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 (Award)* (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]

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[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 Nation's 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

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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 Paparinskis, *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

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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* (Sijthof 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 do 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 UNRIAA 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. Guerrerro, 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, thought 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 practice[31] and in legal writings[32] – 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 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 judges[43] (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

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[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 Chattin 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 Panamian 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,

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[53] For one of the earliest more elaborated proposals, see A Roth, *The Minimum Standard of International Law Appleid to Aliens* (Sijthof 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 *Chattin* (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: Congrulence 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

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[72] cf ECHR, art 6 ; ICCPR, art 14.

[73] See ICJ, *Application for Review of Judgement 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 Compañiá 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]

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[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 *Azinian* (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 *Azinian* (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 complains 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 grief 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 all[112]) 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'); *Spiridion 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 *Spiridion* (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); *Spiridion*, 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 ursue 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 evidence[129] 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 conductive 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 errors[145] 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

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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"'"); *Ostergeetel* (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] *H&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 *Paushok 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 proved[174] (which usually requires more than mere inferences[175]). 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' 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]; *Swisslion* (n 79), [268]; and indirectly *Unglaube v Costa Rica (Award)* (ICSID Case No ARB/08/1, 16 May 2012) [277]; *Spyridion 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

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[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 manifesta*)); 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'); *Paushok* (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'); *Spyridon 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

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[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 Awdi v Romania (Award)* (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 Paushok* (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] *Paushok* (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 Energía* (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 *Paushok* (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 addressed 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] *Paushok* (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

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[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

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[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 *avocamiénto*) 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]

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[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 Paushok 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] *Paushok* (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 Triantafilou, *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]; *Loewen* (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].