadly formulated under the applicable contracts,⁴³ and the investor agreed to comply in those contracts with all applicable laws and regulations.⁴⁴

³⁸ *Amco Asia Corporation and others v Republic of Indonesia* (Decision on Jurisdiction in Resubmitted Proceeding) (ICSID Case No ARB/81/1, 10 May 1988) [126]-[127].

³⁹ *ibid* [125].

⁴⁰ *ibid* [126].

⁴¹ See *Amco Asia Corporation and others v Republic of Indonesia* (Decision on Jurisdiction) (ICSID Case No ARB/81/1, 25 September 1983) [10].

⁴² Foreign Investment Law of 1967, art 26, available at <[http://www.flevin.com/id/lgsa/translations/Laws/Law%20No.%201%20of%201967%20on%20Foreign%20Investment%20\(BI\).pdf](http://www.flevin.com/id/lgsa/translations/Laws/Law%20No.%201%20of%201967%20on%20Foreign%20Investment%20(BI).pdf)>.

⁴³ The arbitration was based on the France–Ecuador BIT and two participation contracts for the exploration and exploitation of oil blocks located in the Ecuadorian Amazonian region. The arbitration clauses in the contracts provide for ICSID arbitration over, respectively, 'any technical and/or economic dispute' and 'controversies' arising out of such contracts. See *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (Decision on Jurisdiction) (ICSID Case No ARB/08/6, 30 June 2011) [126], [160].

⁴⁴ See *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (Interim Decision on the Environmental Counterclaim) (ICSID Case No ARB/08/6, 11 August 2015) [109]-[114].

Finally, even in circumstances where counterclaims grounded in domestic law were otherwise deemed capable of falling within the scope of consent to arbitration, it nonetheless happened that such claims were dismissed – but then for want a sufficiently close connection with the primary claim. This was the situation in *Saluka v. Czech Republic* (2004), where the primary claim concerned the Respondent’s treatment of Claimant’s shareholding of a local bank, whereas the counterclaims related to the purported non-compliance of the Claimant’s parent company with the general law of the Czech Republic in the process of acquisition of that shareholding. The Tribunal found those counterclaims not to form part of “an indivisible whole” with the investor’s primary claim, noting that the legal basis of the counterclaim was to be found “in the application of Czech law” and involved “rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic’s jurisdiction”, with the consequence that “the disputes underlying those heads of counterclaim in principle fall to be decided through the appropriate procedures of Czech law and not through the particular investment protection procedures of the Treaty.”⁴⁵

Similar reasoning led to the dismissal of (parts of) the counterclaims in *Pausbok v. Mongolia* (2011) and in *Oxus Gold v. Uzbekistan* (2015). In *Pausbok*, the investor’s key claims related to the introduction of a windfall tax and of legislation imposing a quota on the percentage of foreign nationals working for a mining company. The counterclaims, on their part, were based on allegations that Claimants owed unpaid windfall taxes and foreign worker fees, and that they were liable for environmental failings and other illegal activity including smuggling and tax-evasion. Notwithstanding that some of those counterclaims seemed related to the windfall taxes, the Tribunal did not consider them to have a reasonable nexus with the main claim, noting that “the Counterclaims arise out of Mongolian public law and exclusively raise issues of non-compliance with Mongolian public law, including the tax laws of Mongolia” and that “[a]ll these issues squarely fall within the scope of the exclusive jurisdiction of Mongolian courts, are matters governed by Mongolian public law”.⁴⁶ Indeed, the Tribunal did not wish to acquiesce to “a possible exorbitant extension of Mongolia’s legislative jurisdiction without any legal basis under international law to do so, since the generally accepted principle is the non-extraterritorial enforceability of national public laws and, specifically, of national tax laws.”⁴⁷ In *Oxus Gold*, the Tribunal was less elaborate, but the grounds for dismissing counterclaims were similar ones. In the circumstances of that case, the relevant claims concerned Respondent’s treatment of the company in which the Claimant held a substantive interest, whereas the counterclaim partly concerned certain financial irregularities allegedly committed by that company. The Tribunal found the counterclaim to lack the “necessary ‘close connection’” with the main claim since it was “largely based on the alleged violations of Uzbek law restrictions regarding foreign currency and other financial regulations”⁴⁸ – issues which again touched on the enforceability of national public laws.

All in all, one cannot escape the impression that the tribunals’ narrow approach to the issue of counterclaims was often motivated by the wish to avoid having to make pronouncements on issues that fall primarily within the adjudicatory authority of domestic courts, and then especially issues of domestic public law of the kind that were raised by the counterclaims in *Amco*, *Saluka*, *Pausbok*, or *Oxus Gold*. This in itself is not surprising given the general propensity of investment tribunals to avoid jurisdictional competition with domestic courts. But the tribunals’ predisposition could also have been a different one. As argued by Arbitrator Reisman in *Spyridon Roussalis*, accepting jurisdiction over counterclaims is not only a concession to the State Party, but

⁴⁵ *Saluka* (n 35) [79].

⁴⁶ *Pausbok* (n 35) [694].

⁴⁷ *Pausbok* (n 35) [695].

⁴⁸ *Oxus Gold* (n 36) [956].

works purportedly to the benefit of the investor as well. In Reisman's view, a narrow approach to the issue of counterclaims is at odds with the objectives of international investment law: "In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal [...] perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant."⁴⁹

* * *

Looking now at the practice of restrictively interpreting and/or applying the pertinent jurisdiction-conferring instruments in general, there is little doubt that this has provided an effective way of removing potential jurisdictional overlaps between domestic courts and investment tribunals – though only overlaps at the micro-level. On closer inspection, one must namely not lose sight of the fact that such practice was only applied in circumstances where the investment tribunals' exercise of adjudicatory authority would have intruded into a sphere where domestic courts enjoy primary adjudicatory authority: in relation to the interpretation and/or application of domestic law. In practice, the deployment of this technique did not result in investment tribunals' relinquishing jurisdiction over the dispute between the host State and the investor altogether. What tribunals were willing to relinquish was merely the authority to deal with issues that were otherwise primarily governed by domestic law.

9.2. Avoiding Jurisdictional Overlaps through Claim Splitting

Another method for eliminating jurisdictional overlaps – in fact, one that has proven to be a particularly effective – has been that of claim splitting: the argumentative technique where jurisdictional competition in relation to a dispute arising out of the same underlying investment is removed by relying on the difference in the cause of action on the basis of which the dispute can be litigated before each of the competing adjudicatory bodies. The technique is, of course, a specific variation of the use of judicial discretion in the construction of the applicable jurisdiction-conferring instruments.

The most often cited authority for the use of such technique is probably the decision of the Annulment Committee in *Vivendi* (2002). Even though the decision may not have been the first occasion where a modern investment tribunal elaborated upon the qualitative distinction between the rights of an investor under an investment contract entered into with a host State and its rights under an investment treaty,⁵⁰ nor the first occasion where a treaty tribunal relied on this qualitative distinction to resolve questions of jurisdictional competition arising in relation to domestic courts,⁵¹ the Committee's decision set out important pronouncements of principle that have decisively shaped the investment tribunals' understanding of their own role and positioning

⁴⁹ Spyridon Roussalis (Declaration Reisman) (n 36).

⁵⁰ A few months earlier, another ICSID Annulment Committee in *Wena v Egypt* also drew upon the distinction between contracts, which deal with questions 'that are by definition of a commercial nature', and the investment treaty, which deals with questions 'that are essentially of a governmental nature', and similarly noted that, while there is necessarily a connection between the contracts and the treaty to the extent that the former were designed to operate under the protection of the latter as a materialization of the investment, such connection did not involve 'an amalgamation of different legal instruments and dispute settlement arrangements' – the functions of those instruments were kept 'separate and distinct.' See *Wena Hotels Ltd v Egypt (Decision on Application for Annulment)* (ICSID Case No ARB/98/4, 5 February 2002) [31], [35].

⁵¹ See eg *Eudoro Armando Olguín v Republic of Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/98/5, 8 August 2000) [30]; *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia (Award)* (ICSID Case No ARB/99/2, 25 June 2001) [330]–[332]; or *Ronald S Lauder v The Czech Republic (Final Award)* (UNCITRAL, 3 September 2001) [161]–[163], which relied on the differences in the causes of action in applying the fork in the road clause. See further infra section 10.2.

vis-à-vis domestic courts.⁵² So much so that *Vivendi* has since then been recurrently relied upon by investment tribunals in asserting their jurisdiction over claims having their source in a contractual relationship between the foreign investor and the host State, even in the face of contractual stipulations vesting domestic courts with exclusive jurisdiction over disputes arising out of the contract.

The Committee's pronouncements were made against the backdrop of a situation where the initial Tribunal at once accepted jurisdiction over several claims that the French investor brought against Argentina pursuant to the Argentina-France BIT in relation to a dispute arising out of its concession contract, but then pronounced itself unable to decide them on their merits due to the "crucial connection" that those claims were perceived to have with issues of contract performance, directing the investor to first assert its rights in proceedings before the courts of Tucumán, as also required by the forum selection clause in the concession contract. The Tribunal emphasized that its decision should not be interpreted as imposing the requirement to exhaust local remedies; rather, the obligation to resort to the local courts was "compelled" by the contractual forum selection clause and by the "impossibility" on the facts of the case to determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the concession contract, and thus to separate claims relating to potential breaches of contract from those relating to BIT violations, without undertaking a detailed interpretation and application of the concession contract – a task which was however left by the contracting parties to the exclusive jurisdiction of the administrative courts of Tucumán.⁵³

The *Vivendi* Committee, however, disagreed with such outcome and concluded that by failing to exercise jurisdiction over treaty claims on the ground that these involved issues of contractual performance, the Tribunal committed a manifest excess of powers.⁵⁴ The Committee based its analysis on the "evident" proposition that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards of protection and questions of contract.⁵⁵ The fact that a potential contract breach could coincide with a purported treaty breach did not necessarily impair the jurisdiction of a treaty tribunal. This is because the substantive protections offered by an investment treaty "set an independent standard", which means that "[a] state may breach a treaty without breaching a contract, and *vice versa*".⁵⁶ Hence, whether there has been a breach of the treaty and whether there has been a breach of contract were "different questions", each to be determined by reference to its own applicable law.⁵⁷ This, in the view of the Committee, also followed from the general principle of the law of State responsibility that the characterization of an act of a State as internationally wrongful is governed by international law and not dependent upon the characterization of the same act as lawful by domestic law.

As explained then by the Committee, the conceptual distinction between breaches of treaty and breaches of contract had several implications. First, insofar as the division of competences between the treaty and the contract forum was concerned, it meant that "where 'the

⁵² For an analysis of *Vivendi*'s impact in practice, see C Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims: the *Vivendi I* Case considered' in T Weiler (ed), *International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law* (London: Cameron May, 2005), 281-323.

⁵³ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Decision on Annulment)* (ICSID Case No ARB/97/3, 3 July 2002) (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) [79], [81].

⁵⁴ *ibid* [93]-[115].

⁵⁵ *ibid* [60].

⁵⁶ *ibid* [95].

⁵⁷ *ibid* [95]-[96].

fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard".⁵⁸ Had that not been the case, as stressed by the Committee, a State would be capable of relying on such a contractual clause to avoid the characterization of its conduct as internationally unlawful under a treaty.⁵⁹ Conversely, where "the essential basis of a claim brought before an international tribunal is a breach of contract", the Committee was of the view that it was necessary to "give effect to any valid choice of forum clause in the contract."⁶⁰ This was in fact a test which had previously been used by the US-Venezuela Mixed Claims Commission in the *Woodruff* case (1903),⁶¹ and from which the Committee also drew inspiration.

Second, since breaches of the treaty were conceptually distinct from contract breaches as a result of the fact that the treaty sets an independent standard, it necessarily followed that a finding of a violation of the substantive protections offered by the treaty was essentially not dependent upon the showing of a breach of a municipal contract. Hence, in the view of the Committee, there was also no basis for any assumption that the conduct of Tucumán carried out in the purported exercise of its rights as a party to the concession contract could not, *a priori*, have breached the BIT. In view of the difference in the applicable standard, the issue "whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights."⁶² It was precisely for this reason that the Committee thus fundamentally disagreed with the Tribunal's conclusion that it was impossible to take a decision on the claim's merits for the reason that such a decision would necessitate the interpretation and application of the underlying concession contract. In the view of the Committee,

"...it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 of the BIT."⁶³

As noted by the Committee, pursuant to the BIT's own provisions on applicable law, the Tribunal was in fact perfectly entitled to "base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT."⁶⁴

The Committee's pronouncements thus provided a theoretical framework, based on a conceptually simple, but rather effective analytical technique that could be used for the purpose of understanding and regulating the jurisdictional divide between the competence of treaty tribunals and the competence of domestic courts and other contractually agreed fora.⁶⁵ It is not

⁵⁸ *ibid* [101]. Against this backdrop, the Committee therefore had no difficulty accepting the Vivendi I Tribunal's preliminary decision that the contractual forum selection clause did not affect the latter's jurisdiction with respect to a claim based on the provisions of the BIT (*ibid.*, [76]).

⁵⁹ *ibid* [103].

⁶⁰ *ibid* [98].

⁶¹ *Woodruff* case (IX UNRIIA, 1903) 213.

⁶² *Vivendi* (n 53), [110].

⁶³ *ibid* [105].

⁶⁴ *ibid* [110].

⁶⁵ The clarity of the conceptual distinction has often been the object of praise by academic commentators. See e.g. BM Cremades and DJA Cairns, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes' in SM Kröll and N Horn (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer, 2004), 325-351, at 330ff; S Lemaire, 'Treaty Claims et Contract Claims: la compétence du Cirdi à l'épreuve de la dualité de l'Etat' (2006) 2

surprising that those pronouncements have had an enormous precedential effect. In subsequent jurisprudence, investment tribunals by and large accepted the fundamental premise that a dispute which is grounded in the same set of acts can give rise to parallel claims under both the contract and the treaty,⁶⁶ with the necessary consequence that both type of claims may perfectly coincide (in that a breach of a contract may also separately rise to a breach of the treaty), while nonetheless remaining independent from one another (in that a State may breach a treaty without breaching a contract and *vice versa*).⁶⁷ By the same token, tribunals accepted that each type of claims is premised on a different enquiry, given that the treaty sets an independent standard.⁶⁸ The emphasis has mostly been laid on the *difference* between the domestic and the international legal order, although, occasionally, arguments have also been advanced about the *separateness* and *self-containedness* of the two, in the most venerable tradition of the dualistic doctrine.⁶⁹

Revue de l'Arbitrage 353; GS Tawil, 'The Distinction Between Contract Claims and Treaty Claims: An Overview' in AJ van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (Kluwer, 2007), 492-544, at 544; or JO Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Brill, 2010), 314-315.

⁶⁶ See eg *SGS v Pakistan* (n 4), [147] ('As a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders'); *Impregilo v Pakistan* (n 25), [258] ('the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim'); *Aguas del Tunari v Bolivia* (n 29), [114] ('The circumstance that a claim under the Concession against the Water Superintendency and a claim under the BIT against Bolivia could both point to the same set of facts should not blur the legal distinction between the two types of claims. It is often the case that one set of facts may give rise to disputes under different laws in different fora.'). or *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (Decision on Jurisdiction)* (ICSID Case No ARB/04/13, 16 June 2006) [80] ('the fact that a dispute involves contract rights and contract remedies does not in and of itself mean that it cannot also involve treaty breaches and treaty claims'). For a restatement of the general principle, see *Ampal-American Israel Corporation and others v. Arab Republic of Egypt (Decision on Jurisdiction)* (ICSID Case No. ARB/12/11, 1 February 2016), [329] ('It is possible, as a jurisdictional matter, for different parties to pursue distinct claims in different fora seeking redress for loss allegedly suffered by each of them arising out of the same factual matrix. As a matter of general principle, contract claims are distinct from treaty claims').

⁶⁷ See eg *Consortium RFCC v Kingdom of Morocco (Award)* (ICSID Case No ARB/00/6, 22 December 2003) [48] ('A breach of the substantive provisions of a bilateral investment treaty can certainly result from a breach of Contract, without a possible breach of the Contract constituting, *ipso jure* and by itself, a breach of the Treaty'); *Eureko BV v Poland (Partial Award)* (19 August 2005), [112] (the Tribunal found it necessary to consider 'whether the acts of which Eureko complains, whether or not also breaches of the SPA and the First Addendum, constitute breaches of the Treaty.'). *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Award) (Vivendi II)* (ICSID Case No ARB/97/3, 20 August 2007) (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v. Argentine Republic*) [7.3.10] (The treaty provisions 'set an independent standard. A state may breach a treaty without breaching a contract; it may also breach a treaty at the same time it breaches a contract.'). *BG Group Plc v The Republic of Argentina (Final Award)* (UNCITRAL, 24 December 2007) [183] ('The Tribunal therefore has jurisdiction to determine if the measures complained of by Claimant constitute a breach of the treaty with respect to "Investments" made by BG, regardless of whether or not the same measures are in breach of the MetroGAS License').

⁶⁸ *Impregilo v Pakistan* (n 25), [258] ('Even if the two [contract claim and treaty claim] perfectly coincide, they remain analytically distinct, and necessarily require different enquiries'); *Vivendi II*, *ibid* [7.3.10] ('Whether there is a breach of contract or a breach of the Treaty involves two different inquiries'); *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador (Award)* (ICSID Case No ARB/04/19, 18 August 2008) [342] ('treaty and contract breaches are different things, responding to different tests, subject to different rules'); or *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan (Award)* (ICSID Case No ARB/03/29, 27 August 2009) [137] ('Breach of contract and breach of treaty are separate questions giving rise to separate inquiries').

⁶⁹ See in particular *Noble Ventures v Romania (Award)* (ICSID Case No ARB/01/11, 12 October 2005) [53], where the Tribunal noted 'the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts', which had the consequence that, 'inasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other, a situation that further reflects the respective autonomy of the two legal systems (municipal and international) each one with regard to the other.'

But the greatest attraction of the analytical distinction between treaty and contract claims was in the justification it provided to investment tribunals to uphold their jurisdiction when faced with competing claims to adjudicatory authority from the side of domestic courts. Not only was the distinction thus employed with the view to overcoming the fact that certain domestic law-related issues otherwise relevant to the treaty claim had not yet been resolved by domestic courts.⁷⁰ The distinction proved above all useful to defeating forum selection clauses otherwise vesting domestic courts with exclusive competence over contract-related issues. Relying on the Committee's proposition in *Vivendi I* that the existence of an exclusive jurisdiction clause in a contract cannot operate as a bar to the application of the treaty standard in circumstances where the fundamental basis of the claim is a treaty,⁷¹ investment tribunals in subsequent cases almost uniformly refused to give effect to such clauses if the claims before them invoked the applicable investment treaty as an independent cause of action.⁷²

The premise was invariably that contract and treaty claims have a different legal basis, which automatically implies a different cause of action. Sometimes, the distinction between contract and treaty claims was presented in terms of a complete, dualist separation between the domestic and the international legal order. In *AES v. Argentina* (2005), for example, the exclusive jurisdiction that was granted to Argentine administrative tribunals under the concession contracts was considered ineffective on the level of international law, since “this *exclusivity only plays within the Argentinean legal order*, for matters in relation with the execution of these concession contracts. They do not preclude AES from exercising its rights as resulting, *within the international legal order* from two international treaties, namely the US-Argentina BIT and the ICSID Convention.”⁷³ On another occasion, the contract/treaty claims distinction was presented as an issue of supremacy of international law over domestic law. Thus, in *Camuzzi v. Argentina* (2005), the observation was

⁷⁰ See eg *Feldman v Mexico (Award)* (ICSID Case No ARB(AF)/99/1, 16 December 2002), [78]; *Nykomb Synergetics Technology Holding AB v The Republic of Latvia (Arbitral Award)* (SCC, 16 December 2003), 10; or *CME Czech Republic BV v The Czech Republic (Final Award)* (UNCITRAL, 14 March 2003), [398]-[412].

⁷¹ *Vivendi (Annulment)* (n 53), [101].

⁷² See eg *CMS Gas Transmission Company v The Republic of Argentina (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/01/8, 17 July 2003) [70]-[76]; *Azurix Corp v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/12, 8 December 2003) [26], [75]-[79]; *IBM World Trade Corporation v República del Ecuador (Decision on Jurisdiction and Competence)* (ICSID Case No ARB/02/10, 22 December 2003) [50]-[70]; *SGS v Pakistan (Jurisdiction)* (n 4), [146]-[148], [187]-[189]; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004), [89]-[94], and *(Decision on Jurisdiction - Ancillary Claim)* (2 August 2004) [23]-[24], [47]-[51]; *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic (Decision of the Arbitral Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/02/1, 30 April 2004) [58]-[62]; *PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey (Decision on Jurisdiction)* (ICSID Case No ARB/02/5, 4 June 2004) [170]-[174]; *Salini v Jordan* (n 10), [92]-[96]; *Siemens AG v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/02/8, 3 August 2004) [180]; *AES Corporation v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/02/17, 26 April 2005) [90]-[99]; *Camuzzi International SA v The Argentine Republic (Decision on Objection to Jurisdiction)* (ICSID Case No ARB/03/2, 11 May 2005) [89], [109]-[119]; *Sempra Energy International v The Argentine Republic (Decision on Objections to Jurisdiction)* (ICSID Case No ARB/02/16, 11 May 2005) [86]-[88], [95]-[101]; *Eureko v Poland* (n 67), [92]-[114]; *Impregilo v Pakistan* (n 25), [286]-[287]; *Bayindir v Pakistan (Decision on Jurisdiction)* (ICSID Case No ARB/03/29, 14 November 2005) [151], [264]-[273]; *Aguas del Tunari, SA v Republic of Bolivia* (n 29), [114]; *El Paso Energy v Argentina* (n 11), [79]-[86]; *Jan de Nul* (n 66), [132]-[133]; *National Grid plc v The Argentine Republic (Decision on Jurisdiction)* (UNCITRAL, 20 June 2006) [167]-[169]; *Suez, Sociedad General de Aguas de Barcelona SA, and Inter-Aguas Servicios Integrales del Agua SA v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/03/17, 16 May 2006) (formerly *Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona, SA, and Inter-Aguas Servicios Integrales del Agua, SA*) [41]-[45]; *Pan American Energy v Argentina* (n 11), [97]-[115]; *BG Group v Argentina* (n 67), [181]-[183]; *Mohammad Ammar Al-Babloul v The Republic of Tajikistan (Partial Award on Jurisdiction and Liability)* (SCC Case No V (064/2008), 2 September 2009) [157]-[159]; *SGS v Paraguay* (n 18), [138]; *Toto Costruzioni Generali SpA v The Republic of Lebanon (Decision on Jurisdiction)* (ICSID Case No ARB/07/12, 11 September 2009) [213]-[217]; *Abaclat v Argentina (Jurisdiction)* (ICSID Case No ARB/07/5, 4 August 2011) [498]-[499]; *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Award)* (ICSID Case No ARB/03/23, 11 June 2012) [930]-[931].

⁷³ *AES v Argentina*, *ibid* [93]; emphasis added.

made that, “[j]ust as a dispute that is purely contract-related will have to be brought before the forum envisaged in the contract, so too a dispute relating to the interpretation of a treaty can be submitted to the mechanisms of that treaty. *If the contrary were true, the contract would nullify the provisions of the treaty.*”⁷⁴ Small variations in arguments notwithstanding, the analytical distinction between contract and treaty claims and the justification this provided for tribunals to uphold jurisdiction under the treaty were soon well-accepted. Thus, the Tribunal in *Enron v. Argentina* (2004) did not deem it necessary to even repeat the other tribunals’ considerations in that respect when it rejected the Respondent’s jurisdictional objections based on the existence of a contractually designated dispute settlement forum.⁷⁵

* * *

The attractiveness of the *Vivendi* approach as a means for regulating jurisdictional interactions between investment tribunals and contractually-agreed fora (and domestic courts more generally) is an obvious one. The distinction between treaty claims and contract claims has provided a conceptual device that *prima facie* allowed for a conciliation between international law’s claims to supremacy, on the one hand; and commercial law’s imperatives of party autonomy and sanctity of the contract, on the other. The analytical distinction enables treaty tribunals to retain unrestricted competence over treaty claims, which competence they undeniably have in being treaty organs deriving their powers from international law. At the same time, it allows for the contract forum to retain exclusive jurisdiction over questions of contract law, in accordance with the will of the contracting parties. Under such a division of labour, each forum can function independently from the other, and remains supreme within its own legal order.⁷⁶ Equally important, such a division of powers provides the possibility of maintaining the effectiveness of dispute settlement procedures under investment treaties, while preserving the integrity of contractual forum selection clauses, and thereby the overall contractual balance.

Yet, the problem with the analytical distinction is that it is also artificial and utterly formalistic. It is artificial because it ignores the possibility of normative overlap resulting from the fact that the content of treaty rights and contract rights (or rights under domestic law more generally) may substantively be analogous, if not identical.⁷⁷ And it is formalistic in that it considers a claim to be based on a different cause of action merely because the obligation asserted is one contained in a different legal instrument. Though such formalism is not uncommon in the practice of international adjudicatory bodies,⁷⁸ the investment tribunals’ strict

⁷⁴ *Camuzzi International SA v The Argentine Republic (Decision on Objection to Jurisdiction)* (ICSID Case No ARB/03/2, 11 May 2005) [112]; emphasis added.

⁷⁵ *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004) (also known as *Enron Creditors Recovery Corp and Ponderosa Assets, LP v The Argentine Republic*) [91].

⁷⁶ Paradigmatic in this respect is *Gami Investments, Inc v The Government of the United Mexican States (Final Award)* (UNCITRAL, 15 November 2004) [41], where the Tribunal made the following observation: ‘It was for the Mexican courts to rule on the licitness of the expropriation as a matter of Mexican law. The present Tribunal defers to the *Sentencia* as an authoritative expression of national law. The present Tribunal will moreover give respectful consideration to the *Sentencia* insofar as it applies norms congruent with those of NAFTA. [...] But ultimately each jurisdiction is responsible for the application of the law under which it exercises its mandate. It was for the Mexican courts to determine whether the expropriation was legitimate under Mexican law. It is for the present Tribunal to judge whether there have been breaches of international law by any agency of the Mexican government.’

⁷⁷ On this, see Y Shany, ‘Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims’ (2005) 99 AJIL 835, at 837, who appositely notes that some domestic legal systems also directly incorporate international norms, including those provided under BITs.

⁷⁸ Cf. dictum by ITLOS in *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures, Order of 3 December 2001)*, ITLOS Reports 2001, 95, at [50]-[51] (“even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention” and “the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results”).

claim-splitting practice comes in marked contrast with the non-formalist attitude adopted in many domestic jurisdictions in dealing with cases of cross-boundary litigation, where the question of identity of actions is approached and dealt with in a flexible way – by reference to the sameness of the factual basis and *substance* of the legal entitlement sought to be established, and not merely by reference to the formal source of the rights invoked.⁷⁹ Of course, it is not the formalism in itself that is problematic, but the consequences that this formalism has had in practice. Namely, the analytical distinction between contract and treaty claims does not in itself foreclose the availability of domestic fora for the resolution of disputes arising out of an investment, and therefore retains the potential for duplication of proceedings – with all the negative consequences that this may entail. The distinction is therefore oblivious to the complex normative and institutional environment in which investors are operating. Hence, the investment tribunals’ reliance on it as a means for regulating their jurisdictional interactions with domestic courts has also not without justification been described by some as “disintegrationist”,⁸⁰ or else as an approach that has turned international investment arbitration into an “autonomous and self-referential system”.⁸¹ Others, of course, have expectedly defended it by reference to the special character and purposes of investment arbitration itself.⁸²

Despite the analytical clarity of the conceptual distinction between contract and treaty claims, its application in practice has not been without hitches. First, distinguishing treaty claims from contract claims has not been without difficulty, particularly in circumstances where an alleged treaty claim has principally hinged on a breach of the contract (9.2.1). Specific problems have furthermore arisen in the application of the distinction in the context of umbrella clauses (9.2.2.).

9.2.1. Application of the Contract/Treaty Distinction in Practice

Distinguishing treaty claims from contract claims may be reasonably simple in circumstances where physical events overtake what was initially a contractual dispute,⁸³ or where the claimants in the treaty proceedings are different from the entities that entered into the contract out of which the dispute has arisen. Yet, in the event that a dispute involves the same parties and concerns the same object, it may be virtually impossible to separate contract issues from the treaty issues.⁸⁴ This is because the factual predicate on which a treaty claim will be based may often be the same

⁷⁹ See C McLachlan, *Lis Pendens in International Litigation* (Brill, 2009), at 123-126, 186, discussing the non-formalist approach adopted in this respect by the ECJ and the Canadian Supreme Court. For a cogent critique of investment tribunals’ practice on this point, see further M Swarabowicz, “Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System” (2017) 8(2) JIDS 280.

⁸⁰ See Shany (n 77), at 844, describing it as an approach that “seeks to resolve tensions between overlapping norms and procedures through rules of exclusion that draw lines of separation between legal regimes and judicial proceedings” and supports the construction of investment treaties as “self-contained instruments”. For a more general discussion on disintegrationist approaches in the interactions between domestic and international adjudicatory bodies, see also Shany, *Regulating Jurisdictional Relations between Domestic Courts and International Tribunals* (OUP), 107ff.

⁸¹ Swarabowicz (n 79), at 14. See also McLachlan (n 79), at 125-126, who takes the view that a non-formalist approach is only possible if courts approach the process of characterization of actions in “a suitably internationalist spirit, taking into account the impossibility of precise identity of action as between different legal systems”. Curiously, however, McLachlan does not advocate the same non-formalist stance when dealing with investment treaty arbitration. Cf *ibid* 256ff.

⁸² See eg E Gaillard, “Vivendi” and Bilateral Investment Treaty Arbitration’, *New York Law Journal* (6 February 2003), defending the *Vivendi* annulment decision as “perfectly well founded” and seeing nothing “pathological” in the coexistence of different adjudicative mechanisms under different instruments where such instruments do not have the effect of “developing their effects on the same plane”.

⁸³ *Wena Hotels Ltd v Egypt* (n 50).

⁸⁴ See eg *SGS v Pakistan* (n 4), [148] (“BIT claims and contract claims appear reasonably distinct in principle. Complexities, however, arise on the ground...”); and *Joy Mining* (n 11), [75] (“To the extent that a dispute might involve the same parties, object and cause of action it might be considered to be a dispute where it is virtually impossible to separate the contract issues from the treaty issues and to draw any jurisdictional conclusions from a distinction between them.” Original footnotes omitted.)

as the factual predicate of a potential contract claim (indeed, in accordance with *Vivendi I*'s own logic, the same conduct on the part of the host State may constitute a breach of contract while also amounting to a breach of treaty, whereas it may also constitute simply a breach of contract, without more). Equally, the object and relief sought pursuant to each type of claim – especially when this takes the form of a request for payment of damages – may also be difficult to distinguish. Hence, in circumstances where the treaty claim essentially hinges on a breach of the contract, the question arises whether the jurisdiction of the treaty forum over treaty claims may nonetheless be affected by the presence of a mandatory contract forum.

In accordance with *Vivendi*, the question whether the claim is a treaty one or a contract one is determined by way of inquiry into the “fundamental basis” of the claim; it is only where “the essential basis” of the claim is a breach of contract the tribunal will give effect to any valid choice of forum.⁸⁵ The problem, as observed by some, is that this part of *Vivendi*'s decision could be interpreted as implying that the test of a claim's “essential basis” requires a tribunal to inquire into the *factual basis* of the treaty claim, with the possible consequence that a tribunal would be bound to decline jurisdiction over a treaty claim where such claim has an “essential basis” in the breach of a contract.⁸⁶ It needs to be said that such a reading would not find support in the *Woodruff* case from which the Committee drew inspiration. In accordance with the views expressed by Umpire Barge in that case, a claim would have an essential basis in the contract “wherever that contract is called upon as a source of those rights and duties whereon a claim may be based”.⁸⁷ In the circumstances of that case, however, there was no issue of contractual claims being presented as treaty claims. The claimant did not actually allege violations of international law, but simply sought to recover from Venezuela the value of several bonds that were issued by a Venezuelan railroad company. As the cause of action was the contract, Umpire Barge also had no difficulty concluding that the “fundamental basis of the claim” was the contract, for a claim of a “denial or unjust delay of justice” – which according to the Umpire would have rendered the contractual forum selection clause inapplicable – “was not only not proven, but not even alleged”.⁸⁸

But misconceptions about the *Vivendi*/*Woodruff* test have not been uncommon in practice. In both *SGS v. Pakistan* and *Bayindir v. Pakistan* (2005), for instance, Respondent sought to fend off claimants' treaty claims by arguing that their “essential basis” was in fact a contractual one.⁸⁹ Referring to *Vivendi*, Pakistan therefore also demanded that effect be given to the relevant contractual forum selection clause.⁹⁰ Yet, such line of argument was not accepted by the respective tribunals, which concluded that, insofar as the Claimants' stated their claims as treaty claims, the essential basis of those claims was not contractual.⁹¹ Considerable confusion in this respect, however, was generated by the jurisdictional decision *SGS v. Philippines* (2004). In that

⁸⁵ *Vivendi I (Annulment)* (n 53), [98].

⁸⁶ See S Alexandrov, ‘Breach of Treaty Claims and Breach of Contract Claims: is it still Unknown Territory?’ in K Yannaca-Small (ed), *Arbitration under International Investment Agreements* (OUP, 2010), 323-350, at 347.

⁸⁷ *Woodruff* case (n 61), 222.

⁸⁸ *ibid* 223.

⁸⁹ See *SGS v Pakistan* (n 4), [43]-[44] and [62]-[63] (the contractual basis of those treaty claims was supposedly attested to by the fact that the contract and treaty claims were based on the same limited factual allegations, that the prayers for relief made before the treaty tribunal were virtually identical to those made in the contract-based arbitration that was proceeding concurrently in Pakistan, and that no specific treaty claims were formulated other than those relating to alleged breaches of the contract); and *Bayindir v Pakistan (Jurisdiction)* (n 72), [152]-[165] (The contractual nature of those claims was inferred from the fact that the treaty cause of action depended on the existence of a contract breach, that the amount of the treaty claims actually corresponded to the amount claimed under the contract, and that the Claimant initially even brought pure contract claims before the treaty tribunal.)

⁹⁰ *SGS v Pakistan* (n 4), [185]; *Bayindir v Pakistan*, *ibid* [151].

⁹¹ In *Bayindir*, the Tribunal expressly noted that, insofar as Claimant was asserting only treaty claims, the case was thus not one where the essential basis of the claims was purely contractual. *ibid* [166].

case, the Tribunal concluded that two of the treaty claims that Claimant had raised in relation to its underlying concession contract, albeit validly stated at the level of jurisdiction, were premature and inadmissible, and therefore ordered a stay of proceedings until the contractual issues were determined in accordance with the contractually-agreed process.⁹² Among the treaty claims to which this finding pertained was the one brought under the umbrella clause. As discussed in 9.2.2., the *SGS* Tribunal understood such claim as having an essential basis in the breach of the contract and thus, pursuant to the *Woodruff/Vivendi I* test, found it appropriate to give effect to the choice of forum clause in SGS' contract.⁹³ The problem, however, was that the Tribunal's findings with respect to the umbrella clause were then extended to SGS' claim under the fair and equitable treatment standard. Perplexing, in this regard, is the fact that in spite of its finding that Respondent's unjustified refusal to pay the sums due to SGS under the concession contract raised "arguable issues" under such standard,⁹⁴ the Tribunal eventually treated the FET claim as one which could not be "determined independently from the contractual issues" referred to the Philippine courts by the contractual forum selection clause.⁹⁵ It may be that the Tribunal simply lapsed into error in considering the viability of Claimant's FET claim. In fact, the Tribunal itself contradicted its finding by noting elsewhere that the dispute was "on its face a dispute about the amount of money owed under a contract" and that "[n]o question of a breach of the BIT independent of a breach of contract claim is raised".⁹⁶

The findings in *SGS v. Philippines* can best be explained by the fact that the dispute between SGS and the Philippines was essentially a commercial one and that the Claimant had not successfully raised any viable treaty breaches apart from those based on the umbrella clause. Indeed, any other reading would be difficult to reconcile with *Vivendi*. In following the reasoning of the *Vivendi* Committee, if Claimant actually raised a *prima facie* treaty claim in relation to the FET obligation, there would have been no reason for such claim not being able to be determined independently from the contractual issues, given that such issues are not determinative as to whether particular conduct involves a breach of a treaty, and given that the tribunal would not be exercising contractual jurisdiction when taking into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law.⁹⁷ Such understanding was apparently shared by other tribunals. In *SGS v. Pakistan*, *Impregilo v. Pakistan*, *Bayindir v. Pakistan*, *Toto v. Lebanon*, and *BIVAC v. Paraguay*, the Respondents' requests for a stay of proceedings in favour of the contractually designated forum have all been flatly denied on the ground that treaty claims, being based on a different cause of action than contract claims and requiring the application of an independent standard, did not depend on a prior legal or factual determination by the contractually agreed forum.⁹⁸ While some of those tribunals have expressed

⁹² *SGS v Philippines* (n 9), [162]-[163].

⁹³ *ibid* [153].

⁹⁴ *ibid* [162].

⁹⁵ *ibid* [156].

⁹⁶ *ibid* [159].

⁹⁷ *Vivendi (Annulment)* (n 53), [105], [110].

⁹⁸ See eg *SGS v Pakistan (Jurisdiction)* (n 4), [186] ("This Tribunal has jurisdiction over the Treaty claims. The right to exercise that jurisdiction does not depend upon the findings of the PSI Agreement arbitrator; that is, such findings are not a factual or legal predicate for the consideration of whether Pakistan violated the Treaty obligations to which SGS points."); *Impregilo v Pakistan* (n 25), [289] ("such a stay, if anything, would confuse the essential distinction between the Treaty Claims and the Contract Claims."); *Bayindir v Pakistan* (n 72), [270] ("In the Tribunal's view its jurisdiction under the BIT allows it – if this should prove necessary – to resolve any underlying contract issue as a preliminary question. Exactly like the arbitral tribunal sitting in Pakistan, this Tribunal should proceed with the merits of the case. This is an inevitable consequence of the principle of the distinct nature of treaty and contract claims."); *Toto v Lebanon (Jurisdiction)* (n 72), [220] ("The Tribunal deems it improper to stay its proceedings, which only concern breaches of the Treaty."); or *BIVAC v Paraguay* (n 29), [127] ("We see no other bar to the admissibility of the claim. Paraguay has argued that the existence of an agreed forum for the resolution of disputes under Article 9 of the Contract means that it is to that forum that the dispute should go. We disagree.

sympathy with the efforts of the tribunal in *SGS v. Philippines* to give effect to the parties' contractual commitments while respecting the general language of BIT dispute settlement provisions,⁹⁹ most of them did not consider that the exercise of treaty jurisdiction could undermine the integrity of the contract, either because taking account of contractual issues – which a treaty tribunal was entitled to consider in the exercise of its treaty jurisdiction – did not entail deciding contractual claims,¹⁰⁰ or because treaty claims at any rate could be decided irrespective of the facts underlying the claims before the contract forum.¹⁰¹ Besides, there were also practical concerns that would make the ordering of a stay of proceedings impracticable, particularly the importance of resolving disputes expediently.¹⁰² Furthermore, inasmuch as the doctrine of admissibility itself was concerned, there were found to be limitations to applying it to situations where the parties to the treaty-based proceedings were different from the parties to the proceedings pursuant to the contractually agreed procedure.¹⁰³

In sum, the test of a claim's essential basis is thus nothing but an inquiry into the *cause of action* on which the claim is based. This is nothing but logical, as the most fundamental distinction between a treaty claim and a contract claim is precisely the source of the right on which the claim is based.¹⁰⁴ How does a treaty claim then differ from a contract claim in relation to a dispute arising out of the same contractual relationship, involving the same parties, and concerning the same object? Most tribunals appeared to understand the fact of a claim having an "essential basis" in the treaty as requiring the claimant to establish that the conduct impugned in the claim had a sovereign character (i.e. involving the exercise of *puissance publique*), and not a commercial one.¹⁰⁵

It is well established that there is a significant distinction to be drawn between a treaty claim and a contract claim, even if there may be a significant interplay between the underlying factual issues.)

⁹⁹ *Bayindir v Pakistan* (n 72), [272].

¹⁰⁰ See *SGS v Pakistan (Jurisdiction)* (n 4), [186] ('This Tribunal can and must consider all facts relevant to determination of the BIT causes of action, including facts relating to the terms of the PSI Agreement. In doing so, we shall not seek to determine the claims asserted under the PSI Agreement; we will determine only the BIT claims of the Claimant.').; or *Impregilo v Pakistan* (n 25), [289] ('Since the two enquiries are fundamentally different (albeit with some overlap), it is not obvious that the contractual dispute resolution mechanisms in a case of this sort will be undermined in any substantial sense by the determination of separate and distinct Treaty Claims.').

¹⁰¹ See *Toto v Lebanon (Jurisdiction)* (n 72), [220] (the Tribunal 'will not deal with the specific facts underlying the two claims submitted before the *Conseil d'Etat*'). See also *BIVAC v Paraguay* (n 29), [125], noting that, unlike in *SGS v Philippines*, there was no apparent unresolved dispute as to the amount payable, and that accordingly, it would not be premature to come to a decision on the merits of the alleged breaches of the FET standard.

¹⁰² See eg *Impregilo v Pakistan* (n 25), [290] ('Further, if a stay was ordered, as Pakistan has sought, it is unclear for how long this should be maintained; what precise events might trigger its cessation; and what attitude this Tribunal ought then to take on a resumed hearing to any proceedings or findings that may have occurred in the interim in Lahore.').; *Bayindir v Pakistan* (n 72), [272] ('However, to do so raises several practical difficulties. In particular, it may be very difficult to decide, at this preliminary stage, which contractual issues (if any) will have to be addressed by the Tribunal on the merits.').; or *Toto v Lebanon (Jurisdiction)* (n 72), [220] ('Besides, as no other contractual claims have presently been introduced, the settlement of these claims, if ever introduced before the *Conseil d'Etat*, could take a substantial period of time. Even for mere reasons of expediency, the Tribunal cannot suspend its proceedings for such a substantial period waiting for judgments which, although indirectly related to some facts which are also the basis of Treaty claims before this Tribunal, have a completely different scope and cause of action.').

¹⁰³ See *Impregilo v Pakistan* (n 25), [289].

¹⁰⁴ See on this B Cremades and D Cairns, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes' in N. Horn (ed), *Arbitrating foreign investment disputes* (Kluwer, 2004), 325-351, at 326-31, distinguishing treaty and contract claims by reference to the different sources of rights, content of rights, the parties to the claim, applicable law, and the different consequences in terms of liability.

¹⁰⁵ See eg *BIVAC v Paraguay* (n 29), [127] (noting that '[t]he fundamental basis of the claim under Article 3(1) of the BIT, over which this Tribunal has jurisdiction, turns on the interpretation and application of that provision and alleged acts of Paraguay (as "*puissance publique*"), not on the interpretation and application of the Contract as such, although the Contract will necessarily be part of the overall factual and legal matrix.').; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana (Award)* (ICSID Case No ARB/07/24, 18 June 2010) [329] (for the observation that Claimant's claims of treaty breach concerned the conduct of a separate legal entity in relation to the contract and the finding that the claimant's 'so-called

9.2.2. When Both Worlds Collide: Applying the Contract/Treaty Distinction to Claims under Umbrella Clauses

Another area where the application of the analytical distinction between contract and treaty claims runs into difficulties concerns claims brought under umbrella clauses. By imposing an obligation on the State to observe contractual commitments entered into with an investor, such clauses have caused the operation of the contract to fall under the protective umbrella of the treaty, thus creating an even stronger link between the contract and the investment treaty than simply through the treatment of the contract as one of the types of protected investments. The difficulties arise when it comes to determining the actual basis of the claim. On the face of it, a host State violates an umbrella clause if it fails to observe the contractual commitments it owes towards the investor. But the failure to observe contractual commitments is, at the same time, a breach of the contract. This could take to mean that, though amounting to a treaty breach, the violation of an umbrella clause in fact depends on the existence of a contract breach. In such circumstances, the question then necessarily arises as to the fundamental basis of the claim that is brought pursuant to an umbrella clause – is that the treaty or the contract? Investment tribunals have given different answers to this question and, consequently, have also arrived at different conclusions as to whether the exercise of their jurisdiction over purported breaches of an umbrella clause was warranted in circumstances where a forum selection clause in the relevant contract mandated recourse to the courts of the host State or some type of domestic arbitration in relation to contractual claims.

The answer to the question to a certain extent depends on the supposed effect of umbrella clauses; an issue on which investment tribunals have also developed divergent views. The point of departure in this respect are the decisions in the two *SGS* cases which, as is well-known, involved the same claimant and arose out of similar transactions, but were brought against two different States on the basis of two different BITs and eventually resulted in diametrically-opposed (and potentially irreconcilable) outcomes. Though often discussed as representing two competing approaches to the interpretation of umbrella provisions, the *SGS* decisions in fact epitomize also two visions or understandings as to the effects that umbrella clauses have in relation to contractual obligations entered into between an investor and the host State. The Tribunal in *SGS v. Pakistan*, on the one hand, premised its notoriously narrow construction of the umbrella clause on the understanding that a broad interpretation of such clause would amount to “incorporating by reference” into the treaty an unlimited number of State contracts and other municipal law obligations, and would have the effect of converting contractual obligations into treaty obligations by way of “instant transubstantiation”.¹⁰⁶ The Tribunal in *SGS v. Philippines*, on the other hand, rejected the idea of the umbrella clause entailing a full-scale internationalization of contractual and other commitments under domestic law, with the consequence that questions of contract law would be converted into questions of treaty law. Instead, the clause was considered to address only the performance of commitments entered into with regard to specific investments, whereas the scope of those commitments remained to be determined in accordance with their proper law, in most cases by reference to the terms of the contract.¹⁰⁷ Therefore, pursuant to the understanding epitomized by the *SGS v. Pakistan* decision,

“treaty claims,” however skillfully repackaged, are inextricably linked to the JVA and are in reality contract claims. To use the language of the award in the *Vivendi (Annulment)* (n 53), “the essential basis” of Hamester’s claims is purely contractual.”; or *Tulip v Turkey*, [354] (for the holding that ‘the determination of whether a claim arises under a BIT involves an inquiry into the “essential basis” or “normative source” of that particular claim. In order to amount to a treaty claim, the conduct said to amount to a BIT violation must be capable of characterisation as sovereign conduct, involving the invocation of puissance publique.’)

¹⁰⁶ *SGS v Pakistan (Jurisdiction)* (n 4), [168], [172].

¹⁰⁷ *SGS v Philippines (Jurisdiction)* (n 9), [126]-[127].

claims under umbrella clauses were to be conceived as treaty claims by reason of the fact that the contractual obligations themselves have been elevated into treaty obligations. Indeed, the Tribunal in *SGS v. Pakistan* treated the umbrella clause claim as any other treaty claim, and did not consider the presence of a forum selection in itself being a bar to the Tribunal's jurisdiction in relation to such claims.¹⁰⁸ In contrast, in accordance with the understanding advanced in the *SGS v. Philippines* decision, the claims under the umbrella clause were to be treated as claims having a basis in the contract, which was eventually also reason for the Tribunal to give effect to a contractual forum selection clause.¹⁰⁹

In the aftermath of the *SGS* cases, tribunals continued to disagree on the supposed effects of umbrella clauses. Some continued to assume that umbrella clauses have the effect of elevating contractual obligations into obligations under international law.¹¹⁰ This was then also reason for concluding that a contractual forum selection clause did not divest the Tribunal of its jurisdiction to hear claims for breach of treaty.¹¹¹ Others, denied that such clauses would have the effect of changing the law of the underlying obligation,¹¹² or at least assumed that what is elevated by the umbrella clause is not the obligation itself, but the breach of such obligation.¹¹³ In some

¹⁰⁸ *SGS v Pakistan (Jurisdiction)* (n 4), [146]-[155] where the Tribunal essentially accepted jurisdiction over SGS's treaty claims as a whole.

¹⁰⁹ *SGS v Philippines (Jurisdiction)* (n 9), [155], [163].

¹¹⁰ See eg *Noble Ventures Inc v Romania* (n 69), [53] (noting how '[a]n umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law') and [61] (concluding that the contracting parties 'had as their aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT'); *BIVAC v Paraguay* (n 29), [142] ('[a]ssuming that Article 3(4) [containing the umbrella clause] does import the obligations under the Contract into the BIT, giving this Tribunal jurisdiction to interpret and apply the Contract as such') and [147] (confirming the view that the umbrella clause 'has the effect of importing the obligations under the Contract into the BIT'); *Hamester v Ghana* (n 105) [348] (suggesting that, by virtue of the umbrella clause, contractual commitments could potentially be 'elevated – and transformed in nature – [...] into treaty commitments of the State itself'); or *Tulip v Turkey* (n 26), [351] (observing that an umbrella clause 'may arguably be relied on in certain circumstances to "elevate" a contractual obligation "entered into" by the State "with regard to investments" [...] to argue that the Contract [...] is so converted into an international obligation'). See also *Salini v Jordan* (n 10), [127] (implicitly suggesting the same proposition in explaining that, insofar as the relevant clause was not capable of being construed as an umbrella clause, the contractual obligations owed by Jordan to the investor "remain purely contractual in nature").

¹¹¹ *El Paso Energy v Argentina* (n 11), [86].

¹¹² See eg *CMS Gas Transmission Company v The Republic of Argentina (Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic)* (ICSID Case No ARB/01/8, 25 September 2007) [95(c)] (holding that '[t]he effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law'); *Toto v Lebanon (Jurisdiction)* (n 72), [202] (holding that claims based upon the umbrella clause 'are governed by the law of the contract and may be affected by the other provisions of the contract'); *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine (Award)* (ICSID Case No ARB/08/11, 25 October 2012) [247] (the umbrella clause did not have the effect of converting 'the extent or content of such obligations into an issue of international law.' The scope of the contractual obligations had to be determined in accordance with the contract); *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile (Award)* (ICSID Case No ARB/01/7, 25 May 2004) [187]; and *Fedax NV v Venezuela (Final Award)* (ICSID Case No ARB/96/3, 9 March 1998) [30]-[33] (holding that it was necessary to consider the provisions of the Venezuelan Commercial Code and its Law on Public Credit to establish the amount of principal and accrued interest under the promissory notes, the failure of payment of which gave rise to Respondent's liability under the umbrella clause). See also *Micula v Romania (Final Award)* (ICSID Case No ARB/05/20, 11 December 2013), [417]ff.

¹¹³ See eg *Eureko v Poland* (n 67), [250] ('breaches by Poland of its obligations under the SPA and its First Addendum, as read together, [...] may be breaches of Article 3.5 of the Treaty [containing the umbrella clause]'); *LESI-Dipenta v Algeria* (n 27) [25(ii)] ('the effect of such clauses is to transform the violations of the State's contractual commitments into violations of the treaty umbrella clause and by this to give jurisdiction to the Tribunal over the matter'); *Invesmart v Czech Republic (Award)* (UNCITRAL, 26 June 2009) [526]. ('existence of an "umbrella clause" elevates breaches of a contract to breaches of the BIT'); *Khan Resources v Mongolia (Award on the Merits)* (UNCITRAL, 2 March 2015) [295] ('a breach by Mongolia of any provision of the Foreign Investment Law would constitute a breach of the ECT's so-called "umbrella" clause'); *Oxus Gold (Award)* (n 36) [365] ('[i]n the absence of an umbrella clause, the State is not liable, on the international level, for violation of purely contractual obligations') and [371] (discussing how 'the violation of any legal obligation contained in the national legal order would be transformed by an umbrella clause into a violation of the Treaty').

cases, this was then also reason to conclude that the basis of the claim remained a contractual one, with the consequence that the claim was affected by contractual forum selection clauses.¹¹⁴

In considering the effects that contractual forum selection clauses will have on claims based under umbrella clauses, the discussion eventually withered away from debates as to the purported effects of umbrella clauses, to the question of the legal nature of the obligations imposed by the clauses as such. Namely, some tribunals, though accepting the view of underlying obligations remaining unchanged, for example took the view that claims under the umbrella clause do have the character of treaty claims simply by reason of them being premised on an obligation that is itself set out in a treaty.¹¹⁵ The obligation to respect commitments entered into by the host State being grounded in the treaty was then precisely reason for some to conclude that claims under the umbrella clause were not capable of being affected by contractual forum selection clauses.¹¹⁶ In fact, in a great deal of cases, objections relating to the presence of a contractual forum selection clause were not even considered specifically in relation to the umbrella clause, but were dispensed with in relation to the totality of treaty claims, with those based on the umbrella clause included.¹¹⁷

The treaty-source of the obligation to respect commitments eventually prompted the discussion whether the umbrella clause actually sets out an independent standard. The Tribunal in *BIVAC v. Paraguay* (2009), though adhering to the view that the umbrella clause will have the effect of importing contractual obligations into the BIT, dismissed the idea that the clause itself would provide a “freestanding international treaty obligation”, in the sense of an “independent standard”, that would allow it to determine whether Respondent’s acts gave rise to a violation of such clause.¹¹⁸ Rather, in order to determine the breach of such clause, the Tribunal deemed necessary to interpret and apply the contract, and thus concluded that “the fundamental basis of the claim”, in the *Vivendi*’s familiar terminology, was not the BIT but rather the contract.¹¹⁹ This conclusion was

¹¹⁴ *Toto v Lebanon (Jurisdiction)* (n 72), [202] (holding in relation to the umbrella clause that “[t]he contractual claims remain based upon the contract”).

¹¹⁵ *Burlington Resources Inc v Republic of Ecuador (Decision on Jurisdiction)* (ICSID Case No ARB/08/5, 2 June 2010) (formerly *Burlington Resources Inc and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*) [189] (“the Tribunal notes that Burlington’s umbrella clause claim is a Treaty claim”); *EDF International S.A, SAUR International S.A and León Participaciones Argentinas S.A v Argentine Republic (Award)* (ICSID Case No ARB/03/23, 11 June 2012) [931].

¹¹⁶ *Eureko v Poland* (n 67); *EDF v Argentina*, *ibid*; see also *See SGS v Philippines* (Dissenting Opinion of Antonio Crivellaro, 29 January 2004) (n 9), [11] (arguing that “[i]f our jurisdiction derives from (also) Article X(2) [the umbrella clause], as unanimously admitted, I see no reason why our Tribunal could not deal with and decide on the merits of the payment claim”).

¹¹⁷ See *CMS Gas v Argentina* (n 72) [70]-[76], [98] (breaches of the umbrella clause were then upheld on the merits, Award of 12 May 2005; however, the award was later annulled in this part for failure to state reasons, *Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic* (25 September 2009) [97]); *Azurix Corp v The Argentine Republic* (n 72), [75]-[79] (the claim under the umbrella clause was later dismissed on the merits, on the ground that the Claimant was not privy to the relevant contract, Award of 14 July 2006, [384]); *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004) [89]-[94], and (*Decision on Jurisdiction - Ancillary Claim*) 2 August 2004, [23]-[24], [47]-[51] (breaches of the umbrella clause were upheld on the merits, Award of 22 May 2007, [269]-[277]; the award was later annulled, but not for reasons relating to the application of the umbrella clause, *Decision on the Application for Annulment of the Argentine Republic* of 30 July 2010); *AES v Argentina* (n 72), [46], [90]-[99]; *Camuzzi International S.A v The Argentine Republic (Decision on Objection to Jurisdiction)* (ICSID Case No ARB/03/2, 11 May 2005) [89]-[90], [105]-[119]; *Sempra Energy International v The Argentine Republic* (n 72), [86]-[101] (breaches of the umbrella clause were also upheld on the merits, Award of 28 September 2007, [305]-[314]); *Continental Casualty Company v The Argentine Republic (Award)* (ICSID Case No ARB/03/9, 5 September 2008) [286]-[302] (but the claims under the umbrella clause were dismissed by the Tribunal, after having upheld the defense of necessity with respect to some of those contractual obligations and finding already a breach of the FET obligation with regard to others, [303]); and *Al-Bahloul v Tajikistan* (n 72), [157]-[159] (subsequently upholding breaches of the umbrella clause, [257], [263]-[268]).

¹¹⁸ *BIVAC v Paraguay* (n 29), [149].

¹¹⁹ *ibid*.

subsequently disputed by the Tribunal in *SGS v. Paraguay* (2010), which criticized such line of reasoning on the ground that it “ignores the source in the treaty of the State’s claimed obligation to abide by its commitments, contractual or otherwise”; for “[e]ven if the alleged breach of the treaty obligation depends upon a showing that a contract or other qualifying commitment has been breached, the source of the obligation cited by the claimant, and hence the source of the claim, remains the treaty itself.”¹²⁰ Since the conceptual distinction between contract claims and treaty claims was thus found to apply “with equal force in the context of an umbrella clause”,¹²¹ the existence of the contractual forum selection clause – which in the circumstances of the case demanded that disputes relating to the contract be submitted to the Courts of the City of Asunción – was held not to operate as a bar to the application of the treaty standard.¹²²

In the end, the problem with the application of the contract/treaty distinction to claims under the umbrella clause is not so much in determining the essential basis of such claims. In accordance with the way the test was applied in *Woodruff* (and as discussed in 9.2.1), the cause of action remains a right deriving from an obligation imposed by an investment treaty. The question is rather whether the umbrella clause can be deemed to set out an independent treaty standard; that is, a standard that is independent from a breach of the contract. It is difficult to argue that this would indeed be the case. In accordance with the logic of the *Vivendi* Committee, it is precisely because the treaty sets an independent standard that a state “may breach a treaty without breaching a contract, and *vice versa*”.¹²³ A violation of an umbrella clause, however, is predicated on a breach of the contract. A host State cannot have failed to observe a contractual obligation it had entered into with an investor without also having breached the contract itself. In other words, in the absence of a contract breach, there is no breach of the umbrella clause. The Tribunal in *MTD v. Chile* perhaps summarized the position most accurately when holding that breaches of the umbrella clause are governed by international law, but “to establish the facts of the breach, it will be necessary to consider the contractual obligations undertaken by the Respondent and the Claimants and what their scope was under Chilean law”.¹²⁴ A related question is whether or not in considering contractual obligations for the purpose of establishing the facts of the treaty breach, the tribunal must be deemed to be exercising contractual jurisdiction, or as formulated by the *Vivendi* Committee, merely “taking into account” the terms of a contract. The Tribunal in *EDF v. Argentina* denied that the former would be the case when it addressed the Respondent’s conduct in relation to the umbrella clause, contending that it did “not act as a judge of contract questions, but rather as a tribunal considering treaty matters, in particular the specific commitments protected by the ‘umbrella clause’”.¹²⁵ It is open to discussion whether such a position is really defensible.

9.2.3. Avoidance of Forum Selection through Simple Redressing of Claim?

Given the investment tribunals’ persistent refusal to abrogate their jurisdiction over treaty claims, the possibility arises that an investor could bypass an exclusive jurisdiction clause in the contract by simply citing provisions of an applicable treaty in the investor’s notice of arbitration – that is, by redressing a contractual claim as a treaty one.¹²⁶ This raises the question as to the discretion of

¹²⁰ *SGS v Paraguay* (n 18), [142].

¹²¹ *ibid.*

¹²² *ibid* [166].

¹²³ *ibid* [95].

¹²⁴ *MTD Equity v Chile* (n 112), [187].

¹²⁵ *EDF v Argentina* (n 115), [944].

¹²⁶ Cf CI Suarez Anzorena, ‘Multiplicity of Claims under BITs and the Argentine Case’ (2005) 2 TDM 20, at 24 describing this phenomenon as a “labelling game”.

the investor to characterize and present its claims as treaty claims; and conversely, as to the degree of scrutiny to be exercised by an investment tribunal in determining whether the claim as presented is indeed a treaty one already at the jurisdictional stage (for, obviously, the determination as to whether there truly has been a violation of the treaty will eventually be determined at the merits stage of the claim).

Investment tribunals have approached this question on the basis of a two-prong proposition.¹²⁷ On the one hand, it has generally been accepted that it is at the claimant's discretion to formulate its case as it sees fit, including by presenting its dispute as a treaty one.¹²⁸ On the other hand, it has been held that the mere assertion of the existence of a dispute under the treaty will not be sufficient to state a treaty claim, given that the test for jurisdiction is an objective one.¹²⁹ With a view to reconcile these considerations, most investment tribunals have considered it necessary, yet also sufficient, to ascertain whether the facts and legal contentions alleged by the claimant, if ultimately proven true, could give rise to a violation of the investment treaty.¹³⁰ Pursuant to this *prima facie* test – as such jurisdictional inquiry is commonly known¹³¹ – tribunals thus assessed whether the stated claims were both *legally* and *factually* adequate for jurisdictional purposes.¹³² Of course, the test being a *prima facie* one, the intensity of a tribunal's review has necessarily been a limited one. Insofar as the legal foundation of a claim is concerned, a tribunal needs not decide whether the claim *would* actually prevail as a matter of law if the factual allegations were proven, but only that it is *capable* of so prevailing.¹³³ Nor is a tribunal expected, in relation to the factual predicate of the claim, to determine at the jurisdictional stage that the facts which are relevant to the treaty claims have *conclusively* been proven.¹³⁴ Save for in exceptional circumstances,¹³⁵ the acts and omissions will instead be *taken as alleged* by the Claimant,

¹²⁷ On the approach to be followed in relation to contract claims potentially disguised as treaty claims, see in particular *SGS v Pakistan* (n 4), [145]; *SGS v Philippines (Jurisdiction)* (n 9), [157]; *Azurix Corp v The Argentine Republic* (n 72), [76]; *Siemens AG v The Argentine Republic* (n 72), [180]; *SGS v Paraguay* (n 18), [137].

¹²⁸ On this discretion, see in particular *Bayindir v Pakistan* (n 72), [167], where the position was taken that 'when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty. The very fact that the amount claimed under the treaty is the same as the amount that could be claimed (or was claimed) under the contract does not affect such self-standing right.'

¹²⁹ *El Paso Energy v Argentina* (n 11), [60]-[61]; *Pan American Energy v Argentina* (n 11), [50]-[51]. On the objective nature of the test, see HE Kjos, *Applicable Law in Investor-State Arbitration* (OUP, 2013), 109-10.

¹³⁰ Cases where this test was applied to claims arising from a contractual relationship include eg *Vivendi (Annulment)* (n 53), [112]; *Azurix Corp v The Argentine Republic* (n 72), [76]; *Impregilo v Pakistan* (n 25), [254]; *Bayindir v Pakistan* (n 72), [197]; *Siemens AG v The Argentine Republic* (n 72), [180]; *Salini v Jordan* (n 10), [151]; *BIVAC v Paraguay* (n 29), [112]-[113]. For an example of an early and more general application of this test, see in particular *United Parcel Service of America v Government of Canada (Award on Jurisdiction)* (ICSID Case No UNCT/02/1, 22 November 2002) [37].

¹³¹ See generally, A Sheppard, 'The Jurisdictional Threshold of a *Prima-Facie* case' in Muchlinski et al (eds), *The Oxford handbook of international investment law* (OUP, 2008), 932-961.

¹³² cf *Continental Casualty Company v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/03/9, 22 February 2006) [60ff], considering the object of the investigation to extend to whether the claim meets the jurisdictional requirements 'both as to the factual subject matter at issue, as to the legal norms referred to as applicable and having been allegedly breached, and as to the relief sought.'

¹³³ On the scope of the test, see generally *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* [1996] ICJ Rep 803 ('Oil Platforms'), Separate Opinion of Judge Rosalyn Higgins, [33]. For a discussion in the context of investment arbitration, see *SGS v Paraguay* (n 18), [51]-[52].

¹³⁴ See on this *SGS v Paraguay* (n 18), [44]-[58]. The standard applicable to the *prima facie* inquiry differs from the standard for findings of fact necessary to establish certain threshold jurisdictional requirements, such as the existence of a protected investment or the investor possessing the proper nationality, which must in contrast be proven by the claimant already at the jurisdictional stage. See *Inceysa v Salvador (Award)* (ICSID Case No ARB/03/26, 2 August 2006) [149]-[155]; and *Phoenix Action, Ltd. v The Czech Republic (Award)* (ICSID Case No. ARB/06/5, 15 April 2009), [61]-[62].

¹³⁵ See eg *SGS v Pakistan (Jurisdiction)* (n 4), [145] (not excluding the possibility 'that there may arise a situation where a tribunal may find it necessary at the very beginning to look behind the claimant's factual claims'). As to what such exceptional circumstances could be, see eg *Amco Asia* (n 41), [38], discussing the possibility for departing from the *prima*

while it will be left to the merits stage for the latter to prove those allegations. Of course, as noted by the Tribunal in *Joy Mining v. Egypt* (2004), this *prima facie* approach to jurisdictional decisions “must always yield to the specific circumstances of each case.”¹³⁶

Even though such *prima facie* test may not be a particularly demanding one, it has not prevented tribunals to occasionally reject certain treaty claims on the ground of them not being capable of giving rise to a treaty breach.¹³⁷ Furthermore, the test has allowed tribunals to ascertain already at the jurisdictional stage whether the “essential basis of the claim” is indeed the treaty, and not the contract. In *SGS v. Philippines* (2004), for example, the Tribunal found that what it was dealing with was “on its face a dispute about the amount of money owed under a contract”, which meant that some of the claims were inadmissible given that their basis was in the contract.¹³⁸ The Tribunal in *Joy Mining v. Egypt* (2004) even found that all claims were contractual in nature, and declined to exercise jurisdiction over them.¹³⁹ Then again, not all tribunals were equally zealous in assessing the basis of the claim already as early as at the jurisdictional stage.¹⁴⁰ And there are good reasons for them not to be. As explained in *Salini v. Jordan* (2004), the purpose of the *prima facie* test is “to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature; but to ensure equally that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate.”¹⁴¹ It may well be in the interest of judicial economy that investment tribunals scrutinize already at the jurisdictional stage whether a claimant has not dressed a contractual claim into a treaty one for the purpose of overriding the mandatory jurisdiction of a contractually-agreed forum. At the end of the day, however, any claims arising out of a contractual relationship not meeting the threshold of a treaty breach will eventually fail at the merits stage. As appositely observed by sole arbitrator Paulsson in *Pantechniki v. Albania*: “there comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty.”¹⁴²

9.3. Regulating Interactions in Cases of Jurisdictional Overlap

As discussed in the previous sections, investment tribunals have firmly and persistently refused to abrogate their jurisdiction over investment disputes by either adopting narrow interpretations of treaty provisions, or more commonly, by relying upon the differences in the respective causes of action. But such a conflict resolution technique can only be effective as long as the competence of the contractually agreed forum is indeed limited to contractual claims. The possibility however arises that the contractually designated forum could also have competence to pronounce upon violations of an applicable investment treaty, which would result in the treaty and the contract forum having

facie approach in the event of ‘manifest or obvious misdescription or error in the characterization of the dispute by the Claimants’; or *Continental Casualty v. Argentina* (n 132), [61], discussing the possibility of a respondent State supplying evidence showing that the case has no factual basis even at a preliminary scrutiny, in which case the Tribunal might dismiss the case if it found such evidence convincing at a summary exam.

¹³⁶ *Joy Mining v. Egypt* (n 11), [30].

¹³⁷ See eg *SGS v. Philippines* (n 9), [161], and *BIVAC v. Paraguay* (n 29), [106]-[117], both rejecting at the jurisdictional stage the claim that the non-payment of contractual sums was capable of amounting to an expropriation of contractual rights.

¹³⁸ *SGS v. Philippines* (n 9), [159], [163].

¹³⁹ *Joy Mining v. Egypt* (n 11), [71]-[82].

¹⁴⁰ See eg *Salini v. Jordan* (n 10), [160]-[166], where the Tribunal noted that the claimants had advanced little argument that the alleged breaches of the contract simultaneously constituted breaches of the treaty, and that the file submitted by the claimants was lacking, in terms of both the facts and the law, but nonetheless held that it must not rule out from the outset that the alleged facts, if established, might constitute breaches of the BIT.

¹⁴¹ *Salini v. Jordan* (n 10), [151].

¹⁴² *Pantechniki SA Contractors & Engineers (Greece) v. The Republic of Albania* (Award) (ICSID Case No ARB/07/21, 31 July 2009), [64].

concurrent jurisdiction over treaty claims. Although this possibility appears to have been implicitly accepted by some investment tribunals,¹⁴³ it has rarely been fully considered in practice.

One can envision three possible solutions to regulate interactions in the event of jurisdictional overlap: the investment tribunal declines jurisdiction over a claim that lies concurrently within the jurisdiction of the domestic court (1), the investment tribunal accepts jurisdiction over such claim in principle, but decline to exercise it due to the inadmissibility of a claim (2), the tribunal exercises jurisdiction notwithstanding the concurrent jurisdiction by the domestic court (3). All three solutions have so far been adopted in arbitral practice.

9.3.1. Denial of Jurisdiction

Lying on one side of the spectrum of conceivable solutions is the possibility that an investment tribunal pronounces itself without jurisdiction over the same claim over which a domestic court or similar forum enjoys exclusive jurisdiction.¹⁴⁴ This solution has been adopted in several cases where there was concurrency of jurisdiction in relation to contractual claims. The proposition that a treaty tribunal ought not exercise jurisdiction over pure contract claims where the contract in question contains a forum selection clause has already been made by the Annulment Committee in *Vivendi I*. Not only did the Committee state the principle that, where the fundamental basis of the claim is a treaty, the existence of such clause cannot operate as a bar to the application of the treaty standard, but also the converse principle that, where “the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract”.¹⁴⁵ In the circumstances of *Vivendi* case, of course, this statement was essentially *obiter*, as the Claimant was not asserting contractual claims, and the Committee only hinted at the possibility of a treaty tribunal having competence to decide such claims by virtue of a broadly-formulated dispute settlement clause in the applicable BIT.¹⁴⁶ However, relying on the Committee’s proposition, several tribunals subsequently pronounced themselves as lacking jurisdiction over claims that were subject to the exclusive jurisdiction of some other forum. The Tribunal in *Joy Mining v. Egypt* (2004), for example, declined for that reason jurisdiction over the investor’s claims in circumstances where all the claims were found to be contract-based claims, precisely on account of a contractual forum selection clause.¹⁴⁷ On the same basis, the Tribunals in *Saluka v. Czech Republic* (2004) and *Oxus Gold v. Republic of Uzbekistan* (2015) denied jurisdiction over some of the counterclaims based on

¹⁴³ See eg *Joy Mining v Egypt* (n 11), [89] (“There is no question here of either exclusive ICSID jurisdiction or of concurrent jurisdiction”); *Salini v Jordan* (n 10), [96] (“the Tribunal will note that the dispute settlement procedures provided for in the Contract could only cover claims based on breaches of the Contract. Those procedures cannot cover claims based on breaches of the BIT”); *Aguas del Tunari v Bolivia* (n 29), [111], where the Tribunal considered ‘as a threshold matter’ that for a contractual forum selection clause in a separate document to be in conflict with the treaty tribunal’s exercise of jurisdiction, ‘that document must both deal with the same matters and Parties and contain mandatory conflicting obligations’ and that only ‘if a true conflict exists, there then arises the question of what effect such a document has on the Tribunal’s jurisdiction’; or *BIVAC v Paraguay* (n 29), [127] (“The issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the courts of Asunción. The treaty issue is therefore not one for that forum”).

¹⁴⁴ This approach differs from the technique of interpreting away jurisdictional overlaps, to the extent that the tribunal denies jurisdiction in the event where such jurisdiction *prima facie*.

¹⁴⁵ *Vivendi (Annulment)* (n 53), [98]. The Committee’s statement of principle was qualified by the condition that the treaty in question did not otherwise provide (*ibid*, fn 69). This question will be considered in Chapter 10.

¹⁴⁶ *ibid* [55].

¹⁴⁷ *Joy Mining v Egypt* (n 11), [89]–[90]. Admittedly, there was some incongruity in the Tribunal’s reasoning as to whether it would actually have jurisdiction over pure contract claims in the absence of a forum selection clause. The Claimant, at any rate, relied on the treaty’s broadly-formulated dispute settlement clause (covering any legal dispute ‘concerning an investment’) in asserting claims based on the contract. The Tribunal declared itself without jurisdiction in the absence of a treaty-based claim, without actually addressing the specific language of the clause, or the more general question whether pure contract claims could at all be asserted before a treaty tribunal. *ibid* [68]–[82].

alleged breaches of Claimant's contractual obligations in circumstances where the contract in question contained its own mandatory dispute settlement provisions.¹⁴⁸ In addition, several other tribunals adopted the Committee's logic, even without explicitly referring to the *Vivendi* precedents. Thus, the Tribunal in *Toto v. Lebanon* (2009) declared itself without jurisdiction over contractual claims that had been asserted pursuant to the umbrella clause, given that those claims remained, in the view of the Tribunal, based upon the contract, governed by the law of the contract, and affected by the other provisions of the contract, including therefore by the contractual jurisdiction clause requiring contractual claims to be submitted exclusively to the Lebanese courts for settlement.¹⁴⁹ Similarly, the tribunals in *Link-Trading v. Moldova* and *İçkale v. Turkmenistan*, though not actually asked to decide purely contractual claims, expressly considered that their competence would not extend to such claims in view of mandatory dispute settlement provisions under the relevant contracts.¹⁵⁰

9.3.2. Inadmissibility of the Claim as a Bar to the Exercise of Jurisdiction

Another way to dealing with problems of jurisdictional overlap is to regulate them as a matter of admissibility, instead of jurisdiction.¹⁵¹ While concurrency of jurisdiction between investment tribunals and domestic courts is thus tolerated at the general level, jurisdictional conflicts are resolved at the level of a particular claim, either through the application of the principle of *lis pendence*,¹⁵² or by holding the particular claim generally inadmissible in circumstances where another forum is vested with exclusive jurisdiction over the same claim.

The application of the principle of *lis pendence*, which in essence precludes the pursuit of proceedings before an adjudicatory body if the same action is already pending before another forum, appears particularly suitable in circumstances where the treaty tribunal and domestic courts would both enjoy concurrent jurisdiction, as alternatives, over the same particular claim. Under such scenario, the jurisdictional conflict could then be resolved in favour of the forum first seized of the claim. In the event that this be the domestic court, the investment tribunal would then be required to decline to exercise jurisdiction that it would otherwise have over the particular claim – of course, provided that the claims presented before, respectively, the domestic courts and the investment tribunal meet the conditions of formal identity. Investment tribunals seemingly accepted the principle of *lis pendens* as a means for regulating jurisdictional conflicts in circumstances of concurrent jurisdiction, even if they never applied it in practice, as the requisite identity of actions had usually not been present in the relevant circumstances. In *Benvenuti & Bonfant v. Congo* (1980), the principle was thus considered in relation to the Respondents' demand

¹⁴⁸ *Saluka v The Czech Republic* (n 35) [53]-[58]; *Oxus Gold v Uzbekistan* (n 36) , [957]-[958].

¹⁴⁹ *Toto v Lebanon (Jurisdiction)* (n 72), 202.

¹⁵⁰ See eg *Link-Trading Joint Stock Company v Department for Customs Control of the Republic of Moldova (Final Award)* (UNCITRAL, 18 April 2002), [61] (considering to lack competence to determine contractual claims 'since said contracts create civil law relations and are governed by their own specific arbitration agreements between the parties thereto'; the Claimant had not formulated any claim based upon breach of contracts, even though the dispute-settlement provisions of the applicable US-Moldova BIT expressly covered disputes concerning 'investment agreements'); or *İçkale İnşaat Limited Şirketi v Turkmenistan (Award)* (ICSID Case No ARB/10/24, 8 March 2016) [306] (merely noting that its jurisdiction was limited to claims arising under the BIT and did not extend to claims arising under the contracts; the applicable treaty provided for arbitration with respect to disputes arising 'in connection with' an investment, but each contract contained a dispute resolution clause referring all disputes arising thereunder to the Arbitration Court of Turkmenistan).

¹⁵¹ A distinction is made here between the existence of adjudicative power – which is a question of jurisdiction – and the exercise of adjudicative power – which is a question of admissibility. On this distinction, see in particular Z Douglas, *The International Law of Investment Claims* (CUP 2009) [297], [306]-[312]; and J Paulsson, 'Jurisdiction and Admissibility' in G Akse & R Briner, *Global reflections on international law, commerce and dispute resolution* (ICC, 2005), 601-617.

¹⁵² *Lis pendence* equally operates at the level of admissibility. See eg *Sanum Investments Limited v Lao People's Democratic Republic (Award on Jurisdiction)* (UNCITRAL, PCA Case No 2013-13, 13 December 2013) [362], [366] (suggesting that *lis pendens* is an obstacle to admission of the claims).

that the ICSID Tribunal relinquish the case in circumstances where a contractual suit that had already been pending before the Revolutionary Court of Brazzaville. The Tribunal declared that the pendency of the case was not in order, since the suits pending before the two bodies involved different parties.¹⁵³ In *SGS v. Pakistan* (2003), on the other hand, the application of the *lis pendens* doctrine was found to have “no application” because the contractual dispute settlement forum (before which the Respondent had already brought claims for breaches of contract) had no competence to pronounce over treaty claims.¹⁵⁴ At least in principle, therefore, these holdings suggest that in case of concurrent jurisdiction over the same kind of claims, the doctrine of *lis pendens* could be applied for the purposes of resolving the jurisdictional conflict.

On the other hand, a somewhat different approach has been followed in some cases where the treaty tribunal and domestic courts were held to possess concurrent jurisdiction over the same type of claims, but where the jurisdiction over *specific* claims was eventually found to be vested exclusively with the domestic courts or another forum by virtue of contractual stipulations to that effect. A number of treaty tribunals considered that the presence of such forum selection clauses would not divest them of jurisdiction over such claims; instead, it would act as a bar to the exercise of that jurisdiction as long as the contractually-agreed forum has not been resorted to first, with the possibility of such jurisdiction being revived in the exceptional circumstances that the contractual forum is unavailable, or fails to decide the claim in accordance with the standards prescribed by international law to the administration of justice.

The prime example of such an approach is the jurisdictional decision in *SGS v. Philippines*, where the Tribunal first accepted, as a matter of principle, jurisdiction over claims concerning the purported refusal on the part of the Philippines to pay the amount due under SGS’ concession contract, but then declared such claims inadmissible insofar as the contract itself designated the Regional Trial Courts of Makati or Manila as the forum with exclusive jurisdiction to hear “[a]ll actions concerning disputes in connection with the obligations of either party” to the contract. The Tribunal’s approach was premised on the idea that both the claim that SGS advanced under the BIT’s broadly-formulated dispute settlement clause, and the one advanced pursuant to the umbrella clause had essentially a contractual basis, in the sense that they could not be determined independently from contractual issues.¹⁵⁵ In deciding those claims, the Tribunal would therefore be exercising jurisdiction over matters that were, by virtue of contractual stipulations, within the exclusive competence of the Philippines’ courts. This gave rise to a jurisdictional conflict proper, which the Tribunal resolved by giving way to domestic courts.

The Tribunal’s logic was essentially as follows. In accordance with Philippine law and with general principle, a contractual stipulation to accept the exclusive jurisdiction of a specific forum had to be treated as effective and binding on the litigating parties, as well as on the adjudicatory body involved in proceedings between those parties, unless overridden by another valid provision, either under domestic law (pursuant to matters of public policy) or under a treaty.¹⁵⁶ Insofar as the latter possibility was concerned, neither the BIT nor the ICSID Convention were considered to allow the investors to pursue contractual claims in disregard of the contractually chosen forum. The dispute-settlement provision of the BIT, on its part, was found to be too broadly formulated to be presumed to override specific provisions of particular contracts, freely negotiated between contractual parties. Furthermore, the BIT itself had the character of a framework treaty, presumably intended by the State Parties to support and supplement, rather than override or replace, actually negotiated contracts.¹⁵⁷ Neither could the ICSID Convention be considered as having such effects.

¹⁵³ *S.A.R.L. Bovenuti & Bonfant v. People's Republic of the Congo (Award)* (ICSID Case No ARB/77/2, 8 August 1980) [1.14].

¹⁵⁴ *SGS v Pakistan* (n 4), [182].

¹⁵⁵ *SGS v Philippines* (n 9), [156]-[162], [170].

¹⁵⁶ *ibid* [138].

¹⁵⁷ *ibid* [141]-[143].

The stipulations in Article 26 thereof, that consent to ICSID Arbitration shall “be deemed consent to such arbitration to the exclusion of any other remedy”, was deemed not to be a mandatory rule, but merely a rule of interpretation, which in itself provided for the possibility of being subject to modification by the parties.¹⁵⁸ At the same time, the applicable exclusive jurisdiction clause could not have deprived the Tribunal of its jurisdiction over the claims altogether, since treaty jurisdiction could in principle not be abrogated by contract.¹⁵⁹ Hence, the question for the Tribunal was not whether it had jurisdiction, but whether it should exercise it over a claim that was supposed to be decided exclusively by another forum. The Tribunal concluded that it was prevented from doing so, invoking the principle that “a party to a contract cannot claim on that contract without itself complying with it”.¹⁶⁰

This impediment being a matter of admissibility, rather than of jurisdiction, the Tribunal considered there was a degree of flexibility in the way such impediment was to be applied.¹⁶¹ In the first place, this meant that the investor would not be precluded from bringing a claim under the umbrella clause if prevented from complying with the contractual exclusive jurisdiction clause for *force majeure* (i.e., in the event that the local courts were closed to it due to armed conflict), or another good reason.¹⁶² Second, the Tribunal did not need to dismiss the claim altogether, but could decide, and in fact did decide, to stay the proceedings pending determination of the amount payable under the contract, either by agreement between the parties or by the Philippine courts.¹⁶³ This solution was thus an attempt to reconcile the principle of effectiveness of treaty jurisdiction and the principle of respect for the integrity of the contractual dispute settlement mechanism. The approach has generally not been met with approval. As an influential commentator observed, the stay of proceedings resulted “in the BIT tribunal having jurisdiction over an empty shell and depriving the BIT dispute resolution of any meaning”,¹⁶⁴ though, this criticism later proved to be somewhat exaggerated.¹⁶⁵

The approach was subsequently followed in *BIVAC v. Paraguay* (2009); the reasoning supporting it differed considerably, however. In contrast to the Tribunal in *SGS v. Philippines*, the *BIVAC* Tribunal considered that the applicable umbrella clause did have the effect of importing the obligations under the contract into the BIT. And not just the obligation of Paraguay to make payment of invoices in accordance with the requirements of the Contract, but *all* of the obligations under the contract, including those flowing from the contractual forum selection clause, which in the circumstances of the case, vested the Courts of the City of Asunción with exclusive jurisdiction over “[a]ny conflict, controversy or claim which arises from or is produced in relation to” the contract.¹⁶⁶ The rationale for this was the same as that guiding the Tribunal in *SGS v. Philippines*, namely that:

¹⁵⁸ *ibid* [144]-[148].

¹⁵⁹ *ibid* [154].

¹⁶⁰ *ibid*. See also [155] (concluding that ‘SGS should not be able to approbate and reprobate in respect of the same contract if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim’).

¹⁶¹ *ibid* [154], [170].

¹⁶² *ibid*.

¹⁶³ *ibid* [171]-[175].

¹⁶⁴ E Gaillard, ‘Investment treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered’ in T Weiler (ed), *International investment law and arbitration: Leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May Ltd 2005), 334.

¹⁶⁵ After all, the proceedings in *SGS v Philippines* were not stayed indefinitely, but were resumed in 2007 after the unresolved questions concerning the quantum of the contractual amount due had been sufficiently clarified. See *SGS Société Générale de Surveillance SA v Republic of the Philippines (Order of the Tribunal on Further Proceedings)* (ICSID Case No ARB/02/6, 17 December 2007).

¹⁶⁶ *BIVAC v Paraguay* (n 29), [142]/[147].

“having regard to the fundamental principle that the autonomy and will of the parties is to be respected, is that the parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an ‘umbrella clause’ provision [...] and to ignore others. [...] To allow BIVAC to choose those obligations it wished to incorporate into the BIT and to ignore others would seriously and negatively undermine contractual autonomy. If the parties to a contract have freely entered into commitments, they must respect those commitments, and they are entitled to expect that others, including international courts and tribunals, also respect them, unless there are powerful reasons for not doing so.”¹⁶⁷

The Tribunal was, of course, careful not to allow that this full scale importation to be interpreted as implying that the investor had also become party to the treaty. The process remained a one-sided one; the umbrella clause did not have the effect of importing into the treaty SGS’s obligation to submit contractual disputes exclusively to the designated domestic courts of Paraguay. Rather, what the clause did import was Paraguay’s “obligation (implicit if nothing else) to ensure that the Tribunals of the City of Asunción were available to resolve” any contractual dispute.¹⁶⁸ In other words, the obligations thus imported for Paraguay were “to pay its invoices in a timely way and if it failed to do so to allow any contractual dispute to go to the Tribunals of the City of Asunción.”¹⁶⁹ It was this latter obligation that essentially prevented the Claimant to invoke the umbrella clause.

In view of Paraguay’s obligation to make domestic courts available to resolve contractual disputes, the *BIVAC* Tribunal conceded that the contractual forum selection clause could be overridden in the exceptional circumstances where the contractual forum is unavailable.¹⁷⁰ The Tribunal also hinted at the possibility that there may be other “powerful reasons” that could justify it not to respect the contractual commitments entered into between SGS and Paraguay, without however identifying what those reasons could be.¹⁷¹ Judging from the Tribunal’s analysis, an important element in this respect may be the language and the circumstances through which the selection of the contractual forum had been effected. In that respect, the Tribunal appeared to lay some emphasis on the fact that the exclusive jurisdiction clause had been voluntarily accepted, that contract had been executed almost two years after the BIT’s entry into force, and that presumably aware of the existence of the BIT, the contracting parties nonetheless chose to include in the contract such a capaciously-formulated dispute settlement provision.¹⁷² In the Tribunal’s view, this was “not without relevance: it indicates, at the very least, that the parties to the Contract, including BIVAC, intended the exclusive contractual jurisdiction of the Tribunals of the City of Asunción to be absolute and without exception, and for it to mean what it says.”¹⁷³

Having concluded that the claim under the umbrella clause was inadmissible, the Tribunal was initially inclined to dismiss the claim altogether; yet, in the absence of arguments of the litigating parties on the matter, decided to join to the merits the question whether the claim should be dismissed or whether the exercise of jurisdiction should be stayed indefinitely or for some other period of time or until some other circumstances pertain.¹⁷⁴ In a subsequent decision, the Tribunal gave BIVAC three months time to decide to pursue its claims before the domestic courts, noting

¹⁶⁷ *ibid* [148].

¹⁶⁸ *ibid* [142].

¹⁶⁹ *ibid* [148].

¹⁷⁰ *ibid* [159(4)].

¹⁷¹ *ibid* [148].

¹⁷² *ibid* [145]-[146].

¹⁷³ *ibid* [146].

¹⁷⁴ *ibid* [160]-[161].

that in the event that BIVAC decides to do so and have its claim ascertained by the domestic courts, the claim under the umbrella clause could again become admissible in the event that the Respondent would somehow disregard the decisions eventually rendered by domestic courts. But in the event that BIVAC was not to file such claim, the Tribunal was to render its Award and terminate the proceedings.¹⁷⁵ In deciding so, the Tribunal was conscious that this would entail additional delays for the Claimant in obtaining relief. But such delays were entirely the responsibility of the Claimant – for, it was the latter that agreed to the exclusive forum selection clause when entering the contract, and the decision not to pursue claims in that forum “was taken by the Claimant and by it alone, without any inducement, and on its own account for ‘commercial reasons.’”¹⁷⁶ BIVAC’s claims were apparently further pursued before domestic courts, but the outcome of those procedures remains unknown.

The arguments of the *SGS v. Philippines* and the *BIVAC* tribunals were later endorsed in *Bosh v. Ukraine* (2012). Though merely as *obiter*, the *Bosh* Tribunal took the position that, in order to present a contractual claim under the umbrella clause in the BIT, the claimant in question must in principle comply with any dispute settlement provision included in that contract. However, the Tribunal conceded that the question whether the Claimants can submit contractual claims under the umbrella clause will also depend on an analysis of the contractual forum selection provision in question.¹⁷⁷ In the circumstances of the case, the relevant contractual stipulation was found to be an exclusive jurisdiction clause. The Tribunal therefore indicated that, were it necessary to decide this issue, it would have required that Claimants first submit their claims under the contract for settlement to the Ukrainian courts, in accordance with the contractual jurisdictional clause.¹⁷⁸

9.3.3. Assertion of Jurisdiction Irrespective of the Jurisdiction of the Domestic Forum

Lying on the opposite side of the spectrum of conceivable solutions is the least deferential approach: the assertion of jurisdiction on the part of the investment tribunal over a specific claim, regardless of any contractual or other stipulations (potentially) vesting a domestic judicial or arbitral forum with exclusive jurisdiction over the same claim.

One comes across this type of solution already in the first case ever registered with the ICSID Centre, the *Holiday Inns v. Morocco* (1974).¹⁷⁹ In the circumstances of that case, the question of jurisdictional competition arose as disputes arising out of the main investment contract were to be submitted to ICSID arbitration, whereas the separate loan contracts, through which the financing for the investment was provided, contained standard choice-of-forum clauses in favour of Moroccan courts. The Respondent therefore argued that the ICSID Tribunal was barred from hearing the matter until the Moroccan courts decided the issues concerning the loan contracts. Yet, the ICSID Tribunal disagreed, holding that it could consider certain fundamental provisions of the loan contracts, regardless of the choice-of-forum clauses. This followed, according to the Tribunal, from the principle of “the general unity of an investment operation” and the principle that “international proceedings in principle have primacy over purely internal proceedings”. This was not to say that certain aspects of the loan contracts “affecting the indirect or secondary aspects of the investment” could not be “isolated” and thus properly fall within the jurisdiction of the Moroccan courts. But in the event that those courts, “on the initiative of one of the parties

¹⁷⁵ *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay (Further Decision on Objections to Jurisdiction)* (ICSID Case No ARB/07/9, 9 October 2012) [290], [294].

¹⁷⁶ *ibid* [291].

¹⁷⁷ *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine (Award)* (ICSID Case No ARB/08/11, 25 October 2012) [250]-[254].

¹⁷⁸ *ibid* [257]-[258].

¹⁷⁹ *Holiday Inns S.A. and others v. Morocco (Decision on Jurisdiction)* (ICSID Case No. ARB/72/1, 12 May 1974).

to a loan contract, be faced with questions which the Arbitral Tribunal for its part would equally be called upon to decide”, the courts were to “refrain from making decisions until the Arbitral Tribunal has decided these questions or, if the Tribunal had already decided them, the Moroccan tribunals should follow its opinion. Any other solution would, or might, put in issue the responsibility of the Moroccan State and would endanger the rule that international proceedings prevail over internal proceedings.”¹⁸⁰

The argument of supremacy of the kind raised in the *Holiday Inns* one was not a frequently invoked one. Instead, especially in the context of ICSID arbitrations, it was more common for tribunals to rely on the argument of exclusivity of the international remedy when dealing with situations of potential concurrency of jurisdictions. In *CSOB v. Slovakia* (2000), the situation was such that the ICSID Tribunal’s jurisdiction was limited to claims arising out of a consolidation agreement, but to decide such claims, the Tribunal would have had to consider certain ancillary matters arising out of related loans agreements, which were otherwise subject to the jurisdiction of the competent local courts. While rejecting the proposition that its jurisdiction could extend over the latter agreements, the Tribunal held that its competence “must include” the determination of any ancillary matters. If the determination of those matters were to be left to the national courts, the Tribunal would have been deprived of its jurisdiction over the consolidation agreement. But given that, pursuant to Article 26 of the ICSID Convention, the Tribunal’s competence over the latter was exclusive of any other remedy, Slovak national courts were precluded from retaining jurisdiction over issues arising under this agreement.¹⁸¹

Granted, the argument of the exclusive remedy was previously also invoked by the Tribunal in *Lanco v. Argentina* (1998). In the circumstances of that case, however, the argument was employed in combination with another argumentative device: as a preliminary matter, the Tribunal refused to treat the jurisdiction of the domestic forum as an exclusive one, by denouncing that the contractual stipulation in effect amounted to a selection of an exclusive forum. In the view of the ICSID Tribunal, the forum selection clause contained in Claimant’s concession contract, which referred the contracting parties “for all purposes derived from the agreement” to the jurisdiction of the Federal Contentious-Administrative Tribunals of Buenos Aires, was not deemed capable of amounting to a previously agreed dispute settlement procedure, since the administrative jurisdiction of the courts could purportedly not be selected or waived under Argentinean law by mutual agreement.¹⁸² Resort to such an argumentative device was not unusual,¹⁸³ and though subsequently criticized by other investment tribunals,¹⁸⁴ it has seemingly not entirely lost its appeal. In *Tulip Inn v. Turkey* (2014), the Tribunal was prepared to uphold a similar argument when taking the view that the applicable contractual dispute resolution clause, though providing that Turkish courts “shall have jurisdiction in the resolution of all disputes that might arise from” the contract, did not expressly state that the jurisdiction of the Turkish courts shall be to the exclusion of any other forum.¹⁸⁵

¹⁸⁰ Passages reproduced in P Lalive, ‘The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*) - Some Legal Problems’ (1981) 51 *Brit.Yb.Int’l L* 123, at 159-160. Professor Lalive praised the outcome and considered that any other solution “would have jeopardized the credibility of international arbitration and the future of the whole ICSID system in particular” *ibid*, at 160.

¹⁸¹ *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic (Decision of the Tribunal on Respondent’s Further and Partial Objection to Jurisdiction)* (ICSID Case No ARB/97/4, 1 December 2000) [35].

¹⁸² *Lanco International Inc v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/97/6, 8 December 1998) [26].

¹⁸³ See eg *Ford Aerospace & Communications Corporation, Aeronutronic Overseas Services Inc. v. Air Force of the Islamic Republic of Iran et al* (1982) 1 Iran-USCTR 268; *Zokor International Inc. v. Iran & Societe du Chemin de Fer Urbain de Teheran et de sa Banlieue* (1982) 1 Iran-USCTR 271; or *E-Systems, Inc. v. Iran & Bank Mellī* (1983) 2 Iran-USCTR 51.

¹⁸⁴ cf. *SGS v Philippines* (n 9), [138].

¹⁸⁵ *Tulip v Turkey* (n 26), [362].

Finally, another way to justify the refusal to give effect to contractual forum selection clauses has been by considering the exclusivity of the forum as superseded as a result of the availability of dispute settlement procedures under an investment treaty. Professing such an approach, for example, was the dissenting arbitrator in *SGS v. Philippines*, Antonio Crivellaro, which saw little reason for qualifying the exercise of the Tribunal's jurisdiction pursuant to the umbrella clause as a result of the presence of a contractually agreed forum. According to Arbitrator Crivellaro, in accepting the exclusive jurisdiction clause in the contract, the investor could not have irrevocably waived its right to refer contractual disputes to the alternative fora offered in the BIT, since that treaty came only in force eight years after the contract.¹⁸⁶ With the treaty's entry into force, the contractually stipulated forum merely ceased to be an "exclusive" forum from the investor's perspective, meaning that the treaty forum and the contractual forum henceforth "survived" and "coexisted" alongside each other.¹⁸⁷ Underpinning Crivellaro's conclusions was, of course, also the policy argument concerning the role of investment treaties. Since, in his view, the most significant advantage granted by BITs to foreign investors was precisely to provide alternative fora for resolving their disputes with the host States, their practical significance would seriously diminish if that particular advantage was put into doubt or denied.¹⁸⁸ The same policy argument was later picked on by the Tribunal in *SGS v. Paraguay*, in explaining how it would not have hesitated to exercise jurisdiction over pure contract disputes, had it been asked to do so, in spite of the contractual forum selection clause that was applicable to Claimant's concession contract in that case. Taking note of the broad language of the treaty's dispute resolution provisions, which granted it jurisdiction over "disputes with respect to investments",¹⁸⁹ the Tribunal expressed the opinion that "deference to a contractual forum selection clause would significantly cut back Article 9's scope" and "effectively negate Article 9's open-ended language, reducing it to a mechanism solely for resolving claims of Treaty breach."¹⁹⁰ Since the contracting States could have stipulated otherwise, "[t]heir choice of language giving a broader scope to the dispute resolution articles of the BIT should not be so readily disregarded."¹⁹¹ Furthermore, insofar as the choice-of-law clause in Article 9(6) of the BIT contemplated the application of "the terms of any particular agreement that may have been concluded with respect to the investment", the Tribunal concluded that the contracting parties evidently had no reservations that a tribunal constituted under the treaty would engage in the resolution of contract claims. Supporting such conclusion was then also the argument of effectiveness. According to the Tribunal, "a decision to exclude as inadmissible all [...] contract claims that are directly advanced under Article 9 (unless the contract lacks a forum selection clause altogether) eliminates a large swath of claims for which this clause of Article 9(6) is applicable. Given Article 9(6)'s readiness to interpret and apply contracts to disputes, there is little reason to think that the State parties were expecting to see it so underutilized."¹⁹²

* * *

An examination of the practice thus reveals a diversity of approaches that have thus far been adopted when dealing with situations of actual jurisdictional overlap. Some of these have been more deferential towards domestic courts than others. The question of deference depended on the importance attributed by arbitrators to the will of the contracting parties, but even more significantly perhaps, on the views that the arbitrators maintained as to their own mandate – i.e. the role that investment arbitration was to play in providing an alternative forum to the

¹⁸⁶ *SGS v Philippines* (Dissenting Opinion of Antonio Crivellaro, 29 January 2004) (n 9), [2].

¹⁸⁷ *ibid* [4].

¹⁸⁸ *ibid* [5]–[6].

¹⁸⁹ Switzerland-Paraguay BIT, art 9.

¹⁹⁰ *SGS v Paraguay (Jurisdiction)* (n 18), [183]. Footnotes omitted.

¹⁹¹ *ibid*.

¹⁹² *Ibid* [184].

resolution of investment disputes. All in all, one must not lose sight of the fact that in the great majority of cases, investment tribunals did not renounce their own jurisdiction altogether. For, even in circumstances where they declined to exercise jurisdiction over claims that were, or could have been, concurrently brought before domestic courts, such renouncement only concerned pure contract claims or counterclaims, but not their jurisdiction over treaty claims as such.

9.4. Concluding Observations

Looking at the general attitude adopted by investment tribunals in cases where a challenge to their adjudicatory authority was mounted from the side of domestic courts, one is able to discern a two-fold tendency. On the one hand, the tendency to eschew direct competition with domestic courts by finding ways to avoid formal jurisdictional overlap; and on the other hand, a predisposition towards solutions that allowed tribunals to assert jurisdictional authority over disputes involving the investor and the host State. Such conclusions may, admittedly, rest on a case-to-case analysis, but the investment tribunals' general disinclination towards accepting potential limitations on their authority or otherwise exercising restraint due to the role of domestic courts has also been confirmed by others empirically.¹⁹³

Being primarily concerned with the repertoire of argumentative and analytical techniques deployed by arbitrators themselves, the chapter identified two broad strategies that were adopted in dealing with jurisdictional competition from domestic courts. In the first place, it discussed the practice of restrictively interpreting and/or applying the pertinent jurisdiction-conferring instruments with a view to removing potential jurisdictional overlaps between domestic and international remedies, actual or potential. Examples included the tribunals' approach to the interpretation of umbrella clauses and dispute settlement clauses in the applicable treaty, or the dispute settlement clauses in pertinent contracts, as well as the tribunals' general approach towards counterclaims. In reality, of course, whilst effective as a way to avoiding problems of jurisdictional overlap, the deployment of this technique did not result in investment tribunals' relinquishing jurisdiction over the dispute between the host State and the investor altogether. What tribunals were willing to relinquish was merely the authority to deal with issues that were otherwise primarily governed by domestic law.

As noted in this chapter, however, the primary means of dealing with the problem of such jurisdictional competition has been through the technique of claim splitting. By building on the premise that a dispute grounded in the same set of acts can give rise to parallel, but mutually independent claims – one the one hand, those grounded in a contract or domestic law, and on the other hand, those grounded in a treaty – investment tribunals simply conceived themselves as operating at a level different than that of domestic courts. The fact that such courts could equally be competent to adjudicate upon disputes arising out of the same underlying facts was thereby irrelevant. As organs of the host State, domestic courts were namely taken to apply standards provided for in domestic law, which were supposed to be materially not the same as the international standards applied by investment tribunals. Despite its obvious artificiality, the conceptual distinction between contract and treaty claims provided in practice an attractive way for dealing with the problem of jurisdictional competition between domestic courts and investment tribunals. Not the least because it provided a convenient way for tribunals to assert their authority over investment disputes, while supposedly respecting and maintaining the integrity of potentially applicable domestic adjudicatory procedures. As the following chapters will further demonstrate, the distinction between contract and treaty claims has in fact become

¹⁹³ See G Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP, 2013), at 125-156.

the dominant approach for regulating most forms of jurisdictional interactions between domestic courts and investment tribunals.

Reliance on the conceptual distinction between contract and treaty claims would obviously not have been conceivable was it not for the internationalization of investment protection standards, which enabled investment tribunals to emancipate themselves from the normative reach of domestic law, and thus the adjudicatory scope of domestic courts. This substantive shift – coupled with the functional one, which allowed investor-State arbitration to establish itself as an effective alternative to domestic litigation – provided the means for investment tribunals to assert themselves as unequal – indeed, as superior – competitors in jurisdictional interactions with domestic courts.

10. REGULATING INTERACTIONS THROUGH SPECIFIC TREATY PROVISIONS

Apart from leaving regulation to investment tribunals themselves, guidance on how to deal with competing claims to adjudicatory authority can also be given in the very instrument that governs the tribunals' jurisdiction – nowadays most frequently the relevant investment treaty.¹ Admittedly, the ICSID Convention itself provides some guidance in this respect, by setting out in Article 26 a presumption that consent to ICSID arbitration operates “to the exclusion of any other remedy”. The exclusive remedy rule, however, is merely a presumption that applies “unless otherwise stated”.² Building on this exception, many investment treaties instead proceed to regulate more specifically the relationship between proceedings commenced before domestic courts (or other contractually-agreed fora) and those before international arbitral tribunals.

As the present chapter intends to demonstrate, there are several ways in which the relationship between domestic and international remedies can be regulated in an investment treaty (10.1.). Some can be more effective than others. Two types of the most frequently applied provisions – irreversible choice of forum clauses, and clauses imposing local litigation requirements – have thus far not proven particularly successful in that respect. While the effects of the former have usually been constrained through the application of the contract claim/treaty claim distinction and the reliance on the triple identity test (10.2), the latter have been rendered meaningless on account of most-favoured-nation provisions and reliance upon the futility exception (10.3.). In other words, even where the applicable treaty envisioned a role to be played by domestic courts in the resolution of investment disputes, investment tribunals employed a variety of devices that allowed them nonetheless to assume jurisdictional authority over disputes involving the investor and the host State. Notwithstanding treaty stipulations, investment tribunals thus did not perceive domestic courts as equal competitors.

10.1. Treaty Provisions Regulating the Relationship between Domestic and International Remedies

One would be mistaken to think that investment treaties invariably envision investment arbitration as a sole means for resolving investment disputes. On the contrary, current treaty language frequently reflects a compromise between the interests of capital-importing States, which often insist on some role to be left for their own judiciaries, and those of the capital-exporting States, which would rather prefer that investors be offered the possibility of unhindered recourse to investor-State arbitration.³ The compromise between these opposing preferences can take the form of provisions offering domestic courts as an alternative to

¹ The relationship between different dispute settlement mechanisms, however, can likewise be regulated in domestic foreign investment codes. See eg art 25 of Mongolia's Foreign Investment Law, which was applied in *Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v The Government of Mongolia (Decision on Jurisdiction)* (UNCITRAL, 25 July 2012) [432]-[438].

² On the issue of presumption, see eg *Lanco International Inc v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/97/6, 8 December 1998) [36]-[38].

³ On the policy clashes between capital-exporting and capital-importing countries, see eg *Maffezini v Spain (Decision on Objections to Jurisdiction)* (ICSID Case No ARB/97/7, 25 January 2000) [57]. On the specific policy of Argentina in relation to the mandatory litigation periods, see also Explanatory Memorandum on the Netherlands Argentina BIT, Toelichtende Nota, Staten-Generaal, Vergaderjaar 1992-1993, 23126 (R 1469), nrs 267a en 1, at 4.

investment arbitration, but also the form of stipulations conditioning recourse to arbitration with some form of prior recourse to domestic judicial procedures.

10.1.1. Choice-of-Forum Provisions

Where domestic courts are thus foreseen as an alternative forum for the resolution of investment-related disputes, this creates potential for parallel litigation, with many of the problems that this brings with it: the possibility of conflicting legal outcomes, the risk of forum shopping, and the prospects of double recovery, to name just a few. Many BITs therefore contain stipulations aimed at preventing duplicative proceedings, and specifically, at precluding investors from having two bites of the same cherry; that is, re-litigating the same dispute before an investment tribunal in the event that it is not satisfied with the outcome of the litigation in the judicial system of the host State, or *vice-versa*. Such provisions can come in a variety of forms.

10.1.1.1. Fork-in-the-Road Clauses

Most dominant⁴ among the currently existing BITs are provisions requiring investors to opt for either litigating investment disputes in domestic courts of the host State, or bringing them to (one or more types of) international arbitration, whereby the investors' choice, once made, is deemed final and operating at the exclusion of the other remedies.⁵ Given the irrevocability of the choice, these provisions are commonly known as “fork-in-the-road” clauses.⁶

10.1.1.2. Reversible Choice-of-Forum Provisions

Not all fork-in-the-road clauses are necessarily irreversible ones. In some BITs, for example, the choice for the domestic judicial route remains revocable as long as no final decision has been rendered by the domestic forum.⁷ Sometimes, the possibility of reversal is thereby subject to the condition that the investor desists from any further or subsequent pursuit of local remedies.⁸ In other BITs, recourse to arbitration remains possible even after a decision has been rendered by domestic courts, in the event that such decision is not deemed to be in conformity with international law.⁹ Then again, in other BITs, the choice for the domestic judicial route remains reversible if no final decision has been rendered by the domestic forum within a prescribed period of time, such as 18 or 36 months.¹⁰

⁴ More than a third of BITs concluded globally after 2000 contains provisions stipulating the finality of a choice for a particular dispute settlement mechanism, and an additional fifth of such BITs contains provisions stipulating the finality of a choice when such choice has been made in favour of domestic courts. See J Pohl, K Mashigo and A Nohen, ‘Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey’, *OECD Working Papers on International Investment*, 2012/02 (OECD Publishing, 2012), at 12-13.

⁵ An often invoked provision of this kind can be found in art 7, US–Argentina BIT, which provides in para 2 that the investor ‘may choose to submit the dispute for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) [to treaty arbitration] in accordance with the terms of paragraph 3’, while in para 3(a) it stipulates that resort to treaty arbitration can only be made ‘[p]rovided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b)’.

⁶ See on this C Schreuer, ‘Travelling the BIT route: Of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 *J World Investment & Trade* 231, 240.

⁷ See eg art 13, Austria–Lebanon BIT (2001); or art 12(3), Gambia–Spain BIT (2008).

⁸ See eg art 11(3), Costa Rica–Spain BIT (1997).

⁹ See eg art 8(2), France–Uruguay BIT (1993).

¹⁰ See eg art 9(3), BLEU–Chile BIT (1992); or art 9(5), Austria–Chile BIT (1997).

10.1.1.3. No U-Turn Clauses

A particular variation of reversible choice-of-forum provisions are those that allow the investor to commence arbitration under an investment treaty on the condition that it discontinues any pending proceedings regarding the dispute in the domestic courts, as well as waives its right to commence such proceedings subsequent to investment arbitration.¹¹ This type of clauses differs from fork-in-the-road provisions, in that the investor's resort to domestic courts is without prejudice to eventual recourse to international remedies.¹² Hence, they are sometimes referred to as "no u-turn clauses". While the use of this treaty device was more common in the treaty-drafting practice of North American states, such clauses have recently become the preferred method for regulate the relationship between investment arbitration and domestic courts in EU agreements.¹³

10.1.1.4. Provisions Relating to Previously Agreed Contractual Remedies

Finally, some investment treaties contain specific stipulations regarding "previously agreed" contractual dispute settlement procedures, by either offering treaty-based arbitration as an alternative to existing contractually-agreed procedures,¹⁴ or by excluding such procedures from the ambit of the treaty-based tribunal.¹⁵ Such provisions remain the exception, rather than the rule.

10.1.2. Sequencing Clauses

Instead of compelling the investor to opt for either domestic judicial procedures or international arbitration, investment treaties may instead envision that both procedures can be used in the event of an investment dispute – sometimes mandating recourse to the local judicial forum as a condition precedent to arbitration; other times merely regulating the sequence in which resort to each forum is made so as to avoid concurrent proceedings.

10.1.2.1. Mandatory Local Litigation Requirements

Though provisions requiring complete exhaustion of local judicial remedies remain rather exceptional ones,¹⁶ it is not uncommon for investment treaties to require the pursuit of domestic procedures for a defined period of time (such as 18 months in the case of the most commonly applied clauses) before resort can be made to investor-State arbitration. This can include

¹¹ The best-known example is art 1121 of the NAFTA, which allows a disputing investor and/or an enterprise it owns or controls to submit a NAFTA claim to arbitration only if they "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 [i.e. concerning the substantive obligations under Chapter 11 of the NAFTA]."

¹² Art 1121 of the NAFTA is specific in this regard, in that it does not only permit recourse to domestic courts prior to bringing a NAFTA claim, but allows domestic proceedings also in parallel to the NAFTA claim to the extent that these relate to 'proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages'.

¹³ See eg art 8.22(1), CETA; or art 9.17(1), EU–Singapore FTA.

¹⁴ See eg art 7, U.S.–Argentina BIT, which provides that the investor has the option of submitting an investment dispute (the latter being defined broadly as including disputes arising out of, or relating to, a contract between the State and the investor) to either domestic courts, to any previously agreed dispute-settlement procedure, or to international arbitration in accordance with the BIT.

¹⁵ See eg article 9(2), Italy–Jordan BIT, which provides that "[i]n case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply."

¹⁶ But see eg art 8(2), Albania–Lithuania BIT (2007); art 13, Australia–Poland BIT (1991) (for all treaty claims other than those for expropriation); or art 9(3)(b), China–Malta BIT (2009) (with respect to investors in Malta).

procedures of an administrative nature,¹⁷ but it can also entail procedures before local courts. Especially under the BITs entered into with certain Latin American States (which, in line with the Calvo doctrine, have long resisted arbitration as a means for settling disputes with foreign investors), recourse to international arbitration is thus only allowed if no decision has been rendered within the prescribed period, or the dispute persists after such period despite the domestic judicial decision having been rendered¹⁸ – though, in some cases, only if such decision is not in conformity with the treaty or international law in general.¹⁹ Most of these BITs demand in this respect that, in the event that recourse is made to international arbitration, the domestic proceedings be discontinued,²⁰ or stipulate that any domestic judicial decisions will be without effect once an award is rendered.²¹

10.1.2.2. Other Provisions Preventing Concurrent Recourse to Different Procedures

Finally, there are also treaty clauses which, without otherwise making recourse to domestic courts mandatory, subject access to investment arbitration to specific conditions in case such recourse is nonetheless pursued, such as, by allowing commencement of arbitration only after a final judgment has been issued by domestic courts,²² or conversely, only when no final judgment has been issued.²³

* * *

Despite the almost infinite variation in which the clauses are drafted, essentially all types of provisions share a common purpose: the avoidance of parallel proceedings before domestic and international fora. In theory, therefore, the clauses are intended to operate as a device for regulating jurisdictional interactions between investment tribunals and domestic courts. Yet, as the following sections will demonstrate, such clauses have rarely been effective in practice.

10.2. Reversing the Irreversible: Strategies for Avoiding Forks in the Road

Among the treaty devices employed with a view to preventing the occurrence of parallel proceedings, choice-of-forum provisions probably provide the greatest challenge to the adjudicative authority of investment tribunals: by presupposing that investment disputes can be equally resolved before domestic courts as before investment tribunals, they of course set domestic procedures on equal footing with international ones. This, in itself, is not a problem. But where the choice to be made is intended to be a final one, such as in the case of fork-in-the-road clauses, complications can eventually arise, as litigation before domestic courts may have the effect of foreclosing recourse to investment arbitration. Investment tribunals responded to this challenge by adopting a very formalistic approach to the interpretation/application of such fork-in-the-road clauses and subjecting their operation to very strict conditions.

¹⁷ See eg art 8(3), China–Denmark BIT (1985); art 10(1), China–Poland BIT (1988); or art 9(3), China–Czech Republic BIT (2005).

¹⁸ See eg art 8(3), Argentina–Italy BIT (1990); art 8(2), Argentina–UK BIT (1990); art 10(3), Argentina–Germany BIT (1991); or art 10(3), Argentina–Spain BIT (1991).

¹⁹ See eg art 11(2), Germany–Uruguay BIT (1987); art 9(3), Netherlands–Uruguay BIT (1988); art 11 (3) BLEU–Uruguay BIT (1991); or art 10 Switzerland–Uruguay (1988) BIT.

²⁰ See eg art 12(4), Argentina–BLEU BIT (1990); art 8(4), Argentina–Italy BIT (1990); art 10(4), Argentina–Netherlands BIT (1992).

²¹ See eg art 8(3)(b), Argentina–Austria BIT (1992).

²² See eg art 9(5), Netherlands–Bulgaria (1999) BIT; or art 8(3), BLEU–Korea BIT (2006).

²³ See eg art 9(5), Netherlands–El Salvador (1999) BIT.

10.2.1. Triple Identity Requirement as a Condition for Triggering the Fork?

According to the terms of standard fork-in-the-road clauses, what matters for them to be triggered is the sameness of the “dispute”. As a way of defending their exercise of adjudicatory authority over investment disputes, investment tribunals proceeded to determine the required “sameness” strictly. This meant that, for the purpose of establishing whether the dispute submitted to the national jurisdiction was potentially the *same* one as the dispute submitted to the international jurisdiction, they routinely applied the formal test of triple identity: the dispute brought before domestic courts had to involve the same parties, and the claim must have had the same object and the same cause of action as the dispute brought to the international tribunal, was the investor considered to have exercised the choice under the fork-in-the-road in favour of host State courts.²⁴

The basis for applying the triple identity test, which is otherwise habitually employed in addressing questions of parallel proceedings in a transnational context,²⁵ are not entirely clear, although some tribunals did refer in this respect to the principle of *lis pendens*.²⁶ In itself, of course, the application of some sort of test for determining identity of actions is not necessarily problematic if such test is applied in a flexible way, considering the need to avoid inconsistent and contradictory decisions, prevent double recovery and double jeopardy, and also to minimize economically undesirable duplicative proceedings.²⁷ Instead, most investment tribunals adopted a formalistic approach in determining identity of causes of action – primarily by relying on the conceptual distinctions between contract and treaty claims, in line with the approach later developed by the *Vivendi* Annulment Committee.²⁸ Such a distinction makes arguably sense where the applicable investment treaty itself defines investment disputes as those relating to breaches of substantive treaty standards, as a result of which, the fork-in-the-road clause can only be triggered in circumstances where the relevant domestic action is based upon an alleged breach of the treaty

²⁴ See eg *Eudoro Armando Olguín v Republic of Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/98/5, 8 August 2000) [30]; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Award)* (ICSID Case No ARB/97/3, 21 November 2000) (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) [55]; *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia (Award)* (ICSID Case No ARB/99/2, 25 June 2001) [330]-[332]; *Ronald S Lander v The Czech Republic (Final Award)* (UNCITRAL, 3 September 2001) [161]-[163]; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt (Award)* (ICSID Case No ARB/99/6, 12 April 2002) [71]; *CMS Gas Transmission Company v The Republic of Argentina (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/01/8, 17 July 2003) [80]; *Azurix Corp v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/12, 8 December 2003) [86]-[92]; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004) [95]-[98]; *Ocidental Exploration and Production Company v The Republic of Ecuador (Final Award)* (LCIA Case No UN3467, 1 July 2004) [43]-[63]; *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic (Decision on Preliminary Objections)* (ICSID Case No ARB/03/13, 27 July 2006) [154]-[157]; *Toto Costruzioni Generali SpA v The Republic of Lebanon (Decision on Jurisdiction)* (ICSID Case No ARB/07/12, 11 September 2009), [203]-[212]; *Hulley Enterprises Limited (Cyprus) v The Russian Federation (Interim Award on Jurisdiction and Admissibility)* (UNCITRAL, PCA Case No AA 226, 30 November 2009) [597]-[599]; *Veteran Petroleum Limited (Cyprus) v The Russian Federation (Interim Award on Jurisdiction and Admissibility)* (UNCITRAL, PCA Case No AA 228, 30 November 2009) [609]-[611]; *Yukos Universal Limited (Isle of Man) v The Russian Federation (Interim Award on Jurisdiction and Admissibility)* (UNCITRAL, PCA Case No AA 227, 30 November 2009) [598]-[600]; *Khan Resources (n 1)*, [388]-[400]; or *Charanne BV and Construction Investments SARL v Spain (Award)* (SCC Case No 062/2012, 21 January 2016) [398]-[410].

²⁵ See *supra* 1.4.2.

²⁶ See *Azurix* (n 24), [88]; and *Enron* (n 24), [97]; both relying, in turn, on the decision in *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo (Award)* (ICSID Case No. ARB/77/2, 8 August 1980).

²⁷ See *supra* 4.3.4.

²⁸ According to the Tribunal in *Olguín v Paraguay* (n 24, [30]), for example, the Claimant's application to domestic courts was thus simply not deemed possible to “have the same juridical effect as a claim against the Republic of Paraguay [under the BIT]”. For other examples where support for the triple identity test was sought in the doctrinal distinction between contract and treaty claims as such, see eg *Vivendi I (Award)* (n 24), [50], [55]; *CMS v Argentina* (n 24), [80]; *Enron*, (n 24), [97].

as such.²⁹ But where the treaty dispute settlement clauses apply to any or all disputes concerning an investment, the introduction of distinctions based on the source of the rights alleged to have been violated can hardly find support in the ordinary meaning of such clauses.³⁰ Indeed, it is often neglected that the *Vivendi* Annulment Committee itself considered the distinction between contract and treaty claims irrelevant to the application of a fork-in-the-road clause where the dispute settlement clause was broadly-formulated: had the investor in that case brought its contract claims before the administrative courts of Tucuman, this would have constituted a final choice of forum, and foreclosed arbitration under the BIT, even with respect to treaty claims.³¹ Still, the attractiveness of distinguishing causes of action by reference to formal differences between contract and treaty claims is not difficult to understand. In combination with a strict application of the triple identity test, such distinction permitted investment tribunals practically never to have had to rescind their jurisdiction, given that domestic proceedings typically involved litigants other than those in proceedings before the international tribunal and/or concerned causes of action based on other sources of law than the applicable investment treaty.

Furthermore, in determining whether proceedings before local courts constituted a final choice of forum, investment tribunals adopted a strict approach in their appraisal of facts. Fork-in-the-road provisions were thus not given effect where the choice made for the domestic remedy was not considered to have been a “genuine” one,³² as in the case where claimants had merely raised pleas in defence of claims in domestic courts (as opposed to having raised actual counter-claims),³³ or where claimants had actually failed to take certain concrete steps in domestic

²⁹ See eg *Middle East Cement* (n 24), [71], where the Tribunal was thus justified in interpreting the fork-in-the-road clause narrowly, since art 10(1) of the Egypt-Greece BIT (1993) applied to ‘[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former’. See also *Corona Materials LLC v Dominican Republic (Award)* (ICSID Case No ARB(AF)/14/3, 31 May 2016) [269], where a similarly narrow definition of investment disputes under art 10.18.4 of DR-CAFTA was considered to require a narrow application of the fork-in-the-road provision.

³⁰ This notwithstanding, many commentators accept the contract/treaty claims distinction, without much hesitation, simply as pertinent to the operation of fork-in-the-road clauses. See eg K Hobér, ‘Res Judicata and Lis Pendens in International Arbitration’ (2014) 366 *Recueil des cours* 99, 364ff.

³¹ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Decision on Annulment)* (ICSID Case No ARB/97/3, 3 July 2002), [55]. The Committee’s holdings on this issue were *obiter* and not further substantiated. On their face, the Committee’s holdings on this issue could be taken to mean that an investor would be precluded from bringing subsequent treaty claims any time where such claims are related to a grievance previously submitted to domestic courts. Such an approach to the issue would be equally problematic. For criticism, see Z Douglas, *The International Law of Investment Claims* (CUP 2009), 155. The Committee’s approach does not seem to have been directly followed by other tribunals in the application of fork-in-the-road provisions. An exception to this might be the decision in *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplín v Plurinational State of Bolivia (Decision on Jurisdiction)* (ICSID Case No ARB/06/2, 27 September 2012) [156]–[158], where the Tribunal seemingly relied on the broad definition of investment disputes in the applicable the Bolivia–Chile BIT in suggesting that any attempt to challenge the revocation of the Claimant’s mining concessions in local courts would have triggered the fork-in-the-road provision.

³² See eg *Occidental* (n 24), [60]–[61] (the tribunal insisting that ‘the choice be made entirely free and not under any form of duress’ and finding a ‘powerful reason’ for not applying the fork-in-the-road in the fact that Claimant purportedly had no ‘real choice’ but to challenge within the time prescribed the adverse resolutions issued by the Ecuadorian Tax authorities, for it would have otherwise forfeited its right to challenge such resolutions); or *Genin* (n 24), [333] (noting how the Claimants-owned bank ‘had no choice’ but to contest the revocation of its license in Estonia, in the interest of all its shareholders).

³³ See in particular *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (Third Interim Award on Jurisdiction and Admissibility)* (UNCITRAL, PCA Case No 2009-23, 27 February 2012) [4.81]–[4.82], where the Tribunal rejected the argument that the raising of a plea in defense could properly be described as the submission of a dispute for settlement in those courts, given that the notion of ‘submission’ connotes the making of a choice and a voluntary decision to refer the dispute to the court for resolution. In assessing the pleas advanced by Claimant as a defense in the domestic proceedings, the Tribunal refused to adopt a formalistic approach and was thus not willing to construe the Claimant’s request that plaintiffs be exclusively liable as going beyond a simple defensive plea, even if such request could be implied as inviting the Tribunal to decide that plaintiffs were actually liable; see *ibid* [4.84]–[4.85]. See also *Enron* (n 24), [98] (noting: ‘Moreover, the actions by TGS itself have been mainly in the defensive so as to oppose the tax measures imposed, and the

proceedings (resulting, for example, in the domestic claim never being heard).³⁴ Obviously, pursuit of domestic litigation was also not deemed capable of foreclosing access to the treaty forum, where the applicable investment treaty was not yet formally in force when recourse to domestic courts had been.³⁵ All in all, the adoption of a stringent approach in the application of fork-in-the-road provisions was deemed justified on account of general policy considerations. Some investment tribunals namely considered that, in view of the importance of investment arbitration to foreign investors, access to such arbitration should not be foreclosed “too easily” by reason of the fact that claims were previously brought before domestic courts.³⁶

10.2.2. In Search for a Balanced Approach to the Application of Forks in the Road

The strict approach to the application of fork-in-the-road provisions, and particularly the tribunals’ insistence on the triple identity test as a means for determining the sameness of the dispute, has attracted support,³⁷ but also criticism among commentators. The triple identity test has thus been considered untenable on several grounds.³⁸ First, as a matter of treaty interpretation, there is nothing suggesting that the word “dispute”, according to its ordinary meaning in international law, would invite or allow distinctions to be made on the basis of the source of the legal obligation alleged to have been breached.³⁹ Second, a strict application of the triple identity test is contrary to the fundamental premise of fork-in-the-road provisions, which presuppose precisely the parity between domestic and international fora as a means for resolving the same investment dispute. Third, and finally, a strict adherence to the test is also contrary to the very *raison d’être* of such clauses, given that it leads, in practice, to the existence of parallel proceedings – a possibility which was intended to be foreclosed. The proposed alternative has been to apply a test of double identity, whereby the sameness of a dispute would be determined – in addition to

decision to do so has been ordered by ENARGAS, the agency entrusted with the regulation of the gas sector. The conditions for the operation of the principle electa una via or “fork in the road” are thus simply not present.”; or *Teimer S.A. Transportes de Cercanías S.A and Autobuses Urbanos del Sur S.A v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/09/1, 21 December 2012) [184] (finding that Claimants had ‘not already “picked” the local court “fork”, thereby forfeiting their access to arbitration’ in circumstances where one of them merely appeared as a defendant in a suit brought against it in the Argentine courts by the Respondent itself).

³⁴ See *Mr. Hassan Andri, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania (Award)* (ICSID Case No ARB/10/13, 2 March 2015) [204] (where the fork-in-the-road provision was not applied in circumstances where domestic proceedings were initiated, but had never proceeded due to non-payment of court fees and non-compliance with other formalities). However, the fact that a specific case has never been decided on the merits will not exclude the triggering of the fork-in-the-road; see *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador (Award)* (ICSID Case No ARB/03/6, 31 July 2007) [182].

³⁵ *MCI Power* (n 34) [180]-[190].

³⁶ See eg *Pan American* (n 24), [155], expressing the view that tribunals were ‘undoubtedly right’ not to assume lightly that choices of forum have been made by claimant parties in favour of the host State’s judicial system, for ‘[i]f the contrary were true, there would be little use in setting up international arbitral procedures for investment disputes.’ See also Schreuer (n 6), 241, similarly arguing that ‘[i]n light of the clear advantages that international arbitration offers to most investors over proceedings in domestic courts, a decision in favour of domestic courts cannot lightly be presumed.’

³⁷ See eg C Liebscher, ‘Monitoring of Domestic Courts in BIT Arbitrations: A Brief Inventory of Some Issues’ in CH Schreuer and C Binder, *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 105-12, at 112-5; and especially H Wehland, *The coordination of multiple proceedings in investment treaty arbitration* (OUP, 2013), 89-98, who considers the strict triple identity test as ‘the most appropriate approach’ and as a ‘natural solution’ to determining identity of disputes.

³⁸ T Jardim, “The Authority of Domestic Courts in Investment Disputes” (2013) 4(1) JIDS 175, 191-192.

³⁹ Cf *Mavrommatis Palestine Concessions (Jurisdiction) (Judgment)* PCIJ (ser A) No 2 (30 August 1924), 11 (‘A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’).

the identity of the parties – either by reference to the object of proceedings,⁴⁰ or else by the proceedings’ “equivalence in substance”.⁴¹

Investment tribunals have not been immune to such criticism and began to recognize that, insofar the triply identity test is usually difficult to satisfy in practice, its strict application has the effect of depriving fork-in-the-road causes of all or most of their practical effect.⁴² The jurisprudence has now gradually been moving towards relaxing the test, through adopting a flexible approach when it comes to meeting one of the prongs of the triple identity requirement.

10.2.2.1. Fundamental Basis Test for Determining Identity of Actions

One way in which tribunals responded to the undesirable consequences of too strict an application of the triple identity test has been by adopting a non-formalist approach towards determining the required identity of causes of action. Representative of this approach is the award in *Pantechniki v. Albania* (2009) where, instead of relying on formal distinctions between contract and treaty claims, an inquiry was rather made into whether the treaty claim had the same “fundamental basis” as the claims submitted before domestic courts; an inquiry which – for the first time ever – resulted in a tribunal giving effect to the applicable fork-in-the-road clause. The Tribunal in that case, composed of Jan Paulsson as Sole Arbitrator, considered that the mere assertion that treaty claims were inherently different from contract claims was “argument by labelling – not by analysis.”⁴³ With a view to determining whether the fork-in-the-road clause had been triggered, Paulsson found it more appropriate to rely on the test set forth by the American-Venezuelan Commission in the *Woodruff* case, and subsequently relied upon by the Annulment Committee in *Vivendi*, which mandated an inquiry into “whether or not ‘the fundamental basis of a claim’ sought to be brought before the international forum was autonomous of claims to be heard elsewhere.”⁴⁴ Arbitrator Paulsson admitted that the inquiry in that respect was a difficult one and was not willing to concede that claims would have the same “essential basis” if they merely shared the same factual predicates and requested the same relief, as argued by Respondent. The subject of the inquiry was rather to determine whether the claimed entitlements had the same “normative source”, which in the circumstances of the case boiled down to establishing whether the claim “truly does have an autonomous existence outside the contract.”⁴⁵ On the facts of the case, it was clear that the relevant domestic court action had a contractual foundation, given that Claimant was enforcing its contractual right to compensation for damage suffered to its equipment during civil disturbances, in accordance with the contractually-agreed risks allocation provisions. But it was also clear that the Claimant’s grievance before the ICSID Tribunal arose out of the same purported entitlement that it invoked in domestic proceedings. By virtue of the fork-in-the-road clause in the Albania-Greece BIT, the Claimant was therefore precluded from adopting the same fundamental basis as the foundation of its treaty claim.⁴⁶

The same approach was later followed in *H&H Enterprises Investment v. Egypt* (2014), where the Tribunal also openly expressed reservations about the suitability of the triple identity test for determining whether a fork-in-the-road clause has been triggered. In the view of the Tribunal, not

⁴⁰ Jardim, at 194; Douglas (n 31), 156 at [325].

⁴¹ McLachlan (n 79), 267.

⁴² See eg *Chevron (Jurisdiction, 2012)* (n 33), [4.76]-[4.77].

⁴³ *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania (Award)* (ICSID Case No ARB/07/21, 30 July 2009) [61]. In that case, art 10(1) of the applicable Albania-Greece BIT (1991) defined disputes as ‘any dispute [...] concerning investments’. However, the Arbitrator did not expressly rely in his reasoning on the breath of the language.

⁴⁴ *ibid* [61].

⁴⁵ *ibid* [62], [64].

⁴⁶ *ibid* [63]-[67]. This finding, however, did not exclude a claim for denial of justice in relation to the treatment it received in Albanian courts, *ibid* [68].

only was there little basis for such test in the language of the applicable US-Egypt BIT, but its application would have also deprived the fork-in-the-road clause from any practical meaning, insofar as the purpose of the clause was precisely to ensure that the same dispute is not litigated before different fora.⁴⁷ The Tribunal further considered the test was not generally apt for application in the investment treaty context where “investment arbitration proceedings and local court proceedings are often not only based on different causes of action but also involve different parties.”⁴⁸ Therefore, in following the *Pantechniki* precedent, the Tribunal considered it more appropriate to assess whether the claims brought to local courts shared the same “fundamental basis” with the claims brought to international arbitration, rather than focusing on whether the causes of actions relied upon in the claims were identical.⁴⁹ Having found that the Claimant’s treaty claims shared the same fundamental basis with its contractual claims before the local arbitral tribunal and Egyptian courts, and that those claims had no autonomous existence outside the contract, the Tribunal ultimately gave effect to the fork-in-the-road and declined jurisdiction over most of the Claimant’s treaty claims.⁵⁰

Granted, not all investment tribunals wholeheartedly adopted a non-formalistic approach to determining identity of cause of action.⁵¹ Nonetheless, the *Pantechniki* award clearly stirred the debate as to the proper approach to the application of fork-in-the-road clauses. What is clear is that the application of the triple identity test is not any longer self-evident.⁵² Indeed, even tribunals otherwise opposed to the application of the “essential basis”, such as that in *Khan Resources v. Mongolia* (2012), considered there to be “some persuasive force” in the argument that the triple identity test may be a too strict one, especially where only one of the requirements of the triple identity test is not satisfied, while the remaining requirements, as well as other aspects of the dispute are identical.⁵³ Yet, too soon a triggering of a fork-in-the-road provision will also have its disadvantages. As the same Tribunal in *Khan Resources* pointed out, should the test be too easy to satisfy, “this could have a chilling effect on the submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law”, for it may result in “claims being brought to international arbitration before they are ripe on the merits, simply because the investor is afraid that by submitting the existing dispute to local courts or tribunals, it will forgo its right to later make any claims related to the same investment before an international arbitral tribunal.”⁵⁴ In the long run, therefore, the application of the fork-in-the-road clauses requires the finding of an appropriate balance between, on the one hand, the imperative of giving effect to the intention of treaty drafters which included such explicit treaty provisions; and on the other hand,

⁴⁷ *He&H Enterprises Investments, Inc. v. Arab Republic of Egypt (Award)* (ICSID Case No. ARB 09/15, 6 May 2014) [364]-[367] and [382].

⁴⁸ *Ibid* [367].

⁴⁹ *Ibid* [368].

⁵⁰ *Ibid* [371]-[387].

⁵¹ See particularly *Khan Resources* (n 1), [389]-[390], expressly refusing to apply the ‘fundamental basis’ test, founding ‘ample authority’ for the application of the triple identity test. It needs to be noted that the subsequent decision in *Toto v Lebanon* (n 24), [203]-[212], which endorses the triple-identity test, was delivered less than two months after the award in *Pantechniki*.

⁵² See eg *Chevron (Jurisdiction, 2012)* (n 33), [4.77]-[4.78], avoiding to decide whether the triple identity test should be applied in the circumstances of the case, relying instead on the specific wording of the applicable BIT itself, which required the dispute to be submitted by the ‘national or company concerned’; *Avdi v Romania* (n 34) [204], avoiding to examine the applicability of the triple identity test, relying instead on the fact that claims in domestic courts never proceeded and were never heard before the Romanian courts and thus have not triggered the application of the fork-in-the-road provision; or *Charanne v Spain* (n 24), [410], intentionally avoiding to examine the parties’ arguments on subject identity/identity of legal basis, basing itself on the finding as to the absence of party identity.

⁵³ *Khan Resources* (n 1), [392].

⁵⁴ *ibid* [391].

the importance of not allowing that too strict an application of such provisions would discourage investors from seeking resolution of their disputes first in local courts.⁵⁵

10.2.2.2. *Factual Test for Determining Identity of Parties*

Another issue which has been generating problems in the application of fork-in-the-road clauses concerns the required identity of parties. This has rarely been satisfied, as claims brought before local courts have typically involved locally established subsidiaries in suits against local administrative authorities, whereas treaty proceedings normally involved the foreign investor and the host State themselves. Already in *Genin v. Estonia* (2001), the Respondent thus argued that, since the Claimants in that case were the principle shareholders of an Estonian bank, they should have been, together with the bank itself, properly considered as a group, with the consequence that the local litigation pursued by that bank be considered an election of a remedy on behalf of the group as a whole. The argument found no sympathy with the Tribunal, which attached importance instead to the fact that the bank's efforts in Estonian courts had been undertaken on behalf of all the bank's shareholders (including minority ones), as well as on behalf of its depositors, borrowers and employees, as opposed to the investment dispute submitted to ICSID arbitration, which related solely to the losses purportedly suffered by the Claimants alone.⁵⁶

Some investment tribunals, however, were more sympathetic towards the need for adopting a non-formalist approach in determining party identity. In the *He & H Enterprises v. Egypt*, for example, the Tribunal expressed itself in favour of flexibility, not only in determining identity of cause of action, but also of parties. The Tribunal considered that the language of the applicable fork-in-the-road provision did not "specifically" require that the parties be the same, but rather that the dispute not be submitted to other dispute resolution procedures. In the view of the Tribunal, it would furthermore "defeat the purpose of the Treaty and allow form to prevail over substance if the respondents were required to be strictly the same because in practice, local court proceedings are often brought against state instrumentalities having a separate legal personality and not the state itself."⁵⁷ Hence, the fact that the Respondent in that case was not *per se* a party to the local proceedings was without consequence to the application of the fork-in-the-road. The Tribunal added that "where [...] jurisdiction is allegedly based on the conduct of an entity with legal personality separate from the respondent State [...] the same standard must apply to the tribunal's assessment of all jurisdictional conditions and limitations, including a fork-in-the-road clause."⁵⁸

Equally in favour of a non-formalistic approach has been the Tribunal in *Charanne v. Spain* (2016). This essentially agreed, as a matter of principle, with the Respondent's proposition that, in order to determine party identity, it was necessary to analyse the "economic reality of the corporate structure of the different entities present in the various procedures in question", particularly with a view to preventing the non-application of the triple identity test through a simple restructuring of the corporate chain.⁵⁹ To that end, Respondent would have to demonstrate that the Claimants and the local companies were "in fact the same entity" so that the actions brought in local courts would be considered as having been brought by the Claimants through intermediary companies. According to the Tribunal, however, for such factual identity to be established, it was necessary to demonstrate that Claimants enjoyed decision-making powers in the companies (and not merely to possess (minor) shareholding interests in the local subsidiaries that nominally belonged to the same group of companies). Alternatively, the Respondent would have to establish that the particular

⁵⁵ See also Douglas (n 31), 155-157; M Swarabowicz, "Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System" (2017) 8(2) JIDS 280, 295-297.

⁵⁶ *Genin* (n 24), [330]-[332].

⁵⁷ *He & H Enterprises* (n 47) [367].

⁵⁸ *Ibid* [383].

⁵⁹ *Charanne v. Spain* (n 24), [406].

corporate structure had been designed or modified with a fraudulent purpose to allow the Claimants to avoid the fork in the road provision.⁶⁰ In the specific circumstances of that case, however, none of those facts were actually proven.

In view of the complex way in which foreign investment is presently conducted, where intricate corporate structures are frequently put into place so as to benefit from taxation and other specific advantages provided for by some jurisdictions, it certainly makes sense to adopt a less formalistic approach to determining identity of parties,⁶¹ or else one risks fork-in-the-road provisions being circumvented by merely allowing that the claim be brought by another entity in the corporate chain.⁶² There is little reason for investment arbitration to diverge in this respect from other instances of transnational litigation, where non-formalistic approaches are regularly employed in that respect.⁶³

10.2.3. Relevance of Treaty Language

At the end of the day, much will depend on the language of the applicable investment treaty. The fork-in-the-road provision may itself dictate the application of the distinction between contract and treaty claims as a ground for determining identity in causes of action,⁶⁴ or else require strict identity of parties as a condition for its application.⁶⁵ What is clear, however, is that absent such express guidance, investment tribunals, as a rule, preferred to interpret silences or ambiguities in the applicable treaty in ways that allowed them to retain their adjudicatory authority, even at the cost of rendering fork-in-the-road provisions practically ineffective. Indeed, this phenomenon has not been limited solely to forks in the road, but was equally observable with investment tribunals' approach towards certain other types of choice-of-forum provisions.⁶⁶

This is not to say that parallel litigation cannot be meaningfully regulated through treaty clauses. What is required, however, is more precise treaty language, as attested to by the example of no u-turn clauses. Unlike the typical fork-in-the-road clause, which precludes parallel proceedings in respect of the same "dispute", the typical no u-turn clause requires investors to desist from commencing parallel proceedings "with respect to the measure" alleged to be in

⁶⁰ *ibid* [407]-[408].

⁶¹ In the same vein, see C Schreuer, 'Concurrent Jurisdiction of National and International Tribunals', (1975/1976) 13 *Houston Law Review* 508 at 510-13, arguing against a formalistic conception of lispendence in the relationship between domestic courts and international tribunals, suggesting instead to look at "the true beneficiaries of a claim before determining whether there is a substantial identity of proceedings" insofar as "the conditions of international relations frequently require different actors to appear in the international arena than in the domestic arena".

⁶² On this danger, see eg CI Suarez Anzorena, 'Multiplicity of Claims under BITs and the Argentine Case' (2005) 2 *TDM* 20, at 23-24.

⁶³ See eg McLachlan (n 79), 117-122. For a contrary view, see Liebscher (n 37), 112, arguing against importing tests developed under domestic laws insofar as the fork-in-the-road is a treaty rule and supposedly requires the application of international tests.

⁶⁴ See examples mentioned *supra* (n 29).

⁶⁵ See eg *Chevron (Jurisdiction, 2012)* (n 33), [4.77]-[4.78], sidestepping the application of the triple identity test precisely because the wording of the BIT itself required that, for the fork to be applied, not only must the dispute have been submitted for resolution to domestic courts, but the dispute also had to be submitted by the 'national or company concerned'.

⁶⁶ See eg *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan (Decision on Jurisdiction)* (ICSID Case No ARB/02/13, 9 November 2004) [92], [96]. In the circumstances of that case, Article 9(2) of the applicable Italy-Jordan BIT expressly stipulated that when an investment contract has been concluded between an investor and an entity of a Contracting State, the procedure foreseen in such a contract "shall" apply. The Respondent argued that the essential basis of the Claimants' request concerned a contractual dispute, which in accordance with Article 9(2) had to be submitted to the contractually-agreed procedure (which in that case was either domestic arbitration, or procedure before Jordanian courts). The Tribunal gave effect to Article 9(2) insofar as contractual disputes were concerned, but did not accept that this provision could deprive it of its jurisdiction to entertain claims based on breaches of the BIT.

breach of a treaty obligation.⁶⁷ Investment tribunals have generally interpreted this to mean that, in order for the no u-turn clause to be triggered, it suffices that both legal actions have a legal basis derived from the same “measure” (i.e. rest on the same factual predicate) and share the same object.⁶⁸ Hence, the fact that the domestic cause of action was grounded in contract violations,⁶⁹ or took the form of an administrative appeal under public law,⁷⁰ was taken to be sufficient to pre-empt recourse to treaty arbitration, even where no treaty violation as such was directly invoked in the domestic lawsuit. Arguably, though, it would seem that the domestic law suit in such cases would have to allege *in its essence* the equivalent of a violation of the treaty.⁷¹

Though no u-turn clauses proved therefore much more difficult to be sidestepped on the basis of the distinction between contract and treaty claims, their application has not been without problems either. Complications have thus arisen with respect to what constitutes a measure, and whether the impugned conduct amounts to a such a measure or merely a “component” thereof that could still be challenged in domestic courts.⁷² Here, too, the argument was then made that an investor should not easily be barred from investment arbitration. In the words of Arbitrator Hight, “it would be an extreme price to pay in order to engage in NAFTA arbitration for a NAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its NAFTA claim—but which nonetheless were not themselves NAFTA claims.”⁷³

On balance, arguments pertaining to the fundamental importance of investment arbitration and to its superior advantages compared to domestic court litigation have thus recurrently been employed in dealing with forum selection clauses. And as the following section will demonstrate, variations of those arguments found similar application in dealing with local litigation requirements.

10.3. Skipping the Unnecessary: Strategies for Avoiding Local Litigation Requirements

Though not intended to (irreversibly) foreclose access to international arbitration, provisions directing the aggrieved investors to first seek resolution of their disputes before host State’s

⁶⁷ See eg art 1121(1)(b) and (2)(b) NAFTA.

⁶⁸ See *Waste Management, Inc v United Mexican States (I) (Award)* (ICSID Case No ARB(AF)/98/2, 2 June 2000) [27].

⁶⁹ *Ibid* [28] (finding Claimant’s waiver ineffective as it sought to exclude claims based on Mexican law while its treaty claims were premised on the same alleged contract breaches that Claimant had already alleged in domestic proceedings initiated by its local subsidiary).

⁷⁰ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador (Award)* (ICSID Case No. ARB/09/17, 14 March 2011) [95]-[107] (pronouncing itself without jurisdiction as the Claimant failed to effectively discontinue proceedings before the courts of El Salvador, where those proceedings concerned the revocation of environmental permits that were also the object of the treaty claims under the CAFTA).

⁷¹ Cf *Waste Management I* (n 69), [28] (holding that “the provisions referred to in the NAFTA constitute obligations of international law for NAFTA signatory States, but violation of the content of those obligations may well constitute actions proscribed by Mexican legislation in this case, the denunciation of which before several courts or tribunals would constitute a duplication of proceedings.”); as well as *Waste Management Inc v United Mexican States* (Dissenting Opinion of Keith Hight) (ICSID Case No ARB(AF)/98/2, 8 May 2000) [47] (suggesting that “[i]t would only be where a lawsuit had been commenced in domestic courts *that essentially alleged the equivalent of a violation of Chapter Eleven* that there would be a clear preemption”).

⁷² In *Waste Management v Mexico (I)*, the primary point of disagreement between the Tribunal’s majority and Arbitrator Hight was whether the impugned conduct in fact constituted one such “measure” or was merely a part thereof. Arbitrator Hight argued that the term ‘measure’ was to be interpreted as an act of the State that was itself a breach of an international obligation at the level of the NAFTA and did not apply to local components of such an act that were not themselves breaches of international obligations. *Waste Management (I) (Dissenting Opinion of Keith Hight)* (n 72) [11]-[26].

⁷³ *Ibid* [44].

courts for a prescribed period of time were likewise perceived by investment tribunals as constituting a challenge to their adjudicative authority. In particular, these “mandatory local litigation requirements” were frequently considered as unnecessary and costly rituals, leading tribunals to often restrain their effects in practice.

In principle, such requirements have all the potential to serve as a device for regulating jurisdictional interactions between domestic courts and investment tribunals. Procedurally, such requirements will have the effect of temporarily barring the exercise by the investment tribunal of jurisdiction over an investment dispute, in favour of the domestic courts of the host State. Most investment tribunals namely considered them to constitute mandatory *preconditions to arbitration*,⁷⁴ and non-compliance with them leading to the tribunal lacking competence to hear the case (and not merely resulting in the claim being inadmissible).⁷⁵ This distinguishes them from clauses prescribing consultation or waiting periods, which have sometimes been interpreted as mere procedural formalities or directives that could be dispensed with under appropriate circumstances.⁷⁶ Furthermore, substantively, mandatory local litigation requirements may remove the actual need for the investment tribunal to exercise its jurisdiction because, at least in principle, the investment dispute may already be resolved through recourse to domestic courts. In that,

⁷⁴ See eg *Maffezzini (Jurisdiction)* (n 3), 36; *BG Group Plc. v. The Republic of Argentina (Final Award)* (UNCITRAL, 24 December 2007) [146]; *Wintershall Aktiengesellschaft v The Argentine Republic (Award)* (ICSID Case No ARB/04/14, 8 December 2008) [115]-[119]; *Abaclat v The Argentine Republic (Decision on Jurisdiction and Admissibility)* (ICSID Case No ARB/07/5, 4 August 2011) [578]; *Ambiente Ufficio v Argentine Republic (Decision on Jurisdiction and Admissibility)* (ICSID Case No ARB/08/9, 8 February 2013), [589]-[591]; *Giovanni Alemanni and Others v The Argentine Republic (Decision on Jurisdiction and Admissibility)* (ICSID Case No ARB/07/8, 17 November 2014) [305]; *Daimler Financial Services AG v Argentine Republic (Award)* (ICSID Case No ARB/05/1, 22 August 2012) [180]-[183]; *ICS Inspection and Control Services Limited (United Kingdom) v The Republic of Argentina (Award on Jurisdiction)* (UNCITRAL, PCA Case No 2010-9, 10 February 2012), [246]-[251]; *Impregilo SpA v Argentine Republic (Award)* (ICSID Case No ARB/07/17, 21 June 2011), [79]-[94]; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No. ARB/07/26, 19 December 2012), [130]; *Ömer Dede and Serdar Elhüseyni v. Romania (Award)* (ICSID Case No. ARB/10/22, 5 September 2013), [212]-[225]. Mandatory in this context relates to the fact that the potential claimant cannot unilaterally amend these conditions, but must accept them as such in order to perfect the agreement to arbitrate. Litigation clauses do not otherwise impose an obligation on investors to pursue local litigation. See on this *Alemanni*, *ibid* [305].

Sometimes the same clauses were interpreted differently by arbitral tribunals. See eg *Hochtief AG v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/07/31, 24 October 2011) [32]-[55], considering it ambiguous whether art 10 of the Argentina-Germany BIT imposed a mandatory submission to domestic courts as a precondition of recourse to arbitration, contrary to the opinion of the *Wintershall* and *Daimler* tribunals. For a similar discrepancy, compare *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan (Award)* (ICSID Case No ARB/10/1, 2 July 2013), [6.1.6]-[6.2.9], interpreting art VII(2) of the Turkey-Turkmenistan BIT as containing a mandatory litigation requirement; and *Mubammad Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Sti v Turkmenistan (Decision on Respondent's Objection to Jurisdiction)* (ICSID Case No ARB/12/6, 13 February 2015) under art VII(2), [280]-[281], interpreting the same provision as merely giving the investor an option to bring proceedings in local courts, in the event of which the then arbitration proceedings cannot be brought until one year has elapsed and no decision has been issued by that court. See also *Camuzzi International S.A v The Argentine Republic (Decision on Objection to Jurisdiction)* (ICSID Case No ARB/03/2, 11 May 2005) [117], interpreting a *prima facie* mandatory litigation clause in art 12 BLEU-Argentina BIT merely as providing ‘the possibility of recourse to local jurisdiction’.

⁷⁵ See *Maffezzini (Jurisdiction)* (n 3), 36; *Wintershall* (n 74), 156; *ICS Inspection* (n 74), [262]-[273]; *Daimler* (n 74), [192]-[193]; *Kiliç v Turkmenistan* (n 74), [6.3.1]-[6.3.15]; as well as *Hochtief AG v Argentine Republic (Separate and Dissenting Opinion of JC Thomas)* (ICSID Case No ARB/07/31, 7 October 2011), [42]. For the contrary approach, see *Abaclat* (n 74), [496], concluding that non-compliance with such requirements would only lead to a lack of admissibility of the claim. But this has been subject to criticism. See *Abaclat v The Argentine Republic (Dissenting Opinion of G. Abi-Saab)* (ICSID Case No ARB/07/5, 4 August 2011), [126], considering the majority’s legal characterization of the plea as ‘conceptually wrong’; or *Kiliç v Turkmenistan* (n 74) [6.3.4], finding that the majority in *Abaclat* ‘fell into legal error’ (n 74). cf also *Telefónica S.A v The Argentine Republic (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/03/20, 25 May 2006) [93] (characterizing such jurisdictional objections as an ‘exception of admissibility’, yet one that would result in ‘the Tribunal’s temporary lack of jurisdiction’); or *Ambiente Ufficio* (n 74), [573] (the Tribunal refusing to ‘draw a neat dividing line between these two concepts and to endorse one of the many controversial views articulated as to where the exact difference lies between them’). For an extensive discussion on the distinction, see *Urbaser* (n 74), [112]-[128].

⁷⁶ See eg *Bivater Gauff v Tanzania (Award)* (ICSID Case No ARB/05/22, 24 July 2008) [343]-[344].

such provisions essentially serve the same purpose as the local remedies requirement: to give the host State an opportunity – albeit a more limited one – to redress, within the framework of its own domestic legal system, the consequences of conduct on the part of the host State that could potentially amount to a violation of the applicable investment treaty.⁷⁷

In practice, however, mandatory litigation requirements have rarely fulfilled any of these functions. As will be demonstrated in the following sections, investment tribunals often permitted claimants to avoid them, by either relying upon MFN clauses so as to invoke third-party treaties which did not contain such pre-arbitration conditions (10.3.1.), or by releasing the claimants from those conditions on the basis of the futility exception (10.3.2.). This, notwithstanding the investor's unrestrained ability to submit the dispute to arbitration. Such local litigation requirements have namely not been taken to imply *exhaustion* of local remedies as traditionally understood under customary international law.⁷⁸ Rather, after the lapsing of the stipulated time-frame, the investor has been deemed free to proceed to arbitration, regardless of whether any judicial decision had yet been rendered, and notwithstanding any decision that may have been rendered.⁷⁹

10.3.1. Avoidance of Mandatory Litigation Clauses through Reliance on MFN Clauses

One of the ways for Claimants to avoid mandatory litigation requirements has been by seeking to displace them by reference to more favourable pre-arbitration conditions in third-party treaties, by way of relying on clauses granting most-favoured-nations (MFN) treatment in the basic treaty. The first to allow a claiming investor to rely on an MFN clause to avoid the consequences of non-compliance with a mandatory litigation requirement in the applicable BIT was the Tribunal in *Maffezini v. Spain* (2000).⁸⁰ Since then, the clause has been relied upon in several other cases, not only for the purpose of displacing purportedly unfavourable pre-arbitration conditions,⁸¹ but also with a view to broadening the scope of the tribunals' jurisdiction over a class of claims for which arbitration was not otherwise provided in the basic treaty,⁸² to importing different arbitration

⁷⁷ *Siemens AG v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/02/8, 3 August 2004) [104]; *Abadlat* (n 74), [581]; *Urbaser* (n 74), [134]. Cf *Telefónica v Argentina (Jurisdiction)* (n 75), fn 55 to [103], considering the clause as 'a mitigated form of the exhaustion of local remedies requirement, to which [Latin American] countries had adhered in accordance with the Calvo doctrine.'

⁷⁸ See *Maffezini (Jurisdiction)* (n 3), [22]-[28]; *Siemens v Argentina (Jurisdiction)* (n 77) [104]; *Gas Natural SDG, SA v The Argentine Republic (Decision of the Tribunal on Preliminary Questions on Jurisdiction)* (ICSID Case No ARB/03/10, 17 June 2005), [30]; *ICS Inspection* (n 74), [261]; or *Urbaser* (n 74), [108], refusing to construe this type of clauses as imposing the exhaustion of local remedies. But see *Wintershall* (n 74), [124].

⁷⁹ See *Maffezini (Jurisdiction)* (n 3), [25]-[29] (for the holding that an international tribunal will always have the final say on the meaning and scope of the international obligations that are in dispute).

⁸⁰ *ibid* [37]-[64].

⁸¹ See *Siemens v Argentina (Jurisdiction)* (n 77), [94]-[103]; *Gas Natural* (n **Error! Bookmark not defined.**), [24]-[31]; *Telefónica SA v The Argentine Republic (Jurisdiction)* (n 75), [91ff]; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/03/17, 16 May 2006) [52]-[66]; *National Grid plc v The Argentine Republic (Decision on Jurisdiction)* (UNCITRAL, 20 June 2006) [52]-[94]; *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v The Argentine Republic / AWG Group Ltd v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/03/19; UNCITRAL, 3 August 2006) [52]-[68]; *Impregilo v Argentine Republic* (n 74), [95]-[108]; and *Hochtief (Jurisdiction)* (n 74), [56]-[111], for instances where Claimants were successful in relying on MFN clauses to displace mandatory litigation requirements. In contrast, see *Wintershall* (n 74), [158]-[198]; *ICS Inspection (Jurisdiction)* (n 74); *Daimler Financial Services* (n 74); and *Kılıç v Turkmenistan* (n 74), [7.1.3]- [7.9.1], for instances where Claimants did not succeed to displace mandatory litigation requirements through reliance on MFN clauses.

⁸² See *Plama Consortium Limited v Bulgaria (Decision on Jurisdiction)* (ICSID Case No ARB/03/24, 8 February 2005) [204]-[209]; *Berschader v Russia (Award)* (SCC Case No 080/2004, 21 April 2006) [159]-[208]; *Telenor Mobile Communications AS v Republic of Hungary (Award)* (ICSID Case No ARB/04/15, 13 September 2006) [90]-[100]; *Tza Yap Shum v Republic of Peru (Decision on Jurisdiction and Competence)* (ICSID Case No ARB/07/6, 19 June 2009) [199]-[220]; *Renta 4 SVSA et al v Russian Federation*

procedures,⁸³ or to expanding the scope of protected investments.⁸⁴ Admittedly, in the latter types of cases, the putative claimants have generally been less successful in relying on MFN clauses than in relation to mandatory litigation requirements. But even with respect to the latter cases, the jurisprudence of investment tribunals remains unsettled and questions concerning the scope of MFN clauses continue to boggle the minds of academics, just as they trouble the minds of individual arbitrators.⁸⁵

Two issues are central to the current controversies about the application of MFN clauses to dispute settlement provisions in investment arbitration: the scope of the right being accorded under an MFN clause, and the actual operation of the MFN clause in relation to questions of arbitral procedure. The former relates to the fact that MFN clauses apply only to subjects that are *ejusdem generis* – i.e., that belong to the same category of subject as that to which the clause itself relates.⁸⁶ Initially, the point of contention has been whether the obligation to provide MFN treatment can only be understood to refer to the material aspects of the treatment granted to investors, or whether it could be deemed applicable to dispute settlement provisions as well. The Tribunal in *Maffezini* proceeded on the premise that the availability of direct arbitration for disputes between the investor and the host State is nowadays “inextricably” linked to the substantive protection of investors’ rights and is thus part of the treatment to which investors are entitled and to which the MFN obligation applies.⁸⁷ Several tribunals subsequently accepted the premise as valid, according it a determinative role in the construction of the MFN clause.⁸⁸ However, others doubted whether dispute settlement provisions are inherently covered by MFN clauses, refusing to proceed on the basis of any interpretative assumptions.⁸⁹ Later, the point of contention has shifted from whether dispute settlement can be seen as an inherent part of treatment, to the question whether the obligations granting investors substantive rights as to the material treatment that they and their investment are entitled to receive are not fundamentally different *in nature* from dispute settlement provisions, which grant those same investors the procedural capacity and means to protect those

(*Award on Preliminary Objections*) (SCC No 24/2007, 20 March 2009) [80]-[118]; *Austrian Airlines v The Slovak Republic (Final Award)* (UNCITRAL, 9 October 2009) [117]-[140]; and *ST-AD GmbH v Republic of Bulgaria (Award on Jurisdiction)* (UNCITRAL, PCA Case No 2011-06, 18 July 2013) [376]-[406], for instances where Claimants were unsuccessful in relying on MFN clauses to expand narrow dispute settlement provisions of the kind found predominantly of Eastern-European BITs which restrict arbitration to the quantum of compensation. See further *Salini v Jordan (Jurisdiction)* (n 66), [102]-[119], for an example of an unsuccessful attempt to use an MFN clause to circumvent a provision in the applicable dispute-settlement clause that specifically required disputes arising out of contracts to be resolved according to the procedure stipulated in the applicable investment agreement. In contrast, see *RosInvestCo UK Ltd v The Russian Federation (Award on Jurisdiction)* (SCC No V079/2005, 1 October 2007) [124]-[139], for a rare instance where the plea to substitute a narrowly-worded dispute-settlement clause was successful.

⁸³ See *Garanti Koza LLP v Turkmenistan (Decision on the Objection to Jurisdiction for Lack of Consent)* (ICSID Case No ARB/11/20, 3 July 2013) [40]-[97], for an example of a successful invocation of an MFN clause to replace UNCITRAL arbitration with ICSID arbitration.

⁸⁴ See *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic (Award on Preliminary Objections to Jurisdiction)* (UNCITRAL, LCIA Case No UN 7927, 19 September 2008) [40]-[41]; and *HICEE BV v The Slovak Republic (Partial Award)* (UNCITRAL, PCA Case No 2009-11, 23 May 2011) [148]-[149], for examples of unsuccessful reliance on an MFN clause to expand the definition of protected investments.

⁸⁵ See eg *Impregilo S.p.A. v. Argentine Republic (Concurring and Dissenting Opinion of Professor Brigitte Stern of 21 June 2011)* (ICSID Case No. ARB/07/17, 21 June 2011); *Hochtief (Dissenting Opinion Thomas)* (n 75); or *Daimler Financial Services AG v. Argentine Republic (Dissenting Opinion of Judge Charles N Brower)* (ICSID Case No. ARB/05/1, 15 August 2012) [17]-[38].

⁸⁶ cf *The Ambatielos Claim (United Kingdom of Great Britain and Northern Greece and Ireland) (Arbitral Award)* (XII UNRIIA 83, 6 March 1956) 107.

⁸⁷ *Maffezini (Jurisdiction)* (n 3), [54].

⁸⁸ In *Maffezini*, *ibid*, the premise was taken into account in interpreting an otherwise broadly-formulated MFN clause, which applied ‘in all matters governed by this Agreement’. In other cases, where the applicable MFN clauses were more narrowly formulated, the premise informed the determination whether dispute settlement provisions are part of the ‘treatment’ (*Siemens*), or a part of the ‘use’ and ‘enjoyment’ (*Renta*).

⁸⁹ *Plama v Bulgaria (Jurisdiction)* (n 82).

rights.⁹⁰ Relying on the distinction between substantive obligations and jurisdictional matters, and the paramount importance that State consent plays in the settlement of international disputes and the absence of any general obligation compelling States to have substantive obligations adjudicated, the tide has now changed to investment tribunals again questioning the application of MFN clauses – even in relation to pre-arbitration conditions on which the jurisprudence after *Maffezini* appeared for some time to be settled.

This change in the jurisprudence is partly attributable to a shift of focus, as claims based on MFN clauses are increasingly addressed as a matter of consent to arbitration. This matter eventually relates to another point of contention, which concerns the actual operation of the MFN clause, and specifically, whether or not the clause can be deemed to operate so as to effectively modify the terms of the standing offer to arbitrate expressed in the treaty's dispute settlement provisions. Some have maintained that an aggrieved investor can only acquire standing to raise an MFN claim before an arbitral tribunal once it satisfies any conditions potentially attached to host State's offer to arbitrate.⁹¹ Others have been more prone to admitting the possibility that the offer could be amended by reference to the terms of a third-party treaty before it is accepted by a putative claimant.⁹² This is not the place to resolve theoretical intricacies raised by the application of MFN clauses to dispute settlement provisions. At the end of the day, the outcome depends on the specific language of the MFN clause and the structure of the treaty. Given that some treaties expressly envision the application of MFN treatment to dispute-settlement arrangements,⁹³ there is nothing inherent to MFN clauses to prevent these from being applicable to dispute settlement matters.⁹⁴

From the point of view of the present inquiry, it is of some significance however that MFN clauses have so far successfully been put to use to avoid mandatory litigation in domestic courts in more than two thirds of the cases.⁹⁵ Therefore, it is not far-fetched to argue that MFN clauses have come to perform an important role in the reallocation of adjudicatory authority from domestic courts to investment treaty tribunals.⁹⁶ There is no doubt that this comports to the intention of various Claimants that relied on the clauses precisely for such purpose. Yet, giving the clauses such effect did not come without investment tribunals actually undertaking a value judgment as to the usefulness of domestic judicial procedures. After all, it is inherent to MFN clauses that they only apply where the treatment accorded under the basic treaty is less favourable than the treatment accorded under a comparator treaty. In *Maffezini*, the Tribunal's application of the MFN clause was premised on the understanding that third-party treaties allowing submission

⁹⁰ For support for such views in academic writings, see esp. C McLachlan, L Shore and M Weiniger, *International Investment Arbitration* (OUP 2009) [7.168]. For support in practice, see esp. *Impregilo (Separate Opinion Brigitte Stern)* (n85) [44]-[110]; cf also *Berschader* (n 82), where the Tribunal devoted ten paragraphs to the observation that 'all matters' cannot really refer to all matters, since some matters covered in BITs – such as their temporal and territorial application, their provisions on denunciation and renewal, etc – cannot be extended by means of an MFN clause.

⁹¹ See Z Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) *Journal of International Dispute Settlement* 97 at 107 (maintaining that a claimant can only assert the claim for MFN treatment by accepting the offer of arbitration on the terms stipulated in the basic treaty).

⁹² SW Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas' (2011) 2(2) *Journal of International Dispute Settlement* 353 at 365.

⁹³ See eg art 3(3), UK-Burundi BIT (1990).

⁹⁴ See ILC, 'Final Report of the Study Group on the Most-Favoured-Nation clause' (2015) ILC Ybk, vol. II (pt. 2), [162]-[163].

⁹⁵ See case cited *supra* (n 80 and 81). See, in addition, *Teinver v The Argentine Republic (Jurisdiction)* (n 33), [159]-[186], where the Tribunal expressed the opinion that Claimants could have relied on the MFN clause to avoid mandatory litigation requirements, had they not already been found to have satisfied those requirements in the circumstances of the case.

⁹⁶ See on this particularly Schill (n 92), 362, who argues that the question as to whether an MFN clause can confer jurisdiction on an investment treaty tribunal 'is essentially one relating to the allocation of adjudicatory authority between domestic courts and investment treaty tribunals.'

of disputes to arbitration without prior referral to domestic courts contained dispute settlement provisions that were more favourable to the protection of the investor's rights and interests than treaties requiring such referral.⁹⁷ The Tribunal noted in this respect how investors "have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts".⁹⁸ The Tribunal in *Telefónica* considered it even "undisputable" that it was preferable for an investor not to be obliged to litigate its claim in the courts of the host State before being allowed to submit it to ICSID arbitration, and that being exempted from such a requirement represented a "better treatment".⁹⁹ The Tribunal in *Gas Natural*, in contrast, did not rely on the investor's own preferences in determining which treatment was more favourable, but on a general presumption of investment arbitration being actually superior to adjudication by domestic courts. In that Tribunal's view, the provision of independent international arbitration was "a crucial element – indeed perhaps the most crucial element" of investment treaties, insofar as these "offered to investors assurances that disputes that might flow from their investments *would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts*".¹⁰⁰ Access to international arbitration only after an initial resort to domestic courts was thus necessarily seen a less favourable degree of protection than access to arbitration immediately.

These kinds of assumptions have given rise to criticism that it was not possible to actually imply a hierarchy in favour of dispute settlement provisions. McLachlan, Shore, and Weininger, in particular, warned that "it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration."¹⁰¹ Tribunals responded by arguing that the problem might lie in the way that the issue is articulated. According to the *Renta* Tribunal,

"Investors who desire access to a neutral international forum are 'necessarily' denigrating national justice. They do no more than make clear that their comfort is greater knowing that the international alternative is open to them. This is a rational concern. Nor is there anything illegitimate about the desideratum of an option to seise a neutral forum. History is replete with examples of investment disputes which have overwhelmed the capacity of national institutions – in countries of all stages of development – for dispassionate judgment."¹⁰²

Recent tribunals therefore preferred not to frame the question as one concerning whether or not resorting to domestic courts is more or less favourable to investors than international arbitration, but simply as one turning on the availability of a choice.¹⁰³ Reframing the question in such terms, however, is a bit of a red herring. For, the investor is not deprived of international arbitration because of mandatory litigation requirements; the latter are merely a condition for it to access arbitration. A more important development, however, is the greater comparative scrutiny

⁹⁷ *Maffezini (Jurisdiction)* (n 3), [39]-[40], [56].

⁹⁸ *ibid* [55].

⁹⁹ *Telefónica S.A v The Argentine Republic (Jurisdiction)* (n 75), [103]. Similar assumptions were made by other investment tribunals. See eg *Suez/Interaguas (Jurisdiction)* (n 81), [55]; *Suez/AWG* (n 81), [55] (concluding that investors receive a more favorable treatment when they do not need to submit to domestic courts first).

¹⁰⁰ *Gas Natural (Jurisdiction)* (n 81), [29].

¹⁰¹ McLachlan, Shore and Weininger (n 90), para 7.168.

¹⁰² *Renta v Russia* (n 82), [100].

¹⁰³ See eg *Hochtief* (n 74), [100] ("whatever the substantive merits of litigation and of arbitration, it is always more favourable to have the choice as to which to employ than it is not to have that choice."); or *Impregilo v Argentine Republic* (n 74), [101] ("...what should be considered is whether a choice between domestic proceedings and international arbitration, as in the Argentina-US BIT, is more favorable to the investor than compulsory domestic proceedings before access is opened to arbitration. The answer to this question is in general, and certainly in this case, evident: a system that gives a choice is more favorable to the investor than a system that gives no choice.")

to which dispute settlement clauses in third party treaties are increasingly subjected. As correctly noted by some tribunals, in cases where dispute settlement provisions in third party treaties contain fork-in-the-road clauses, it is certainly disputable whether or not such treatment is more favourable to dispute settlement provisions that solely impose time-bound domestic litigation as a pre-arbitration condition.¹⁰⁴

10.3.2. Release from Mandatory Litigation due to Futility

Another way for investment tribunals to accept jurisdiction over particular claims, despite the claimants' failure to have recourse to domestic remedies in accordance with treaty-imposed mandatory litigation requirements, has been through a successful demonstration that such recourse would have been futile, or else that it would not have led to an effective resolution of the dispute.

10.3.2.1. *The Legal Basis for the Futility Exception*

Exceptions grounded in the argument of futility were accepted on a variety of grounds. In most cases, the matter was primarily approached as an issue of treaty interpretation. In *BG v. Argentina* (2008), for example, the futility exception was accepted based on an *a contrario* argument: if the applicable mandatory litigation requirement were construed as an “absolute impediment to arbitration”, this would have lead to absurd and unreasonable results (and as such proscribed by Article 32 VCLT) in the event that recourse to domestic courts was “unilaterally prevented or hindered by the host state”.¹⁰⁵ In *Abaclat v. Argentina* (2011), instead, the exception was considered to implicitly follow from the object and purpose of the dispute settlement system put in place by the applicable BIT. Insofar as that system was one aimed at providing a “fair and efficient dispute settlement mechanism”, the ideas of fairness and efficiency had to be taken into account when interpreting and determining how the system was supposed to work in practice.¹⁰⁶ This required, in turn, the weighing of the interests of the litigating parties – that is, of Argentina’s interest in being given the opportunity to address the purportedly wrongful conduct within the framework of its own legal system, and of the investor’s interest in being provided with an efficient dispute resolution mechanism. Accordingly, the disregard of the litigation requirement would have been compatible with the treaty’s dispute settlement system where it had not “unduly deprived the Host State of a fair opportunity to address the issue through its domestic legal system.”¹⁰⁷ A variation of this “balancing” argument was later presented in *Urbaser v. Argentina* (2012). There, the futility exception was held to be applicable on the ground that obligations imposed by the local litigation requirement were “bilateral” in nature, meaning that it was not solely the host State, but equally the investor that it was not supposed to be deprived of a “fair opportunity” to have the dispute addressed through the local courts.¹⁰⁸ In *Ambiente Ufficio v. Argentina* (2013), the exception was instead accepted on the ground that the treaty-imposed mandatory litigation requirement was “sufficiently comparable” to the customary law obligation to exhaust local remedies so as to warrant the latter being “taken into account”, pursuant to Article 31(3)(c) VCLT, in the interpretation of the former, and thus to admit the application of the futility exception in the context of the treaty requirement.¹⁰⁹ Finally, in *Giovanni Alemanni v. Argentina* (2014), stronger emphasis was placed on the other elements of the dispute settlement provisions,

¹⁰⁴ *Daimler* (n 74), [240ff]; *ICS v Argentina* (n 7481), [322].

¹⁰⁵ *BG v Argentina* (n 74), [147]. The Tribunal had otherwise difficulties accepting the plea of futility solely on the ground that customary international law recognized such plea as an exception to the rule of exhaustion of local remedies. *ibid* [146].

¹⁰⁶ *Abaclat v Argentina* (n 74), [579].

¹⁰⁷ *ibid* [582].

¹⁰⁸ *Urbaser* (n 74), [131].

¹⁰⁹ *Ambiente Ufficio* (n 74), [599]-[607].

and particularly the requirement mandating litigants to settle their dispute through friendly consultation as a first step. Given that such consultations only had to be pursued “insofar as possible”, the requirement, when “properly interpreted”, had to be seen as incorporating a futility exception. But since potential domestic litigation depended on the outcome of this consultation process, it “logically” followed that a similar analysis pertained to the domestic litigation requirement, which therefore incorporated a futility exception by necessary implication.¹¹⁰

Other tribunals, in contrast, were less clear in stipulating the precise legal basis on which futility exceptions could be accepted. In *Kiliç v. Turkmenistan* (2013), the Tribunal seemingly accepted the futility exception merely by way of analogy with the international law rule of exhaustion of local remedies, confining itself to assessing the alleged futility of Claimant’s prior recourse to the courts of Turkmenistan.¹¹¹ In *Daimler v. Argentina* (2012), on the other hand, futility was accepted as “the requirement for waiving treaty-based jurisdictional pre-requisites in international law”.¹¹² But there were also tribunals which resisted to accept futility exceptions in the absence of explicit language. Such was the case in *ICS v. Argentina* (2012), where the Tribunal was not willing to “create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretive source, however desirable such policy considerations might be seen to be in the abstract.”¹¹³ In spite of this principled stance, however, the Tribunal proceeded to conclude that futility had at any rate not been demonstrated in the circumstances of that case.¹¹⁴

10.3.2.2. *The Standard for Assessing Futility*

This is not to say that the plea of futility has generally been accepted lightly. In all fairness, most investment tribunals considered that the threshold to be met for such exception to apply was rather high. In particular, to most tribunals, the futility of a particular remedy was not to depend on the “likelihood of success” in domestic judicial proceedings.¹¹⁵ Indeed, in practically all of the cases where the exemption from the local litigation requirement was accepted on grounds of futility, this was essentially due to the apparent *impossibility, as a matter of law*, to successfully challenge the imputed measures,¹¹⁶ while in cases where the plea of futility was not accepted, this was largely because claimants failed to demonstrate that domestic judicial relief was actually unavailable.¹¹⁷ Furthermore, in arriving at these findings, tribunals often deemed it appropriate to evaluate the evidence adduced in support of alleged futility of domestic judicial procedures rather

¹¹⁰ *Alemanni* (n 74), [310]-[311]; but the Tribunal also shared the analysis and the conclusions on the futility exception by the *Ambiente Ufficio* Tribunal ([316]).

¹¹¹ *Kiliç v Turkmenistan* (n 74), [8.1.1]-[8.1.21].

¹¹² *Daimler* (n 74), [198].

¹¹³ *ICS v Argentina* (n 74), [267].

¹¹⁴ *ibid* [269].

¹¹⁵ Some tribunals expressly aligned their analysis with the threshold habitually used for determining the futility of a remedy in the context of the customary rules on diplomatic protection – namely, the test of a reasonable prospect of obtaining an effective remedy. See *ICS v Argentina* (n 74), [269] and fn 296.; *Ambiente Ufficio* (n 74), [610]; *Alemanni* (n 74), [316]. The *Ambiente* and *Alemanni* Tribunals also declined to give weight to the trouble and expense that a claimant would have been put to had it made recourse to local courts. *Alemanni* (n 74), [315]-[316]. Other tribunals merely considered the “likelihood of success” not to be “central” to the futility assessment. See eg *Daimler* (n 74), [191]; or *BG v Argentina* (n 74), [156].

¹¹⁶ See *BG v Argentina* (n 74), [148]-[156]; *Abadlat* (n 74), [585]-[588]; *Ambiente Ufficio* (n 74), [615]-[620].

¹¹⁷ See eg *Daimler* (n 74), [191] (rejecting the futility argument as Claimant did not assert that it ‘lacked a cause of action before the Argentine courts’ or that it was ‘in some other way prevented from complying’ with the litigation requirement); *ICS v Argentina* (n 7481), [269] (finding that this was ‘not a case of obvious futility, where the relief sought is patently unavailable within the Argentine legal system’); or *Kiliç v Turkmenistan* (n 74), [8.1.4], [8.1.6] (holding that Claimant must have demonstrated that recourse to Respondent’s courts was not available to the investor under Turkmen law as a matter of principle).

stringently.¹¹⁸ All in all, the threshold applied to determining the futility exception in the context of local litigation clauses has thus not significantly differed from the standard applied to determining futility in the context of the judicial finality requirement.¹¹⁹ This, despite the admonition of some tribunals that, in the context of the former, the threshold to be met should arguably have been lower than in the context of the latter.¹²⁰

Not all investment tribunals were equally eager to apply such high threshold for establishing futility, however. In the view of the arbitrators in *Abaclat v. Argentina* (2011), the consequences of the Claimants' noncompliance with the local litigation requirement did not hinge on the potential futility of local remedies, but conversely, turned on the question whether the host State had not been "unduly deprived" of a fair opportunity to address the issue through its domestic legal system.¹²¹ This accordingly shifted the inquiry from the question whether Claimant had a reasonable prospect of obtaining an effective remedy, into the question whether there was a "real chance in practice" – as opposed to only a "theoretical opportunity" – that the Host State, through its courts, would have addressed the issue in a way that could lead to an effective resolution of the dispute.¹²² In much the same way, the Tribunal in *Urbaser v. Argentina* (2012) considered the inquiry to turn on the question whether the Host State has "allow[ed] its courts to operate in a manner that the opportunity to reach a suitable remedy is provided in efficient terms."¹²³ This necessitated determining whether the domestic proceedings were of such a nature that a decision on the substance could possibly be reached within the prescribed period, and not merely that it was not futile; for, "[a] party must be granted an opportunity or a chance to have the court reach an adjudicatory phase, otherwise the entire system would be meaningless."¹²⁴

In some ways, the scope of this redefined inquiry did not materially differ from that applied in the context of the standard of reasonable possibility of an effective remedy – namely, the question of the actual availability of a remedy. In its assessment whether there was a "real chance" that the State would have been able to address the dispute, the *Abaclat* Tribunal put weight on the fact that, if presented in Argentinean courts, a potential claim for compensation would not have been effective in view of the juridical impossibility for the government to pay out any compensation to bondholders that did not participate in the debt restructuring.¹²⁵ Furthermore, the Tribunal attached importance to the fact that the Argentine legal system generally did not provide for mass claims mechanisms.¹²⁶ In a similar way, the *Urbaser* Tribunal put weight on the fact that Claimants, as shareholders, would have lacked *jus standi* before the competent Argentinean courts to bring derivative claims with respect to the damage suffered by the local company, meaning that their claims would not have been capable of being adjudicated on the merits.¹²⁷

In other ways, however, the standard employed in *Abaclat* and *Urbaser* importantly differed from the customary law standard of futility. While under the latter, the likelihood of success and the

¹¹⁸ See eg *Kiliç v. Turkmenistan* (n 74), [8.1.10]-[8.1.21] (where a heightened standard of proof was applied in the assessment of Claimant's evidence); or *Daimler* (n 74), [191] (where a lower standard of proof was applied in the assessment of Respondent's rebuttal). The latter approach attracted criticism on the part of the dissenting arbitrator. See *Daimler (Dissenting Opinion Brower)* (85), [15].

¹¹⁹ cf Chapter 8.

¹²⁰ *Ambiente Ufficio* (n 74), [611].

¹²¹ *Abaclat* (n 74), [582].

¹²² *ibid.*

¹²³ *Urbaser* (n 74), [131].

¹²⁴ *ibid* [135]; cf also [131].

¹²⁵ *Abaclat* (n 74), [585].

¹²⁶ *ibid* [587].

¹²⁷ *Urbaser* (n 74), [157]-[163], and [202].

plaintiff's trouble and expense in pursuing a remedy would have played no role in the assessment of futility, in dispensing the Claimants from compliance with the local litigation requirement, the *Abaclat* Tribunal treated as relevant the fact that a potential constitutional challenge of the domestic statute that otherwise prevented Claimants from obtaining compensation from the State, would not have succeeded within the 18-months timeframe prescribed by the treaty, and the fact that, in the absence of mass claims mechanisms, Claimants would have needed to initiate separate claims, which would have made domestic litigation burdensome.¹²⁸ Furthermore, unlike in the context of the general futility plea, where it is for the Claimant to prove that a remedy was unavailable or ineffective, the *Abaclat* Tribunal reproached the Argentinean Government for not having arranged for an examination of the constitutionality of the emergency legislation, as this "could have brought clarity on the effectiveness of claims before the Argentinean courts".¹²⁹ In a similar fashion, the *Urbaser* Tribunal concluded that any potential constitutional challenges (coupled with a potential claim for compensation) that Claimants may have possibly initiated before Argentinean courts would not only have been "highly unlikely", but based upon the operational time frame of ordinary local courts, "actually impossible" to succeed – even if not inconceivable as a matter of principle.¹³⁰ Inasmuch as "[a] proceeding that can in no reasonable way be expected to reach that target is useless and unfair to the investor", the Claimants were thus likewise not required to comply with the local litigation rule.¹³¹

10.3.3. Is There a Proper Approach to the Application of the Mandatory Litigation Requirements?

In terms of regulatory technique, clauses imposing domestic litigation requirements have some obvious advantages over other treaty devices aimed at regulating jurisdictional interactions between domestic courts and investment tribunals. Compared to fork-in-the-road clauses, such requirements do not preclude double-dipping: An investor can try to resolve the dispute in domestic courts first, without losing its right to eventually resort to the international remedy. However, precisely in view of their design – *viz.*, the fact that the prescribed periods may be possibly too short to yield a resolution of the dispute, and that the investor is ultimately not bound to accept the outcome of domestic litigation – many investment tribunals perceived such clauses as "nonsensical",¹³² and as constituting nothing but an "obstacle" to international arbitration.¹³³ In the same vain, many academic commentators proceeded to treat them as "no more than a costly ritual that serves no purpose except to delay arbitration."¹³⁴ The question then is what an appropriate approach to their interpretation and application should be.

¹²⁸ *Abaclat* (n 74), [585].

¹²⁹ *ibid* [586].

¹³⁰ *Urbaser* (n 74), [156]. For the Tribunal's analysis, see [154]-[156] and [191]-[201].

¹³¹ *ibid* [202].

¹³² See eg *Plama v Bulgaria (Jurisdiction)* (n 82) [224] (considering one such clause as 'nonsensical from a practical point of view'); or *Hochtief* (n 74), [51], [88] (deeming such a clause as 'pointless' and providing 'no necessary benefit, and no necessary result other than the delay of the arbitration proceedings').

¹³³ *Urbaser* (n 74), [139] (treating such clause as 'an obstacle before access to international arbitration' that does 'not represent the most favourable option with respect to the efficient protection of international investment').

¹³⁴ C Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4(1) LPICT 1, at 4-5. See also A Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 LPICT 371, at 399 ('It is doubtful whether such a clause could ever serve the purpose of avoiding arbitration'); G Petrochilos, S Noury and D Kalderimis, 'Article 26' in LA Mistelis (ed), *Concise international arbitration* (Kluwer, 2010), 78 ('the most likely effect of such a provision is delay in the settlement of the dispute'); or GB Born and M Šćekić, 'Pre-arbitration Procedural Requirements: a Dismal Swamp' in DD Caron, SW Schill, A Cohen Smutny & EE Triantafilou, *Practising virtue: inside international arbitration* (OUP, 2015), 227-263, at 242-3 (doubting their effectiveness in the absence of the acceptance of a local judgment by the investor).

10.3.3.1. Towards a Balanced Approach to Their Interpretation?

Much of the misgivings that both investment tribunals and commentators have had with local litigation requirements are clearly based on an understanding of domestic courts as inherently capable of effectively resolving investment disputes. This understanding has not only provided the rationale for the application of MFN clauses in relation to dispute settlement provisions, but also the premise on which the scope and effect of the local litigation requirements were defined. Many tribunals thus proceeded to interpret such requirements as not foreclosing access to international arbitration even where a judgment had been rendered on the merits,¹³⁵ even where the language used in such provisions could conceivably also be interpreted as limiting recourse to arbitration solely to cases where no judgment has been rendered, or the domestic judgment had not been complied with.¹³⁶

As a matter of principle, there is nothing that would warrant treating prior litigation requirements as necessarily pointless.¹³⁷ First, one cannot *a priori* rule out the possibility that domestic courts, if seized of the investment dispute, could not deliver a judgment in the investor's favour and thus render subsequent arbitration moot.¹³⁸ What if the host State, for instance, uses its sovereign powers to accelerate domestic judicial proceedings, so that a suitable remedy is nonetheless provided within the requested time frame?¹³⁹ Second, even where it does not resolve the dispute as a whole, prior recourse to domestic courts may contribute to the narrowing of contentious issues, and perhaps even induce the host State to settle the dispute out of court.¹⁴⁰ Third, even where the investment dispute eventually ends up going to international arbitration, prior domestic litigation may still be of significance to the international claim. A judgment may thus confirm a contested legal right claimed to exist under domestic law, or it may otherwise provide a valuable factual predicate for the subsequent treaty claim (by establishing, for example, that the impugned measures have violated domestic law).¹⁴¹ Furthermore, prior domestic litigation may also lead to an expansion of the international claim where the treatment received by the investor in the respondent's courts compounds a (inchoate) treaty breach.¹⁴² Last

¹³⁵ See *Urbaser* (n 74), [191] ("Article X(3)(a) provides for bringing the dispute to international arbitration if it 'persists' although a decision on the substance had been reached at the domestic level. In other words, a decision rendered by a domestic court has no *res judicata* effect on an arbitral tribunal notwithstanding compliance with the test that would otherwise cause *res judicata* effect to attach under the domestic law of the Host State"); or *Maffezini (Jurisdiction)* (n 3), [27] ("it is to be noted that Article X(3)(a) does not say that a case may not be referred to arbitration if a domestic court has rendered a decision on the merits of the dispute within a period of eighteen months. It provides merely that if such a decision has been rendered and if the dispute continues, the case may be referred to arbitration.").

¹³⁶ On cogent arguments on this point, see further Swarabowicz (n 55), 297.

¹³⁷ For criticism, see also AS Rau, 'The Allocation of Power between Arbitral Tribunals and State Courts' (2017) 390 *Recueil des Cours* 9, 242-244, objecting to the treatment of the local litigation requirement in an "unnecessarily reductive and unnuanced fashion", "as little more than an empty, formal ritual without operative significance".

¹³⁸ See eg Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Decision on Jurisdiction) (ICSID Case No ARB/10/7, 2 July 2013) (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), [143] (suggesting that, if the challenge before Uruguay's administrative court of the measure claimed to be in violation of the applicable BIT had been successful, the Claimants' treaty claims in the arbitration would have lost their "legal grounds"). See also *Maffezini (Jurisdiction)* (n 3), [36] (noting that investors are likely to seek international arbitration only if dissatisfied with the domestic judicial decision, and that they will probably desist to do so if convinced that the international tribunal would reach the same decision).

¹³⁹ See *Telefónica (Jurisdiction)* (n 75), fn 55 to [103] (observing that "[i]t cannot be excluded from the outset that the host State might be able, if it so wishes, to speed up proceedings and the issuance of a decision by its own courts' in the prescribed period of time).

¹⁴⁰ *BG Group PLC v. Republic of Argentina*, 134 S. CT 1221 (2014) (Roberts, C. J., dissenting).

¹⁴¹ On this, see *Hochtief (Dissenting Opinion Thomas)* (n 75), [8]-[9].

¹⁴² On this, see *Daimler* (n 74), [247].

but not least, domestic litigation may equally serve other policy goals, such as the strengthening of the domestic rule of law.¹⁴³

On the other hand, it may well be that, in practice, insisting on the investor's pursuit of domestic remedies in circumstances where host State courts are notoriously slow may constitute an excessive burden for the foreign investor. Indeed, in many of the cases involving Argentina, one of the reasons for investment tribunals not have major objections to releasing claimants from mandatory litigation requirements can be also sought in the fact that recourse to such litigation could have been very costly. The Argentinean court fees namely depended on a fixed percentage of the claimed amount, meaning that foreign investors would have potentially been spending millions of USD merely on court fees, for which it was "far from self-evident" that they would be recoverable through subsequent arbitration.¹⁴⁴

The mere fact that these provisions have been inserted into treaties at the behest of the capital-importing contracting parties is no reason for local litigation requirements to be interpreted solely from the perspective of whether or not they actually provide a benefit to, or constitute a burden for, the investor.¹⁴⁵ Their interpretation cannot thus be based on a priori assessment that the mandatory litigation requirement may lack utility. For, what if domestic courts may actually have a track record of resolving disputes within the given time frame?¹⁴⁶ This begs the question as to what the appropriate test should be, in order to consider an investor exempted from complying with the local litigation requirements: Should *reasonable prospect of success* be sufficient to establish futility for that purpose, or can the more stringent tests of *reasonable possibility of an effective remedy* or even *obvious futility* be better employed to those ends?¹⁴⁷ In the end, such distinctions may be more of a theoretical than practical value: within the very short time frame prescribed for local litigation, what may seem obviously futile may come close to that what may offer no reasonable prospect of success.

10.3.3.2. Towards a Non-Formalistic Approach to Their Application?

Absent conditions in the host State's judicial system making compliance with local litigation requirements futile or demonstrably useless, the question eventually arises as to what the appropriate approach should be to determining whether such preconditions to arbitrations have been met. Interesting, practically none of the tribunals otherwise relieving investors from compliance with those preconditions, invoked the usual problem of identity of actions as a reason for considering such preconditions difficult to be met in practice. On the contrary, most investment tribunals – and especially those giving effect to local litigation requirements – adopted a non-formalistic approach to the assessment whether investors complied with these preconditions. This was above all visible in terms of substance. Hence, the fact that suits brought

¹⁴³ See *ibid*, [197], for the interesting argument that mandatory litigation of investment disputes in domestic courts may contribute to the development of a Host State's judiciary, to the extent that domestic courts could gain experience in deciding matters relating to investor's treaty rights.

¹⁴⁴ *Urbaser* (n 74), [201].

¹⁴⁵ See *Urbaser* (n 74), [137] (convincingly suggesting that the rule's interpretation cannot possibly be based on mere 'theoretical musings' pursuant to which the rule shall be deemed useless merely because of the 'likelihood of a "pointless litigation"'). See also eg *Ambiente Ufficio* (n 74), [614] (observing in the same sense that, since the local litigation requirement cannot be construed as requiring a final disposition of disputes in the prescribed time frame, accepting futility for reason of alleged impossibility or potential incapacity of the local courts to resolving an actual dispute within such time frame would have the effect of rendering the treaty-imposed requirements "nugatory" in most real-life investment disputes); or *ICS v Argentina* (n 74), [267] (considering it "especially dangerous" to admit a futility exception in relation to the local litigation requirement "in the absence of conclusive evidence adduced to support a tribunal's teleological inferences: the same provision may strike some as 'nonsensical' and others as genius").

¹⁴⁶ cf *Daimler* (n 74), [197] (refusing to treat the clause as 'nonsensical', 'particularly in light of the Government's assertions that the Argentine courts can and do frequently resolve disputes in less than 18 months').

¹⁴⁷ cf *supra* 8.5.2.

before domestic courts involved different claimants than those subsequently participating in proceedings before investment tribunals was for example not considered to be a barrier to the fulfilment of the mandatory litigation requirement.¹⁴⁸ Neither were consequences attached to the fact that the legal basis or the cause of action of domestic proceedings was not the same as that invoked in subsequent arbitration.¹⁴⁹ Rather, investment tribunals considered it sufficient that the “subject matter” of both actions was in “substance” the same by sharing the same “goal”,¹⁵⁰ or by involving “substantially similar facts”,¹⁵¹ or else that the cause of action at the domestic level be of such nature that permits resolution of the dispute to “the same extent” as if the claim had been brought before an international arbitral tribunal pursuant to an investment treaty.¹⁵² Indeed, the triple identity test habitually applied in the context of fork-in-the-road clauses was deemed to “not merry well” with the purposes of the local litigation requirement.¹⁵³ On top of that, also in terms of procedure, many investment tribunals presented themselves nonformalistic by not dismissing claims on account of the fact that the mandatory litigation period had not yet lapsed at the time that the request for arbitration had been filed.¹⁵⁴

In defending their leniency in assessing the sameness of the dispute litigated in domestic courts, some tribunals sought support in ICJ’s own approach to dealing with issues of compliance with the local remedies rule, pursuant to which the “essence of the claim” has been deemed the appropriate basis for comparison.¹⁵⁵ Others found support for their nonformalist approach above all in the language of the applicable investment treaty, where the notion of “dispute” was broadly defined.¹⁵⁶ In the end, what is above all striking, is how strongly this non-

¹⁴⁸ See eg *Teimer v Argentina (Jurisdiction)* (n 33), [133], where the preceding litigation involving Claimant’s subsidiary in Argentina’s courts was found to have satisfied the mandatory litigation requirement in the applicable Spain-Argentina BIT, notwithstanding the fact that the subsidiary itself was subsequently not involved in the ICSID arbitration; or *Philip Morris v Uruguay* (n 138), [98]-[114], where the mandatory litigation requirement in the Switzerland-Uruguay BIT was deemed satisfied where only one of the claimants in treaty proceedings was actually involved in domestic proceedings. Of relevance was that the one claimant “clearly acted in the interest also of the other Claimants”, as it was wholly-owned by the latter. *Ibid*, [114].

¹⁴⁹ Tribunals expressly rejected that the action brought before a local court would need to allege a breach of the applicable treaty. See *Urbaser* (n 74), [181], *Ömer Dede* (n 74), [252]. Tribunals also rejected that the relief sought in the domestic courts would have to be the same or similar to the relief sought in international arbitration. *Wintershall* (n 74), [118], [196].

¹⁵⁰ *Teimer v Argentina (Jurisdiction)* (n 33), [132] The domestic proceedings in that case involved the determination of the value of the expropriated assets pursuant to Argentina’s local laws, while the ICSID proceedings related to the validity of the expropriation from the perspective of the standards of treatment prescribed by the treaty.

¹⁵¹ *Philip Morris v Uruguay* (n 138), [113] The remedies sought in domestic administrative courts were different and based on a different cause of action than the remedies before the investment tribunal.

¹⁵² *Urbaser* (n 74), [181]; *Ömer Dede* (n 74), [253]. This was considered to require that the “entire dispute” must be capable of being brought to the competent local court. *Urbaser*, *ibid*.

¹⁵³ *Ömer Dede* (n 74), [249].

¹⁵⁴ See *TSA Spectrum de Argentina SA v Argentine Republic (Award)* (ICSID Case No ARB/05/5, 19 December 2008) [111]-[113], deciding not to decline jurisdiction in spite of the eighteen months mandatory litigation period prescribed by art 10 of the Netherlands-Arentina BIT not yet having lapsed when ICSID proceedings were initiated, since only three out of the eighteen months remained after the Claimant obtained the first decision on its administrative appeal and it was unlikely that the investor would have obtained a court decision to its satisfaction before the expiry of the eighteen months. See also *Teimer v Argentina (Jurisdiction)* (n 33), [135]; or *Philip Morris v Uruguay* (n 138), [130]-[148].

¹⁵⁵ *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, [59] (the local remedies rule does not “require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties”; it is sufficient “if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.”). The precedent was relied upon in *Teimer v Argentina (Jurisdiction)* (n 33), [132]-[133].

¹⁵⁶ *Philip Morris* (n 138), [107]-[113]. But see *Ömer Dede* (n 74), [247]-[253], where the fact that art 6 of the applicable Turkey-Romania BIT defined disputes as those involving “a breach of any right conferred or created by this Agreement with respect to an investment” was not considered a reason to hold that the dispute in domestic courts would have to be articulated in terms of a treaty breach.

formalistic attitude contrasts with the attitude adopted by tribunals in relation to fork-in-the-road clauses, despite the point of comparison in both cases being the sameness of the “dispute”.

10.4. Concluding Observations

When it comes to the interpretation and application of treaty provisions specifically aimed at regulating jurisdictional interactions, investment tribunals have thus not constituted their role towards domestic courts any differently than in other contexts of jurisdictional competition. Despite treaty language carving out specific roles for domestic courts in the disposition of investment disputes, tribunals largely refused to abrogate their adjudicatory authority in favour of the domestic judiciary.

Interestingly, when facing such express treaty stipulations, tribunals could not position themselves by reference to the supremacy argument – for the instruments from which they derived their adjudicatory authority themselves envisioned a particular role for domestic courts. Indeed, in the case of fork-in-the-road clauses, the role envisioned is actually one that implies parity between the international and the domestic forum. Rather, in limiting the effects of jurisdiction-regulating treaty devices, investment tribunals primarily capitalized on the substantive shift – the availability of concrete, treaty-prescribed standards of treatment. While in the case of the fork-in-the-road clauses, it was the contract/treaty claim distinction *itself* that was primarily relied upon to uphold the jurisdiction of the international forum, in the case of the mandatory local litigation clauses, it was rather one concrete treaty standard that proved particularly valuable for that purpose – the MFN provision.

As noted in this chapter, it is debatable whether such practice can really be reconciled with the language of applicable treaty provisions. When it comes to fork-in-the-road clauses, there is little in their language that would suggest that the sameness of a “dispute” should be determined by reference to the law on which the claim is grounded. Furthermore, one cannot fail to observe the marked divergence between the formalism applied in determining the sameness of a dispute for the purposes of the fork-in-the-road clauses, and the non-formalism pursued in determining such sameness in the context of mandatory local litigation clauses – a divergence that attests very clearly to the tribunals’ general pro-arbitration stance. As to MFN clauses, their application to dispute settlement provisions continues to remain subject of contestation. For the purposes of the present inquiry, there is no need to take a firm stance on whether or not such application is warranted. What is rather of interest is that their extension to dispute settlement clauses was essentially premised on the perception of prior domestic litigation being less favourable than direct recourse to treaty remedies.

Thus, what is rather clear from this overview of existing jurisprudence is that beneath the tribunals’ approach to interpretation and application of treaty provisions one finds a fundamental distrust towards domestic courts and disbelief in their ability to achieve a final disposition of investment disputes. Especially in the interpretation and application of mandatory local litigation clauses, the reasoning frequently rested on the presumption that domestic courts are inherently incapable of resolving investment disputes, and that such disputes will necessarily persist even in the event of a positive outcome of domestic litigation. One could equally proceed from the opposite assumption, that mandatory recourse to local judicial remedies may actually decrease the costs of litigation, for where investment disputes are satisfactorily resolved by domestic courts, investors are less likely bring their claims to arbitration. In the end, the question turns on the extent to which one believes that investment disputes are capable of disposition by domestic courts, which is ultimately a question of trust.

As the following chapter will demonstrate, the same fundamental distrust towards domestic courts essentially also permeates the tribunals' approach to determining the effects of contractual stipulations agreed between investors and host States.

11. REGULATING INTERACTIONS AT THE LEVEL OF THE INVESTOR: WAIVERS AND OTHER RENOUNCEMENTS OF TREATY REMEDIES

To complete the analysis, the final chapter in this part considers how successful the regulation of interactions between investment tribunals and domestic courts has been at the level of each individual investor. The analysis builds on the proposition that investment arbitration is neither a mandatory nor an exclusive dispute settlement mechanism but that, at least from the perspective of the investor, the mechanism remains a voluntary one, and that an investor is essentially also free to decide to have its dispute with the host State resolved by other means than through investment (treaty) arbitration.¹ Building on such proposition, the chapter examines the circumstances under which the investor has been taken to have validly opted for a dispute settlement method other than the treaty forum. In particular, it essentially looks at whether investment tribunals were prepared to concede that a choice-of-forum agreement entered into by the investor could have had the effect of precluding, from the outset, the jurisdiction of the treaty forum. Given the focus of the present study, the chapter essentially deals with the possibility that the choice is made in favour of domestic courts; to a large extent, however, the findings may be equally applicable to other dispute settlement mechanisms (such as contractual arbitration, for instance).

The analysis proceeds on the assumption that investor's choice for a particular forum can be undertaken in a variety of ways. For ease of discussion, a distinction will be made between those cases where a choice can be deemed to have been made in the context of an agreement (formal or informal) between the investor and the host State (11.1), and those cases where a choice must be deemed to have arisen as a result of the investor's conduct as such (11.2). Neither the former, nor the latter possibility have attracted much consideration in academic literature. Some of the issues have nonetheless been touched upon by investment tribunals; and though the practice may not be abundant, the few precedents still permit to formulate a few general observations. Namely, the general disinclination of investment tribunals to relinquish their competence over a particular dispute in favour of the jurisdiction of domestic courts.

11.1. Regulating Jurisdictional Conflicts by Means of Agreement between Investor and Host-State

It seems appropriate to begin the analysis by considering first the straightforward possibility of an investor agreeing with the host State that a dispute arising out of a treaty-protected investment be decided by a forum other than the investment treaty tribunal. An agreement to such effect could

¹ A great deal of investment treaties adopt terminology consistent with the proposition that recourse to treaty remedies remains at the discretion of the investor. See eg art 1120(1) NAFTA ('a disputing investor may submit the claim to arbitration'); art 9(2) China BIT (the dispute 'shall be submitted by the choice of the investor'); art 10(2) Germany BIT (the dispute 'shall, at the request of the investor of the other Contracting State, be submitted to arbitration'); art 10(3) Italy BIT ('the investor in question may submit at his choice the dispute for settlement'); art 11(2) Switzerland BIT ('the investor may submit the dispute...'); art 8(2) UK BIT (a dispute shall 'be submitted to international arbitration if the national or company concerned so wishes'); art 14(1) Austrian BITs ('the investor may choose to submit it [a dispute] for resolution'); arts 22(1) and 23(1) Canada BITs (an investor of a Party 'may submit to arbitration'). The proposition is further confirmed by art 36(1) ICSID Convention, which stipulates in the relevant part that 'any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General...' Furthermore, the investor retains the freedom to settle the dispute, or discontinue the proceedings. See eg Rule 43(1) ICSID Arbitration Rules (recognizing the freedom of the disputing parties to agree on a settlement of the dispute or otherwise to discontinue the proceeding before an award is rendered).

potentially take on a variety of forms; though, in practice, it has been mostly in relation to two types of contractual clauses that such possibility has been considered: in relation to exclusive forum selection clauses and in relation to contractual waivers. Hence, the following sections explore the question whether investment treaty tribunals could be deprived of jurisdiction over treaty claims as a result of a contractual stipulation vesting exclusive jurisdiction over such claims with domestic courts (11.1.1.), as well as the question whether a treaty tribunal could lack jurisdiction over a particular treaty claim as a result of an investor renouncing its treaty actions by virtue of a contractual waiver (11.1.2.). Furthermore, the question is explored whether an agreement to have treaty claims decided by a forum other than the treaty tribunal could be entered into after the dispute has arisen (11.1.3.).

11.1.1. Forum Selection Clauses

In the context of many commercial transactions having an international element, it is not uncommon for the parties to designate a particular forum to adjudicate disputes arising out of such transactions.² Such designation can be made on a non-exclusive basis; very often, however, the selection of a forum is a mandatory one, requiring that litigation be pursued solely in the agreed forum, at the exclusion of other fora that would otherwise also possess jurisdiction. In the context of investment arbitration, the question has thus not infrequently arisen as to whether an exclusive jurisdiction clause in favour of domestic courts of the host State included in a contract that the latter had entered into with the investor could have the effect of depriving a treaty tribunal of jurisdiction over treaty claims potentially arising out of such contract. As explained in 9.2., in the practice of arbitral tribunals, jurisdictional objections based on the presence of such forum selection clauses have rarely been successful. Nevertheless, most investment treaty tribunals conceded the possibility – albeit at the level of principle, and only in an implicit way – that a contractual forum selection clause could affect their jurisdiction.³ Indeed, as a matter of logic, such possibility cannot be discarded. The jurisdiction of a treaty tribunal is consensual in nature, as it is based on the State's unilateral offer to arbitrate investment disputes and the investor's acceptance of such offer, which together give rise to an agreement to arbitrate. In most cases, such agreement is only perfected once the investor institutes proceedings; and even once perfected, it can be still subject to change by mutual agreement.⁴ In view of the importance of party autonomy, there is little reason why the jurisdiction of a treaty tribunal cannot be further affected by contractual stipulations embodying agreements of other kind.

Nonetheless, the effects of contractual forum selection clauses give rise to several conceptual quandaries. In the practice of investment tribunals, the discussion most often turned on the question whether the choice for a particular jurisdiction extended also to treaty claims. In this respect, the inquiry was mostly limited to the material scope of the contractual clause in question (1). Much less attention, on the other hand, was devoted to the question of the extent to which a forum other than that provided for in the applicable investment treaty has competence to pronounce upon claims concerning the treaty's violations (2), or the extent to which a treaty

² In the context of (international) commercial arbitration, a distinction is usually made between 'forum selection clauses' (ie clauses designating a particular court in a jurisdiction agreed upon by the parties) and 'arbitration agreements' (ie clauses designating arbitration as a dispute resolution mechanism). See on this GB Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Kluwer Law International 2013), 2. In the context of the present analysis, however, the term 'forum selection clause' will be used more loosely, as a shorthand for indicating any agreement that effects the designation of a particular dispute settlement body, regardless of whether that body is judicial or arbitral in nature.

³ One of the few instances where such concession has expressly been made is the Annulment decision in *Vivendi v Argentina (Decision on Annulment) (Vivendi I)* (ICSID Case No ARB/97/3, 3 July 2002) [76]. There, the observation was made that, in order for a contractual stipulation to 'exclude the jurisdiction' of an international tribunal arising under a BIT, at the very least, 'a clear indication of an intention to exclude that jurisdiction would be required.'

⁴ cf ICSID, art 25(1) (prohibiting only unilateral withdrawals of consent to ICSID arbitration).

tribunal's jurisdiction over treaty claims could actually be shared with any other forum (3). Each of these questions warrants careful consideration.

11.1.1.1. *The Question of Material Scope*

In practice, several factors have been determinative in the ascertainment whether a particular contractual stipulation was intended to affect the jurisdiction of a treaty tribunal. For a forum selection clause to be capable of displacing the jurisdiction of a treaty tribunal in favour of domestic courts, it was first of all deemed necessary that clause in question actually entailed a mandatory selection. Clauses stipulating that “the parties agree to the jurisdiction” of the local courts, or that the investor “recognizes the jurisdiction and competence” of such courts, were normally not held to amount to a mandatory choice.⁵ A further obstacle has been the question of contractual privity. For a contractual forum selection clause to be opposable in proceedings before an investment tribunal, it was required that the clause in question had been executed between the host State and the same legal or natural person that later brought the claim under the relevant investment treaty.⁶ The third stumbling block has been the required identity of subject-matter: in order for the forum selection clause to be considered effective vis-à-vis a treaty tribunal, the matters submitted to the contractually-agreed forum had to include treaty claims. This has probably been the most difficult obstacle to overcome: not so much because forum selection clauses were in some cases expressly limited to contractual claims;⁷ but especially because investment tribunals have generally not been willing to assume that the contractually-agreed forum had in fact been designated to determine treaty claims in the absence of express language to such effect. Such stance is perhaps defensible in circumstances where the forum selection clause is silent on the matters that are to be submitted to the contractually agreed forum.⁸ But it is more difficult to justify in circumstances where the clause in question is formulated broadly enough to be capable of being construed, on an ordinary reading, as encompassing treaty claims. Of relevance here are especially the standard formulae that are frequently used in investor-State contracts and which typically cover “all” or “any” disputes “arising out of”, “in connection with”, or “relating to” the instrument in question. While in many domestic jurisdictions, such contractual formulae would not uncommonly be construed as capable of encompassing claims other than those based on the contract in question (e.g. statutory or tortious claims),⁹ in investment arbitration, there has often been a preference for their narrow construction.¹⁰

⁵ For an example of the former, see *Lanco International Inc v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/97/6, 8 December 1998) [6] and [26]; for the latter, see *Aguas del Tunari SA v Republic of Bolivia (Decision on Respondent's Objections to Jurisdiction)* (ICSID Case No ARB/02/3, 21 October 2005) [112]. For a similar conclusion, see also *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Decision on Jurisdiction)* (ICSID Case No ARB/00/4, [27]).

⁶ In the absence of contractual privity, investment tribunals have generally also refused to give effect to contractual forum selection clauses. See eg *Aguas del Tunari*, ibid [114].

⁷ See eg *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Award)* (ICSID Case No ARB/97/3, 21 November 2000) [27], where the investor submitted to the exclusive jurisdiction of the local courts ‘for purposes of interpretation and application of this Contract’.

⁸ See eg *Aguas del Tunari* (n 5), [111]-[114], where the applicable concession contract stipulated that ‘[The Concessionaire] recognizes the jurisdiction and competence [...] of the courts of the Republic of Bolivia, in accordance with the SIRESE law and other applicable Bolivian laws’ and the treaty Tribunal was only willing to entertain the assumption that such language amounted to an exclusive forum selection clause for disputes arising under the Concession; treaty claims were not deemed capable of falling under that provision.

⁹ For examples, see G Born, *International Commercial Arbitration*, vol 1 (Kluwer 2009), 1099-1107.

¹⁰ See eg *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan (Decision on Jurisdiction)* (ICSID Case No ARB/02/13, 9 November 2004), where the Tribunal concluded ([96]) that the dispute settlement procedures provided for in the Contract ‘could only cover claims based on breaches of the Contract’ and ‘cannot cover claims based on breaches of the BIT’, despite the fact that the procedures in question applied to a ‘dispute of any kind whatsoever [...] in connection with, or arising out of, the Contract or the execution of the Works’ ([71]). There have also been exceptions: See also *Aguas del Tunari* (n 5), fn 90 to [114]: ‘An exclusive forum selection clause in a contract is generally regarded as severable from the

11.1.1.2. Competence of Domestic Forum over Treaty Claims

In some cases, investment tribunals refused to uphold contractual forum selection clauses in relation to treaty claims due to considerations external to the actual language of the clause in question. One such obstacle was found in the fact that the contractually designated forum was not competent to pronounce upon treaty claims. In *SGS v. Pakistan* (2003), where the forum selection clause in the Claimant's concession contract appeared broad enough to possibly encompass treaty claims (in that it applied to "[a]ny dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination or invalidity thereof"), the ICSID Tribunal decided not to give effect to it, for among other reasons, because the designated forum would not have been competent, as a matter of Pakistani law (as the law applicable to the contract), to consider potential treaty claims. Furthermore, the contract predated the treaty and could therefore not be presumed that the contractual forum was vested with competence over treaty claims.¹¹ In a similar way, the Tribunal in *BIVAC v. Paraguay* (2009) decide not to give effect to the contractual forum selection clause in relation to Claimant's treaty claims, in circumstances where the designated local courts, as a matter of Paraguayan law, lacked competence to interpret and apply the treaty. This notwithstanding the Tribunal's finding that the text of the clause (which vested the local courts with exclusive jurisdiction over "any conflict, controversy or claim which arises from or is produced in relation to" the Claimant's contract) was "very broad" and "capable of being interpreted to include not only disputes relating directly to alleged breaches of the Contract but also disputes concerning acts that may be connected with the Contract which may give rise to claims under other instruments, including the BIT."¹²

11.1.1.3. Exclusive Nature of Treaty Tribunal's Jurisdiction

An altogether different question is whether the competence of the treaty tribunal in relation to treaty claims can actually be shared by some other adjudicatory body, or remains vested exclusively with the treaty tribunal. Some tribunals sought an answer to this question in the language of the dispute-settlement provisions in the applicable treaty. The Tribunal in *SGS v. Pakistan* (2003), for example, interpreted the fact that the applicable BIT provided only for recourse to arbitration under the ICSID Convention to warrant the presumption that treaty claims lay exclusively within its own jurisdiction.¹³ It thus rejected the argument that treaty claims would have fallen also within the jurisdiction of the contractual forum, which was otherwise competent to decide "[a]ny dispute, controversy or claim arising out of, or relating to" the Claimant's concession contract – a formula which was arguably broad enough the encompass treaty claims. Though, the applicable BIT did not expressly stipulate that the jurisdiction of the ICSID Tribunal was an exclusive one, the Tribunal considered that the treaty's silence on this point warranted the inverse inference, noting that the Contracting Parties to the BIT "have not stated that the jurisdiction of the ICSID-constituted tribunal is not exclusive".¹⁴ The problem with this reasoning is that the jurisdiction of the tribunal under the applicable BIT in that case was not limited to claims concerning violations of the treaty itself, but extended to "disputes with respect to investments".¹⁵ If the exclusivity argument really applied, this would have meant that all disputes with respect to a covered investment – that is, even

contract of which it is a part. And although it is usually the case that such a clause only refers to disputes arising under the contract, it can be broader in scope. For example, some clauses refer not only to disputes "arising under" the contract but also disputes "related to" the contract.

¹¹ *SGS v Pakistan (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/01/13, 6 August 2003), [153]-[154].

¹² *Bivac v Paraguay BIVAC v Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/07/9, 29 May 2009), [145].

¹³ *SGS v Pakistan* (n 11), [152].

¹⁴ *ibid.*

¹⁵ cf art 9(1) of the applicable Switzerland-Pakistan BIT.

disputes concerning violations of domestic law – should have been submitted to ICSID arbitration; a conclusion that is difficult to accept.

At the more general level, it is possible to question whether inferences based on the availability of alternative mechanism (or lack thereof) are really justified. Investment treaties are quite divergent in the mechanisms that they set out for the resolution of investment disputes. On the one hand, it is not infrequent for investment treaties to provide for a variety of alternatives: not only can disputes concerning investments be submitted to different types of investment arbitration (e.g. ICSID Arbitration, *ad hoc* arbitration under UNCITRAL rules, or arbitration before the SCC...);¹⁶ sometimes provision is expressly made for the possibility of such disputes being submitted to domestic courts as an alternative to international arbitration.¹⁷ On the other hand, there are also examples of investment treaties which offer the investor no such choice, limiting the available dispute settlement mechanism to procedures provided for under the ICSID Convention only.¹⁸ But at the end of the day, recourse to those mechanisms remains at the choice of the investor. The latter may decide (for instance, out of financial considerations) to attempt to have its investment dispute settled in the courts of the host State and in the context of those proceedings invoke violations of an applicable investment treaty. Even though that investment treaty may solely provide for ICSID arbitration, there is nothing that would prevent the investor from invoking the treaty before domestic courts, and provided that (as a matter of domestic law) the latter are indeed competent to hear claims of alleged violations of international law, there is no general rule of international law that would prohibit the adjudication of such treaty claims by such courts.¹⁹ A matter would, perhaps, be different if the treaty stipulated that the competence to pronounce upon violations of the treaty lies exclusively with the treaty tribunal. But investment treaties do not go thus far. Contrary to the presumption advanced by the *SGS v. Pakistan* Tribunal, the better conclusion would be that, in the absence of an express treaty stipulation to such effect, the treaty forum does not enjoy exclusive jurisdiction over treaty claims.

This finally raises the question of the effects of Article 26 ICSID Convention, which itself stipulates that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.” The problem is that, in the context of treaty-based arbitrations, the presumption in favour of exclusivity of the ICSID Centre only operates once the investor has accepted the State’s offer to arbitrate disputes under the investment treaty. Until the investor has perfected the agreement to arbitrate the dispute by accepting the offer, Article 26 does not prevent the host State and the investor from agreeing that treaty claims be submitted to a forum other than an ICSID tribunal. Furthermore, as the words “unless otherwise stated” make clear, even once consent to ICSID arbitration is perfected, the presumption is subject to modification by agreement of the parties.

11.1.2. Contractual Waiver of Treaty Rights

In practice, the existence of a contractual forum selection clause was not so much used as an argument to the effect that treaty claims should more properly have been decided by another

¹⁶ See eg art 26 ECT, or art 1120 NAFTA.

¹⁷ See eg art 11(2) Switzerland BITs (‘the investor may submit the dispute either to the courts or the administrative tribunals of the Contracting Party in whose territory the investment has been made or to international arbitration’); or art 9(1) Netherlands–Paraguay BIT (‘any legal dispute arising between a Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party may, at the request of one of the parties concerned, be submitted to the competent tribunal of that Contracting Party’).

¹⁸ See eg art 9(2) Switzerland–Pakistan BIT; or Netherlands–Nigeria BIT.

¹⁹ In some contexts, the competence of domestic courts can be limited by way of treaty stipulations. cf Art 267 TFEU recognizing the exclusive competence of the Court of Justice of European Communities to conclusively determine questions relating to the interpretation of the European Treaties, as well as questions concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.

forum as it was rather advanced as an argument to the effect that treaty remedies had simply been renounced. Consequently, investment tribunals have often been required to consider whether contractual forum selection clauses could be construed as amounting to a waiver of remedies provided for under an applicable investment treaty.

The question of waiver – in the sense of a voluntary renunciation of a right or claim²⁰ – again gives rise to several conceptual quandaries. In the first place, the question arises as to the actual possibility of a waiver – both, as a question of *disposability*; i.e. the capacity of the investor to renounce available treaty remedies (1), and as a question of *permissibility* of such renouncement (2).²¹ If such possibility is accepted, in the second place, the question arises as to the *conditions* under which a waiver can validly be expressed in order to be effective before a treaty tribunal (3).

11.1.2.1. Disposability

Several investment tribunals have focused their analysis on this latter, practical question, while either accepting (even if only implicitly) that individual investors were capable of renouncing remedies available to them under an investment treaty, or at least were working under the assumption that such renouncement was possible.²² A handful of tribunals nonetheless queried specifically about the actual possibility for an investor to effectively renounce the availability of investment arbitration to resolving disputes with host States. Among those accepting such option was the Tribunal in *Aguas del Tunari v. Bolivia* (2005), which took the view that, if an investor were to expressly waive the right to invoke, or to modify the extent of, ICSID jurisdiction, there was no reason why such agreed waiver could not be given effect:

“Assuming that Parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective. Given that it appears clear that the Parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their disputes other than that of ICSID, it would appear that an investor could also waive its rights to invoke the jurisdiction of ICSID.”²³

A few other tribunals, in contrast, expressed doubts as to whether investors were actually capable of waiving, by means of a contract, rights accruing to them under a treaty between two States. To the Tribunal in *SGS v. Philippines*, for instance, it was “...to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest.”²⁴ In a similar tone, the Tribunal in *SGS v. Paraguay* considered it to be “...a serious question whether individuals are capable of waiving rights conferred upon them by a treaty between two States.”²⁵

²⁰ See eg I Feichtner, ‘Waiver’ *Max Planck Encyclopedia of Public International Law* (online, October 2016). (waiver ‘denotes the renunciation or abandonment of a right or claim’).

²¹ Cf *Waste Management, Inc. v. United Mexican States (I) (Award)* (ICSID Case No. ARB(AF)/98/2, 2 June 2000), [18] (“The requirement of a waiver in any context implies a voluntary abdication of rights, inasmuch as this act generally leads to a substantial modification of the pre-existing legal situation, namely, the forfeiting or extinguishment of the right. Waiver thus entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect.”)

²² See eg *Crystallex International Corporation v. Bolivarian Republic of Venezuela (Award)* (ICSID Case No. ARB(AF)/11/2, 4 April 2016) [481] (“...even if it were minded to find that an investor may waive by contract rights contained in a treaty...”).

²³ *Aguas del Tunari v. Bolivia* (n 5), [118].

²⁴ *SGS v. Philippines (Jurisdiction)* (ICSID Case No. ARB/02/6, 29 January 2004) [154].

²⁵ *SGS v. Paraguay (Decision on Jurisdiction)* (ICSID Case No. ARB/07/29, 12 February 2010), fn 108 to [178].

In light of the way that those concerns have been expressed by the SGS tribunals, the problem can initially be considered as an issue of disposability:²⁶ are investors, as private parties, capable of disposing rights provided for under investment treaties; that is, rights provided for under instruments to which they are not actually privy?²⁷ The question is a doctrinal one and turns broadly on the issue whether one State's obligations under investment treaties are owed to the other State contracting party, or directly to the latter's nationals.²⁸ If the former is the case, and the investors are thus mere beneficiaries of those obligations, a waiver of rights under investment treaties would essentially be without effect, for the same reason that Calvo clauses were not deemed capable of effectuating a waiver of the right to diplomatic protection – because the right in question does not belong to the national, but to the State.²⁹ If the obligations are owed directly to the investors, on the other hand, the latter – as actual right holders – would be capable of their disposition. As to the nature of the rights conferred by investment treaties, a nuanced discussion has eventually emerged in academic literature.³⁰ A distinction is thus made between the substantive protections guaranteed by the treaty – i.e. the standard of treatment that the host State is to accord to the investor and to which the investor is therefore entitled – and the procedural capacity of the investor to enforce those treaty guarantees pursuant to the treaty's dispute settlement mechanism – i.e. the possibility of invoking the State's responsibility under international law as a result of the violations of the specific treaty standards. At least when it comes to the latter, commentators seem to agree that the right to arbitrate an investment dispute is one belonging to the investor, and not to its State of nationality.³¹ The practice of investment tribunals, in turn, seems to confirm such distinction. Whereas divergent positions have been taken in arbitral decisions as to whom the obligations concerning the standards of treatment under investment treaties are owed to,³² there seems to be lesser of a disagreement that the right to enforce the provisions of the investment treaty is one accruing to the investor.³³ If the latter

²⁶ It is worth emphasizing that in cases such as *SGS v Paraguay*, *ibid*, or *Crystallex v Venezuela* (n 22) [481], the issue was not raised beyond the general question as to whether or not treaty rights could be waived.

²⁷ Under general international law, it has gradually become accepted that inter-State treaties may create individual rights. See eg *Jurisdiction of the Courts of Danzig (Advisory Opinion)* PCIJ (ser B) No 15 (1928), 17-19; or *LaGrand Case (Germany v US) (Merits Judgment)* [2001] ICJ Rep 466 (27 June 2001) [77]-[78]. See generally K Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011).

²⁸ The doctrinal discussion has been articulated in terms of a distinction between the 'derivative right' theory, pursuant to which the foreign investor would be exercising a right derived from its home State's right to bring a claim against another State on behalf of its national, and the 'direct rights' theory, pursuant to which the investor is endowed directly with a right to make a claim in arbitration in its own capacity. The two theories have been coined by Z Douglas in his seminal article 'Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYBIL 152, particularly 162-64. For a useful overview of the discussions concerning both theories, see E De Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP 2014) 60-70.

²⁹ See eg *Woodruff* case (IX UNRIIA, 1903) 222.

³⁰ See eg J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, at 887 who considers it to be 'a matter of interpretation whether the primary obligations (eg, of fair and equitable treatment) created by such [an investment] treaty are owed to qualified investors directly, or only to the other contracting state(s).'

³¹ See De Brabandere (n 28), 63; JJ Van Haersolte-Van Hof and AK Hoffmann, 'The Relationship between International Tribunals and Domestic Courts' in P Muchlinski, F Ortino, & C Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP, 2008), 962-1007, at 1002-03; Z Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex' (2006) 22 *Arbitration International* 37-38; C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2009), 63-65; or H Wehland, *The coordination of multiple proceedings in investment treaty arbitration* (OUP, 2013), 74-83.

³² See eg *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v The United Mexican States (Award)* (ICSID Case No ARB (AF)/04/05, 21 November 2007) [161]-[180]; and *Corn Products International, Inc v United Mexican States (Award)* (ICSID Case No ARB (AF)/04/01, 15 January 2008) [161]-[179].

³³ See eg *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004) [49] (referring to the 'direct right of action of foreign shareholders under the Bilateral Investment Treaty for protecting their interests in the qualifying investment'); or *Gas Natural SDG, SA v The Argentine Republic (Decision of the*

position is accepted, then the investor should also be capable of renouncing such right, regardless of the question as to whom the obligations concerning the investor's standard of treatment are owed to.

In relation to waivers, however, the question of disposability has been additionally complicated by investment tribunals' different understandings as to what could possibly be considered to be the object of the waiver. A waiver can namely concern two things: on the one hand, the investor can be considered to be waiving the *claim* that the host State had violated one or more of its obligations concerning the treatment that it was supposed to accord to the investor; on the other hand, the investor can be seen as renouncing the *right* as such to enforce the violation of the treaty guarantees. The former possibility was seemingly contemplated by the Tribunal in *SGS v. Philippines* (2004), when it expressed doubts as to whether "a private party can by contract waive rights or *dispense with the performance of obligations imposed on the States parties to those treaties under international law*".³⁴ It was then endorsed by the Tribunal in *Eureko v. Poland* (2005), which accepted that "any breaches, contractual or under the Treaty, have been fully and unconditionally waived by both parties" upon execution of an addendum to the original share purchase contract.³⁵ The Tribunal took the view that the contractual waiver was effective and in accordance with international law inasmuch as the latter "recognizes that an investor may, after a claim against a State has arisen, enter into a settlement agreement with that State and commit to a final waiver of those claims" and, as a result of which, "[t]he State can subsequently rely on that waiver and assert it as a defence against the investor, should such investor attempt to raise those claims again."³⁶ In *MNSS v. Montenegro* (2016), the contractual waiver was likewise accepted as possible, on the ground that the treaty conferred substantive rights upon the investor, which was thus also claiming on its own behalf.³⁷ Just as in *Eureko*, the waiver in that case was not considered in relation to the investor's right of recourse to arbitration, but in relation to a claim concerning the violation of a treaty standard; namely, the investor's claims under the umbrella clause of the applicable BIT.³⁸ Unlike in *Eureko*, however, the contractual waiver did not concern an already existing treaty violation, but was considered to affect all treaty claims grounded on the treaty's umbrella clause that were grounded on breaches of the contract in question. The holdings in *Eureko* and *MNSS* must then be contrasted with the decisions in *Aguas del Tunari v. Bolivia* (2005), *TSA v. Argentina* (2008), and *Occidental v. Ecuador* (2008), where the possibility of a waiver was considered in relation to the right to recourse to investor arbitration as such.³⁹ At the end of

Tribunal on Preliminary Questions on Jurisdiction) (ICSID Case No ARB/03/10, 17 June 2005) [34] ('the foreign investor acquires rights under the Convention and Treaty, including in particular the standing to initiate international arbitration'). See also UK Court of Appeal (Civil Division), *Occidental Exploration & Production Company v The Republic of Ecuador* (Judgment) [2005] EWCA Civ 1116 (9 September 2005) [17]-[22]; or *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment, Second Phase) [1970] ICJ Rep 3 (5 February 1970) [90] ('The instruments in question [i.e. investment protection treaties] contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures'). All emphases added.

³⁴ *SGS v Philippines* (n 24), [154], emphasis added.

³⁵ *Eureko BV v Republic of Poland (Partial Award)* (19 August 2005) [173] cf also *Toto Costruzioni Generali SpA v The Republic of Lebanon (Award)* (ICSID Case No ARB/07/12, 7 June 2012) [85], where the Tribunal held that, although the Claimant's waiver of its right to invoke the contractual party's liability under the contract to claim contractual damages did not affect its right to invoke Lebanon's breach of the investment treaty, the assessment of damages and of the compensation to be granted for a treaty breach may be affected by a waiver not to claim compensation under the said contract, when both damage claims cover the same harm.

³⁶ *ibid* [175]. The Tribunal found support for this proposition in the Second and Third Restatements of Foreign Relations of the United States.

³⁷ *MNSS BV and Recupero Credito Acciaio NV v Montenegro (Award)* (ICSID Case No ARB(AF)/12/8, 4 May 2016) [163].

³⁸ *ibid* [160].

³⁹ See *Aguas del Tunari v Bolivia* (n 5), [118] (where the waiver was considered to concern solely the Claimant's 'rights to invoke the jurisdiction of ICSID'); *TSA Spectrum de Argentina SA v Argentine Republic (Award)* (ICSID Case No ARB/05/5,

the day, the possibility of waiving a claim relating to a violation of a treaty-imposed standard of treatment is not irreconcilable with the possibility that the standards of treatment might primarily be owed to the other State contracting party to the investment treaty, and not to the investor itself. The law of State Responsibility recognizes that persons or entities other than States may directly be injured by an internationally wrongful act of a State and clearly envisages that those persons or entities may directly be entitled to claim reparation for such act.⁴⁰ As explained by Crawford, a breach of international law gives rise to secondary obligations that may be owed directly to the beneficiary of the obligation. In the context of investment treaties, this beneficiary is the investor who, according to Crawford then, "...effectively opts in to the situation as a secondary right holder by commencing arbitral proceedings under the treaty", and thus "[a] new legal relation, directly between the investor and the responsible state, is thereby formed, if it did not already exist."⁴¹ Thus, if secondary rights created as a result of the breach, among which also the obligation of reparation, could be owed directly to the beneficiary of the primary obligation in question, it is conceptually not impossible for the beneficiary to waive such right, even where the primary obligation in itself may be owed to another State.⁴² On either understanding of the object of a waiver, there is therefore no reason why an investor could not effectively renounce the rights in question.

11.1.2.2. Permissibility of Waivers

Granted, an altogether different question is whether a disposition of rights accruing to an investor under a treaty can be considered permissible. An answer to this question may, of course, be sought in the text of the applicable investment treaty, and in general international law. Investment treaties typically stipulate that investor-State arbitration remains at the option of the investor,⁴³ without otherwise stipulating that such option may not be derogated from. The ICSID Convention, likewise, does not prohibit claimants from foregoing arbitration before the ICSID Centre, but merely requires that, once consent to such arbitration had been given, "no party may withdraw its consent unilaterally."⁴⁴ Nor do the general rules of the law of responsibility suggest that the right to invoke the responsibility could not be waived.⁴⁵ In the absence of a clear

19 December 2008) [62] (where the query turned on whether the investor intended to relinquish 'any right to a remedy under the BIT'); or *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador (Decision on Jurisdiction)* (ICSID Case No ARB/06/11, 9 September 2008) [73] (where the matter was discussed as 'an exception or waiver to ICSID jurisdiction').

⁴⁰ cf ILC Draft Articles on State Responsibility, art 33(2), which stipulates that the articles are 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.' See generally J Crawford, *State Responsibility: The General Part* (CUP 2013), 548-49.

⁴¹ Crawford, 'The ILC's Articles' (n 30), at 887-888. Conceptually, the situation can be compared to the situation of a third-party beneficiary in the law of contracts, where a person may have the right to sue on a contract, despite not having originally been an active party to the contract.

⁴² Such secondary right of reparation resulting out of a breach of a State's international obligation materializes only after the breach; it is questionable whether an investor could renounce such a right prospectively, in the absence of an actual breach. See Z Douglas, *The International Law of Investment Claims* (CUP 2009), 36 (apparently ruling out the possibility of waiver in such circumstances).

⁴³ See eg art 1120(1) NAFTA ('a disputing investor may submit the claim to arbitration'); art 9(2) China BIT (the dispute 'shall be submitted by the choice of the investor'); art 10(2) Germany BIT (the dispute 'shall, at the request of the investor of the other Contracting State, be submitted to arbitration'); art 10(3) Italy BIT ('the investor in question may submit at his choice the dispute for settlement'); art 11(2) Switzerland BIT ('the investor may submit the dispute...'); art 8(2) UK BIT (a dispute shall 'be submitted to international arbitration if the national or company concerned so wishes'); art 14(1) Austrian BITs ('the investor may choose to submit it [a dispute] for resolution'); arts 22(1) and 23(1) Canada BITs (An investor of a Party 'may submit to arbitration').

⁴⁴ ICSID Convention, art 25(1).

⁴⁵ cf ARSIWA, art 45, providing that '[t]he responsibility of a State may not be invoked if: [...] the injured State has validly waived the claim'.

prohibition of waivers, the answer may further be sought in considerations of public policy – as, after all, was seemingly also suggested by the Tribunal in *SGS v. Philippines* when noting that treaties will normally confer rights on individuals “in order to achieve some public interest.”⁴⁶

The analogy can surely be made with the arrangements in many domestic legal systems where waivers of certain rights will be considered unenforceable, or with human rights law, where waivers are considered inapplicable to the inalienability of human rights as such. Though the human rights analogy has generally been rejected in relation to waivers of investment protection standards,⁴⁷ some have nonetheless advanced the idea that public policy considerations should affect the possibility of disposing rights provided for under investment treaties. Adhering to such proposition is Schreuer, who maintains that “the idea of a public order function of treaties that provide for an agreed minimum standard and which should not be susceptible to abrogation is also applicable to the investment field.”⁴⁸ This, in his view, is not because of the special nature of investment treaty standards, but because of the function that investor-State arbitration purportedly has in ensuring that international conflicts do not escalate between the investor’s home State and the State of its investment. Were the investor to waive access to a remedy granted by treaty in relation to future uncertain events, the investor’s home States would most probably resume diplomatic protection in situations the investor’s rights have been violated – a situation which Schreuer appears not to consider to be desirable.⁴⁹ Similar concerns have been expressed by Salacuse, who argues that investor-State arbitration “is not only a means to protect individual investor rights but also to assure respect of the reciprocal treaty obligations and rights by the states concerned” and ultimately serves as a mechanism to assure the preservation of the treaty structure; should investors be allowed to permanently waive their rights, this would risk undermining the international legal structure between the contracting states.⁵⁰ Salacuse’s views were found “appealing” to some other commentators.⁵¹

Others, in contrast, oppose the idea that a public order function could relate, in one way or another, to the interests of the investor’s home State. Spiermann for example argues that, precisely because the home State’s right to diplomatic protection revives in the event that the investor has waived its consent to ICSID arbitration (and is thus able to intervene in favour of the well-being of the investor), the interests of the home State are not relevant to the permissibility of waivers.⁵² This is not to say that Spiermann discounts altogether the relevance of extra-legal considerations from the assessment of a waiver’s permissibility. Building on the jurisprudence of the European Court of Human Rights where waivers of human rights have under circumstances been accepted, Spiermann advances two factors that should eventually be taken into account in determining the acceptability of a waiver: the absence of constraints in how the waiver has been effected; and the availability of minimum guarantees that are commensurate to the waiver’s importance.⁵³ On the basis of these factors, Spiermann considers that serious

⁴⁶ *SGS v Philippines* (n 24), [154].

⁴⁷ Douglas (n 31), 27-52, at 37; C Schreuer, ‘Investment Protection and International Relations’ in A Reinisch and U Kriebaum (eds), *The Law of International Relations—Liber Amicorum Hanspeter Neuhold* (Eleven Publishing 2007) 345-58, at 357. It needs to be noted, however, that even when it comes to human rights, waivers can under circumstances be permitted. This has been the case with the right to a fair trial guaranteed under art 6 ECHR, with respect to which the European Court of Human Rights accepted the possibility of a waiver. See eg *Deewer v Belgium (Judgment)* [1980] ECHR 1 (27 February 1980) [49].

⁴⁸ Schreuer, *ibid* 357.

⁴⁹ *ibid*.

⁵⁰ J Salacuse, *The Law of Investment Treaties* (OUP 2010), [391].

⁵¹ See De Brabandere (n 28), 69.

⁵² O Spiermann ‘Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under bilateral Investment Treaties’ (2004) 20 *Arbitration International* 179, 201-02.

⁵³ *ibid* 208.

inequality in bargaining power between the investor and the home State could be ground for rendering a waiver ineffective; in general, however, he remains of the view that proceedings in national courts accompanied by the home state's right of diplomatic protection should be deemed to provide sufficient guarantees making a waiver acceptable. In Spiermann's view, "unless the bilateral investment treaty contains an explicit provision to the contrary, there is a presumption that the investor has the power to waive international arbitration."⁵⁴ Similar arguments have been advanced in defence of the possibility of waivers by some other commentators.⁵⁵

The question of permissibility of a waiver has not attracted much attention in the practice of investment tribunals – with the notable exception of the recent award in *MNSS v. Montenegro* (2016). Apart from examining whether the contractual waiver was "freely entered into by investors",⁵⁶ the Tribunal in that case examined whether the waiver was also not contrary to public policy. Specifically, the Tribunal took the view that the public interest "may not be ignored", insofar as Investor-State arbitration "has an important function in the public interest for the relations between the States concerned".⁵⁷ Accordingly, the question was "not whether the rights may or may not be waived, but to what extent, if they have been waived, the waiver is in detriment of the public purpose pursued by the State parties to the BIT".⁵⁸ In the circumstances of that case, no detriment of such kind has been found to have arisen: though the pertinent contract included a waiver of contractual claims that was found to be effective in relation to claims arising under a treaty's umbrella clause, it also provided for the possibility of ad hoc UNCITRAL arbitration in relation to contractual claims as such. In the view of the Tribunal, the investor's ability to settle contractual disputes with the State by arbitration was thus "evidently congruent with the public purpose pursued by the State parties to the BIT".⁵⁹ The public purpose in this case was apparently the need to provide the investor with the possibility to pursue, if need be, its contract claims outside the judicial system of the host State.

The question eventually boils down to what one considers to be the public interest that is to be safeguarded through the prohibition of a waiver: is it to avoid the interference of the investor's home State in an investment dispute (Schreuer's view), is it the preservation of the treaty structure (Salacuse's view), or is it perhaps specifically to avoid litigation in domestic courts (the *MNSS* tribunal's position)? Or is it, instead, merely the need to ensure to investors the availability of an adequate mechanism for the settlement of their disputes with the host State? Related to these is the secondary question whether a prohibition of waivers is actually an appropriate means for safeguarding such public interest. If at issue is solely the preservation of the treaty structure, there is no reason why the investor's home State could not assure respect of reciprocal treaty obligations by resort to arbitration that is available under most investment treaties. Besides, as pointed out by Spiermann, the home State remains free to resort to the mechanism of diplomatic protection in order to safeguard any public interest which it considers at stake. At the end of the day, not all contractual waivers are the same. Instead of scrutinizing the arrangements entered into between investors and home States by reference to presumed public policy concerns that are not traceable to actual treaty provisions, what is perhaps more important for determining the validity of a contractual renouncement of treaty remedies is the

⁵⁴ *ibid.*

⁵⁵ See eg Van Haersolte-Van Hof and Hoffmann who accept the possibility of a waiver by similarly relying on the jurisprudence of human rights courts, and who similarly discount the relevance of home State's interests to the ascertainment of a waiver's permissibility. Van Haersolte-Van Hof and Hoffman (n 31), 1004-05. See further Wehland (n 31), 82-3.

⁵⁶ *MNSS v Montenegro* (n 37), [163].

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid* [164].

actuals scope of the waiver and the process through which the waiver had been effected. A more limited contractual waiver, entered into with respect to a specific, existing treaty violation, and without any elements of coercion, will probably be easier to accept than a blanket waiver, entered into with respect to all prospective disputes – let alone waivers that have not even been freely entered into.⁶⁰

11.1.2.3. *Conditions for Waivers to be Effective*

Building on the assumption that, subject to certain conditions, waivers of treaty remedies could be possible, the inquiry can now turn to the circumstances under which a contractual stipulation can be considered to amount to a renouncement of treaty remedies on the part of the investor. The standard applicable to assessing the effects of contractual stipulations has been set out by the Tribunal in *Aguas del Tunari v. Bolivia* (2005). In the view of the latter, the question whether a contractual clause could affect the jurisdiction of an ICSID tribunal was a “question of the intent” of the parties in concluding the contract, which was a matter that turned on the facts of each specific case. Nevertheless, in ascertaining such intent, a distinction was to be made, on the one hand, between the situation where the contract expressly waived the right to invoke, or modified the extent of, ICSID jurisdiction; and on the other hand, the situation where the contract only contained an exclusive forum selection clause designating a forum other than ICSID.⁶¹ In the case of the latter, the Tribunal cautioned against implying a waiver of treaty remedies from the mere existence of such clause. In the view of the arbitrators,

“an ICSID tribunal has a duty to exercise its jurisdiction in such instances absent any indication that the Parties specifically intended that the conflicting clause act as a waiver or modification of an otherwise existing grant of jurisdiction to ICSID. A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID. [...] [A]n explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal. However, the Tribunal will not imply a waiver or modification of ICSID jurisdiction without specific indications of the common intention of the Parties.”⁶²

In line with the approach developed in *Aguas del Tunari*, other investment tribunals likewise considered that clear and unequivocal language was required in order for a contractual forum selection clause to be construed as a waiver of treaty remedies.⁶³ Though some decisions suggested that a waiver could only be effective if made expressly,⁶⁴ others have appeared to accept that a waiver could also be implicit – provided specific indications of the common intention of the Parties, as potentially inferable from the circumstances of the contract’s

⁶⁰ See Van Haersolte-Van Hof and Hoffmann (n 31), fn 207 at 1004, who similarly draw a distinction between a waiver of the investor’s rights after a dispute has arisen, in full knowledge of the situation, and a blanket waiver for any dispute that might possibly arise in the future, which they found more difficult to accept.

⁶¹ *Aguas del Tunari v Bolivia* (n 5), [115].

⁶² *ibid* [119].

⁶³ See eg *Occidental v Ecuador* (n 39), [71] (“[b]ased on elementary principles of contract interpretation, any exception to the availability of ICSID arbitration for the resolution of disputes arising under the Participation Contract [...] requires clear language to this effect”); *TSA Spectrum* (n 39), [62] (for the clause to amount to a waiver of treaty remedies, it was ‘incumbent on Argentina to indicate this in a clear manner in the Contract or in connection with the conclusion of the Contract’); or *Crystallex v Venezuela* (n 22), [481] (“even if it were minded to find that an investor may waive by contract rights contained in a treaty, any such waiver would have to be formulated in clear and specific terms”).

⁶⁴ See eg *SGS v Philippines* (n 24), [154] (“unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract”); *SGS v Paraguay* (n 25), [179] (“[a]t least in the absence of an express waiver, a contractual forum selection clause should not be permitted to override the jurisdiction to hear Treaty claims of a tribunal constituted under that Treaty”); or *MN. SS v Montenegro* (n 37), [163] (“investors may waive the rights conferred to them by treaty provided waivers are explicit”).

conclusion.⁶⁵ The latter proposition seems probably the correct one: since international law does not prescribe any particular form for a legal act (except for requiring that such act clearly evinces a party's intention),⁶⁶ there is no reason why a waiver could not be made by implication.⁶⁷

Investment tribunals have generally advanced two policy rationales for adopting a strict approach to appreciating the effects of contractual forum selection clauses. For some, a cautious approach was warranted in light of the special protection provided for by investment treaties. According to the Tribunal in *TSA v. Argentina* (2008), an interpretation permitting contractual clauses to be construed as implicit waivers

“if generally applied, would make it possible for governments to avoid their treaty obligations as regards important matters such as expropriation by the simple expedient of inserting clauses in their contracts that vitiated the right to international arbitration, thereby effectively rendering the arbitration provisions of a bilateral investment treaty a nullity. This would seem inconsistent with a state's basic obligation under international law to implement its treaty obligations in good faith.”⁶⁸

A similar view was taken by the Tribunal in *SGS v. Paraguay* (2010), which argued that, “[g]iven the significance of investors' rights under the Treaty, and of the international law ‘safety net’ of protections that they are meant to provide separate from and supplementary to domestic law regimes, they should not lightly be assumed to have been waived”.⁶⁹ Others sought support for a stringent approach to interpretation in the essential nature of the waiver as a legal concept. According to the Tribunal in *Crystallex v. Venezuela* (2016), “a waiver, if and when admissible at all, is never to be lightly admitted as it requires knowledge and intent of forgoing a right, a conduct rather unusual in economic transactions.”⁷⁰ The argument reflects the approach taken with respect to the construction of waivers in many domestic jurisdictions, where a strong and clear showing of intent to waive is typically required on the ground that a waiver entails a relinquishment of a right that is an *intentional* one.⁷¹

Considering the stringency by which the effects of contractual forum selection clauses were to be assessed, it is perhaps not surprising that arguments based on contractual waivers have in practice not been particularly successful. The requirement that a waiver be expressed in clear language has typically been taken to require that the contractual stipulation in question makes specific reference to ICSID or other type of investment treaty arbitration. According to the

⁶⁵ See eg *TSA Spectrum* (n 39), [62], where the Tribunal was not willing to assume ‘without convincing evidence’ that the investor intended to relinquish the right to treaty arbitration by merely concluding the contract; for the clause to have such ‘far-reaching effect’, it was ‘incumbent on Argentina to indicate this in a clear manner in the Contract or in connection with the conclusion of the Contract.’

⁶⁶ cf *Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Preliminary Objections)* [1961] ICJ Rep 17, 31.

⁶⁷ See art 45 ARSIWA (“The responsibility of a State may not be invoked if: [...] (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.”). The possibility of implied waiver has been accepted by the ICJ itself in *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168 [293] (‘waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right’).

⁶⁸ *TSA Spectrum* (n 39), [63].

⁶⁹ *SGS v Paraguay* (n 25), [178].

⁷⁰ *Crystallex v Venezuela* (n 22), [481].

⁷¹ Thus, the US Courts, for example, decide the issue of waiver under the ‘clear and convincing’ standard of proof (see eg *Moss v Minor Properties, Inc* (1968) 262 Cal.App.2d 847, 857 [69 Cal.Rptr. 341]; *City of Ukiah v Fones* (1966) 64 Cal.2d 104, 107–108 [48 Cal.Rptr. 865, 410 P.2d 369]; *Florence Western Medical Clinic v Bonta* (2000) 77 Cal.App.4th 493, 504 [91 Cal.Rptr.2d 609]; or *Brooklyn Fed Saving Bank v 9096 Meserole St. Realty LLC*, NYLJ, Nov 22, 2010, No. 3012/10, 2010 NY Misc LEXIS 5450 (Kings Co Nov 5, 2010) (Miller, JJ)).

Tribunal in *Aguas del Tunari*, “silence as to the question is not sufficient”;⁷² nor can – as one can possibly infer from decisions of other tribunals – generic references to arbitration be considered satisfactory.⁷³ For a waiver to be effective, it is furthermore necessary for there to be subject matter-identity. In *Azurix v. Argentina* (2003), the contractual clause stipulating that the investor “waives” any other potentially applicable “forum or jurisdiction” was not considered capable of affecting claims under the treaty because the jurisdiction of the contractual forum was limited to “any dispute regarding the construction and execution” of the contract, and therefore did not encompass treaty claims.⁷⁴ Indeed, as in relation to the dispute settlement mechanism, specificity was also required with regard to the subject-matter of the disputes that were subject of the waiver: in the absence of express language, investment tribunals did not seem prepared to assume that the contractual choice of forum extended to treaty claims, even in circumstances where the jurisdiction of the relevant forum was broadly formulated. Thus, in *TSA Spectrum v. Argentina* (2008), the Tribunal considered the wording of the contractual forum selection clause not to be such as to exclude recourse to a treaty remedy in relation to disputes arising out of about acts that might constitute breaches of both the Concession Contract and the BIT, in spite of the clause applying not only to “all the issues arising from the application or interpretation of the rules governing the bidding process” but also to “any other issue directly or indirectly related to the object and effects of the bidding process”.⁷⁵ Similarly, the Tribunal in *Crystalex v. Venezuela* considered that, in the absence of any mention being made of the Claimant’s rights under the BIT, and any reference to the BIT in general terms, the contractual exclusive jurisdiction clause was not to be construed as a waiver of Claimant’s right to a treaty remedy, notwithstanding the fact that the clause in question appeared not to be limitative, as it applied to all disputes “arising from the execution” of the concession contract.⁷⁶ Conversely, in *MNSS v. Montenegro* (2016), though the relevant contract contained a stipulation that the investor “waives on behalf of itself any right which it might otherwise have under international law to assert claims against [...] [the State] other than pursuant to the express terms of this Agreement”, the Tribunal concluded that the scope of the waiver encompassed only contract claims, and was not capable of capturing claims for breach of the BIT, insofar as the waiver had to be read in conjunction with the contractual dispute settlement clause, which only applied in turn to “[a]ny dispute or difference arising out of this Agreement, or the breach, termination or invalidity thereof”.⁷⁷ Though the Tribunal conceded that “arising out” meant “originating” or “resulting from”, it did not consider that the clause could apply to disputes beyond the confines of the contract.⁷⁸ Last but not least, for a waiver to be opposable, it is furthermore necessary that the renouncement of the treaty remedy has actually been made by the Claimant itself, or at least on its behalf. In the above-mentioned *Azurix* case, for example, the waiver was not considered effective, insofar as the Respondent was not a party to any of the relevant contractual arrangements, and the purported waiver was thus not considered to have been made in favour of the Respondent.⁷⁹

⁷² *Aguas del Tunari* (n 5), [122]. See also *Crystalex v Venezuela* (n 22), [482] (noting that the clause in question ‘makes [...] no reference [...] to the Claimant’s right to seek recourse in arbitration for the alleged violation of those rights’).

⁷³ See eg *Occidental v Ecuador* (n 39), [63], [73] (where the contractual stipulation that the contractor ‘expressly waives its right [...] to have recourse to any national or foreign jurisdictional body not provided for in this Participation Contract, or to arbitration not recognized by Ecuadorian law or provided for in this Participation Contract’ was not considered sufficiently precise to be possibly construed as an exception or waiver to ICSID jurisdiction).

⁷⁴ *Azurix Corp v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/12, 8 December 2003) [79]-[81].

⁷⁵ *TSA Spectrum v Argentina* (n 39), [62], [59].

⁷⁶ *Crystalex v Venezuela* (n 22), [482].

⁷⁷ *MNSS v Montenegro* (n 37), [149]-[159].

⁷⁸ *ibid* [156], [158].

⁷⁹ *Azurix v Argentina* (n 74) [85].

11.1.3. Agreements Post-Dating the Emergence of an Investment Dispute

If the proposition is accepted that an investor can agree beforehand, by means of contractual stipulations, to the exclusive determination of any potential disputes concerning the applicable investment treaty by a forum other than the treaty tribunal, the question arises whether the investor can also effect such a choice after the emergence of such dispute.

As a matter of principle, there is nothing to suggest that such choice would not be possible. Insofar as ICSID arbitrations are concerned, the irrevocability of consent as provided for under Article 25(1) of the ICSID Convention applies solely to unilateral attempts at withdrawal, permitting the parties to amend or terminate consent to ICSID arbitration by mutual agreement, even after the institution of proceedings.⁸⁰ Furthermore, some investment treaties expressly envision the possibility that an investment dispute, once arisen, be resolved by other means than those provided for under the treaty. Though not particularly common, an example of such stipulations can be found in Article 8(2) of the Austria-Czech & Slovak Republic BIT, which was subject of consideration in *European American Investment Bank v. Slovakia* (2014). In the circumstances of that case, the Tribunal had no misgivings about giving effect to the ordinary meaning of the clause – which provided that investment disputes be submitted to arbitration, unless “otherwise agreed” – and thus accepted the possibility that it could relinquish jurisdiction over the treaty dispute submitted to it in the event that the parties had indeed agreed to have their dispute determined by the Slovak courts.⁸¹ Apart from requiring that there be a meeting of minds between the litigating parties, the Tribunal was otherwise not willing to construe the clause as imposing any particular requirements as to the form in which such agreement is made.⁸² In the circumstances of that case, the Tribunal thus readily inquired whether an agreement of that kind could be deemed to have come into existence, by virtue of the submissions made by the same parties in proceedings relating to the same dispute that were pending before domestic courts. Such proposition could not be sustained on the facts of the case: though finding that in the course of its domestic litigation, Claimant claimed for the breaches of the same provisions of the BIT as in the treaty arbitration, the Tribunal did not consider that an agreement to have the treaty claims decided by domestic courts had actually come into existence, given that Claimant’s petition expressly that the primary forum was arbitration and requested suspension of domestic judicial proceedings pending the decision of the treaty tribunal, and on the other hand, the Respondent did not clearly accept the jurisdiction of the Slovak courts in relation to the treaty dispute.⁸³ As a matter of principle, however, the possibility was clearly accepted that, even after the emergence of a dispute, an investor could validly agree to the determination of treaty claims by a forum other than the treaty tribunal.

11.2. Resolution of Jurisdictional Conflicts as a Result of the Litigants’ Conduct

The discussion has thus far focused on the means of regulating jurisdictional interactions between domestic courts and investment tribunals on the basis of an agreement between the litigating parties. Yet, an investor may be relinquishing its right to have a particular dispute arbitrated before an investment tribunal, not only as a result of contractual stipulations it may have expressly or implicitly entered into, but also as a result of other conduct. Depending on the circumstances, an

⁸⁰ The discretion of the parties in this respect is confirmed by Rule 43 of the ICSID Arbitration Rules which provides for the possibility that arbitration proceedings are discontinued as a result of an agreed settlement between the parties.

⁸¹ *European American Investment Bank v. Slovakia (Second Award on Jurisdiction)* (UNCITRAL, 4 June 2014) [167].

⁸² *ibid* [167]-[169].

⁸³ *ibid* [172]-[188].

investor's acts or omissions can give rise to specific legal consequences as a result of which an investment tribunal may possibly have to relinquish its competence over a particular dispute in favour of the jurisdiction of domestic courts. The remainder of this chapter looks at two particular grounds pursuant to which this can happen: the possibility that the investor's conduct amounts to a waiver of the investor's right to treaty remedies (11.2.1.), and the possibility that an investor may be precluded from pursuing a treaty claim as a result of estoppel (11.2.2.).

11.2.1. Waiver by Conduct

Expanding on the assumption that, under given circumstances, an investor can validly renounce its right to arbitrate a dispute before a treaty tribunal, the question arises whether such renouncement can only be effected by means of contractual stipulations, or whether an investor can also relinquish its right in other circumstances. As already noted above, some investment tribunals have seemingly accepted the possibility that a waiver could also be an implicit one, provided that the intent on the part of the investor to relinquish the right to arbitrate has been clearly expressed. Yet, if intent can be inferred from the circumstances of the conclusion of a contract, there is of course little reason why it could not be inferred from the investor's other conduct, including the latter's attitude in pursuing its treaty claim.

The possibility for a waiver to occur as a result of the investor's conduct in domestic litigation has only occasionally been considered by investment tribunals. In *SGS v. Pakistan*, the argument of waiver by conduct was eventually rejected on the circumstances of that case. But a similar argument was later efficaciously used in *Eurom v. Slovakia*. Though initially finding that the Claimant's initiation of local litigation, coupled with the State's response in that litigation, did not give rise to an agreement to have the treaty dispute determined otherwise than by arbitration, the Tribunal nevertheless concluded that the investor's conduct before domestic courts as a whole was such that it eventually amounted to a waiver of the right to arbitrate its treaty claims before the investment tribunal. In the circumstances of that case, the Claimant commenced proceedings before the Courts of Bratislava in which it advanced claims that were substantially the same as those advanced in the arbitration it commenced pursuant to the applicable Austria-Czech and Slovak Republic BIT.⁸⁴ The Claimant maintained that the legal action in domestic courts was necessary to prevent its claims from becoming statute-barred under Slovak law in the event the treaty tribunal would deny jurisdiction over the treaty claims. And indeed, insofar as the local proceedings were originally commenced as a precautionary measure, the Tribunal was not prepared to treat the mere filing of the petition in the local courts as amounting to a waiver of itself.⁸⁵ The Tribunal concluded, however, that the procedural steps that the Claimant had taken in domestic courts after the filing of the petition went beyond what was necessary to protect the Claimant's position pending the outcome of the jurisdictional challenges in the arbitral proceedings. The Tribunal took issue, in particular, with the fact that Claimant failed to take steps to have the local proceedings stayed pending the outcome of the arbitration, that Claimant actually requested in its submissions before the local courts that a judgment be delivered on the merits of the treaty claims, and that Claimant failed to properly inform the local court as to the status of the arbitration proceedings.⁸⁶ In the view of the Tribunal, the "overall pattern of

⁸⁴ *Eurom v Slovakia* (n 81), [238]. That is, in its Petition for the commencement of domestic legal proceedings against the National Council of the Slovak Republic in the District Court Bratislava I, the Claimant alleged violations of the same provisions of the BIT as it alleged in the treaty proceedings that it commenced a year earlier. Additionally, the Petition alleged that the impugned acts of the Slovak Republic (i.e. the changes in the law on health insurance) also breached the provisions of the Constitution of the Slovak Republic and the European Convention on Human Rights. *ibid* [32].

⁸⁵ *ibid* [239].

⁸⁶ *ibid* [258]-[261].

conduct”⁸⁷ displayed by the Claimant in relation to the litigation in the Slovak courts “was such that a reasonable person would have concluded that it was no longer treating that litigation as a mere safeguard but was actively pursuing it with a view to obtaining a judgment in its favour irrespective of whatever might happen in the arbitration.”⁸⁸ The conduct was therefore held to amount to a waiver of the right to arbitrate, with the consequence that the Tribunal was without jurisdiction over the outstanding treaty claims.

The Tribunal’s findings were, to a certain extent, context-specific; for, it does not frequently happen that claims advanced in proceedings before domestic courts would include “the entirety of the claim in the arbitration proceedings” as in the *Eurom* case.⁸⁹ In this respect, the case can be contrasted with the earlier award in *SGS v. Pakistan*, where the waiver argument appeared to have been rejected precisely because the Claimant did not present “claims expressly based on alleged violations of the BIT before any other court or tribunal”⁹⁰. Namely, in the proceedings that SGS brought against Pakistan before the courts of Switzerland, the claims were clearly contractual ones, with SGS claiming payment of amounts that were still due under its concession contract and seeking a declaration that the contract was wrongfully terminated by Pakistan.⁹¹ Ostensibly contractual were also the counterclaims presented by SGS in the arbitration that Pakistan had in the meanwhile commenced in accordance with the contractual dispute settlement provisions (this, notwithstanding the fact that in six of seven heads, the contractual relief sought was actually identical to that later claimed in the treaty-based proceeding).⁹² In the absence of express references to treaty violations, the Tribunal was not willing to imply a waiver from the pursuit of contractual claims in Swiss courts, or from the mere filing of the counterclaim setting out substantive claims in the contractual arbitration (especially considering that in the context of the latter, SGS also reserved its rights without prejudice to rights under international law).⁹³ Nor was the Tribunal prepared to accept that, by submitting its contractual counterclaims, SGS was precluded from claiming compensation with respect to treaty violations. In the view of the arbitrators, “[s]ince the BIT does not contain a provision that requires a would be claimant to refrain from pursuing claims for damages in other fora in order to invoke ICSID jurisdiction, the Tribunal cannot read such a requirement into the BIT.”⁹⁴

Notwithstanding its outcome, at the level of principle, the *SGS v. Pakistan* decision supports the proposition that the right to arbitrate treaty claims can possibly be waived as a result of a claimant’s conduct. The only difference worth noting between the *SGS* and *Eurom* awards is perhaps the legal basis on which the waiver argument was considered. The *Eurom* Tribunal approached the question of waiver on the basis that the law applicable to determining whether or not there has been a waiver was Swedish law – being the law that governed the arbitration in that case –, though also taking account of Slovak law – as the law that governed the procedure before the local courts. As a matter of law, the Tribunal did not have reservations in accepting the waiver-by-conduct argument. According to Swedish law, the right to arbitrate could be lost by waiver, and the commencement of court proceedings in a State other than the seat of the

⁸⁷ *ibid* [254]. The Tribunal put emphasis on the fact that it was evaluating ‘the cumulative effect’ of the steps taken by the Claimant in local court proceedings ([240]) and that its conclusions had been reached ‘on the basis of the Claimant’s conduct taken as a whole and not on the basis that any one incident is decisive in and of itself’ ([265]).

⁸⁸ *ibid* [264].

⁸⁹ *ibid* [238].

⁹⁰ *SGS v Pakistan* (n 11), [181].

⁹¹ *ibid* [20]-[25].

⁹² *ibid* [181].

⁹³ *ibid* [179]-[180].

⁹⁴ *ibid* [180].

arbitration was also capable of constituting a waiver.⁹⁵ The *SGS* Tribunal, in contrast, seemingly considered the waiver argument as a matter of international law.

11.2.2. Estoppel

A final matter that needs to be considered is the possibility of the investor being precluded from pursuing treaty remedies as a result of the principle of estoppel – a general principle of law recognized and applied also by investment tribunals,⁹⁶ just as by international courts in general.⁹⁷ Similarly to a waiver, the principle of estoppel can serve to foreclose the exercise of a party's right based upon the party's representations or conduct in general.⁹⁸ Though the element of conduct is thus relevant to both the question of waiver and that of estoppel – which is why both principles can also be applied in the same breath⁹⁹ –, there is nonetheless a fundamental difference in the way that both principles operate: whereas the issue of waiver turns on the ascertainment of a party's intention to relinquish a particular right, the issue of estoppel turns upon the detriment suffered by another party in relying on a party's conduct. Under international law, estoppel is namely considered to be subject to the requirements that (1) there is a clear statement of fact by one party, (2) that such statement is voluntary, unconditional and authorized, and (3) that there is reliance in good faith by another party on such statement to that party's detriment or to the advantage of the first party.¹⁰⁰ Conceivably, if an investor were to clearly and consistently act in a way suggesting that it would not be pursuing remedies available under an investment treaty, the principle of estoppel could operate to prevent that investor from subsequently retracting from its previous representations – provided that the Respondent State was entitled to rely, and in fact did rely on those representations, and as a consequence of such reliance has suffered prejudice, or else the investor has secured for itself some benefit or advantage.

Interestingly, in the practice of investment tribunals, it has not been uncommon for States acting as respondents to mount jurisdictional objections based on estoppel whilst relying on representations that the investor had made in judicial proceedings before local courts. Thus far, such arguments have not been particularly successful – though, mostly for factual reasons. In *SGS v. Pakistan*, the Respondent argued that Claimant's conduct in proceedings before Swiss courts and in the contract-based arbitration had given rise to estoppel, with the consequence that SGS was prevented to seek relief under the ICSID Convention. But the argument was quickly

⁹⁵ *Euram v Slovakia* (n 81), [223]-[224], [229].

⁹⁶ See eg *Pope & Talbot Inc v The Government of Canada (Interim Award)* (UNCITRAL, 26 June 2000) [111]; or *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic (Decision on Preliminary Objections)* (ICSID Case No ARB/03/13, 27 July 2006) [159].

⁹⁷ Though originating in common law systems, the principle of estoppel has gradually become accepted in international law. The plea of estoppel was accepted by the ICJ in the *Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Merits Judgment)* [1962] ICJ Rep 6 (15 June 1962) 32. But the Court considered pleas based on estoppel in several other cases, including in *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark) (Judgment)* [1969] ICJ Rep 3 (20 February 1969) [30]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility, Judgment)* [1984] ICJ Rep 392 (26 November 1984) [51]; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (Judgment, Application by Nicaragua for Permission to Intervene)* [1990] ICJ Rep 92 (13 September 1990) [63]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) (Judgment, Preliminary Objections)* [1998] ICJ Rep 275 (11 June 1998) [57].

⁹⁸ For a comparison of how the two principles operate, see eg G Bundy Smith and TJ Hall 'Critical Distinctions between Waiver and Estoppel' (2010) 244(117) *New York Law Journal* (17 December 2010).

⁹⁹ cf eg *SGS v Pakistan* (n 11), [175]-[181], where Pakistan's plea of estoppel was considered against the same factual background as the plea that SGS waived its right to seek relief under the ICSID Convention.

¹⁰⁰ See generally on this requirements DW Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence' (1957) 33 *British Year Book of International Law* 176. The requirements have been cited with approval in *Pope & Talbot* (n 96), [111]; *Pan American Energy* (n 96), 160; and *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and others (Award on Jurisdiction)* (ICSID Case No ARB/07/3, 28 December 2009) [211]-[212].

dismissed: “[G]iven the general purpose of the ICSID Convention and the object and purpose of the BIT,” the arbitrators were “hesitant to imply estoppel (or waiver for that matter) with respect to BIT claims that have not in fact been alleged in another forum.”¹⁰¹ The reasoning raises the question whether the Tribunal took properly into account the fact that estoppel operates differently than waiver, and that as a consequence, the absence of any allegations as to the breach of the applicable BIT on the part of the SGS in either of the prior proceedings might not have been in itself determinative to the question of estoppel. It seems that the proper inquiry should have been (1) whether the investor, by pursuing the contractual remedies route, and as a result of its representations in general, evinced an intention not to pursue treaty remedies, and (2) whether the Respondent relied on those representations to its detriment. The question of detrimental reliance was curiously absent from the Tribunal’s consideration, just as were the other requirements of estoppel – though, this may probably have to do with the way that the argument was pleaded in the circumstances of that case.¹⁰²

A jurisdictional objection based on estoppel was advanced in a similar way in *Pan American Energy v. Argentina* (2006). There, the Respondent argued that Claimants were estopped from resorting to dispute settlement under the applicable BIT, on account of them having brought, through their local company, a private dispute before the Argentine courts and having mentioned in those proceedings the BIT and the ICSID Convention. On the facts of the case, the estoppel argument seemed rather far-fetched: the local claim involved only private parties, with Argentina appearing only as an *amicus curiae*; the legal action was not in any way related to a dispute of any kind whatsoever with Argentina or any of its organs; and the issues before the domestic courts concerned questions of Argentinean domestic law, with the BIT having only been mentioned in passing, with a view to show to the defendant party in the local proceedings that it should have turned to investment arbitration if it had a claim for unfair treatment of its investment. Against this backdrop, it was not surprising that the Tribunal also rapidly dismissed the estoppel argument. The Tribunal was of the view that, in the circumstances where the BIT and the ICSID Convention were only mentioned in the domestic proceedings in passing and not in relation to the possibility of the Claimant actually resorting to treaty remedies, one could “scarcely speak” of a clear statement of fact (if a statement was made at all by the Claimant, considering that it was only its subsidiary that participated in the local proceedings) and that Argentina, insofar as it was not even a party to the local dispute, could not be said to have relied on the references that had been made to the BIT and, even less, to have suffered a disadvantage from those references.¹⁰³ As a matter of principle, the decision in *Pan American Energy v. Argentina* nevertheless suggests that, depending on the position taken in domestic courts, estoppel could operate in such a way as to preclude an investor from subsequently bringing a claim before an investment tribunal.

In essence, there is nothing to suggest that estoppel could not operate in such way. Investment tribunals have seemingly accepted the possibility that estoppel could be determinative for the jurisdiction of an investment tribunal. Estoppel was seemingly capable of creating consent to arbitrate where the offer to arbitrate might otherwise not have been effective,¹⁰⁴ of allowing a party to

¹⁰¹ *SGS v Pakistan* (n 11), [177].

¹⁰² See [175], where note is made that the estoppel argument had been advanced by the Respondent ‘on a general basis’.

¹⁰³ *Pan American Energy v Argentina* (n 96), [159]-[160].

¹⁰⁴ See in particular *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic* (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/97/4, 24 May 1999) [44]-[47], where an ICSID Tribunal was prepared to give effect to an estoppel argument based on the fact that Respondent announced in its Official Gazette that the BIT had entered into force, whereas in reality it has not, was it not for the fact that the claimant failed to demonstrate that it had relied on that position to its own detriment.

bring ICSID arbitration pursuant to a contract to which it otherwise was not privy,¹⁰⁵ or even of precluding a claim altogether on the ground that the investor acquiesced in the implementation of the measure that was the object of the actual complaint before the treaty tribunal.¹⁰⁶ Due to the specific requirements of estoppel, which set a rather high threshold before a party may be precluded from pursuing treaty remedies, it is not very realistic for estoppel to be often successfully applied in regulating jurisdictional conflicts between domestic courts and treaty tribunals.

11.3. Concluding Observations

Also when it comes to the interpretation and application of instruments entered into between the investor and the host State, or the appreciation of the investors' conduct in relation to local litigation more generally, investment tribunals were not particularly prone to relinquishing their competence over a particular dispute in favour of the jurisdiction of domestic courts. Though accepting, at the level of principle, the proposition that investors were capable of agreeing to the exclusive disposition of their treaty-related investment disputes in domestic courts, they rarely upheld such possibility in practice. Similarly to the situations described in chapters 9 and 10, they relied for that purpose on a number of commonly used techniques: the conceptual distinctions between contract and treaty claims, and a formalistic approach to the interpretation and application of applicable instruments, and the assessment of the investors' conduct more generally.

Contractual forum selection clauses were thus not deemed capable of having preclusive effect on the investment tribunals' own jurisdiction in the absence of contractual privity and identity of subject matters. It was particularly the distinction between contract and treaty claims that was again recurrently relied upon in denying such clauses effects on the international plane. The distinction between contract- and treaty-based causes of action was either relevant to circumscribing the material scope of the clauses in question, or was used to undermining the designated courts' competence to actually consider particular claims. In practice, forum selection clauses were only deemed capable of having effect where they made specific reference to ICSID or other type of investment treaty arbitration. Investment tribunals namely insisted on their narrow construction, even in circumstances where the contractual language employed would in other contexts have been possibly capable of being construed as encompassing claims other than those based on the contract in question.

A similar kind of formalism was adopted in determining whether contractual clauses amounted to a renunciation of treaty procedures. In determining whether contractual stipulations could be construed as amounting to a waiver of remedies available under an applicable investment treaty, tribunals thus either required that such waiver be expressed in clear language, or – to the extent that they accepted that a waiver could also be implicit – adopted a strict approach to appreciating the effects of contractual stipulations. Much in the same way, tribunals proceeded to stringently assess the investors' acts or omissions more generally. The investors' pursuit of local litigation was not accepted to amount to an implied waiver of treaty remedies in the absence of express references to treaty rights in the context of such litigation; nor was such pursuit in itself deemed capable of giving rise to an estoppel. The formalism and pedantry on

¹⁰⁵ See eg *East Kalimantan* (n 100), [211]-[216], where the estoppel argument was considered in relation to the possibility that the Indonesian Province of East Kalimantan had the right to bring ICSID arbitration pursuant to a contract to which it otherwise was not a party. The argument was premised on statements made by the Respondent during the domestic legal proceedings, which purportedly affirmed the Province's right. The argument eventually failed because those statements were not entirely clear and unambiguous, while the Province also failed to prove detrimental reliance.

¹⁰⁶ See *Pope & Talbot* (n 96), [106]-[112] (the estoppel argument failed because no representation of any sort was found to have been made by the investor to Canada, and insofar as a representation made to a different party could have been regarded as a representation made to Canada on which Canada could rely, there was no evidence showing that Canada changed its position in any way by reason of reliance on such representation).

these issues was often defended by reference to the idea that the right to recourse to the international remedy was not one to be easily renounced. Indeed, some tribunals expressed doubts whether such right was capable of being renounced at all.

All in all, whilst formally accepting domestic courts as competitors with a potentially equal jurisdictional entitlement to the resolution of investment disputes, investment tribunals thus again exploited argumentative devices, such as the contract claims/treaty claims distinction in order to position themselves as superiors to domestic courts.

* * *

Reflecting more broadly on situations in which domestic courts performed the roles of *competitors*, what one can find is thus a general predisposition of investment tribunals to favour the path to arbitration and accord no deference to domestic courts. On account of the substantive shift, tribunals have been provided with independent standards to be applied in the adjustment of investment disputes, whereas due to the procedural shift, there is also procedurally no reason for investment tribunals to have to give way to domestic courts.

12. FINAL CONCLUSIONS AND REFLECTIONS

Bringing this enquiry to an end, it is now necessary to revert to the essential premises of this study and re-state the three broad roles performed by domestic courts in investment arbitration. This shall provide the basis for some final reflections.

12.1. Domestic Courts as Partners

Though nowadays mostly established pursuant to dispute settlement provisions provided for in investment treaties and predominantly mandated to decide claims based on international law, investment arbitral tribunals are bound to decide disputes that are intrinsically linked to host States' domestic law. The domestic legal framework – comprising the host State's commercial, fiscal, labor, environmental, and other legislation – provides the principal parameters within which foreign investors operate. In fact, it is in the host States' law that the very proprietary rights and interests, which form the object of protection by investment treaties, are grounded in the first place. Not to mention a number of other important roles that domestic law more broadly continues to have in the context of investment arbitration – such as where it comes to determining the investors' nationality or that of the corporate vehicle through which they are investing, or when it comes to ascertaining the existence of an agreement to arbitrate. Despite the ascendancy of international law as the primary benchmark through which the propriety of host States' dealings with foreign investors is now measured, domestic law remains relevant to a number of issues before investment tribunals – and thereby also domestic judicial organs, as interpreters of that law.

It was one of the premises of the present inquiry that, especially when it comes to the law-ascertainment process, it was possible to conceptualize domestic courts as partners to investment tribunals: as the bodies primarily entrusted with the interpretation and application of domestic law, domestic courts, through their pronouncements in concrete cases, are namely expected to be capable of assisting tribunals in determining points of law that are necessary to decide the cases before them. But as the inquiry eventually showed, such partner role was not accepted without some reluctance. Indeed, tribunals generally approached domestic courts with a certain duality. On the one hand, they frequently expressed reservations about *concrete* pronouncements previously made in domestic judicial proceedings involving the investor and/or its investment. Though occasionally prepared to formally accord such pronouncements preclusive effect in relation to matters that were relevant to the merits of a particular treaty claim, tribunals mostly refuted the idea of being legally bound by domestic judgments, especially where such judgments purported to put into doubt the existence or scope of their own adjudicatory powers. On the other hand, tribunals with equal frequency acknowledged the great utility of domestic jurisprudence in the law ascertainment process *in general* and in practice recurrently resorted to such jurisprudence in determining questions of domestic law that were relevant to determining issues pending before them. This duality, as the present inquiry explained, is but the necessary consequence of the fact that domestic judgments, as any other outcome of adjudication, generate effects at both the concrete and the abstract levels. Whilst less inclined to give deference to prior determinations made by domestic courts in deciding controversies involving the concrete foreign investor, tribunals had little trouble accepting the role of jurisprudence generally in the law-ascertainment and law-clarification at the abstract level.

Taking a step back, the inquiry further noted that, in spite of formal disclaimers regarding the purported lack of *res judicata* effects of domestic court pronouncements, investment tribunals

nonetheless accorded them weight in practice. Ultimately, what appeared determinative of whether or not deference will be given to prior judicial determinations was the quality of the latter. Regardless of whether the determinations in question were relevant because of concrete pronouncements *in casu*, or because of general pronouncements *in abstracto*, investment tribunals have been prone to accept them as long as they emanated from independent, disinterested judicial decision-makers, and were not tainted by deficiencies in procedure or substance – that is, as long as they were unimpeachable from the perspective of international standards. From the vantage point of investment tribunals, domestic courts were thus seen as partners in the law-ascertainment process, provided that their overall conduct did not turn them into suspects. This partner role manifested itself not only where the need arose to clarify ambiguous statutory provisions or to determine points of law not otherwise capable of being determined by simple application of statutory provisions, but also where domestic courts' findings of fact proved valuable to the matters before investment tribunals.

At the end of the day, there are many good reasons for according deference to domestic courts' judgments. Some of them are perhaps practical ones. As arbitrators sitting on investment tribunals are not chosen for their particular knowledge of domestic law (and in fact, the arbitrators' detachment from the host State is even considered the main advantage of investment arbitration), reverting to domestic courts' judgments may potentially substitute lacunae in the arbitrators' knowledge of domestic law. Furthermore, in view of their fact-finding powers, domestic courts may also be better placed to make particular factual determinations. But even as a matter of law, investment tribunals are not entirely free to ignore domestic courts' jurisprudence in determining points of domestic law that are essential to their decision. In being adjudicatory bodies applying a law originating from a legal order other than the one to which they owe their existence, tribunals are actually bound to consider the case law of domestic courts, for they are obliged to interpret and apply domestic law in such way as it would actually be applied in the domestic legal system. While this may not translate into an autonomous obligation to engage *proprio motu* in their own research of relevant case law, it does at the very least require from arbitrators to seek the views of the litigating parties as to any domestic jurisprudence that may be pertinent to the interpretation or application of domestic law before them.

12.2. Domestic Courts as Suspects

In adjudicating investment disputes, investment tribunals may need to revert to domestic courts for reasons other than those pertaining to ascertaining the content of the applicable law. As part of their judicial function, courts conclusively determine legal relationships between litigating parties, and in the exercise of that function, they not only have the capacity, but also the propensity to confirm, amend, or extinguish particular rights existing under domestic law. As those rights may themselves constitute protected assets under an investment treaty, or else be relevant to the operation of the investment, their judicial treatment may hence affect the interests of investors. In consequence, the conduct of domestic courts may itself become the object of scrutiny insofar as investment tribunals may have to assess the conformity of such conduct with the State's obligations under an applicable investment treaty and/or international law more generally.

Given the capacity of investment tribunals to review the propriety of the impugned judicial conduct from the perspective of international standards, the inquiry thus proceeded from the assumption that, in the particular context where their conduct will be perceived as injurious to the investor and/or its investment, domestic courts will be approached on the part of investment tribunals with a certain level of suspicion. A large part of the inquiry has thus been devoted to discussing the standards pursuant to which such "suspect" conduct of domestic courts has generally been scrutinized. The analysis of arbitral practice revealed in this respect a

twofold tendency. On the one hand, it demonstrated that it has been principally through the lens of the denial of justice concept that investment tribunals appraised the propriety of judicial action. Whilst firmly established as part of the minimum standard of treatment under customary international law, in the context of investment treaties, the prohibition of denial of justice was taken to be subsumed under the fair and equitable treatment standard, which could thus be violated on account of judicial misconduct. On the other hand, however, the discussion also pointed to the growing inclination of tribunals to review judicial conduct against other standards of treatment prescribed by investment treaties.

One need not look far to find the reason for this trend. Denial of justice has categorically proven difficult to establish, as attested to by the remarkable scarcity of cases where a host State had been found liable for having failed to accord fair and equitable treatment on account of inadequate administration of justice. As demonstrated in the analysis, this is not because investment tribunals have come to treat domestic courts with greater circumspection than other State organs, but because the test for establishing a denial of justice is considered to set a high threshold: only the gravest irregularities in domestic proceedings and only the most egregiously wrong judgments are deemed capable of engaging the responsibility of the State. Given the rather feeble prospects for successfully holding a State liable on the ground of denial of justice, it is therefore not surprising that investors have increasingly sought to rely on other standards of treatment prescribed by investment treaties in an attempt to obtaining redress for the injuries purportedly suffered at the hand of the host State judiciary.

But such attempts have not been without conceptual challenges. Investment treaties rarely, if ever contain concrete stipulations as to the treatment that the investor is entitled to receive at the hands of the judiciary. The extent to which a particular treaty standard is actually susceptible of being violated through the intermediary of the courts essentially depends on the nature of the obligation. The problem is not so much with treaty obligations that can possibly be construed as demanding particular judicial outcomes, but rather with those that could be taken to require judicial treatment of a particular kind. As many of the obligations currently found in investment treaties find their origins in obligations deemed to form part of the minimum standard of treatment under customary international law, the difficulty in this respect revolves essentially around the question as to how such treaty standards precisely relate to the concept of denial of justice – a concept which, as part of the minimum standard, provided the chief normative framework for assessing the propriety of judicial conduct. Perhaps not surprisingly, a number of investment tribunals found no reason to draw categorical distinctions between disparate treaty standards when these are applied to the administration of justice. The standards of fair and equitable treatment, of full protection and security, of non-impairment, and even the due process obligation that commonly conditions the legality of expropriations were hence oftentimes interpreted as all entailing the same fundamental obligation that demands from the State the provision of an adequate system of justice. But there has also been a tendency to construe treaty standards as being additive to the customary international law standard of denial of justice. This has not solely been the case with treaty clauses requiring the provision of “effective means of asserting claims and enforcing rights”, which were considered to set out an independent treaty standard that in relation to the system of justice demands more than what is required under customary international law. But it has also been observable in the growing acceptance of the possibility that the fair and equitable treatment standard itself can be violated by courts in other ways than through denial of justice.

The question in this respect has not been solely about whether specific treaty standards could be taken to impose more exacting or demanding obligations upon the judiciary than the denial of justice standard, but perhaps even more about whether the violations of such standards could be procedurally easier to establish. In the context of denial of justice claims, judicial finality has namely been accepted as a substantive condition of claims, meaning that responsibility could

only be engaged once the judicial system as a whole has been tested. But such a judicial finality requirement has obviously not been sitting well with the system of investor-State arbitration where prior recourse to local remedies has generally been dispensed with as a condition for resorting to the international forum. Therefore, the prospect of measuring purportedly improper judicial treatment against disparate treaty standards – standards that are susceptible of being construed as imposing more onerous demands upon courts than merely an “adequate” administration of justice – is thus also a question of whether judicial finality can be avoided as a condition for establishing liability.

In its origins, the case for judicial finality has essentially been a case for preventing international treaty tribunals from sitting as regular courts of appeal from decisions emanating from domestic courts, and for preserving the integrity of the domestic legal system, without at the same time preventing treaty tribunals from ultimately exercising some form of external control. The tendency to construe treaty standards as imposing more rigorous demands from domestic adjudicatory processes than those flowing from the general duty of an adequate administration of justice is ultimately a tendency towards lesser deference being accorded to domestic courts. But it is also a tendency that decontextualizes the operation of the domestic courts from the local law that these are interpreting and applying in administering justice. This tendency is based on the presumption that the propriety of domestic adjudicatory processes can conclusively be determined without having to deal with domestic law at all. It is obvious that this presumption can be appealing to investment tribunals, composed as they are of arbitrators not necessarily familiar with the applicable domestic law. But it is certainly debatable as a practice.

12.3. Domestic Courts as Competitors

Investment arbitration may have become the preferred method for the settlement of investment disputes; in fact, as one that obviates the need for prior recourse to domestic courts. In many cases, however, the measures adversely affecting an investment and that usually form the predicate of claims before investment tribunals may equally be justiciable in host State courts. In many countries, the legality of decisions of public authorities and other acts involving the exercise of public power may for example be tested before specialized (administrative) courts. In some jurisdictions, the conduct of public authorities may be subject to constitutional challenges; in others, the possibility may exist to contest such conduct through tort actions. Leaving aside potential constitutional or statutory limitations preventing suits against State organs or governmental agencies, domestic courts may often themselves provide an avenue for redressing injuries suffered by the investor.

Underpinning the present inquiry was hence the proposition that domestic courts, to the extent that they may be in a position to claim adjudicatory authority over particular grievances incurred by investors, are capable of being perceived also as competitors to investment tribunals. What the inquiry demonstrated on this point is that, in response to such adjudicatory competition, investment tribunals had by and large the propensity of not treating domestic courts on terms of mutual equality. Whilst generally inclined to construe their own jurisdiction in such ways that allowed them to avoid formal jurisdictional overlap with domestic courts, arbitrators were largely predisposed towards solutions that allowed them nonetheless to assert adjudicatory authority over disputes involving the investor and the host State. In general, the path favoured was the one leading to arbitration, with no deference being accorded to domestic courts.

Such solutions would not have been possible was it not for the internationalization of investment protection standards, which enabled investment tribunals to emancipate themselves from the normative reach of domestic law, and thus from the adjudicatory scope of domestic courts. Indeed, the primary argumentative device employed by tribunals to assert authority over

investment disputes and to claim priority in their jurisdictional interactions with domestic courts turned out to be the conceptual distinction between the normative sources in which each claim was grounded. As adjudicatory bodies deriving their mandate from treaty instruments vesting them with the task of applying standards prescribed by international law, investment tribunals were capable of conceiving themselves as international organs operating at a different level than domestic courts. The fact that the courts could equally be competent to adjudicate upon disputes arising out of the same underlying facts could not affect the tribunals' own mandates, for courts, as organs of the host State, were presumed to apply standards provided for by domestic law, which are formally not the same as the international standards applied by the investment tribunals themselves. And insofar as each of them was thus taken to be applying different sources of law, investment tribunals were not perceived as encroaching upon the adjudicatory authority of domestic courts, or otherwise infringing upon the integrity of potentially applicable domestic adjudicatory procedures.

The investment tribunals' predisposition for solutions leading towards arbitration was so pervasive that most attempts at regulating interactions between investment tribunals and domestic courts – be it through treaty devices, be it through contractual stipulations – have largely been ineffective: investment tribunals persistently refused to abrogate their adjudicatory authority in favor of domestic courts. This predisposition was perhaps most pronounced in the interpretation and application of treaty provisions that actually envision a role to be played by domestic courts in the resolution of investment disputes – such as fork-in-the-road clauses or mandatory local litigation requirements. The former were mostly not given effect on the simple ground that claims based on domestic law considered by domestic courts could not prevent claims grounded in international law to be considered by investment tribunals. The latter, on the other hand, were frequently avoided as mandatory prior domestic litigation was either taken to be less favourable to investors than direct recourse to treaty arbitration or appeared futile in the circumstances of the case. Treaty stipulations notwithstanding, domestic courts were not thus perceived as adjudicators on par with investment tribunals. Informing the tribunals' approach to the interpretation and application of such treaty provisions was a fundamental distrust towards domestic courts and a disbelief in their ability to achieve a final disposition of investment disputes.

But also when it comes to the interpretation and application of contractual stipulations entered into between the investor and the host State, or the appreciation of the investors' conduct in relation to local litigation more generally, investment tribunals were not particularly prone to relinquishing their competence over a particular dispute in favour of domestic courts. Contractual forum selection clauses were thus by and large interpreted narrowly and not deemed capable of having a preclusive effect on the investment tribunals' own jurisdiction in the absence of contractual privity and perfect identity of subject matters. Absent very clear language to the contrary, contractual stipulations were thus not taken as being capable of giving rise to a renunciation of treaty procedures and the mere pursuit of prior local litigation was neither accepted as amounting to an implied waiver of treaty remedies, nor capable of giving rise to an estoppel. The right to the international remedy was not one to be renounced easily – indeed, it was often seen as a right that was not capable of being renounced at all. All in all, in the circumstances of adjudicatory competition, investment tribunals did not conceive of themselves as functional alternatives to domestic courts – they asserted themselves as the primary forum for the resolution of investment disputes.

12.4. The Rise of Arbitral Power over Domestic Courts – Final Reflections

Based on the findings of the present inquiry, it is now possible to extract some of the common themes and points of analysis, and reflect on what their implications are for the investment

arbitration practice. The intention is not so much to provide concrete proposals; rather, such reflection may have value in framing the path for reform of the system.

12.4.1. Between Authority and Competence: Who Ultimately Decides?

Informing the interactions between investment tribunals and domestic courts is, at the core, the question as to who has ultimately the authority to decide particular matters. This question, as the present author sees it, is not so much about which adjudicatory body is to decide specific claims. In that sense, the present inquiry does not problematize the existence of international investment tribunals' arbitral powers as such. Reviewing host States' conduct for violations of international obligations – obligations to which they themselves subscribed – is believed to be an appropriate function for investment tribunals; indeed, part of their very own mandate. Nor has it been the intention to question whether investment tribunals' proper role extends to the scrutiny of domestic judicial conduct. The purpose of investment arbitration may not be to directly correct injustices that transpire in domestic courts. But it certainly is its proper task to determine whether the conduct of host State organs, including judicial ones, conforms with international law. In submitting to arbitral review, states must be presumed to have intended to submit to arbitral review their action in all of its forms. Indeed, as some of the cases discussed in this dissertation amply demonstrated, there is certainly a need for an international mechanism that can ultimately check the power of domestic courts as well.

The more difficult issue is the finer one: who is ultimately to decide questions of applicable domestic law – questions which are normally and properly within the remit of domestic courts. This is not an issue that allows for simple answers. The problem is admittedly not unique to investment arbitration, but equally arises in other contexts of transnational interactions between different adjudicatory bodies, where one set of adjudicators may be called upon, or may be put in a position, to determine points of law on which they may not be particularly knowledgeable. In the context of investment arbitration, however, the problem is an exacerbated one. Not only because investment tribunals – in contrast to other international courts or tribunals – may actually have to apply domestic law, alongside international law. But especially because they may have to do so without the benefit of prior pronouncements on contentious points of domestic law by competent domestic courts, given that access to them is under most treaties not conditioned on prior recourse, let alone exhaustion of local remedies – a circumstance which again sets them apart from most other international courts and tribunals.

When the issue is one of applying domestic law, investment tribunals obviously venture into a field where their authority is not self-evident. This is not to say that investment tribunals are not capable, where required, to identify and apply the pertinent rules of domestic law.¹ Their authority to do so, however, is not unbound. Tribunals must obviously strive to discern the law as it is actually applied in the host State, and not settle on an account of domestic law that they deem preferable. The latter may be tempting, especially where parties in an arbitration submit conflicting expert reports on domestic law, each on the face of it equally convincing. It also follows that it is not for investment tribunals to conclusively decide contentious issues of domestic law. These are more properly within the remit of domestic courts, which possess greater knowledge and expertise, but also greater legitimacy to do so.² Especially where domestic

¹ Cf G Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions' (2005) 21 *Arbitration International* 631.

² The present author thus disagrees with the proposition advanced by Paulsson that international courts and tribunals, including arguably investment tribunals, must have at least equally great authority as domestic courts to annul or disregard laws which violate domestic mandatory laws (and not merely violate international law). See J Paulsson, 'Unlawful Laws and the Authority of International Tribunals' (2008) 23 *ICSID Review - Foreign Investment Law Journal* 215, at 224; and id, *The Idea of arbitration* (OUP, 2013), 239.

legal problems have potential public implications, it is for domestic courts to address and settle them, by paying due regard to the interests of all relevant stakeholders. It is for investment tribunals, in turn, to ensure that domestic courts get the chance to do so, if necessarily by organizing arbitral proceedings in a way that makes it possible for domestic courts to make pronouncements on the issues in contention. In some circumstances, this may mean awaiting for the outcome of domestic proceedings.

When it comes to deciding questions of domestic law, it is therefore the opinion of the present author that investment tribunals must structurally accord deference to domestic courts. Not only as a matter of some discretionarily applied principle of comity,³ but on principled grounds, accorded both for epistemic reasons and as a matter of proper allocation of authority.⁴ Against this background, the present author does not find convincing the currently still prevailing reluctance on the part of investment tribunals to accept as conclusive prior domestic judicial determinations. Surely, domestic courts, in being closely tied to the state of which they are an organ, may not always be trusted to provide independent and impartial assessments of the state of the law, dispense justice with respect to the foreigner in a dispassionate way, or in general hold the respondent host State to the requirements of international law. But investment tribunals are also uniquely positioned to use international law to control and sanction domestic courts' abuses of domestic law, in the sense that they can determine whether particular judicial pronouncements have been rendered in compliance with international standards of procedural propriety and/or in accordance with the State's other obligations under international law. When these conditions have been satisfied, there is no reason why tribunals should not treat as authoritative – indeed, not take as conclusive – the points of law previously decided by domestic courts. The author therefore suggests that the deference (and authority) which should thus be accorded to domestic courts is not an absolute one, but one subject to the condition that those courts interpret and apply the law honestly and competently. The readiness of at least some tribunals to condition their acceptance of domestic judicial outcomes with the latter's compliance with international standards shows potential for such an approach.

12.4.2. Regulation, Co-Ordination: Return to the Local Remedies Rule?

The findings of the present study eventually prompt the question whether the relationship between investment tribunals and domestic courts need to be regulated differently than it is under the present regime.

It is difficult to imagine that, in its essence, investor-State arbitration would go away in the years to come. Surely, we may witness the establishment of one or more permanent institutions, perhaps even a standing multilateral investment court. Furthermore, it is likely that the current system of investment arbitration may undergo other significant reforms. However, as a *type of remedy* – namely, one that allows aggrieved foreign investors to bring claims against the host States of their investments in an international forum that operates outside the judicial system of that very same host State – investment arbitration is not likely to disappear. Its replacement would only be acceptable where another remedy is found that is deemed equivalent to, or at least approximately substitutable with, investment arbitration. Relegating investment disputes to the exclusive resolution by domestic courts does not appear a realistic option. One of the decisive advantages of investor-state arbitration over domestic judicial procedures is the fact that such arbitration operates independently from the domestic legal order of the host State, and is thus immune from any opportunistic behaviour that the latter may engage in with a view to avoiding liability. Unlike the operation of domestic courts, investment arbitration cannot be affected by

³ Cf Y Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP 2007), 165ff.

⁴ My understanding builds on P Daly, *A Theory of deference in Administrative Law: Basis, Application and Scope* (CUP 2012), 7ff.

measures introduced by the host State in the exercise of its sovereign powers (*puissance publique*), including opportunistic legislative changes of the domestic legal framework. Nor is it constrained by domestic constitutional and legislative limitations that may prevent domestic courts from reviewing impugned conduct of State authorities against internationally-prescribed standards,⁵ or else from reviewing such conduct at all. Absent the ability to disimbed themselves from the domestic legal order, In the absence of this external positioning, the only way for domestic courts to offer a functional alternative to investor-State arbitration is in combination with State-to-State dispute settlement mechanisms – an alternative, however, which is generally seen as leading to the politicization of investment disputes and is unlikely to be implemented.

This is not to say that domestic judicial procedures cannot, in practice, operate as alternatives to international arbitration.⁶ Indeed, in many respects, domestic procedures possess significant advantages over arbitral proceedings. Unlike investment tribunals, whose remedies are essentially limited to monetary awards, domestic courts actually have the power to annul impugned measures adopted by other State organs, to order injunctive or declaratory relief, and above all, the power to enforce compliance with their own orders. The present author therefore believes that their role in the resolution of investment disputes should not be neglected, but that their function be rather enhanced. But it is also true that foreign investors remain generally averse to local remedies for a number of more or less valid concerns related to the operation of the domestic legal system – be it because of a general discomfort with seemingly complicated foreign legal procedures, be it because of costly delays attributable to overburdened or idle courts, be it because of the risk of judicial bias or fear of arbitrary decisions rendered by incompetent judges. The challenge then is in recalibrating the relationship between domestic and international procedures in a way that allows for disputes to be dealt with at the most immediate level that is capable of resulting in their resolution, while at the same time retaining the ability to have recourse to an external adjudicatory body where domestic judicial organs are incapable or unwilling to adequately dispense justice. In other words, the task is to enhance investment arbitration's complementary character.

This is a task that requires rethinking a number of essential parameters under which investment arbitration has been operating. First, it entails reconsidering the scope of the treaties' dispute settlement provisions. By restricting such scope to claims concerning violations of the discrete standards of protection provided by the applicable treaty, one prevents investment tribunals from taking cognizance of claims relating to simple breaches of contract or breaches of specific domestic laws, reducing the potential of jurisdictional overlap with domestic courts. Second, it necessitates reconsidering the very terms of the standards of treatment prescribed. In formulating such standards less expansively and setting a higher threshold for establishing their violation (through the introduction of limitative or qualifying language, but also through the addition of explanatory and clarifying ictory provisions),⁷ it is possible to discourage the use of investment arbitration as a mere alternative to domestic remedial processes. As claimants will want to make sure that their treaty claims have sufficient prospects of success, they may attempt perhaps more frequently recourse to local remedies instead. Third, and perhaps most importantly, it requires rethinking the conditions under which the international remedy is accessed. As the present inquiry demonstrated, two of the most commonly used treaty devices – fork-in-the-road

⁵ On domestic courts' competence to adjudicate private treaty-based claims and their inadequacy for deciding investment disputes, see further M Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements', (2015) 18 *Journal of International Economic Law* 655, at 659ff.

⁶ But see M Paparinskis, 'Investors' Remedies under EU Law and International Investment Law', (2016) 17 *Journal of World Investment & Trade* 919, suggesting that genuine comparisons on this point are difficult to make.

⁷ See eg. Art 8.10 CETA, which limits the FET standard to a set of most egregious instances of misconduct; or Art 2.4(6) and (7) Singapore-EU IPA, which narrows the scope of the umbrella clause to adverse measures adopted by the host state in the exercise of governmental authority, preventing simple contractual breaches to serve as a predicate for claims.

clauses, and mandatory local litigation clauses – have proven rather poor-designed to effectively regulate the relationship between domestic courts and investment tribunals. Especially the former are rather objectionable as a regulatory device: by being potentially capable of foreclosing access to the international remedy, fork-in-the-road clauses create disincentives for investors to attempt even some degree of recourse to domestic courts.

Are there alternatives then? If the policy goal is only to prevent parallel proceedings, the no-u-turn clauses, as discussed in this dissertation, certainly provide an effective means of regulation. In not foreclosing access to arbitration in case prior resort has been made to domestic courts, such clauses at least incentivize investors to resolve disputes through domestic remedies. Another, though oft-neglected alternative is, of course, to demand the exhaustion of local remedies as a condition for accessing the international remedy. Admittedly, suggestions towards the re-introduction of the local remedies rule run the risk of being seen as heretic, given that one of the defining characteristics of investment arbitration has always been the very ability of foreign investors to avoid prior litigation in domestic courts.⁸ But as some correctly point out, in current practice, investors do frequently pursue *both* domestic and international remedies already.⁹ This notwithstanding, making recourse to domestic remedies compulsory is still frequently resisted on the ground that mandatory prior domestic litigation will end up increasing the duration and the costs of litigation.¹⁰ But this argument rests on the presumption that domestic courts are inherently incapable of resolving disputes between the foreign investor and the host State, and that such disputes will necessarily persist even in the event of a positive outcome of domestic litigation. One may equally proceed, however, from the opposite assumption that mandatory recourse to local judicial remedies may actually decrease the costs of litigation, for where investment disputes are satisfactorily resolved by domestic courts, investors are less likely bring their claims to arbitration. In the end, the question turns on the extent to which one believes that investment disputes are capable of disposition by domestic courts, which is ultimately a question of trust.¹¹ Economically, the addition of an extra layer of proceedings may not add much to the overall costs of litigation, at least not when compared to the total costs of investment arbitration. And as a matter of legal principle, requiring recourse to domestic judicial remedies would certainly not be an unusual demand, given the wide prevalence of such requirement in the context of human rights courts. Indeed, to follow the practice of these courts, one could envision the requirement to depend on the mere prospect of success, or be otherwise dispensed with under less strict conditions than under the stringent obvious futility requirement currently adhered to by (some) investment tribunals.

Currently, the arguments still build on preconceptions of ineffectiveness, partiality, or incompetence of the domestic judiciary. This notwithstanding all investment made, or at least lip-

⁸ See eg C Schreuer, 'Do We Need Investment Arbitration?' (2014) 11(1) TDM, at 10, suggesting that 'any reintroduction of a requirement to exhaust local remedies would be a retrograde step'.

⁹ See eg S Puig, 'Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga' (2013) 5 Mexican Law Review 199, at 235 ff, demonstrating this on the example of sweeteners litigation in Mexico.

¹⁰ See eg N Hachez and J Wouters, 'International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?' in F Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (2013), 417-449, at 441; Schreuer (n 8), at 5, 10; or C Tietje and F Baetens, 'The Impact of Investor-State Dispute Settlement (ISDS) in the TTIP' (2014), available at <<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf>>, at 95.

¹¹ For a powerful critique, see M Sattorova, 'Return to the Local Remedies Rule in European BITs? Power (In)equalities, Dispute Settlement, and Change in Investment Treaty Law', (2012) 39 Legal Issues of Economic Integration 223, arguing how the waiver of local remedies was never intended to operate as part of a reciprocal bargain, but was meant to safeguard direct access to arbitration only for claimants from a certain category of States.

service paid to strengthening the rule of law, at all levels.¹² It may be time to start talking about the actual reliability of respondent host States' judicial systems and devise mechanisms that would allow domestic systems to demonstrate that they are capable of adequately adjudicating investment disputes.

12.4.3. Domestic Courts, Investment Arbitration, and the Rule of Law

A broader issue that this dissertation eventually unpacks is the fundamental question of the rule of law; specifically, the implications that the current dynamics between investment tribunals and domestic courts may have on the fostering of the rule of law, both domestically and internationally.

The question of the rule of law is, of course, inextricably bound up with the current regime of investment law. By providing a forum for the impartial adjudication of investment disputes – as an alternative to potentially arbitrary and unpredictable judicial decision-making by host States' courts, habitually perceived as structurally biased in favor of domestic interests – investment arbitration is, in its very essence, an attempt to compensate for the institutional deficiencies in the domestic rule of law.¹³ Just as investment treaties – in protecting investors against potentially capricious changes of local laws and arbitrary conduct by local authorities – are nothing but attempts at offsetting internal governance problems through the provision of a stable and predictable external legal framework grounded in international law.¹⁴ Indeed, it is these internal governance problems that frequently form the very predicate of treaty claims brought before investment tribunals.¹⁵ So much so, that investment arbitration has arguably come to operate also as a mechanism for determining compliance with rule of law requirements, including by the domestic judiciary as such.¹⁶

That the investment regime can thus contribute to the strengthening of the *international* rule of law does not mean, however, that it is also conducive to improving the *domestic* rule of law in the States recipients of investments. Opposing perspectives have thus far emerged on this question in the broader scholarly discussions. On the one side of the debate, there are those suggesting that investment treaties – especially in enabling that investment disputes be removed from the jurisdiction of domestic courts – inhibit the development of domestic rule of law. According to this line of scholarship, the escape route provided by arbitration is claimed to reduce pressure for improvement and reform of domestic institutions, if not belittle its

¹² See eg 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', UN Doc A/RES/67/1 (30 November 2012).

¹³ See TW Walde, 'The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases', (2005) 6 J. World Investment & Trade 183, at 190, explaining how the 'very *raison d'être* of investment treaties and, in particular, of the innovation of direct investor arbitration against States is the perception, held for a long time and universally, that a foreign investor does not, and cannot be expected to have, confidence in the impartiality of domestic courts, in particular in countries with a recognized low quality of governance.'

¹⁴ See S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (2012), 1–2 and 146–7; and C Tan, 'Reviving the emperor's old clothes: The good governance agenda, development and international investment law,' in SW Schill (et al) (ed), *International Investment Law and Development: Bridging the Gap* (2005), 147–179, at 155–157.

¹⁵ See eg CG García, 'All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration,' (2004) 16 Fla. J. Int'l L. 301, at 326–333, discussing the different types of investment treaty claims that are generally apt to arise in an environment of weak rule of law and governance.

¹⁶ See HE Kjos, 'Domestic Courts under Scrutiny: the Rule of Law as a Standard (of Deference) in Investor-State Arbitration' in M Kanetake and PA Nollkaemper, *The rule of law at the national and international levels: contestations and deference* (Hart, 2016), 353–382, at 357, suggesting that the tribunals' awards on the merits 'may also indicate whether the host state, through its courts, acted in accordance with the rule of law'.

significance.¹⁷ Absent the necessity for engaging with the host State's legal system, investors have little incentive to demand better judicial performance. Domestic courts, on their part, by losing their business to arbitration, supposedly lack incentive to improve the quality of their decision-making, whereas governments, in being able to delegate dispute resolution to external sources, are held to lack enticement to invest in their own judiciaries.¹⁸ This line of scholarship finds support in empirical studies disproving that the adoption of investment treaties would lead to higher domestic institutional quality and, in fact, suggesting that the presence of international arbitration might even undermine the quality of the local legal system.¹⁹ They also find corroboration in individual case-studies demonstrating how investment arbitration, in obviating the need for creating independent courts, can assist illiberal regimes in maintaining restrictions on judicial independence or otherwise repress their judiciaries, and thus curtail the development of the domestic rule of law.²⁰

On the other side of the debate, there are those suggesting that the foreign investment regime, in complementing weak domestic institutions, can nonetheless support and foster the development of domestic rule of law, including in domestic courts. This is said to occur in a variety of ways. First, in providing a model as to what an appropriate standard of governance may be, investment treaty standards are held to be capable of influencing domestic laws and practices within host States, including those of domestic courts, through different processes of diffusion or influence. This can occur indirectly, through expert guidance and reform proposal provided by international financing institutions, but also directly, as States respond with domestic reforms to concrete arbitral decisions.²¹ Second, the existence of external treaty standards and of the possibility of their enforcement through investment arbitration is considered to generate important signaling effects. The prospect of property rights and contractual commitments being able to be effectively enforced through arbitration purportedly reduces the benefit that host State actors can expect from abusing domestic judicial procedures, in turn, reducing pressure on domestic judges to conform with governmental preferences, and thus enhancing the independence of the domestic judiciary.²² Third, especially where investment treaties expressly empower domestic courts to resolve investment disputes, and limit the scope of arbitration to claims concerning treaty violations, they can give domestic courts an incentive to provide independent and impartial adjudication of the cases on their dockets.²³ This line of scholarship, though not directly supported by empirical studies, finds some limited support in anecdotal

¹⁷ See eg M Halle and LE Peterson, 'Investment Provisions in Free Trade Agreements and Investment Treaties: Opportunities and Threats for Developing Countries' (2005), at 24, available at <<https://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/poverty/RBAP-PR-2005-Investment-Provisions.pdf>>; or D Aguire, *The Human Right to Development in a Globalized World* (2008), 142-143.

¹⁸ For an overview, see T Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 *International Review of Law and Economics* 107, at 119-121.

¹⁹ See *ibid*, 118-122, where Ginsburg's own empirical study finds little evidence to support the proposition that investment treaties would foster domestic governance.

²⁰ MF Massoud, 'International Arbitration and Judicial Politics in Authoritarian States' (2014) 39(1) *Law & Social Inquiry* 1, presenting an insightful case study of Sudan.

²¹ See B Kingsbury and SW Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) *New York University Public Law and Legal Theory Working Papers* 146, at 16-19, attributing such role especially to the FET standard, in view of the various components of the concept of the rule of law that it embodies.

²² Wälde (n 13), 186-191, who also considers investment treaties to have 'a major role' in helping countries with under-developed governance to improve the quality of their governance system.

²³ SD Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law,' (2006) 19 *Pac. McGeorge Global Bus. & Dev. L.J.* 337, 367-370, who sees the relationship between investment arbitration and court litigation as a 'symbiotic' one in promoting the rule of law.

evidence concerning instances of “compliance pull” before the adoption of investment treaties,²⁴ as well as in response to experiences with investment arbitration.²⁵ This evidence includes instances of investment treaties and arbitral awards having positively influenced domestic judicial decision-making in concrete cases.²⁶

All in all, there remains much uncertainty as to the effects that investment treaties generally have on the development of the domestic rule of law. Suggestions that the investment regime actually benefits the domestic rule of law remain tenuous and unsupported by broader (empirical) studies.²⁷ But what is also clear is that the mechanisms of interaction between investment treaties and the rule of law are much more complex than the current strands of scholarship would seem to suggest. For one, investment arbitration and local judicial institutions do not operate as perfect substitutes. In view of its cost, investment arbitration frequently operates only as a mechanism of last resort, after the investor has already exhausted local remedies.²⁸ Furthermore, their degree of substitution may strongly depend on the particular treaty – on the type of disputes for which investment arbitration is provided (i.e. whether this is available only for treaty violations, or for all disputes concerning an investment), as well as on the procedural devices governing the relationship between international and domestic remedies (i.e. whether or not the treaty uses fork-in-the-road clauses, as opposed to the no-u-turn clauses or mandatory local litigation requirements). In the end, as some have suggested, the investment treaties’ effects on domestic rule of law may well depend on the circumstances of each case.²⁹

Based on the findings of this study, however, the present author remains skeptical about one thing: the overall prospects for the current system of investment arbitration, and the investment treaty regime in general, to influence domestic courts’ conduct in a way that fosters the domestic rule of law. This is not so much because the author would have doubts as to whether the standards of treatment prescribed by investment treaties are normatively capable of exerting a positive influence on the conduct of domestic courts. It is true that some of the treaty standards (e.g., the “effective means” provision) remain vaguely articulated, and that other standards (e.g., the FET obligations) are sometimes inconsistently applied. It is also true that in many cases where court conduct was scrutinized against the standard of denial of justice, the arbitral awards may have been insufficiently reasoned. But at its very core, the standard of denial

²⁴ See eg P Del Duca, ‘The Rule of Law: Mexico’s Approach to Expropriation Disputes in the Face of Investment Globalization’ (2003) 51 U.C.L.A. L. Rev. 35, explaining Mexico’s legislative and constitutional reforms following the conclusion of the NAFTA, which had the aim of extending the general protections of the rule of law and increase the independence of the judiciary.

²⁵ See eg J Paulsson, ‘Enclaves of Justice’, (2007) University of Miami Legal Studies Research Paper No. 2010-29, at 12, reporting how Mexican officials, in the wake of NAFTA, have developed ‘the salutary instinct of avoiding conduct which might be criticized in an international forum’.

²⁶ See eg Kingsbury and Schill (n 21), at 18, referring to the example of a Namibian court’s reliance on the Germany-Namibia BIT in deciding a domestic dispute; or Puig (n 9), at 236, demonstrating how Mexican constitutional courts have used international law language and international tribunals’ decisions in their own case law.

²⁷ M Sattorova, ‘The Impact of Investment Treaty Law on Host State Behavior: Some Doctrinal, Empirical, and Interdisciplinary Insights’ in Lalani, S, and Rodrigo Polanco, L (eds), *The Role of the State in Investor-State Arbitration* (Nijhoff, 2015), 162-186, at 174. This has not prevented commentators to claim that the treaty-imposed standards of treatment ‘have begun to show spill-over effects on the internal systems of the countries concerned’. See Schreuer (n 8), at 4.

²⁸ Cf Puig (n 9), at 206.

²⁹ See also BK Guthrie, ‘Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law’ (2013) 45 N.Y.U. J. Int’l L. & Pol. 1151, at 1197, concluding that it is not possible to determine in the abstract which of the two analytical models adopted in scholarship is correct, suggesting rather that question be assessed with respect to the particular social, political, and legal contexts of individual countries.

of justice remains a viable benchmark for assessing the propriety of judicial action, as is it builds on the essential elements of the rule of law concept.³⁰

Of concern are rather the systemic impediments, which prevent sustained and meaningful interactions between domestic courts and international investment tribunals. It is clear that investment arbitration has not been intended to, nor it is capable of, serving as a mechanism for the correction of errors and the achievement of consistency of law at the level of domestic courts. The review performed by investment tribunals over domestic judicial conduct is not an appellate one, in the sense that tribunals would be capable of undoing domestic court's determinations of fact or law, or reversing their judgments. Their awards are frequently not even binding on State courts.³¹ But it is also clear that under the current system, the rule of law element equally cannot be strengthened through transnational judicial dialogue, as in other instances of interactions between domestic and international adjudicatory bodies, which contribute to the substantive development of a shared understanding of international norms, and thus foster domestic compliance.³² In structural terms, the review performed by investment tribunals over domestic courts for consistency with due process and other substantive requirements of international law may arguably resemble the type of review of domestic judicial organs performed by the European Court of Human Rights or the Inter-American Court of Human Rights. However, one wonders whether the current patterns of interactions are sufficient to create a sustained dialogue – if, in fact, a proper dialogue can emerge at all. In view of the *ad hoc* nature of investment arbitration, with its strong orientation towards the resolution of single particular disputes and the remedying of past wrongs by providing financial compensation, one has doubts whether an occasional finding of State liability for improper judicial conduct does actually provide sufficient pressure to result in reforms of dysfunctional domestic judiciaries.³³ Courts, on their part, may not be aware of the possibility that their behavior could engage the host State's responsibility under an investment treaty.³⁴ One has further doubts where a process of acceptance and contestation can properly emerge where cases arising out of the same fact patterns are decided by different arbitral tribunals, and where the domestic courts reviewed are not in a position to meaningfully engage in a process of substantive contestation,³⁵ or where, in fact, the domestic courts engaging in conversation with investment tribunals may not even be the domestic courts reviewed.³⁶ Current reform proposals towards the creation of more permanent multilateral judicial institutions hold promise to change that.

³⁰ See further HP Aust and G Nolte, 'International Law and the Rule of Law at the National Level' in M Zurn, A Nollkaemper & R Peerenboom (eds), *Rule of law dynamics: in an era of international and transnational governance* (CUP 2012), 48-67, at 59ff.

³¹ See also RB Ahdieh, 'Between Dialogue and Decree: International Review of National Courts' (2004) 79 New York University Law Review 2029, 2045-2049, explaining why the appellate review model is inapplicable to interactions between domestic courts and NAFTA investment tribunals.

³² See B Peters, 'The Rule of Law Dimensions of Dialogues between National Courts and Strasbourg' in M Kanetake and PA Nollkaemper, *The rule of law at the national and international levels: contestations and deference* (2016).

³³ The author does not exclude positive influences in circumstances where the conduct of the judiciary has engaged a State's responsibility in several consecutive cases, as in the example of Ecuador described in the introduction to this dissertation.

³⁴ Cf Sattorova (n 27), 175-176.

³⁵ Cf WS Dodge, 'Loewen v. United States: Trials and Errors under NAFTA Chapter Eleven,' (2002) 52 DePaul L. Rev. 563, at 571, pointing to how investment tribunals are more insulated from review, as the review by domestic courts in the setting aside or enforcement stage is a limited one. This, of course, applies only to non-ICSID arbitrations. Under the ICSID system, domestic courts cannot properly review arbitral awards. See section I.1.

³⁶ In instances of post-award review, the reviewing courts are typically not those of the host State's respondents in arbitrations, but rather the domestic courts of the State hosting the seat of the arbitration, or courts of those States where the investor may seek to enforce an award against a respondent State. See further Ahdieh (n 31), 2020-2023, admitting that in the context of the NAFTA, the exchanges take place with domestic courts that are located in other States than the one involved in the arbitration.

Samenvatting (Summary in Dutch) – Nationale rechtspraak in investeringsarbitrage: partners, verdachten, concurrenten

Deze studie handelt over de diverse rollen die door investeringstribunalen worden toegekend aan nationale gerechten bij het beslechten van geschillen tussen staten en buitenlandse investeerders. Het proefschrift onderzoekt onder meer de benadering van nationale gerechten in de jurisprudentie van internationale investeringstribunalen. Het onderzoek maakt de balans op van deze steeds groeiende jurisprudentie; met het doel om deze niet alleen beter te begrijpen, maar ook met de bedoeling om een coherente theorie te ontwikkelen over hoe nationale gerechten worden gepercipieerd door internationale arbiters. Deze studie betoogt dat deze rollen in essentie op drie manieren kunnen worden onderscheiden. Ten eerste als *partners*, in de zin dat nationale gerechten arbitragetribunalen kunnen bijstaan bij het vaststellen van feiten, alsmede betreffende de toepasselijkheid en inhoud van nationaal recht. Ten tweede, als *verdachten*, in de zin dat hun gedrag zelf schadelijk kan zijn voor de investeerder en zijn investering, en als zodanig onderwerp van onderzoek door arbitragetribunalen wordt. En ten derde, als *concurrenten*, in de zin dat nationale gerechten, door een oplossing te bieden voor het herstel van schade die de investeerder lijdt door toedoen van de autoriteiten van een gastland, kunnen concurreren met arbitragetribunalen als mogelijke fora voor het oplossen van investeringsgeschillen. Teneinde ieder van deze specifieke rollen toe te lichten, is het onderzoek verdeeld in drie delen. Elk deel bestaat uit drie hoofdstukken die verschillende aspecten van de jurisprudentie van arbitragetribunalen behandelen. Deze worden voorafgegaan door hoofdstukken die respectievelijk de theoretische en historische referentiekaders beschrijven, waarmee de relatie tussen investeringstribunalen en nationale gerechten mogelijk kan worden onderzocht en geduid.

Hoofdstuk 1 introduceert een aantal theoretische kaders die kunnen worden gebruikt om de relatie tussen nationale gerechten en investeringstribunalen te conceptualiseren. In het bijzonder worden drie soorten hulpmiddelen genoemd. Ten eerste instrumenten die anders worden gebruikt voor het conceptualiseren van de relatie tussen de verschillende rechtsordes waarin beide soorten rechtsprekende organen opereren, zoals de doctrines van monisme en dualisme en het uitgangspunt van de suprematie van het internationaal recht. Ten tweede, instrumenten die gewoonlijk worden toegepast bij het reguleren van interacties tussen verschillende rechtsprekende instanties, zoals de principes van *res judicata* en *lis alibi pendens*. En ten derde, de instrumenten die worden toegepast in de procedure van het herzien van de beslissingen van het ene gerecht of instantie door andere, zoals dat het geval is overeenkomstig herzieningsstandaarden en respect voor eerdere beslissingen. De in dit hoofdstuk besproken theoretische instrumenten zijn niet geanalyseerd vanuit een normatieve ambitie, bijvoorbeeld om te bepalen wat idealiter de juiste relatie tussen nationale gerechten en investeringstribunalen zou moeten zijn. Veeleer betoogt de studie dat deze theoretische hulpmiddelen zo hun beperkingen hebben. Mede om die reden worden de instrumenten louter besproken en ingezet met het oog op de daaropvolgende analyse van jurisprudentie, aangezien sommige van deze theoretische concepten de besluitvorming door investeringstribunalen in de praktijk lijken te beïnvloeden.

Hoofdstuk 2 zet op zijn beurt de historische ontwikkelingen uiteen die de houding van internationale hoven en tribunalen ten opzichte van nationale gerechten onmiskenbaar hebben beïnvloed en dat blijven doen. De studie stelt dat de huidige houding veel te maken heeft met de manier waarop arbitrage tussen investeerders en staten aangewend wordt als een specifiek mechanisme voor de regeling van internationale investeringsgeschillen. Ontworpen op een manier die buitenlandse investeerders toestaat om een direct beroep te doen op een internationale rechtsgang zonder de voorafgaande uitputting van nationale rechtsmiddelen, heeft investeringsarbitrage zich geleidelijk kunnen ontwikkelen tot een volwaardig alternatief voor lokale berechting van investeringsgeschillen. Onvermijdelijk leidde dit tot een perceptie dat

ationale rechten eigenlijk overbodig zijn. Een dergelijke perceptie werd tevens gevoed door de parallelle ontwikkeling van het internationaal recht als het belangrijkste rechtskader van de normen voor de betrekkingen van gastlanden met buitenlandse investeerders. Nu het nationale recht niet langer alle relevante normatieve kaders geeft, verliezen nationale rechten ook in toenemende mate het primaat in investeringsgeschillenbeslechting alsmede de mogelijkheid om voorrang boven internationale rechterlijke instanties te claimen. De studie toont aan dat de procedurele en inhoudelijke internationalisering van de relaties tussen investeerders en staten, die plaatsvond met de invoering van investeringsarbitrage, op zichzelf niet nieuw is, maar deel uitmaakt van een lange reeks inspanningen, vanaf ten minste de 19^e eeuw, om buitenlandse investeringen uit te zonderen van beperkingen die op nationaal niveau worden gesteld. Deze inspanningen zijn, zoals de studie stelt, gekoppeld aan het lang bestaande wantrouwen tussen kapitaalexporterende/westerse en kapitaalimporterende/niet-westerse staten over het vermogen van nationale (niet-westerse) rechten om adequaat de geschillen met buitenlandse investeerders te beslechten.

Tegen deze theoretische en historische achtergrond zoals in de hoofdstukken 1 en 2 beschreven, gaat het onderzoek verder met de analyse van de hedendaagse arbitragejurisprudentie. In **deel I** van het proefschrift, dat de hoofdstukken 3 tot 5 bevat, worden eerst de verschillende situaties besproken, waarbij nationale rechten als *partners* voor investeringstribunalen kunnen worden beschouwd. Zoals de studie betoogt, is deze rol voornamelijk op het terrein van de vaststelling van het geldende recht. In hoofdstuk 3 wordt uiteengezet dat, ondanks de opkomst van het internationaal recht als de belangrijkste maatstaf voor de omgang van staten met buitenlandse investeerders, de nationale wetgeving nog steeds van groot belang is bij het beslechten van investeringsgeschillen door investeringstribunalen - en daarmee ook nationale rechten, in hun rol als de rechterlijke instanties die primair belast zijn met de interpretatie en toepassing van dat nationale recht. Hoofdstuk 3 brengt de verschillende omstandigheden in kaart waaronder investeringstribunalen groepen kunnen zijn om het nationale recht in het kader van arbitrage te interpreteren en toe te passen. Uit het onderzoek blijkt dat investeringstribunalen daar dikwijls mee te maken krijgen. Het hoofdstuk laat zien dat het internationale investeringsrecht tegenwoordig een complexe relatie onderhoudt met andere rechtsbronnen, waaronder het nationale recht, met als gevolg dat investeringstribunalen nationale rechterlijke uitspraken die dit recht interpreteren en toepassen niet kunnen negeren.

De twee daaropvolgende hoofdstukken handelen vervolgens over de vraag hoe investeringstribunalen de bevindingen en uitspraken van nationale rechterlijke instanties hebben benaderd ingeval deze relevant waren voor de aan hen voorgelegde rechtsvragen. Daartoe onderzoekt hoofdstuk 4 in de eerste plaats de gevolgtrekkingen die internationale investeringstribunalen hebben willen geven aan de uitspraken van nationale rechten die in een eerder stadium werden gedaan in nationale gerechtelijke procedures waarbij de investeerder en/of zijn investering betrokken was. Uit het onderzoek blijkt dat met betrekking tot zaken die echt relevant waren voor de kansen op een bepaalde verdragsaanspraak, de investeringstribunalen opvallend genoeg meestal weerlegden dat zij juridisch gebonden zijn aan de oordelen van die nationale rechterlijke instanties. Tribunalen hebben daarbij verschillende gronden aangevoerd om de invloed van de rechtsgevolgen van nationale rechten te verkleinen. Zo riepen zij argumenten aan betreffende de beginselen van de suprematie van het internationaal recht en het dualisme. Ook deden zij dikwijls een beroep op de specifieke bevoegdheden of plichten die hun werden verleend of die zij genoten op grond van hun rechtsprekende functies, zoals het kompetenz-kompetenz-beginsel of de plicht om zelfstandig het bewijsmateriaal te waarderen dat aan hen wordt voorgelegd. Uiteindelijk merkt het onderzoek echter ook op dat, ondanks formele uitzonderingen met betrekking tot het vermeende ontbreken van gezag van nationale rechterlijke uitspraken, investeringstribunalen hen in de praktijk niettemin vaak enig gewicht in de schaal van hun arbitrage hebben toegekend.

Hoofdstuk 5 bespreekt hierna de rol die de jurisprudentie van nationale gerechten speelt in het proces van vaststelling van het geldend recht in het algemeen. Uit het onderzoek blijkt dat in het geval van jurisprudentie die geen direct verband houdt met de concrete investeerder of zijn investering, tribunalen vaak het nut van deze ruiterlijk erkenden en er in feite herhaaldelijk gebruik van maakten bij het vaststellen van het toepasselijk nationaal recht dat relevant was voor het beslechten van kwesties die bij hen aanhangig waren. Dit was met name het geval wanneer de behoefte ontstond om onduidelijke wettelijke bepalingen te verhelderen of om rechtspunten te bepalen die anders door eenvoudige toepassing van wettelijke bepalingen niet konden worden vastgesteld. Zoals hoofdstuk 5 betoogt, is de neiging van het gemiddelde tribunaal om zich in dergelijke omstandigheden te beroepen op de jurisprudentie van de nationale rechter niet alleen wel zo praktisch, maar vloeit deze ook voort uit het feit dat arbiters die zitting hebben in dergelijke tribunalen kennis van het toepasselijke nationale recht ontberen. Het hoofdstuk laat zien dat arbiters in feite niet vrij zijn om dergelijke jurisprudentie te negeren. Als rechtsprekende instanties die het recht toepassen dat afkomstig is van een andere rechtsorde dan die waaraan zij hun bestaan te danken hebben, zijn investeringstribunalen eigenlijk wel verplicht om de jurisprudentie van nationale gerechten in hun werk te betrekken, al was het alleen al omdat zij verplicht zijn om het nationale recht op die manier te interpreteren en toe te passen zoals het feitelijk zou worden toegepast in het nationale rechtssysteem. Alhoewel zich dit niet laat vertalen in een op zichzelf staande verplichting om op eigen initiatief onderzoek te doen naar relevante nationale jurisprudentie, zijn arbiters op z'n minst verplicht om hierover de standpunten van de partijen te vragen bij de onderwerpen die relevant zijn voor de interpretatie of toepassing van het toepasselijke nationale recht.

Al met al blijkt uit de analyse in deel 1 dus een zekere dualiteit van de zijde van de investeringstribunalen in hoe zij nationale gerechten benaderen als 'partners'. Hoewel tribunalen over het algemeen niet geneigd zijn om zonder meer eerdere uitspraken van de nationale gerechten te volgen die betrekking hebben op de geschillen waarbij de buitenlandse investeerder betrokken is, hebben investeringstribunalen weinig moeite om de rol van nationale rechters en hun jurisprudentie over het algemeen te aanvaarden in de vaststelling van het geldende nationale recht en de juridische verduidelijking op abstract niveau. Al met al toont deel 1 van het onderzoek echter aan dat de mate van respect voor de nationale jurisprudentie uiteindelijk draait om de kwaliteit van de rechterlijke uitspraken van de nationale gerechten. In de praktijk, ongeacht of de bepalingen in kwestie relevant waren vanwege concrete uitspraken, of vanwege uitspraken in abstracto, waren tribunalen over het algemeen geneigd om deze uitspraken te accepteren zolang deze waren gebaseerd op beslissingen van onafhankelijke, niet belanghebbende rechters en de uitspraken geen ernstige tekortkomingen vertoonden in procedureel of inhoudelijk opzicht: dat wil zeggen, zolang ze vanuit het perspectief van internationale normen onaantastbaar waren. Met andere woorden, investeringstribunalen accepteren nationale gerechten dus als partners in het proces van rechtsvinding in de mate dat hun algemeen gedrag hen niet in verdachten veranderde.

In **deel II** van het proefschrift, dat de hoofdstukken 6 tot 8 omvat, verschuift het onderzoek vervolgens naar die omstandigheden waarin investeringstribunalen binnenlandse rechtbanken als '*verdachten*' benaderen: namelijk in situaties waarin het gedrag van nationale gerechten zelf mogelijk niet voldoet aan de toepasselijke internationale normen. In de uitoefening van hun reguliere rechterlijke functies, bevestigen nationale rechterlijke instanties gewoonlijk de eigendomsrechten en andere rechten die een investeerder bezit volgens het nationale recht of wijzigen zij deze dan wel verklaren zij deze vervallen. Die rechten betreffen echter vaak activa die ook worden beschermd door een investeringsverdrag, of zijn anderszins van belang voor de werkwijze van een beschermde investering. Wanneer de juridische behandeling van de investeerders' rechten door de nationale rechterlijke instanties niet voldoet aan de normen van het internationaal recht, kan de gaststaat dus aansprakelijk worden gesteld voor overtreding van het toepasselijke

investeringsverdrag. Om die situaties onder de loep te nemen behandelen de volgende drie hoofdstukken de normen aan de hand waarvan investeringstribunalen het vaakst dit "verdachte" gedrag van nationale rechterlijke instanties aan een kritische beoordeling onderwerpen.

Hoofdstuk 6 begint met een onderzoek van de praktijk van de investeringstribunalen aan de hand van het concept van de rechtsontzegging ('denial of justice'); een concept dat tot op de dag van vandaag het belangrijkste normatieve kader blijft bieden voor het beoordelen van de correctheid van rechterlijk gedrag. Hoewel het verbod op rechtsontzegging een onderdeel vormt van de minimumstandaard van behandeling waarop investeerders volgens het internationaal gewoonterecht recht hebben, passen investeringstribunalen dit verbod gewoonlijk toe als onderdeel van de standaard van eerlijke en rechtvaardige behandeling ('Fair and Equitable Treatment') van buitenlandse investeringen zoals voorgeschreven in investeringsverdragen. Echter, zoals hoofdstuk 6 laat zien, de beoordeling van het gedrag van nationale gerechten door het prisma van de rechtsontkenning is grotendeels onderworpen gebleven aan onbepaalde normen, niet veel verschillend van die toegepast door verschillende arbitrale en gerechtelijke instanties van vóór de Tweede Wereldoorlog, en dus afhankelijk van de subjectieve beoordeling van de arbiters die over elk specifiek geval apart beslissen. Bovendien blijkt uit het onderzoek dat rechtsontzegging heel moeilijk vast te stellen is, zoals blijkt uit het opmerkelijk geringe aantal gevallen waarin een gaststaat aansprakelijk werd gesteld omdat hij de investeerders niet de juiste behandeling in de rechtsbedeling had gegeven. Zoals de analyse aantoont, was dit niet omdat investeringstribunalen de nationale gerechten met meer omzichtigheid zijn gaan behandelen dan andere staatsorganen, maar omdat de test voor het aantonen van een rechtsontzegging als een hoge drempel werd beschouwd: alleen de zwaarste onregelmatigheden bij nationale procedures en alleen de meest manifest verkeerde beslissingen werden geacht tot aansprakelijkheid van de gaststaat te kunnen leiden.

Gezien de vrij zwakke vooruitzichten om een staat met succes aansprakelijk te stellen op grond van rechtsontzegging, is het niet verrassend dat investeerders steeds vaker andere, meer specifieke behandelingsnormen inroepen onder investeringsverdragen, in een poging verhaal te halen voor de schade die door toedoen van de rechterlijke macht van de gaststaat is toegebracht. Hoofdstuk 7 gaat in op deze praktijk en gaat na hoe investeringstribunalen andere verdragsnormen met betrekking tot omstreken juridisch gedrag hebben geïnterpreteerd en toegepast. Aangezien veel van de verplichtingen onder geldende investeringsverdragen hun oorsprong vinden in de internationale minimumstandaard van behandeling, heeft een groot aantal investeringstribunalen met de vraag geworsteld hoe dergelijke verdragsnormen zich dan precies verhouden tot de concepten van rechtsontzegging en rechtvaardigheid. Vele tribunalen zijn uiteindelijk niet bereid geweest een categorisch onderscheid te maken tussen ongelijksoortige verdragsnormen (zoals die van eerlijke en rechtvaardige behandeling, volledige bescherming en veiligheid, niet-bijzondere waardevermindering en zelfs de eerlijke procesverplichting in onteigeningsbedingen). Om die reden interpreteerden zij deze dus niet anders dan de gebruikelijke verplichting van staten om te voorzien in een adequaat rechtssysteem. Het onderzoek wijst echter ook uit dat nogal wat investeringstribunalen ook geneigd zijn om afwijkende verdragsnormen als toevoegsel aan de gebruikelijke internationale minimumstandaard te interpreteren, en zodoende meer strenge of veeleisende verplichtingen aan de rechterlijke macht op te leggen dan die van de rechtsontzeggings-standaard. Dit is het geval geweest met verdragsbepalingen die het bestaan van "effectieve middelen voor het doen gelden van claims en handhavingsrechten" vereisten. Deze werden beschouwd als een relatief zwaardere verdragsnorm. Ook is waarneembaar dat in een toenemend aantal gevallen investeringstribunalen bereid zijn geweest een schending van de standaard van eerlijke en rechtvaardige behandeling vast te stellen op andere gronden dan door rechtsontzegging.

Hoofdstuk 8 sluit dit deel van het onderzoek af met de bespreking van de principiële rechtsvraag in hoeverre nationale rechterlijke procedures zo mogelijk volledig moeten zijn

uitgeput voordat op internationaal niveau onrechtmatig juridisch gedrag kan worden ingeroepen en vastgesteld. Uit het onderzoek blijkt dat het uitputten van nationale rechtsmiddelen telkens een materiële voorwaarde voor claims van rechtsonzeggings is. Dit betekent dat toerekenbaarheid en aansprakelijkheid pas kunnen worden verondersteld zodra het nationale rechtelijke systeem in zijn geheel is ingeroepen en uitgeprobeerd om rechtsherstel aan de gelaedeerde buitenlandse investeerder te bieden. Conceptueel is de toepassing van deze finaliteitsregel gekoppeld aan de specifieke aard van de internationale verplichting in kwestie. Aangezien het verbod van rechtsonzeggings is gebaseerd op de plicht om een adequaat rechtssysteem te bieden, moet het systeem als geheel worden getest voordat men kan zeggen dat de plicht tot rechtsherstel is geschonden. Toch kunnen niet alle verdragsnormen noodzakelijkerwijs verplichten om een bepaald soort rechts systeem in stand te houden. Zoals uit het onderzoek blijkt, zijn investeringstribunalen niet bereid geweest de finaliteitsregel te aanvaarden ten aanzien van alle soorten verdragsvorderingen die zijn gebaseerd op het vermeende wangedrag van nationale gerechten. Het probleem is echter dat verplichtingen volgens de meeste verdragsnormen op verschillende manieren kunnen worden geïnterpreteerd, waardoor de toepassing van de finaliteitsregel afhankelijk is van hoe men de concrete verdragsnorm interpreteert.

Het geheel overziende, laat de studie dus het bestaan van een dubbele neiging zien in situaties waarin nationale gerechten in de rol van ‘verdachten’ optraden. Aan de ene kant toont het onderzoek dat voornamelijk het concept van rechtsonzeggings de grondslag vormt bij de beoordeling door investeringstribunalen van de juistheid van nationale rechterlijke stappen, maar ook dat deze norm een hoge drempel oplegt die in de praktijk moeilijk te nemen bleek te zijn. Anderzijds wijst het onderzoek uit dat investeringstribunalen in toenemende mate de neiging hebben om rechterlijk gedrag te toetsen aan andere door investeringsverdragen voorgeschreven behandelingsnormen. Sommige van deze zijn opgevat als het opleggen van zwaardere eisen aan nationale rechterlijke instanties dan alleen een "adequate" rechtsbedeling. Zoals uit het onderzoek blijkt, is de tendens om vermeende inadequate rechtsbedeling te toetsen aan de hand van andersoortige verdragsnormen niet alleen een poging om de strenge eisen van de norm van rechtsonzeggings te ontlopen, maar ook om te ontkomen aan het vereiste van uitputting van alle nationale rechtsmiddelen en dus van finaliteit als voorwaarde voor het inroepen en eventueel vaststellen van aansprakelijkheid van de gaststaat op internationaal niveau. Deze laatste regel past niet goed bij het huidige stelsel van arbitrage tussen investeerders en staten, waarbij het voorafgaand gebruik van alle nationale rechtsmiddelen in het algemeen is geschrapt als voorwaarde voor het kunnen indienen van een internationale claim.

Tot slot, in **deel III** van het proefschrift, dat de hoofdstukken 9 tot en met 11 omvat, richt de focus van het onderzoek zich op situaties waarin nationale gerechten kunnen worden gezien als ‘concurrenten’ van investeringstribunalen. Zoals het onderzoek betoogt, is internationale investeringsarbitrage de voorkeursmethode geworden voor de afwikkeling van geschillen met buitenlandse investeerders. Vaak zijn echter de maatregelen die een investering nadelig beïnvloeden en die de investeerder voornemens is aan te vechten voor een investeringstribunaal, evenzeer aan de kaak te stellen in de rechtszalen van de gaststaat. In dergelijke situaties kunnen nationale gerechten zelf een mogelijkheid bieden om beroep aan te tekenen, en zodoende de toegang tot internationale arbitrage overbodig maken. In de hoofdstukken 9 tot en met 11 wordt onderzocht hoe investeringstribunalen hebben gereageerd op gevallen waarin nationale gerechten hun rechterlijke bevoegdheid opeisen over bepaalde klachten en grieven van buitenlandse investeerders.

Hoofdstuk 9 onderzoekt in de eerste plaats de verschillende juridische technieken die door arbiters zelf worden toegepast in situaties van daadwerkelijke of potentiële concurrentie met rechtspraak van nationale gerechten. Het onderzoek laat een tweeledige tendens zien. Aan de ene kant hebben investeringstribunalen de neiging gehad om directe concurrentie met nationale gerechten te vermijden door manieren te vinden om formele overlapping van rechtspraak te voorkomen. Aan de andere kant, en zelfs soms tegelijkertijd, geven deze de voorkeur aan

oplossingen die hen in staat stelden om rechtsmacht uit te oefenen over het concrete investeringsgeschil. Daartoe hebben tribunalen twee strategieën ontwikkeld. In de eerste plaats hebben zij de gewoonte gehad om de relevante rechtsinstrumenten beperkend te interpreteren en/of toe te passen teneinde mogelijke overlappingen tussen nationale en internationale rechtsmiddelen weg te nemen. Dit hield echter niet in dat de rechtsmacht over het investeringsgeschil als geheel werd opgegeven, maar slechts de bevoegdheid om zaken te behandelen die anders in de eerste plaats door het nationale recht werden beheerst. Ten tweede, en meer algemeen, onderscheidde de tribunalen de normatieve basis waarop de vorderingen voor de rechtbanken werden gebaseerd op de basis van de claims die in de arbitrage werden gepresenteerd. Dit werd gedaan met het oog op het geldend maken van hun rechtsmacht over het investeringsgeschil. Nationale gerechten, als organen van de gaststaat, werden verondersteld normen toe te passen waarin het nationale recht voorziet en die formeel niet dezelfde zijn als de internationale normen die de tribunalen zelf toepassen. Internationale investeringstribunalen zagen zichzelf dus op een ander niveau dan nationale gerechten. Hoewel de laatste evengoed bevoegd zouden kunnen zijn om geschillen te beslechten die voortkomen uit dezelfde onderliggende feiten, zou dit geen invloed kunnen hebben op de eigen mandaten van de internationale tribunalen, aangezien dezelfde reeks handelingen aanleiding kan geven tot parallelle, maar onderling onafhankelijke claims.

In de volgende stap onderzoekt hoofdstuk 10 de verschillende verdragsmiddelen waarmee staten geprobeerd hebben om de onderlinge jurisdictie tussen nationale gerechten en investeringstribunalen te regelen en wordt besproken hoe deze middelen in de praktijk zijn geïmplementeerd. Uit het onderzoek blijkt dat, ook wat betreft de interpretatie en toepassing van dergelijke verdragsinstrumenten, investeringstribunalen hun rechtsmacht over het investeringsgeschil geldend hebben weten te maken. Ondanks het feit dat deze verdragsbepalingen aan nationale gerechten een specifieke rol bij de beslechting van investeringsgeschillen hebben toegekend, weigerden internationale tribunalen grotendeels om van het uitoefenen van hun rechtsprekende bevoegdheden af te zien ten gunste van nationale gerechten. In het geval van zogenaamde ‘fork-in-the-road’-clausules, die vereisen dat investeerders onherroepelijk een keuze maken tussen een nationale rechtsgang en internationale arbitrage, hebben investeringstribunalen bijvoorbeeld herhaaldelijk een onderscheid gemaakt tussen claims gebaseerd op het contract en claims gebaseerd op het verdrag om zodoende hun eigen bevoegdheid te handhaven. Claims gebaseerd op het contract, dat op basis van het nationale recht voor nationale gerechten konden worden beslecht, werden dus onderscheiden van claims die gegrond zijn in internationaal recht en die aan investeringstribunalen werden voorgelegd. In het geval van zogenaamde verplichte lokale geschillenbeslechting die de benadeelde investeerders ertoe dwingen eerst hun geschillen bij de gerechten van het gastland voor een bepaalde periode te brengen, hanteren tribunalen verschillende technieken. Zij probeerden deze te omzeilen door dergelijke bepalingen eerder als minder gunstig voor investeerders te beschouwen dan door rechtstreekse toevlucht te nemen tot verdragsarbitrage, of door ze als niet van toepassing te beschouwen in de omstandigheden van het geval.

Ten slotte gaat hoofdstuk 11 in op de rol van de investeerder zelf in het omgaan met gevallen van rechtsmachtsconflicten. Het richt zich met name op de mogelijkheid dat de investeerder afstand kan doen van zijn recht om arbitrage in te roepen met betrekking tot een investeringsgeschil. Dit door middel van contractuele bepalingen die zijn aangegaan met het gastland, of op grond van de eigen gedragingen van investeerders ten opzichte van het geschil. Uit het onderzoek blijkt dat ook in dergelijke omstandigheden investeringstribunalen niet bijzonder geneigd waren om afstand te doen van hun bevoegdheid over een specifiek geschil ten gunste van nationale gerechten. Contractuele forumkeuzeclausules werden dus in grote lijnen terughoudend geïnterpreteerd en werden niet geacht om zomaar de jurisdictie van de tribunalen aan te kunnen tasten, in ieder geval niet in afwezigheid van zeer expliciete contractuele bepalingen. Ook het louter

procederen in nationale gerechten werd niet geacht om tot een impliciete afstand van verdragsmiddelen te kunnen leiden. In algemene zin werd de investeerder niet geacht om gemakkelijk afstand te kunnen nemen van het recht op een internationaal rechtsmiddel.

Over het geheel genomen heeft het onderzoek in deel 3 aldus aangetoond dat investeringstribunalen in situaties van bevoegdheidsconflicten over het algemeen de neiging hadden om nationale gerechten niet te behandelen op basis van wederzijdse gelijkheid. Hoewel zij over het algemeen geneigd waren hun eigen rechtsbevoegdheid zodanig te construeren dat zij formele overlap met nationale rechterlijke instanties konden vermijden, waren arbiters grotendeels geneigd oplossingen te vinden die hen in staat stelden hun bevoegdheid over het concrete investeringsgeschil te handhaven. Over het algemeen ging de voorkeur altijd naar oplossingen die leiden tot arbitrage. Investeringstribunalen zagen zichzelf niet zozeer als functionele alternatieven voor nationale gerechten; zij achtten zich veeleer als het voornaamste forum voor het oplossen van investeringsgeschillen.

In zijn geheel werpt het onderzoek dus nieuw licht op een belangrijk aspect van de relatie tussen nationale gerechtelijke instanties en internationale scheidsgerechten. Als zodanig is het proefschrift ook van belang voor de discussie over verdere ontwikkeling en hervorming van het huidige systeem van geschillenbeslechting tussen investeerders en staten.

Summary – Domestic Courts in Investor-State Arbitration: Partners, Suspects, Competitors

This is a study about the roles accorded to domestic courts by investment tribunals in the process of arbitrating disputes between States and foreign investors. As such, it investigates the approaches taken and attitudes held towards domestic courts in the jurisprudence of arbitral tribunals. The study takes stock of this ever-growing jurisprudence; not only with a view to making sense of it, but with the intent to developing a coherent theory on how domestic courts are perceived by international adjudicators. The argument advanced in this study is that these roles can essentially be conceptualized in three ways. First, as *partners*, in the sense that domestic courts can assist arbitral tribunals in the determination of certain points of fact, as well as of points of applicable domestic law. Second, as *suspects*, in the sense that their conduct may itself be injurious to the investor and its investment, and as such become the object of scrutiny by arbitral tribunals. And third, as *competitors*, in the sense that domestic courts, by providing an avenue for redressing injuries suffered by the investor at the hands of a host State's authorities, can compete with arbitral tribunals as potential fora for resolving investment disputes. With a view to explaining these specific roles, the inquiry is divided into three parts, each comprised of three chapters dealing with different aspects of arbitral jurisprudence. These are preceded by chapters explaining, respectively, the theoretical and historical frames of reference through which the relationship between investment tribunals and domestic courts can possibly be thought of and conceptualized.

Chapter 1 introduces a number of theoretical tools that can be employed to conceptualizing the relationship between domestic courts and investment tribunals. Three types of tools are mentioned in particular. First, tools that are otherwise used to conceptualize the relationship between the different legal orders in which both types of adjudicatory bodies operate, such as the doctrines of monism and dualism and the principle of supremacy of international law. Second, tools that are customarily applied in regulating interactions between different adjudicatory bodies, such as the principles of *res judicata* and *lis alibi pendens*. And third, tools that are applied in the process of reviewing the decisions of one type of bodies by others, as is the case with the concepts of standard of review and deference. The theoretical tools discussed are not introduced with a normative aspiration, to determine what the proper relationship between domestic courts and investment tribunals should be. Indeed, the study actually explains that these theoretical tools are not without limitations. The tools are merely discussed with a view to informing the subsequent analysis of jurisprudence, given that some of these theoretical concepts appear to have guided investment tribunals' decision-making in practice.

Chapter 2 sets out, in turn, the historical developments that have arguably shaped and continue to shape investment tribunals' attitude towards domestic courts. The study argues that the present day attitude has much to do with the way that investor-State arbitration was inaugurated as a specific mechanism for the settlement of investment disputes. Designed in a way that permits investors to have direct recourse to international adjudication without the previous exhaustion of local remedies, investment arbitration has been able to progressively establish itself as a fully-fledged alternative to local litigation of investment disputes, leading thereby to a perception of redundancy of local courts. Such perception has been further underpinned by the parallel emergence of international law as the chief body of law prescribing the standards through which the propriety of host States' dealings with foreign investors are now measured. Once domestic law had ceased to provide the relevant normative benchmarks, domestic courts were namely deprived of the possibility to claim epistemic priority over other adjudicatory bodies. The study suggests that the procedural and substantive internationalization of investor-State relations which thus occurred with the introduction of investment arbitration is not in itself novel, but is

rather part of a long line of efforts, from at least the nineteenth century onwards, to exempt foreign investment from constraints posed by local contexts. These efforts, as the study argues, are ultimately linked to the long prevailing distrust among capital-exporting/Western States towards the ability of foreign, non-Western courts to adequately adjust controversies between foreign investors and the host States of their investments.

With the theoretical and historical scene thus set in chapters 1 and 2, the inquiry then proceeds with the analysis of present day arbitral jurisprudence. In **part 1** of the dissertation, comprising chapters 3 to 5, the various situations are first discussed where domestic courts can be seen as *partners* to investment tribunals. These, as the study argues, is primarily in the law ascertainment process. The study begins by explaining in chapter 3 that, despite the ascendance of international law as the primary benchmark through which the propriety of host States' dealings with foreign investors is now measured, domestic law continues to be of relevance to a number of issues before investment tribunals – and thereby also domestic courts, as the judicial bodies primarily entrusted with the interpretation and application of that law. To inform the subsequent inquiry, chapter 3 hence maps out the different circumstances in which investment tribunals may be called to interpret and apply domestic law in the adjudicative process, demonstrating that such circumstances are much ubiquitous than investment tribunals may sometimes be willing to concede. The chapter shows that international investment law today operates in a complex relationship with other sources of law, including domestic law, with the consequence that investment tribunals are not in a position to ignore domestic judicial pronouncements interpreting and applying that law.

The two succeeding chapters then proceed to examine how investment tribunals have actually approached the findings and pronouncements of domestic courts when these were relevant to the issues before them. To that end, chapter 4 explores first the effects that international investment tribunals have been willing to concede to domestic courts' pronouncements previously made in domestic judicial proceedings involving the investor and/or its investment. The inquiry demonstrates that, though occasionally prepared to formally accord such pronouncements preclusive effect in relation to matters that were relevant to the merits of a particular treaty claim, investment tribunals mostly refuted the idea of being legally bound by domestic judgments, especially where such judgments purported to put into doubt the existence or scope of their own adjudicatory powers. Tribunals have thereby invoked a variety of grounds for declining effects to domestic judgments. They invoked arguments relating to the principles of the supremacy of international law and dualism, but also made an appeal to specific powers or duties bestowed upon or enjoyed by them by virtue of their adjudicatory functions, such as the *kompetenz-kompetenz* principle or the duty to autonomously appreciate evidence submitted to them. Ultimately, however, the inquiry also notes that, in spite of formal disclaimers regarding the purported lack of *res judicata* effects of domestic court pronouncements, investment tribunals have nonetheless often accorded them some weight in practice.

Chapter 5 thereafter examines the treatment of domestic courts' jurisprudence in the law ascertainment process more generally. The inquiry shows that, in the case of jurisprudence unrelated to the concrete investor or its investment, tribunals frequently acknowledged its utility, and in fact recurrently resorted to it in determining points of applicable domestic law that were relevant to determining issues pending before them. This was especially the case where the need arose to clarify ambiguous statutory provisions or to determine points of law not otherwise capable of being determined by simple application of statutory provisions. As chapter 5 argues, the tribunals' inclination to resort in such circumstances to domestic courts' jurisprudence is not only a practical one, related to the fact that arbitrators sitting on such tribunals lack knowledge of the applicable domestic law. The chapter rather suggests that arbitrators are in fact not free to avoid considering such jurisprudence. In being adjudicatory bodies applying a law originating from a legal order other than the one to which they owe their existence, investment tribunals are

actually bound to consider the case law of domestic courts, for they are obliged to interpret and apply domestic law in such way as it would actually be applied in the domestic legal system. The chapter thereby explains that, though this may not translate into an autonomous obligation to engage in researching relevant case law on their own initiative, arbitrators are at the very least required to seek the views of the litigating parties as to any domestic jurisprudence that may be pertinent to the interpretation or application of the applicable domestic law.

Overall, the analysis in part 1 thus reveals a certain duality on the part of investment tribunals when it comes to domestic courts' role of *partners*. Whilst generally disinclined to give deference to prior court determinations pertaining to controversies involving the concrete foreign investor, investment tribunals have had little trouble accepting the role of domestic courts' jurisprudence generally in the law-ascertainment and law-clarification at the abstract level. All in all, however, what Part 1 of the inquiry has revealed is that the question of deference ultimately turns on the quality of judicial determinations made by domestic courts. In practice, regardless of whether the determinations in question were relevant because of concrete pronouncements *in casu*, or because of pronouncements *in abstracto*, investment tribunals have generally been prone to accept them as long as these pronouncements were found to emanate from independent, disinterested judicial decision-makers, and were not tainted by deficiencies in procedure or substance – that is, as long as they were unimpeachable from the perspective of international standards. From the vantage point of investment tribunals, domestic courts were thus accepted as partners in the law-ascertainment process to the extent that their overall conduct did not turn them into suspects.

In **part 2** of the dissertation, comprising chapters 6 to 8, the inquiry then shifts to those circumstances where investment tribunals approach domestic courts as *suspects*: namely, to situations where the conduct of domestic courts itself may fail to respect applicable international standards. In the exercise of their regular judicial functions, courts habitually confirm, amend, or extinguish proprietary and other rights that an investor possesses under domestic law. Those rights, however, oftentimes constitute assets protected under an investment treaty, or else are otherwise relevant to the operation of a protected investment. Where the judicial treatment of those rights fails to meet the standards prescribed by international law, the host State may thus incur responsibility for violating the applicable investment treaty. To take account of this fact, the subsequent chapters examine the standards pursuant to which investment tribunals most frequently scrutinize such “suspect” conduct of domestic courts.

Chapter 6 begins the examination of the investment tribunals' practice by reference to the concept of denial of justice; a concept that still today continues to provide the main normative framework for assessing the propriety of judicial conduct. Whilst forming part the minimum standard of treatment to which investors are entitled under customary international law, the prohibition of the denial of justice has by and large continued to be applied by investment tribunals as part of the fair and equitable treatment standard now prescribed in investment treaties. However, as chapter 6 ultimately shows, the appraisal of court conduct through the prism of denial of justice has largely remained subject to indeterminate standards, not much different from those applied by various arbitral and judicial bodies before WWII, and thus dependent on the subjective appraisal of the arbitrators deciding each specific case. Moreover, the inquiry shows that denial of justice claims have proven to be categorically difficult to establish, as attested to by the remarkable scarcity of cases where a host State had been found liable for having failed to accord investors proper treatment in the administration of justice. As the analysis demonstrates, this is not because investment tribunals have come to treat domestic courts with greater circumspection than other State organs, but because the test for establishing a denial of justice has been considered to set a high threshold: only the gravest irregularities in domestic proceedings and only the most egregiously wrong judgments have been deemed capable of engaging the responsibility of the State.

Given the rather feeble prospects for successfully holding a State liable on the ground of denial of justice, it is therefore not surprising that investors have increasingly sought to rely on other, more specific standards of treatment prescribed by investment treaties in an attempt to obtaining redress for the injuries purportedly suffered at the hand of the host State judiciary. Chapter 7 takes account of this practice, by looking at how investment tribunals have construed and applied such other treaty standards in relation to impugned judicial conduct. The study shows that, since many of the obligations currently found in investment treaties find their origins in the different elements of the minimum standard of treatment, many investment tribunals have struggled with the question how such treaty standards then precisely relate to the concept of denial of justice. Many have ultimately not been willing to draw categorical distinctions between disparate treaty standards (such as that of fair and equitable treatment, full protection and security, non-impairment, and even the due process obligation in expropriation clauses) and thus interpreted them not any differently from the customary obligation demanding from States the provision of an adequate system of justice. The inquiry notes, however, that there has also been a tendency on another part of investment tribunals to construe disparate treaty standards as additive to the customary international minimum standard, and thus as imposing more exacting or demanding obligations upon the judiciary than the denial of justice standard. This has been the case with treaty clauses requiring the provision of “effective means of asserting claims and enforcing rights”, which were considered to set out a relatively more demanding treaty standard. Yet, it has also been observable in the growing acceptance of the possibility that the fair and equitable treatment standard itself could be violated by courts in other ways than through denial of justice.

Chapter 8 completes this part of the inquiry by discussing the extent to which procedures before domestic courts may have to be fully exhausted before wrongful judicial conduct can be established. The inquiry notes that, in the context of denial of justice claims, the achievement of finality of judicial action has largely been accepted as a substantive condition of claims, meaning that responsibility has only been taken to be engaged once the judicial system as a whole has been tested. Conceptually, the application of this finality rule has been linked to the specific nature of the international obligation at issue. Since the prohibition of denial of justice has been grounded in the duty to provide an adequate system of justice, and this latter is an obligation to maintain a system of a particular kind, the system as a whole needs to be tested before one can say that the duty has been violated. Yet, not all treaty standards may necessary impose an obligation to maintain a system of a particular kind. As the inquiry notes, investment tribunals have thus not been willing to accept the finality rule to be applicable to all types of treaty claims predicated upon the conduct of domestic courts. The problem, however, is that obligations pursuant to most treaty standards are capable of being construed in different ways, which makes the application of the finality rule contingent on how one interprets the concrete treaty standard.

On the whole, in relation to situations in which domestic courts performed the roles of *suspects*, the study reveals thus a twofold tendency. On the one hand, it demonstrates that it has been principally through the lens of denial of justice that investment tribunals appraised the propriety of judicial action, but also that this standard has been taken to impose a high threshold, which happened to be difficult to meet in practice. On the other hand, the study points to the growing inclination of tribunals to review judicial conduct against other standards of treatment prescribed by investment treaties. Some of these have been construed as imposing more onerous demands upon courts than merely an “adequate” administration of justice. As the inquiry suggests, the tendency of testing purportedly improper judicial treatment against disparate treaty standards is not only part of the efforts to avoid the stringent requirements of the denial of justice standard, but also to evade the requirement of judicial finality as a condition for establishing liability. The latter rule does not sit well with the system of investor-State arbitration where prior recourse to local remedies has generally been dispensed with as a condition for bringing a claim.

Finally, in **part 3** of the dissertation, comprising chapters 9 to 11, the focus of the inquiry moves on to those situations where domestic courts can be seen as *competitors* of investment tribunals. As the study argues, investment arbitration may have become the preferred method for the settlement of investment disputes. Often, however, the measures adversely affecting an investment, which the investor intends to challenge before an investment tribunal, may equally be justiciable in host State courts. In such situations, domestic courts may themselves provide an avenue for redress, ideally making recourse to arbitration unnecessary. Chapters 9 to 11 closely examine how investment tribunals responded to such instances where domestic courts challenge the tribunals' adjudicatory authority over particular grievances incurred by investors.

Opening the discussion, Chapter 9 first examines the various legal techniques employed by arbitrators themselves in dealing with situations of actual or potential jurisdictional competition with domestic courts. The inquiry demonstrates a two-fold tendency. On the one hand, investment tribunals have had the tendency to eschew direct competition with domestic courts by finding ways to avoid formal jurisdictional overlap. On the other hand, and at the same time, they have been predisposed towards solutions that allowed them to assert jurisdictional authority over the concrete investment dispute. To that end, tribunals adopted two broad strategies. In the first place, they have had the habit of restrictively interpreting and/or applying the pertinent jurisdiction-conferring instruments with a view to removing potential jurisdictional overlaps between domestic and international remedies. This did not entail the relinquishment of jurisdiction over the investment dispute as a whole, however; what tribunals were willing to relinquish was merely the authority to deal with issues that were otherwise primarily governed by domestic law. Second, and more commonly, with a view to asserting their authority over the investment dispute, tribunals distinguished the normative basis on which the claims before courts were grounded from the basis of the claims presented in the arbitration. Domestic courts, as organs of the host State, were presumed to apply standards provided for by domestic law, which are formally not the same as the international standards applied by the investment tribunals themselves. Investment tribunals thus conceived themselves as operating at a level different than that of domestic courts. Though the latter could equally be competent to adjudicate disputes arising out of the same underlying facts, this could not affect the tribunals' own mandates, since the same set of acts can give rise to parallel, but mutually independent claims.

In the next step, chapter 10 examines the various treaty devices through which States have attempted to regulate jurisdictional interactions between domestic courts and investment tribunals, and discusses how these devices have been implemented in practice. The inquiry shows that, when it comes to the interpretation and application of such treaty devices, investment tribunals have not constituted their role towards domestic courts any differently than in other contexts of jurisdictional competition. Despite treaty language carving out specific roles for domestic courts in the disposition of investment disputes, tribunals largely refused to abrogate their adjudicatory authority in favour of domestic courts. In the case of so-called fork-in-the-road clauses, which require investors to irrevocably opt for either litigating investment disputes in domestic courts of the host State, investment tribunals for example relied on the contract/treaty claim distinction to uphold their own jurisdiction regardless of whether investors previously engaged in domestic litigation. Claims based on domestic law presented to domestic courts were thus not treated as capable of precluding claims grounded in international law presented to investment tribunals. In the case of so-called mandatory local litigation clauses, which direct the aggrieved investors to first seek resolution of their disputes before host State's courts for a prescribed period of time, tribunals employed different techniques. They proceeded to avoid them by either considering such provisions to be less favourable to investors than direct recourse to treaty arbitration, or by finding them futile in the circumstances of the case.

Finally, chapter 11 looks at the role of the investor itself in dealing with instances of jurisdictional competition. It focuses especially on the possibility that the investor could relinquish

its right to pursue arbitration with regard to an investment dispute through contractual stipulations entered into with the host State, or on account of its overall conduct in relation to local litigation. The inquiry demonstrates that also in such circumstances, investment tribunals were not particularly prone to relinquishing their competence over a particular dispute in favour of domestic courts. Contractual forum selection clauses were thus by and large interpreted narrowly and not deemed capable of having a preclusive effect on the investment tribunals' own jurisdiction in the absence of contractual privity and perfect identity of subject matters, and in the absence of very clear language to such effect. And so was the mere pursuit of prior local litigation not accepted by tribunals as being capable of amounting to an implied waiver of treaty remedies, or otherwise giving rise to an estoppel. The right to the international remedy was not one to be renounced easily – indeed, it was often seen as a right that was not capable of being renounced at all.

On the whole, what the inquiry in part 3 thus demonstrates is that, in situations of adjudicatory *competition*, investment tribunals had by and large the propensity of not treating domestic courts on terms of mutual equality. Whilst generally inclined to construe their own jurisdiction in such ways that allowed them to avoid formal jurisdictional overlap with domestic courts, arbitrators were largely predisposed towards solutions that allowed them to assert adjudicatory authority over disputes involving the investor and the host State. In general, the path favoured was the one leading to arbitration, with no deference being accorded to domestic courts. All in all, investment tribunals did not conceive of themselves as functional alternatives to domestic courts – they asserted themselves as the primary forum for the resolution of investment disputes.

As a whole, the study thus sheds light on an important aspect of the relationship between national judicial organs and international adjudicatory bodies. As such, it informs the further development and reform of the current system of investor-State dispute settlement.

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