7. STATE RESPONSIBILITY FOR VIOLATIONS OF SPECIFIC TREATY STANDARDS

Denial of justice may have been the most common way through which the State's responsibility towards foreign investors has been engaged on account of the conduct of its judiciary. But does this mean that a State's responsibility necessarily exhausts itself in the concept of denial of justice? The practice of investment tribunals suggests the contrary: through their acts or omissions, domestic courts were taken to be equally capable of violating other standards of treatment prescribed by investment treaties. The purpose of the present chapter is to explore how these specific treaty standards have been construed and applied in relation to judicial conduct. Ultimately, the aim is to determine how stringently these standards could be said to operate – or better, how demanding the proof of their violation is, especially when compared to the high threshold that is generally required for a finding of denial of justice.

The succeeding sections of this chapter discuss the different categories of investment treaty obligations that have proven to be, or else deemed to be capable of engaging the responsibility of the State through the intermediary of the courts (7.2.-7.6). The discussion is preceded by some preliminary considerations as to how one can conceptually distinguish violations of specific treaty standards from the delict of denial of justice (7.1.), and is concluded with an analysis of the standard of review applied by investment tribunals in determining whether the said obligations have been breached (7.7). The chapter will demonstrate that investors have been increasingly successful in invoking the responsibility of host States on account of violations of concrete treaty standards. Such standards have namely been taken to provide investors with stronger protections against judicial misconduct than the traditional standard of denial of justice.

7.1. Denial of Justice Distinguished from Violations of other Treaty Standards

The obligation not to deny justice is not the only international obligation incumbent upon judicial organs; neither is every act or omission attributable to the judiciary and incompatible with a State's international obligations a denial of justice.[1] These distinctions were readily recognized in arbitral practice,[2] as well as State practice more broadly,[3] even if in the classic writings of the early twentieth Century, disagreements existed as to the line dividing denial of justice from other wrongs thus occasioned by the judiciary. In the view of a scholar who systematically classified various types of obligations incumbent upon judicial organs, Eusthatiadès, the division was essentially to be drawn between, on the one hand, the *general* international obligation not to commit denials of justice under customary international law; and on the other hand, *special* obligations that could be incurred either by treaty or general custom and which would typically have the effect of prescribing or proscribing the exercise of jurisdiction in specific cases (as in the

[1] cf AV Freeman, The international responsibility of states for denial of justice (Longmans 1938), 40-41.

[2] See especially *Martini Case (Italy v Venezuela) (Award)* (3 May 1930), reproduced in (1931) 25 AJIL 554, where Venezuela was held responsible for a decision of its Court of Cassation, which was found to be incompatible on several points with an international arbitral award previously rendered in accordance with an international treaty to which Venezuela was a party (see especially 577, 580, 581), but which was not otherwise found to amount to a denial of justice (569-76). In the same award it was further accepted that Court of Cassation could have rendered Venezuela also responsible for a violation of the 1861 Treaty of Commerce between Italy and Venezuela with respect to certain provisions of that treaty relative to the prohibition of monopolies (see 564-65).

[3] See 1930 Committee on Codification, bases for discussion 5 and 6.

case of treaties regulating privileges and immunities of State agents), or requiring the pronouncement of a judicial decision containing a specified result (as in the case of extradition treaties requiring respect of the "specialty doctrine").[4] Freeman, in contrast, suggested in his seminal treatise that the dividing line ought not depend on the source of the obligation, but on its nature. Accordingly, the proper criterion to be resorted to in distinguishing situations of denial of justice from other international wrongful acts occasioned by judicial conduct was whether the conduct complained of "infringe[d] any international rule aiming, either wholly or in part, at the legal protection of the rights of foreigners."[5]

The problem with Freeman's conception is that, in the context of modern investment treaties, infractions constituting a denial of justice would then necessarily include judicial acts or omissions that violate other discrete standards of treatment. For what would, for example, the omission to guarantee freedom of monetary transfers, or the failure to provide adequate compensation for expropriated property, be other than the infringement of international rules "aiming […] at the legal protection of the rights of foreigners"? Adhering to Freeman's conception would therefore result in a conflation of denial of justice with violations of other investment treaty obligations, thus giving rise to important questions, such as whether the high threshold for a finding of denial of justice ought therefore be equally applicable to establishing whether the domestic judiciary violated other standards of treatment, or whether the principle of judicial finality be also applied to determining claims relating to violations of those discrete standards.[6] The answer to these questions essentially depends on the nature and character of the investment treaty obligation in question, which can be more specific and exacting than the more general and fundamental obligation of providing a system of justice that adequately protects the rights of foreigners, in the nonfulfillment of which denial of justice finds emanation. An automatic transposition of the standards of denial of justice to determining violations of other treaty obligations is thus not necessarily warranted, even if in reality it may often be necessary, such as in circumstances where the wrongful conduct of domestic courts becomes a necessary legal predicate of a treaty claim, and the standard of denial of justice is (out of convenience) applied as a measure of wrongfulness.

At the level of principle, there is no question that violations of concrete standards of treatment incumbent upon a State under an investment treaty cannot materialize through the intermediary of the courts. As organs of the State, courts are obviously capable of engaging the latter's responsibility on account of conduct which is not in conformity with the State's international obligations.[7] A factor of relevance in this respect is solely whether the obligations in question are of such a nature that they are also amenable to being violated through the conduct of domestic courts; for, not all international obligations invariably impose demands on how domestic courts should conduct themselves.[8] The extent, to which particular obligations will be

[4] K Eustathiadès, La responsabilité internationale de l'État pour les actes des organes judiciaires et le problème du déni de justice en droit international (Pedone 1936), 67-68.

[5] Freeman (n 1), 50-51.

[6] This is not to say that one cannot find traces of such thinking in existing jurisprudence. See eg *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi I) (Award)* (ICSID Case No. ARB/97/3, 21 November 2000) [80] (categorizing under the rubric of denial of justice instances of denial of access to courts, unfair treatment in those courts, judgments that are substantively unfair, as well as denial of 'rights guaranteed to French investors under the BIT by the Argentine Republic').

[7] So much has also been accepted by investment tribunals. See eg *Arif v Moldova (Award)* (ICSID Case No ARB/11/23, 8 April 2013) [439]; or *Eli Lilly and Company v The Government of Canada (Final Award)* (ICSID Case No UNCT/14/2, 16 March 2017) [221].

[8] To provide a random examples: a treaty obligation requiring parties to respect the immunity of diplomatic agents from the criminal jurisdiction of the receiving State (such as Art 31(1) of the Vienna Convention on Diplomatic Relations) will more likely be engaged by judicial conduct than a treaty obligation requiring parties to cooperate for the conservation and sustainable use of biological diversity (such as Art 5 of the Convention on Biodiversity).

incumbent upon judicial organs, will depend on their nature and character, as well as the material scope of their regulation. A great many of investment treaty standards are probably such that, under circumstances, could be construed as requiring specified conduct on the part of the judiciary. This is but the necessary consequence of, on the one hand, the fact that the very object of those standards is the protection of investments; and on the other hand, the fact that those investments are grounded in proprietary rights governed by host State law, and thereby subject to the adjudicatory jurisdiction of host State's courts, which are thus obviously capable of affecting those investments. In practice, of course, violations of some treaty obligations are more likely to materialize through the intermediary of the courts than violations of others – be it only because judicial organs may less often have dealings with the foreign investor than other State organs.

The purpose of the following sections is to examine those investment treaty obligations that have often been engaged in practice on account of acts or omissions by the judiciary, or that, due to their nature, are more likely than others to eventually be engaged by such acts or omissions. The analysis begins by discussing obligations entailing the maintenance of a judicial system of a particular kind – a category of obligations most susceptible of serving as a basis of claims predicated upon judicial conduct, given that the nonfulfillment of such obligations can usually be appreciated only through individual cases of treatment by domestic courts (7.2.). The analysis then proceeds to discuss a category of investment treaty obligations which, though not specifically directed at the judiciary, have often been engaged on account of judicial action, due to the fact that the courts, in their ordinary exercise of judicial functions, are susceptible of interfering in the rights that form the object of protection of those obligations. For practical purposes, the discussion separately addresses the problem of judicial expropriations (7.3.) and other treaty obligations aimed at providing legal and economic security to investments (7.4.). The remainder of the analysis is devoted to examining treaty obligations that, due to their nature and character, lend themselves to application in the judicial context – even though as such are not any more likely to be violated by the acts or omissions of judicial organs than by those of other State organs. For ease of discussion, the analysis in this respect separately discusses obligations that are capable of being construed as requiring specific treatment in judicial proceedings (7.5.), and obligations that are better disposed of being interpreted as requiring specific judicial outcomes (7.6.), although, at times, such distinction can appear somewhat artificial.

7.2. Obligations to Provide a System of Adequate Judicial Protection

As already discussed in Chapter 6, denial of justice was properly understood as a failure to provide a system of justice that adequately protects the rights of foreigners.[9] The provision of such system was an essential element of the "established standard of civilization",[10] and an indispensable component of the protection that a State owed to foreign nationals and their property as part of the minimum standard of treatment under customary international law that developed in the nineteenth Century.[11] In the course of the twentieth Century, however, this minimum standard of treatment – which, in practice, as explained in chapter 2, turned out not to be one, but a set of (loosely defined) standards aimed at ensuring adequate protection to the life, liberty, and property of foreigners[12] – began to find concretization in specific standards of

[9] See *supra* 6.1. cf also *Arif* (n 7), [432]-[434], [445].

[10] See GW Gong, The Standard of 'Civilization' in International Society (Clarendon 1984) 15, 18.

[11] M Paparinskis, *Minimum Standard of Treatment* (2013), 46ff.

[12] See eg G Schwarzenberger, 'The Protection of British Property Abroad' (1952) 5 Current Legal Problems 295, at 298, where the duty to comply with the minimum standards of international law was described as follows: 'In particular, the organization of every State must correspond to reasonably defined minimum requirements of the rule of law in the Anglo-Saxon sense or of the Continental *Rechtstaat*. States must, for instance, provide for an independent judiciary. Interference with the property of foreigners is permissible only in the exceptional case of expropriation, that is to say, in circumstances

treatment that capital-exporting states began to include in their commercial, and later predominantly investment treaties. The treaty-drafters of the 1950s and 1960s articulated three specific rules which, in their view, flowed from the "well-established general principle of international law that a State is bound to respect and protect the property of nationals of other States": namely, the obligation of assuring property fair and equitable treatment, the obligation to provide most constant protection and security, and the obligation to ensure that property is not impaired by unreasonable or discriminatory measures.[13] To these specific rules, which since then have commonly been included in a single treaty provision, a separate standard was added which articulated the customary obligations concerning the conditions under which foreign property could be taken (i.e. what was known as the Hull formula).[14] Curiously, though the newly formulated treaty standards attempted to buttress or improve the generic and loosely defined obligations under the minimum standard of treatment, none of them specifically addressed the question of the foreigner's right of access to domestic judicial procedures, or more concretely defined the treatment that the foreigner was to receive at the hands of the judiciary.

As already noted in the previous chapter, in the practice of investment tribunals, the prohibition of denial of justice has chiefly found concretization under the principal of those treaty standards – that of the fair and equitable treatment. This development was not an entirely logical one, however, given that the FET standard, as originally formulated, was the one least considered to directly embody the elements of the minimum standard of treatment; the benefits of the latter were rather held to be embodied in the form of the positive obligation to ensure the "most constant protection and security",[15] which – as already explained in chapter 2 – had a much longer pedigree in the treaty drafting practice of the capital exporting states.[16] But of greatest significance in this respect is perhaps the conceptual shift that the application of the denial of justice standard through the FET standard has brought about. While the delict of denial of justice was originally conceived as the nonfulfillment of a *positive duty* incumbent upon states under general international law, in the context of the FET standard, the prohibition of denial of justice has essentially been operating as a *negative duty* – as the obligation to abstain from treating investors unfairly and inequitably by denying them justice.[17]

To make up for this conceptual shift, investment tribunals began to extrapolate a positive duty to provide an adequate system of justice from concrete treaty standards. Apart from the fair and equitable treatment standard itself (7.2.1), the treaty provisions relied upon to construe such duty included the full protection and security standard (7.2.2), the non-impairment obligation (7.2.3), and the due process requirement in the context of expropriation clauses (7.2.4). Some states, on the other hand, supplied such a duty by incorporating in their investment treaties discrete obligations aimed at the assurance of a system of effective remedies. These were articulated in the form of what are presently known as the "effective means" obligations (7.2.5).

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in which the property is required for public purposes. In this case, the procedure of expropriation must be judicial or quasi-judicial, and the owner is entitled to prompt, adequate and effective compensation. Otherwise, expropriation amounts to illegal confiscation and is an international tort.'

[13] 1967 OECD Draft Convention on the Protection of Foreign Property, 8.

[14] OECD Draft Convention, art 3.

[15] See G Schwarzenberger, *Foreign Investments and International Law* (Stevens 1969), 114-15.

[16] cf T. Weiler, The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context (Brill, 2013), 59ff.

[17] cf US Model BIT 2004, art 5(2)(a).

7.2.1. The *Unglaube* Case: The Duty to Provide "Adequate Legal Remedies" as part of the Fair and Equitable Treatment Standard

The award in *Unglaube v. Costa Rica* (2012) stands for the proposition that the obligation of fair and equitable treatment, in addition to the negative obligation not to deny justice, imposes upon the State also a positive duty to provide "adequate legal remedies" in its legal system.[18] According to the *Unglaube* Tribunal, to establish a violation of this duty, the Claimant was required to "demonstrate that the laws of Costa Rica, taken as a whole, did not afford them an adequate opportunity, within a reasonable time, to vindicate their legitimate rights".[19] Though the purported focus of the inquiry was therefore on the legal framework as such, in order to appraise the functioning of the domestic system of judicial protection as a whole, the Tribunal did scrutinize specific instances of treatment accorded to the Claimants in the course of domestic judicial proceedings. But as with respect to establishing denial of justice, the threshold was a high one, as Claimant was required proving "more than simply that a particular court or administrative tribunal arrived at the wrong result".[20]

In the circumstances of that case, the Claimants acquired land for a tourism project in Costa Rica, but its development eventually got hindered by the Government's decision to establish an ecological national park around the Claimants' property. In the course of the years, the Claimants challenged some of the governmental measures before Costa Rican Courts, but ultimately without success. In light of this outcome, Claimants maintained before the Tribunal that the entire legal system of Costa Rica had amounted to a charade. According to the Claimants, the unavailability of adequate remedies revealed itself especially in the fact that the Costa Rican legal system did not remedy the allegedly unlawful and unjust stalling of the permit-issuing process, which froze the development of the area around the natural park. Apart from that, the inadequacy of the legal system was supposedly also reflected in the failure on the part of the Claimants to obtain judgments in their favour on several occasions. The Tribunal disagreed, however. One of the Claimants, Ms. Marion Unglaube, succeeded in some of her legal actions, and while she had not been successful in persuading Costa Rican courts that the suspension of development activities was unlawful, the facts did not establish that she actually had a legitimate claim, or that the failure of the judicial system to find in her favour in itself amounted to a denial of justice.[21] Furthermore, the Tribunal considered that the negative outcomes, in themselves, did not establish the absence of timely and meaningful legal remedies, noting that Claimant has had "several important victories along the way, including at least one in the Supreme Court."[22] Taken together, the Tribunal was not able to establish an absence of adequate and timely avenues of legal recourse that would enable Claimants to vindicate the rights they claimed to possess.

The *Unglaube* case suggests that the determination of the adequacy of legal remedies will be context specific, and will based on the evaluation of the remedial process as a whole. The scrutiny will not be based on a correctness test, but the Tribunals may nevertheless attempt to determine the legitimacy of domestic claims as such.

[18] Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica (Award) (ICSID Case Nos ARB/08/1 and ARB/09/20, 16 May 2012) [271]-[278].

[19] ibid, 272.

[20] ibid.

[21] ibid, 277.

[22] ibid, 274.

7.2.2. The Duty to Make a Functioning System of Courts and Legal Remedies Available to the Investor as Part of the Full Protection and Security Standard

In the practice of investment tribunals, however, it was not so much the standard of fair and equitable treatment, but that of full protection and security that was more often susceptible to being interpreted as entailing a duty to provide an adequate system of justice. This, of course, is not in itself surprising given that the standard – which presently appears with no less frequency in modern investment treaties,[23] mostly as a complement to the FET obligation – has also been considered to be one that most directly embodied the benefits of the minimum standard in relation to the protection of property.[24]

Among the first to interpret the standard as extending to the provision of *judicial protection* to investments was the Tribunal in *Lauder v. Czech Republic* (2001). The latter held, specifically, that the host State's duty under the full protection and security obligation "was to keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law."[25] Other tribunals construed the standard in the same way: as entailing a duty to maintain a functioning judicial system that is available to the investor and that allows it to have its claims properly considered.[26] This was of course part of the general duty of providing a legal framework that offers legal protection to investors – a duty which, in the view of the Tribunal in *Frontier Petroleum Services v. Czech Republic*, necessarily comprises "both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights".[27]

On the face of it, such duty to provide "appropriate procedures that enable investors to vindicate their rights" would not seem to diverge from the duty to provide "adequate legal remedies" that the *Unglaube* Tribunal inferred from the fair and equitable treatment standard.[28] Nor, for that matter, would it seem to be any different from the general obligation to provide a system of justice that affords foreigners adequate judicial protection to their rights, which States purportedly owe to foreign investors as part of the minimum standard of treatment under customary international law. In fact, some tribunals construed and evaluated the duty in the same terms as a claim for denial of justice. For instance, in *Al Bahloul v. Tajikistan* (2009), the Tribunal considered that the concept of protection and security in investment treaties "could arguably cover a situation in which there has been a demonstrated miscarriage of justice",[29] but ultimately

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[23] See UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (2007), 28. The obligation to provide investors with full protection and security finds its source in the treaty-making practice the 19th Century, particularly in the early bilateral commercial treaties concluded by the United States. See JW Salacuse, *Law of Investment Treaties* (OUP 2010), 208-10.

[24] Schwarzenberger (n 15), 114. See also RR Wilson, 'Property-Protection Provisions in United States Commercial Treaties' (1951) 45 AJIL 83, at 102, explaining that the 'most constant protection and security' standard used in US commercial treaties was expressive of the minimum treatment intended.

[25] Ronald S Lauder v The Czech Republic (Final Award) (UNCITRAL, 3 September 2001) [314].

[26] See *Parkerings-Compagniet AS v Republic of Lithuania (Award)* (ICSID Case No ARB/05/8, 11 September 2007) [360]-[361] (confirming that the duty under the protection and security standard 'was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court'); or *Frontier Petroleum Services Ltd v The Czech Republic (Final Award)* (UNCITRAL, 12 November 2010) [273] (the obligation is 'to make a functioning system of courts and legal remedies available to the investor').

[27] Frontier Petroleum Services ibid, [263].

[28] *Unglaube v Costa Rica* (n 18), [271]-[278].

[29] Al Bahloul v Tajikistan (Partial Award on Jurisdiction and Liability) (SCC Case No V 064/2008, 2 September 2009), [246].

found no violation of the FPS standard after referring to its previous findings in relation to the denial of justice claim predicated on purported due process violations.[30]

The *Al Bahloul* Tribunal took the view that establishing a miscarriage of justice in the context of the FPS standard is "not a matter of strict liability", adding that an investor "is not guaranteed that he will prevail in a court action under all circumstances."[31] Other tribunals construed the standard in a similar way. According to the *Frontier* Tribunal,

> "not every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, such as an international tribunal, is 'wrong' would not automatically lead to state responsibility as long as the courts have acted *in good faith* and have reached decisions that are *reasonably tenable*. In particular, the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated."[32]

In the circumstances of the *Frontier* case, the Tribunal eventually applied the FPS standard to the conduct of the judiciary solely in relation to claims concerning the allegedly excessive court delays.[33] The delays were eventually not found to have violated the standard, with the Tribunal finding the judicial system of the Czech Republic to have been available to Claimant and responsive to its requests, most of which were also addressed promptly. While there was a delay of 18 months, which had occurred between Claimant's initial filing and the Regional Court's first action and which was "not ideal", the Tribunal "appreciated" that at the time in question, the Czech courts were experiencing at once a high volume of cases and a shortage of judges, which helped to explain such delay. Thus, "although not an optimal situation for the efficient resolution of claims," the specific delay was not found to have risen to the level of a breach of the standard.[34] In the context of court delays, the Tribunal also dismissed the related argument that government officials would have breached the FPS standard by allegedly having failed to take action when alerted to the delay at the Regional Court, taking the view that such officials were not under an obligation to intervene in court proceedings between private parties;[35] nor, for that matter, in dealings between private parties outside the court room[36] – a point which was previously underscored by other tribunals.[37]

All in all, the approach taken by the *Frontier* Tribunal in determining the Respondent's compliance with the FPS standard was a deferential one and the Tribunal avoided setting any particular standard that a domestic legal system would have to meet, in order to be considered as providing "a functioning system of courts and legal remedies" available to Claimant. But other tribunals, too, refrained from setting any particular standards in that respect, aside from the

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[30] ibid [247].

[31] ibid [246].

[32] *Frontier Petroleum Services* (n 26), [273]. See also [467] ('The Czech Republic made a functioning system of courts and legal remedies available to Claimant. Claimant availed itself of this system with only limited success. However, not every failure to obtain redress is a violation of the principle of full protection and security.')

[33] For reasons unexplained, the Tribunal did not apply the standard in relation to the claim that the Czech Courts' refusal to enforce and recognise a commercial arbitral award similarly amounted to a violation of the obligation to offer full protection and security, which the Tribunal solely assessed in relation to the FET standard cf ibid [469] ff.

[34] *Frontier Petroleum Services* (n 26), [336].

[35] ibid [337].

[36] See ibid, [464]-[465], where the Tribunal dismissed the FPS claim premised on the allegation that the Czech officials of the state agencies involved in the Claimant's enterprise failed to 'exert pressure' on the bankruptcy trustees to properly protect the interests of Claimant.

[37] See *Lauder* (n 25), 314 ('The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships.')

threshold issue of availability. What is particularly notable is that tribunals avoided making assessments as to whether the domestic remedies would actually be effective in redressing the wrongs allegedly suffered by investors. In *Lauder,* the Tribunal considered that numerous Czech court proceedings initiated by Claimant's entities against their commercial partner *ipso facto* showed that the Czech judicial system had remained fully available to the Claimant. Specifically, the fact that a decision was rendered in favour of one of those entities by the Regional Commercial Court in Prague was "conclusive evidence of this availability". The Tribunal arrived at such conclusion, in spite the fact that the decision in question had later been annulled by the High Court in Prague – evidently satisfied by the fact that an appeal was still pending before the Czech Supreme Court, which the Tribunal believed could still have rendered a favourable ruling.[38] The mere availability of a remedy was also sufficient to the Tribunal in *Saluka v. Czech Republic* (2006) not to find a failure to provide full protection and security in the fact that the Czech Supreme Public Prosecutor's Office, as the last instance for appeals, upheld the freezing of the Claimant's shares in a Czech bank on grounds on which the Claimant had not even been heard, in view of the fact that the Claimant was in a position to lodge, and in fact had lodged, a petition with the Czech Constitutional Court challenging the denial of its right to be heard.[39] Without otherwise wishing to decide whether the freezing of Claimant's shareholding was actually capable of falling within the scope of the FPS clause, the Tribunal accepted the availability of a constitutional challenge as sufficient to satisfy the FPS standard.

7.2.3. The *Belokon* Case: Unavailability of Judicial Remedies as a Breach of the Non-Impairment Clause

Occasionally, a duty of providing a legal framework that offers adequate legal protection to investments, including through judicial means, was effectively construed from the non-impairment clause. One such example can be found in the *Belokon v. Kyrgiz Republic* (2014) award. In the circumstances of that case, the Kyrgyz courts denied standing to the deposed former managers of the Claimant's bank to challenge the imposition of temporary administration on the bank, insofar as Kyrgyz law permitted only the temporary administrator, or a latter's delegate, to challenge such imposition.[40] The Claimant contended that the refusal of standing amounted to a denial of justice, which was then presented as one of the predicates for the FET claim.[41] The Tribunal, however, considered it "more appropriate" to undertake the analysis of whether the inability to challenge the imposition of temporary administration amounted to a violation of the non-impairment obligation under Article 2(3) of the applicable BIT.[42] Without otherwise inquiring whether the Kyrgyz judicial decisions were itself improper from the perspective of international law, the Tribunal concluded that "the failure to provide for a practicable means to challenge the imposition of temporary administration" was an unreasonable impairment of the right to develop and manage the bank, and to enjoy the fruits of its legitimate shareholding, which was prohibited by the BIT.[43]

The Tribunal omitted to explain why it was "more appropriate" to consider that part of the claim under the non-impairment clause, and not according to the standard of denial of justice. The Respondent's failure to make available within its domestic legal system a mechanism to challenge the imposition of the impugned measure would likely have amounted to a denial of justice on its own account. At any rate, the standard thus construed on the basis of the non-

[38] ibid, 314.

[39] Saluka Investments BV (The Netherlands) v Czech Republic (Partial Award) (UNCITRAL, 17 March 2006) [493].

[40] Valeri Belokon v The Kyrgiz Republic (Award) (UNCITRAL, 24 October 2014) [100]-[105].

[41] ibid [229].

[42] ibid [253].

[43] ibid [266].

impairment clause was not a particularly demanding one; the issue turned on the elementary question of the availability of a remedy.

7.2.4. The *ADC* Case: Availability of an "Actual and Substantive Legal Procedure" as a Condition for Lawful Expropriations

Finally, a similar duty of providing appropriate remedial procedures to vindicate rights has other times been construed from treaty provisions conditioning the legality of expropriations. As a rule, investment treaties allow States to expropriate covered investments, provided that such expropriations be for a public purpose, non-discriminatory, in accordance with due process of law, and accompanied by the payment of adequate compensation.[44] Of importance to the conduct of domestic courts is particularly the requirement of due process of law, which is deemed to require that expropriation is carried out in accordance with procedures established in domestic legislation and fundamental internationally recognized standards, is conducted in a non-arbitrary manner, and with an opportunity for the affected investor to have the measure reviewed before an independent and impartial body.[45] The right to an independent review, of course, presupposes the existence of adequate review procedures and the absence of such procedures may be reason for a tribunal to conclude that the taking was not effected under due process of law. This is precisely what happened in the *ADC v. Hungary* (2006), where the Respondent was found to have failed to demonstrate that Respondent's legal system provided methods enabling the Claimants to review the measures that amounted to the expropriation of the latter's investment.[46] According to the *ADC* Tribunal, in the expropriation context, the "due process of law" requirement

> "…demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow."[47]

Though the *ADC* Tribunal did not elaborate on the source of this obligation, the requirement finds its normative basis again in the general obligation under customary international law to maintain and make available to aliens a fair and effective system of justice that affords adequate judicial protection to their rights.[48]

Unlike the tribunals interpreting the FPS obligation, the *ADC* Tribunal proceeded to set qualitative requirements that a domestic judicial system was to meet to satisfy the due process requirement: the legal procedure had to "be of a nature to grant an affected investor a reasonable

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[44] The language in the treaties varies, but the four conditions have arguably crystallized so as to represent customary international law on expropriation. See UNCTAD, *Expropriation* (Series on Issues in International Investment Agreements II, 2012), 27.

[45] ibid, 36ff.

[46] ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary (Award) (ICSID Case No ARB/03/16, 2 October 2006) [438].

[47] ibid [435].

[48] See eg Schwarzenberger (n 15), 163, considering that the term 'due process of law' as used in the expropriation clauses is nothing but the minimum standard regarding the protection of foreign property under international law. For a concurring view, see Wilson (n 24), 88.

chance within a reasonable time to claim its legitimate rights and have its claims heard".[49] Though this may not be an exacting standard, it was still sufficient for the Tribunal to reject Respondent's (unsubstantiated) argument that Claimants could have ultimately sought legal remedies before the Hungarian Constitutional Court by way of the generic procedure available to a discontented party to request judicial review of whatever it believes to be in conflict with the Constitution,[50] and to conclude that, on the specific facts established in that case, there was no appropriate method for the investor to resort to contest the legality of the impugned measures.[51] Those findings appear context specific, as it would otherwise be difficult to accept that the "reasonable chance" standard could not be satisfied through the possibility of a constitutional challenged of the impugned measure. In *EURAM v. Slovakia* (2012), for example, the Tribunal considered it would have been "unduly formalistic" not to hold a judgment of Slovakia's Constitutional Court, in which the legality of the impugned measure was considered, as capable of qualifying as a ruling for the purposes of a BIT expropriation provision, in spite of the fact that the Constitutional Court was not applying the BIT.[52] In fact, in the peculiar circumstances of the case, it did not even matter to the Tribunal that the Claimant had not been party to the proceedings before the Constitutional Court. The latter's judgment had namely an *erga omnes* effect, in the sense that, once having been reviewed by the Constitutional Court, the legality of the impugned measure could not have been raised in other proceedings before Slovak Courts.[53]

7.2.5. The *Chevron* Case: Free-Standing Treaty Obligation to Provide "Effective Means for Asserting Claims and Enforcing Rights"

An example of a provision that has increasingly been put to good use in actions predicated upon judicial conduct can be found in the free-standing treaty clauses requiring "effective means of asserting claims and enforcing rights". Contrary to other standards of treatment from which obligations to maintain judicial systems of a certain kind were construed, the "effective means" provision is not a very common one. Apart from the ECT,[54] it is predominantly found in BITs concluded by the US;[55] however, through operation of MFN clauses that are otherwise present in the large majority of investment treaties, the reach of "effective means" provisions could potentially be extended to unanticipated situations.[56] The chance for claimants attempting such extension increased considerably after the Tribunal in *Chevron v. Ecuador I* (2010) interpreted one such clause as creating "an independent treaty standard" which, as such, "constitutes a *lex specialis* and not a mere restatement of the law on denial of justice" and which purportedly sets out "a distinct and potentially less-demanding test" when compared to the high threshold required for

[49] *ADC v Hungary* (n 46), [435].

[50] ibid [417], [419].

[51] ibid [438].

[52] European American Investment Bank AG (EURAM) v Slovak Republic (Award on Jurisdiction) (UNCITRAL, 22 October 2012), [395]-[396].

[53] cf [390]-[391].

[54] Art 10(12) ECT provides: 'Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.'

[55] See eg art 2(7) of the US-Ecuador BIT, which stipulates: 'Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.'

[56] See eg *White Industries Australia Limited v The Republic of India (Final Award)* (UNCITRAL, 30 November 2011) [11.2.1]-[11.2.9], where Claimant was entitled to rely, pursuant to an MFN obligation contained in the underlying India-Australia BIT, on the 'effective means' clause from a differently drafted India-Kuwait BIT. cf *Apotex Holdings Inc and Apotex Inc v United States of America (Award)* (ICSID Case No ARB(AF)/12/1, 25 August 2014) [9.66]-[9.71], where an attempt was made to import the effective means clause in art II(2)(b) of the Jamaica-USA BIT into a NAFTA arbitration by way of the MFN provision in art 1103 NAFTA; however, the Tribunal refrained from deciding whether or not that MFN provision could have the effect of modifying the content of other NAFTA provisions.

establishing a denial of justice under customary international law.[57] This was certainly not how the clause was previously understood by other tribunals. In *Duke v. Ecuador* (2008), the same provision was considered "to implement and form part of the more general guarantee against denial of justice", and was not seen as requiring more than "guarantee[ing] the access to the courts and the existence of institutional mechanisms for the protection of investments".[58] Nor were similar provisions in other earlier cases applied in a way suggesting that the "effective means" standard imposed requirements on domestic judicial systems more onerous than those laid down in customary international law.[59] Yet, the tide may have changed, as *Chevron I* Tribunal's reading of the clause found further endorsement in *White Industries v. India* (2011), where the Tribunal further clarified the content of the "effective means" standard.[60]

In accordance with the *Chevron* Tribunal's understanding, the "effective means" standard, though directed at many of the same potential wrongs as the customary international law standard of denial of justice, differed from the latter in several ways;[61] though, most significantly, in the threshold relevant for establishing a breach. Thus, if the standard of denial of justice was deemed to require the showing of a particularly serious shortcoming and egregious conduct on the part of judicial organs, the "effective means" standard engaged the responsibility of the State for "a failure of domestic courts to enforce rights 'effectively'" – a condition which, in the view of the Tribunal, was not always sufficient for a finding of denial of justice under customary international law.[62] Apart from noting that the standard of "effectiveness" was one that applied to "a variety of State conduct that has an effect on the ability of an investor to assert claims or enforce rights,"[63] the Tribunal did not find it necessary to set out general criteria that were to be used to determine whether a particular judicial means was to be considered effective.[64] Instead, considering that the subject of the complaint in that case concerned the delays that Claimant's subsidiary TexPet experienced in having its contract disputes with the Ecuadorian government adjudicated in the courts of Ecuador, the Tribunal satisfied itself with explaining that, for any

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[57] Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Partial Award on the Merits) (UNCITRAL, PCA Case No 34877, 30 March 2010) [242]-[244].

[58] Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador (Award) (ICSID Case No ARB/04/19, 18 August 2008) [391].

[59] See eg *Petrobart Limited v The Kyrgyz Republic (Award)* (SCC Case No 126/2003, 29 March 2005), where the 'effective means' clause of Art 10(12) ECT was held to have been violated on account of the interference on the part of the Executive in judicial proceedings involving the Claimant. Given that an independent judiciary is an essential component of a fair system of justice that states are to maintain pursuant to customary international law, there is no indication that the Tribunal understood the clause as imposing more onerous standards. cf also *Limited Liability Company AMTO v Ukraine (Final Award)* (SCC Case No 080/2005, 26 March 2008) [87], where the same art 10(12) ECT was interpreted as demanding the existence of legislation for the recognition and enforcement of property and contractual rights, as well as secondary rules of procedure allowing that the principles and objectives of that legislation be translated by the investor into effective action in the domestic tribunals – though, both sets of rules were merely required to meet 'minimum international standards'.

[60] *White Industries* (n 56).

[61] An important difference, in the view of the Tribunal, is that a claim of a breach of the 'effective means' provision did not demand a 'strict exhaustion of local remedies' as in the context of a denial of justice; for the claim to be made, it was sufficient that Claimants had 'adequately utilized' the means made available to them to assert claims and enforce rights in Ecuador. *Chevron (Contractual Claims)* (n 57), [268]. This will be further discussed in Chapter 8.

[62] ibid [244]; emphasis added.

[63] ibid, [248].

[64] In this respect, the decision differed from that in *AMTO v Ukraine* (n 59), [88], where the Tribunal proceeded to interpret the term 'effective' in art 10(12) ECT as implying that the 'effective means' standard was a 'systematic, comparative, progressive and practical' one, and applied those criteria in its assessment of the effectiveness of Ukrainian bankruptcy legislation.

means to be considered effective, they must not be subject to indefinite or undue delay, for undue delay in effect amounts to a denial of access to those means.[65]

Yet, in the specific circumstances of the *Chevron I* case, the lower threshold supposedly applicable to the "effective means" standard was not immediately obvious. Due to its conceptual closeness with the standard of denial of justice, the Tribunal was namely of the opinion that the interpretation and application of the "effective means" standard was to be "informed" by the law on denial of justice.[66] In the context of that decision, this resulted in the Tribunal using the same factors for determining the reasonableness of judicial delays under the effective means provision as those that had previously been developed by other tribunals in the context of denial of justice claims relating to judicial delays – namely, the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case, and the behaviour of the courts themselves.[67] Hence, on the facts of the case, the delays of 13 to 15 years were found to be undue, insofar as they resulted from prolonged periods of complete inactivity of the judiciary that were inexplicable otherwise than by the apparent unwillingness of the Ecuadorian courts to decide the cases. As such, they amounted to a breach of the "effective means" obligation under the BIT.[68] Since the latter provision was deemed to constitute "a *lex specialis* with greater specificity", the Tribunal refrained from considering whether the same judicial delays could also have given rise to a denial of justice.[69] Considering that similar periods of delays were actually sufficient in some other cases for a finding of denial of justice under customary international law,[70] the added value of the newly interpreted standard were not directly apparent.

It was only in the *White Industries v. India* (2011) case, which similarly arose out of domestic judicial inaction, that it became clear how potential claimants can capitalize on the supposedly less demanding standard applicable to the "effective means" clause. The subject of complaint in that case were the judicial delays that White Industries, an Australian mining company, had experienced in its attempt to enforce in Indian courts a foreign arbitral award previously rendered in its favour in a commercial arbitration with state-owned mining company, Coal India. The proceedings dragged for over nine years, after the White Industries' attempt at enforcement before the Delhi High Court was stayed as a result of India Coal's attempt to set aside the award in separate proceedings before the Calcutta High Court, and subsequently the Supreme Court of India. While finding no treaty breach with respect to delays experienced in proceedings before the Delhi High Court, the Tribunal held that the inability of the Indian judicial system to deal with White's jurisdictional claim in the set-aside proceedings, and specifically, the failure of India's Supreme Court to hear Whites jurisdictional appeal for over five years, amounted to undue delay and constituted a breach of the "effective means" obligation.[71] This in spite of the Tribunal's initial finding that the same delay did *not* amount to a denial of justice.[72]

The most interesting aspect of the *White Industries* case is that it clearly demonstrates, in relation to the same facts, how the "distinct and potentially less demanding" test – which the Tribunal, in following the *Chevron* award, considered to be applicable to determining breaches of the "effective means" obligation – operates when compared to what was considered to be the

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[65] *Chevron (Contractual Claims)* (n 57), [250].

[66] ibid [244].

[67] ibid [250].

[68] ibid [254]-[262].

[69] ibid [275].

[70] cf *supra* 6.2.2.1.

[71] *White Industries* (n 56). See [11.4.15] and [11.4.19], respectively.

[72] ibid [10.4.22]-[10.4.24].

"stringent" standard of denial of justice.[73] Particularly so, since the Tribunal considered the same factors to determine whether judicial delays amounted to, respectively, a denial of justice under customary international law, or a breach of the effective means standard – namely, the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case and the behaviour of the courts themselves.[74] The difference between the standards materialised particularly in the assessment of India's Supreme Court's inability to hear White's jurisdictional appeal for over five years. When examined in relation to denial of justice, the behaviour of that court, although "certainly unsatisfactory in terms of efficient administration of justice" and otherwise "regrettable", was not deemed to amount to "a particularly serious shortcoming" or "egregious conduct that 'shocks or at least surprises, a sense of judicial proprietary'", and thus to have "reached the stage of constituting a denial of justice".[75] In coming to that conclusion, the Tribunal considered it relevant "to bear in mind that India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary."[76] Conversely, the Tribunal had "no difficulty" concluding that the same delays breached the "effective means" standard.[77] As briefly explained in a footnote, "with respect to a forward looking promise by a State to provide 'effective means' of enforcing rights and making claims, the relevance of the State's population or the current operation of its court system(s) (in assessing the undueness of a delay) is limited. This is because the focus of such a *lex specialis* is whether the system of laws and institutions work effectively at the time the promisee seeks to enforce its rights / make its claims."[78]

Apart from clarifying the weight to be given to certain systemic conditions in determining the reasonableness of a delay pursuant to the "effective means" standard, the *White Industries* decision further clarified the extent to which individual instances of judicial conduct engage the responsibility of the state under the "effective means" obligation. Whereas the *Chevron* Tribunal somehow left it open whether or not a single failure on the part of domestic courts to enforce particular rights would amount to a breach of the "effective means" standard,[79] the *White Industries* Tribunal considered the standard to require "both that the host State establish a proper system of laws and institutions and that those systems work effectively *in any given case*".[80] Such a reading, of course, converts the "effective means" standard into an exacting one, and – as I shall explain in the next section – it is doubtful whether this accords with the intent of the treaty drafters. Such reading at any rate departs from the views expressed by the Tribunal in *AMTO v. Ukraine* (2008), which interpreted the "effective means" standard as not entailing an obligation to offer guarantees in individual cases, and which therefore considered that individual failures, though perhaps amounting to evidence of systematic inadequacies, were not themselves a breach of the "effective means" obligation.[81] Eventually, such reading does not sit comfortably with the *Chevron*

[73] ibid [11.3.2] and [10.4.5]/[10.4.8], respectively. The Tribunal endorsed the 'comprehensive analysis of the meaning and application' of that standard by the *Chevron* Tribunal and considered it 'equally appropriate' for application in the case ([11.3.2]-[11.3.3]). This was not surprising since Judge Brower sat as arbitrator on both tribunals.

[74] ibid [10.4.10] / [11.3.2.(i)].

[75] ibid [10.4.22]-[10.4.23].

[76] ibid [10.4.18].

[77] ibid [11.4.19].

[78] ibid fn 78 to [11.4.16].

[79] The *Chevron* Tribunal spoke of 'a failure' of domestic courts to enforce rights effectively; *Chevron (Contractual Claims)* (n 57), [244]. But in applying the standard to the specific context of that case, the Tribunal found that 'delay with respect to each of the seven court cases had become unreasonable, and *a* breach of Article II(7) was completed'; ibid [251]); emphasis added.

[80] *White Industries* (n 56), [11.3.2]; emphasis added.

[81] *AMTO v Ukraine* (n 59), [88]. Such view finds also support in *Charanne BV and Construction Investments SARL v Spain (Award)* (SCC Case No 062/2012, 21 January 2016) [470], where it was held that, to verify whether the requirements of the "effective means" obligations are met, 'tribunals must examine the legal system in question *as a whole*.' Emphasis added.

Tribunal's observation that the threshold of "effectiveness" requires "…that a measure of deference be afforded to the domestic justice system" and that an arbitral tribunal is not "empowered […] to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*."[82]

7.2.6. One and the Same Systemic Obligation?

Taking account of the evolution of today's most common investment treaty standards, and their conceptual origins in the minimum standard of treatment, it is of course not surprising that tribunals considered it possible to construe more or less the same systemic obligation on the basis of such a variety of different treaty standards.[83] This is but the logical consequence of the fact that the duty to provide adequate judicial remedies is equally central to the different elements of protection provided by each of these separate treaty standards. In that sense, it would have little merit to discuss which of the treaty standards above is better disposed for being used as a basis to construe a positive obligation to provide an adequate system of justice.

Much more debatable, on the other hand, is the correctness of the *Chevron* Tribunal's reading of the "effective means" provision as one setting out, as a matter of *lex specialis*, a more onerous standard in relation to investors' access to courts – rather than merely incorporating the prescriptions of the minimum standard of treatment in this regard. The *Chevron* Tribunal's reading appears to have been influenced by the narrative sketched out by one of the leading commentators on US BITs, Kenneth J. Vandevelde, about the origin and purposes of such clauses.[84] In his monograph on US investment treaty practice, Vandevelde explains that, though it was undisputed that customary international law guaranteed an alien the right of access to the courts of the host State,[85] it was because of "disagreement among publicists" concerning the *content* of this right that the United States was prompted to seek treaty protection.[86] While Vandevelde does not expound upon the exact points of contention between the publicists, a former leading commentator on US treaty practice, Robert R. Wilson (and on whose views Vandevelde also relied in support of his proposition), had previously explained that the disagreement essentially revolved around the question whether the foreigners' right to judicial remedies was solely governed by the national treatment standard, or whether the right to such remedies was also predicated upon the existence of a system measuring up to civilized standards.[87] If the "effective means" clause was therefore intended to clarify any points of contention, this was more likely to confirm that the foreigners' right to judicial remedies had to conform to the minimum standard of treatment under customary international law, and to dispel the argument that the basis on which access to courts could be demanded for foreign investors was merely the same as that applicable to nationals of the forum State. Support for the view that the "effective means" clause did not purport to incorporate more onerous standards than that required by the minimum standard of treatment can further be found in the fact that the "effective means" provision was deleted from the 2004 model BIT, precisely because "US drafters believed that the customary international law principle prohibiting denial of

[82] Chevron (Contractual Claims) (n 57), [247].

[83] See *OAO Taftneft v Ukraine (Award on the Merits)* (UNCITRAL, 29 July 2014), [427], noting that '[i]ssues concerning the role of the judiciary are particularly difficult to distinguish as to whether they should be treated under one standard or the other [ie. FET or FPS], or both'.

[84] ibid, [243].

[85] Indeed, also Freeman observed in his 1938 treatise on denial of justice that the principle of rendering justice to foreigners was "so well established in the modern practice of States that literature on the law of nations is marked by a total absence of dissent from the proposition that foreigners must be granted access to court in order to defend their rights." Freeman (n 1), 215-16.

[86] KJ Vandevelde, U.S. International Investment Agreements (OUP, 2009), 411.

[87] See RR Wilson, *United States Commercial Treaties and International Law* (Hauser 1960), 214, 242. See also his earlier 'Access-to-Courts Provisions in United States Commercial Treaties' (1953) 47 AJIL 20, at 23-24.

justice provides adequate protection and that a separate treaty obligation was unnecessary."[88] It is unlikely that customary international law recently evolved so much so as to rise to the more onerous standard that the *Chevron* Tribunal read into the "effective means" clause.

Commentators remain divided as to whether the effective means clause is additive and autonomous, or merely equivalent to the standard of denial of justice. [89] And so do apparently arbitral tribunals, at least given that some appear to treated the standards as substantially the same.[90]

7.3. The Obligation not to Expropriate without Compensation and the Problem of Judicial Takings

Another category of investment treaty obligations, which have commonly been invoked as basis for host State liability in relation to judicial conduct, are those geared specifically towards providing legal and economic security to the investment as such. Three types of clauses would appear to be relevant in this respect: the expropriation clause, which prohibits uncompensated takings of proprietary rights; the umbrella clause, which aims at ensuring respect of commitments entered into by the host State in relation to an investment; and the fair and equitable treatment standard, in the part where it aims at protecting the economic value of the investment through the specific protection of investor's legitimate expectations. The object of these clauses is ultimately to preserve the economic value of the investment. But in order to achieve that, the standards necessarily protect the proprietary rights forming the basis of the investment (as in the case of the expropriation and umbrella clauses), or the integrity of the legal framework in which the investment is imbedded (as in the case of the legitimate expectations component of the FET standard). That these standards are therefore susceptible of becoming engaged on account of judicial conduct is rather obvious. As part of their adjudicatory function, courts have namely the power to conclusively determine legal relationships when these are at dispute, and in the exercise of that function, they not only have the capacity, but also the propensity to confirm, amend, or extinguish legal rights. Since many of such rights are capable of falling within the definition of protected assets under an investment treaty, any judicial modification of such rights can technically be construed as an interference with an investment, and thus provide the predicate of a treaty claim based on such clauses.[91] The main challenge in determining violations of this category of investment standards is therefore in distinguishing what constitutes a normal exercise of judicial functions, from what amounts to an unjustified interferences with the investment itself or the legal framework in which the investment is embedded.

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[88] Vandevelde (n 86), 415.

[89] See eg MD Goldhaber, 'The Rise of Arbitral Power Over Domestic Courts' (2013) 1 Stanford Journal of Complex Litigation 373, 400–401 (rejecting the idea that the effective means clause weould imply that judicial action should be assessed aginst standards more intrusive than denial of justice); O Garibaldi, 'Effective Means to Assert Claims and Enforce Rights' in Kinnear, Fischer, Mínguez Almeida, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer, 2015), 359–374 (considering the effective means standard to be one autonomous from, and more stringent than the denial of justice standard); or B Demirkol, *Judicial Acts and Investment Treaty Arbitration* (CUP 2018), 54, at 42–50 (considering the effective means standard as indistinguishable from the denial of justice standard).

[90] *He&H Enterprises Investments, Inc. v. Arab Republic of Egypt (Award)* (ICSID Case No. ARB 09/15, 6 May 2014) [406] (rejecting the effective means claim, on the ground that the same reasoning was applicable to both denial of justice and denial of effective means claims). cf *OAO Taftneft* (n 83), [441] (being somewhat unclear – the Tribunal, having found liability under FET and FPS standards, saw no need to examine the question of effective means separately, on the ground that the effective means standard was 'to a large extent subsumed' under the former).

[91] See in this respect specifically Z Douglas, 'Property, Investment, and the Scope of Investment Protection Obligations' in Z Douglas, J Pauwelyn and JE Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (OUP, 2014), discussing the difficulties arising out of different conceptual understandings of the rights and interests that form the basis of an investment.

The purpose of the present section is to identify, specifically, the circumstances under which a judicial measure could qualify as a compensable expropriation under international law. The reason for this is a practical one, as there is already a significant body of arbitral jurisprudence concerning expropriation claims grounded in the acts or omissions of the judicial arm of the State. To complete the analysis, section 7.4. looks instead at the conditions for judicial conduct serving as a predicate for claims concerning violations of umbrella clauses or violations of legitimate expectations under the FET standard.

7.3.1. Predicating an Expropriation Claim upon Judicial Conduct

Clauses prohibiting uncompensated takings of proprietary rights are among the key provisions of modern investment treaties.[92] While their primary purpose is to secure that the investor is not deprived of all, or substantially all, of the value of its investment,[93] their effect is not to prohibit expropriations as such – to the contrary, investment treaties invariably recognize the host State's power to expropriate investments. Expropriation clauses merely impose conditions on the exercise of that power, such as that the taking be for a public purpose, non-discriminatory, in accordance with due process of law, and accompanied by adequate compensation.[94]

Given that a host State can expropriate not only by taking title to, or possession of, the investment, but also by depriving the investor of the economic benefit of the investment, most expropriation clauses are formulated capaciously. They apply both to outright expropriations or nationalizations (which are deemed to cover situations involving a legal transfer of the title to the property or its outright physical seizure), and to measures having effect equivalent thereto (a formula that is intended to cover measures that permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way). Albeit primarily concerned with the protection of investments against governmental abuses of legislative or executive power,[95] the clauses' capacious formulation makes them clearly susceptible for being used also for claims grounded in judicial conduct. Judicial interferences with particular rights – especially rights that are only incorporeal, such as rights granted under public concessions which are invalidated by a judicial decision – can namely be presented as instances of direct or indirect expropriation.[96]

Yet, the possibility of predicating expropriation claims upon the acts of the State's judicial arm does not come without conceptual difficulties. These difficulties do not only relate to the very nature of judicial measures, as described above. In the context of expropriation claims, the challenges lie particularly in international tribunals' strong reliance on the "sole effects" doctrine when it comes to determining the occurrence of an expropriation. For, when judged solely by its effects, any judicial measure resulting in the extinction of a legal right constituting a protected

[92] cf Section 2.2.5 where I explain how the challenges mounted against traditional investment protection standards by developing countries, and particularly against the standards for compensation in the event of expropriation, have actually been the primary drivers for the introduction of bilateral investment treaties.

[93] On the structure and policy of expropriation provisions, see further Vandevelde (n 86), 271-82.

[94] cf UNCTAD, *Expropriation: A Sequel* (Series on Issues in International Investment Agreements II, 2013).

[95] cf *OAO Taftneft* (n 83), [459].

[96] In practice, whether a particular judicial measure may qualify as a direct or indirect taking will very much depend on the circumstances of each case. Most of the proprietary interests that are susceptible to being affected by judicial decisions – such as rights to property *in rem*, shareholding rights in companies, contractual rights, concessionary and other rights granted under public law, intellectual property rights – are usually each individually capable of constituting a protected asset and thus an investment within the meaning of the applicable investment treaty. Considering that judicial interferences with investor's rights normally affect the title to the proprietary interest, such interferences may in many cases qualify as instances of direct expropriations. Where, on the other hand, the legal right affected will not separately qualify as a protected investment, a judicial interference with such a right may be presented as an instance of indirect expropriation, to the extent that such interference may have possibly destroyed nearly all the value of the investment operation.

assed could nominally be brought up as a substantial deprivation of an investor's investment and thus used as a basis for an expropriation claim, no matter how justified such judicial measure might have been.[97] That this may lead to absurd results has not infrequently been recognized by arbitral tribunals. In *Saipem v. Bangladesh* (2009), for example, the Tribunal had no doubt that, as a matter of fact, the setting aside by Bangladeshi courts of a commercial award had substantially deprived the investor of its rights under the award.[98] Yet, as a matter of law, the Tribunal was hesitant to accept that such actions automatically translated into an expropriation, because "if this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds."[99] In a similar way, the Tribunal in *Swisslion v. Macedonia* (2012) did not find it possible to accept that a judicial termination of a contract between a State entity and an investor could be "equated to an expropriation of contractual rights simply because the investor's rights have been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State's being found to be in breach of its international obligations."[100]

This eventually raises the question as to how legitimate judicial actions could be distinguished from improper interferences with investors' rights in the context of an expropriation claim. For, when a concession is judicially annulled because it had been obtained by fraud, or when a contract is terminated by court decision on account of investor's default, it would seem counterintuitive to accept expropriation claims predicated upon such conduct. But it is equally clear that a State should not be put in a position which would allow it to abuse its domestic judicial procedures for the purpose of avoiding its responsibility under international law. The problem cannot be resolved through resort to established exceptions, such as the police powers doctrine.[101] The principle underlying this doctrine – that compensation is not required for injuries resulting from *bona fide*, non-discriminatory regulation within the police power of the State – cannot be meaningfully applied to all claims predicated upon judicial conduct. Assessing individual judicial decisions by reference to whether or not they can be justified on the basis of the State's sovereign right to protect order, public safety, health, and morals or promote the general welfare – which is, essentially, what police powers are understood to be[102] – would namely require distinguishing impugned judicial acts on the basis of their nature and purpose. This would clearly provide too artificial a measure to adequately distinguish expropriatory judgments from normal exercises of judicial functions.

Given the limitations of the traditional "sole effects" approach, as well those of the "police powers" doctrine, it is unsurprising that investment tribunals have adopted a different approach in deciding expropriation claims predicated upon judicial conduct. As the following sections will demonstrate, with a view to distinguishing proper from improper judicial interferences with investors' proprietary interests, tribunals by and large required that the impugned judicial conduct be itself wrongful so as to amount to an expropriation.

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[97] On this concern, see V Been and JC Beauvais, 'The global fifth amendment? NAFTA's investment protections and the misguided quest for an international 'regulatory takings' doctrine' (2003) 78 New York University Law Review 30, at 82-83.

[98] In that case, the commercial award was not an investment itself; the object of expropriation, instead, were the Claimant's residual contractual rights under the investment as crystallized in the commercial award. See *Saipem SpA v The People's Republic of Bangladesh (Decision on Jurisdiction and Recommendation on Provisional Measures)* (ICSID Case No ARB/05/07, 21 March 2007) [125]-[128].

[99] Saipem SpA v The People's Republic of Bangladesh (Award) (ICSID Case No ARB/05/07, 30 June 2009) [133].

[100] *Swisslion v Macedonia (Award)* (ICSID Case No ARB/09/16, 6 July 2012), 314.

[101] See generally Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (Award) (ICSID Case No. ARB/10/7, 8 July 2016), [290]-[301].

[102] See further C Titi, 'Police Powers Doctrine and International Investment Law', in F Fontanelli, A Gattini, and A Tanzi (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018), 323-43.

7.3.2. Wrongfulness of Judicial Conduct as a Predicate of Expropriation Claims

If any agreement can be discerned from the practice of investment treaty tribunals, it is certainly for the proposition that, in circumstances where the expropriation claim is predicated upon injuries that originate in the conduct of the judiciary, such conduct must itself be reproachable in order to amount to an act of expropriation. This proposition appears in fact so well established that one can consider it a general principle for determining the existence of judicial expropriations.[103] Two caveats apply to it, however. First, the proposition attaches solely to those expropriation claims that are predicated upon injuries originating *primarily* or *essentially* in the conduct of the judiciary; and second, it applies only insofar as the domestic legislation applied by the courts is not itself contrary to international law. I shall address these conditions more closely in 7.3.2.

The principle has sometimes been stated in general terms. The Tribunal in *Saipem* thus postulated that the "unlawful character" of the impugned judicial decisions was "a necessary condition" to establish a claim of expropriation based on the conduct of the judiciary – even if immediately adding that such a requirement was only "due to the particular circumstances of this dispute and to the manner in which the parties have pleaded their case", while emphasizing that its analysis "should not be understood as a departure from the 'sole effects doctrine'".[104] Apart from statements of principle, however, the strongest authority for the principle can actually be derived from the reasoning adopted by investment tribunals in rejecting expropriation claims predicated upon judicial conduct.

7.3.2.1. Judicial Expropriations Predicated Upon the Existence of a Denial of Justice

The standard most commonly applied by investment tribunals to determining whether an act of the judiciary gave rise to an expropriation was that of denial of justice (applied either as part of the minimum standard of treatment under customary international law, or as an element of the fair and equitable treatment standard). This is, after all, logical given that denial of justice constitutes a delict that is specifically concerned with judicial acts.[105]

In practice, of course, it was chiefly because claimants failed to establish that the domestic judicial decisions, or the process leading to them, amounted to a denial of justice that investment tribunals rejected expropriation claims predicated upon judicial interferences in the claimants' proprietary interests. In *Loewen v. USA* (2003), the Tribunal categorically rejected the claim that the discriminatory conduct of the US judge, the excessive verdict rendered in the proceedings, the denial of Loewen's right to appeal, and the coerced settlement violated Article 1110 of NAFTA barring the uncompensated appropriation of investments of foreign investors. According to the Tribunal, in such circumstances, a claim alleging an appropriation in violation of Article 1110 "can succeed only if Loewen establishes a denial of justice under Article 1105 [NAFTA]".[106] In *Ares v. Georgia* (2008), the Claimants' investments could not be deemed to have been expropriated by reason of a decision of a Georgian court annulling the Claimants' contractual rights under a share-purchase agreement, with the consequential extinction of Claimants' shareholding interests in a local production plant, since the evidentiary record did not bear out Claimants' allegations that they had not been afforded fair treatment, or otherwise faced

[103] This wealth of jurisprudence notwithstanding, some commentators, adhering to the sole effects doctrine, dismiss the question of illegality as conceptually relevant to the appraisal of judicial expropriations. Demirkol (n 89), 54.

[104] *Saipem* (n 99), [134].

[105] cf *OAO Taftneft* (n 83), [460] (noting how judicial expropriations are 'inevitably intertwined' with denial of justice and violations of other standards governing court conduct).

[106] Loewen Group, Inc and Raymond L Loewen v United States of America (Award) (ICSID Case No ARB(AF)/98/3, 26 June 2003) [141].

a denial of justice by, or at the hands of, that court.[107] The Tribunal was of the opinion that there could be no expropriation where contractual rights are brought to an end "by a series of decisions of the Georgian Courts, which decisions we find cannot properly be faulted under international law."[108] In *Liman Caspian v. Kazakhstan* (2010), the decisions of Kazakh courts invalidating an assignment agreement through which Claimant obtained an oil exploration licence were similarly held not to constitute an expropriation on the ground that impugned decisions "were not arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking due process", which meant that the licence transfer was not wrongfully annulled.[109] In *Swisslion v. Macedonia* (2012), the fact that the decisions of Macedonian courts terminating a share purchase agreement, through which the Claimant acquired shareholding interests in a Macedonia-based food producer, have not been successfully challenged before the Tribunal meant "…that the argument that the court effected an expropriation must fail."[110] In *Arif v. Moldova* (2013), a string of decisions of Moldovan courts resulting in the annulment of Claimant's concession contract relating to the building and management of a duty-free store network and a related lease agreement were found not to have given rise to an expropriation, as Claimant failed to establish that there had been "collusion between the courts and the investor's competitors in the proceedings before the Moldovan courts over these agreements", that the Moldovan courts "have acted in denial of justice in any way", or that "the Moldovan judiciary has not applied Moldovan law legitimately and in good faith".[111] In *Ryan & Schooner Capital v. Poland* (2015), Claimant's expropriation claim failed insofar as the Polish courts' decisions, which upheld the decisions of Polish tax authorities concerning Claimants' VAT entitlements, and which served as the predicate of the claim, "were not the result of denial of justice or abuse of process".[112] And in *Anglia Auto Accessories v. Czech Republic* (2017), the expropriation claim premised upon the alleged deprivation of Claimant's contractual right to damages under a commercial award, which was said to result from the Czech Courts' purported inactivity in the process of its enforcement, equally failed in the circumstances where Claimant could not establish "'excessive obstacles' in its enforcement attempts, or 'arbitrary, discriminatory and unreasonable' conduct by the Respondent's courts, or a sweeping refusal to act."[113]

It is worth noting that this type of reasoning was not applied solely in cases where the rights affected by judicial decisions were incorporeal, but was also extended to cases where judicial decisions resulted in interferences with physical property. Hence, in *Garanti Koza v. Turkmenistan* (2016), the claim of direct expropriation, which the investor mounted on the fact that its factory and equipment had been seized by Turkmen courts after it abandoned work on a construction project, was rejected on the ground that the actions of the Turkmen courts followed as a matter of normal legal process under Turkmen law from the investor's default under the construction contract.[114] The Tribunal explained that "[a] seizure of property by a court as the result of normal

[107] Ares v Georgia Ares International SrL and MetalGeo SrL v Georgia (Award) (ICSID Case No ARB/05/23, 28 February 2008) [8.3.5]-[8.3.7].

[108] ibid [8.3.9]; Italics in the original, underlining mine.

[109] Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan (Award) (ICSID Case No ARB/07/14, 22 June 2010) [431]-[432].

[110] *Swisslion v Macedonia* (n 100), [312]. Elsewhere, the Court already established that the judicial decisions did not amount to a denial of justice. See [265]-[275].

[111] *Arif v Moldova* (n 7), [415].

[112] Vincent J Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Republic of Poland (Award) (ICSID Case No ARB(AF)/11/3, 24 November 2015) [490]-[491].

[113] *Anglia Auto Accessories Ltd v Czech Republic (Final Award)* (SCC Case No. V 2014/181, 10 March 2017) 301; cf 291-303.

[114] *Garanti Koza LLP v Turkmenistan (Award)* (ICSID Case No ARB/11/20, 19 December 2016) [364]-[366].

domestic legal process does not amount to an expropriation under international law unless there was an element of serious and fundamental impropriety about the legal process."[115]

Furthermore, the reasoning has been extended to cases where the injurious acts, while predicated on a preceding judicial act, were eventually afflicted by some other State organ or private party – such as where a court has ordered the seizure of property and the executive organ has subsequently taken it. In the *Liman* case discussed above, an order by the Ministry of Energy, by which the exploration licence was re-transferred to another entity, was not considered capable of constituting an expropriatory measure in itself, since the order only executed the court decision invalidating a previous licence transfer and a governmental authority "cannot be reproached for acting in accordance with a decision taken by the state's own courts" where such court decisions "are irreproachable and have to be accepted from the perspective of international law."[116] At the level of principle, however, the principle was already espoused earlier in *Middle Eastern Cement v. Egypt* (2002) where, in the context of an administrative (and not judicial) seizure and action, the view was taken that "normally, a seizure and auction ordered by the national courts do not qualify as a taking", but can amount to a measure the effects of which would be tantamount to expropriation if not taken "under due process of law".[117] The principle was implicitly confirmed in other cases.[118]

7.3.2.2. Judicial Expropriations Predicated Upon Other Violations of International Law

Arguably, as denial of justice is not the only standard that can possibly applied to determining the propriety of judicial conduct, the non-observance of some other international obligation which ought to have been respected through the medium of specified conduct on the part of domestic courts could equally serve as a predicate of an expropriation claim.

Attesting to his proposition is the award in *Saipem v. Bangladesh* (2009), where the propriety of the impugned judicial conduct was tested, instead of by reference to denial of justice, against Bangladesh's obligations under the 1958 New York Convention and general principles of (international) law. And in fact, in the circumstances of that case, the interferences on the part of the Bangladeshi courts with an ongoing commercial arbitration were held to have given rise to an unlawful expropriation, on the ground that: (1) the Bangladeshi courts had exercised their supervisory jurisdiction over the arbitration process for an unjustified end when revoking the authority of the local arbitral tribunal, and thereby violated the internationally accepted principle of prohibition of abuse of rights; and (2) by revoking the arbitrators' authority and subsequently annulling the commercial award, the Bangladeshi courts directly violated Article 2 of the New York Convention (1958), which obliged them to recognize arbitration agreements.[119] Of course, one may wonder whether in the circumstances of that case, it may not have been more appropriate to determine the propriety of the courts' interferences with the local arbitration process by reference to the denial of justice standard.[120] At the level of principle, however, there is

[115] ibid, [365].

[116] *Liman Caspian* (n 109), [433]-[434].

[117] Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt (Award) (ICSID Case No ARB/99/6, 12 April 2002) [139].

[118] See *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger (Award)* (ICSID Case No ARB/11/11, 15 July 2013), [125]-[126] (finding that an expropriation of Claimant's investment occurred, on the ground that the denunciation of Claimant's concession contract was annulled by the Supreme Court of Niger and that therefore there was 'in any case no legal basis which could justify the requisitions of assets, materials and personnel' of the Claimant's subsidiary).

[119] *Saipem* (n 99), [145]-[173].

[120] The Tribunal deemed that it could not undertake such an inquiry in view of jurisdictional limitations directing it solely to determine whether an expropriation has occurred. But then one may wonder on what basis the Tribunal deemed itself nonetheless competent to pronounce itself on violations of the New York Convention.

nothing which would suggest that the New York Convention could not be violated by means of inappropriate conduct on the part of the local courts.

As suggested by the award in *ATA Construction v. Jordan* (2010), it may actually be possible for particular judicial acts to engage the responsibility of the State because of their non-conformity with the obligations under the New York Convention even in circumstances where the impugned judicial acts would not otherwise amount to a denial of justice.[121] Hence, the fact that Jordanian courts annulled a local commercial award previously rendered in favour of the investor, and thereby also extinguished the underlying contractual arbitration clause, was held to have "deprived an investor such as the Claimant of a valuable asset in violation of the Treaty's investment protections."[122] Such conclusion was based on the finding that, by failing to respect Claimant's right to invoke the contractual arbitration agreement and to refrain from exercising their own jurisdiction on the substance of the commercial dispute, the courts directly violated Jordan's obligation under Article 2 of the New York Convention (1958)[123] – but notwithstanding the fact that the Tribunal considered that otherwise no claim of denial of justice, whether substantive or procedural, could possibly have been sustained in relation to the actions of the Jordanian courts.[124]

Predicating expropriation claims upon judicial violations of other obligations than the prohibition of denial of justice will often have an advantage in that it will obviate the need for satisfying the high threshold that is required for establishing denial of justice, including the requirement of judicial finality which, as I shall discuss in chapter 8, otherwise demands the exhaustion of local remedies. Invoking violations of other obligations than those arising under the applicable investment treaty does give rise, however, to an important jurisdictional question: are investment tribunals actually empowered to make pronouncements on such violations?

The *Saipem* case itself provides a rather curious example of how this question may (not) play a role. In the circumstances of that case, the applicable Italy-Bangladesh BIT restricted the Tribunal's jurisdiction solely to claims for expropriation. Since the Tribunal presumably did not have jurisdiction over claims pertaining to violations of other treaty standards, the Claimant also decided not to present its claim as one grounded in denial of justice.[125] Against this backdrop, it is all the more surprising that the *Saipem* Tribunal nonetheless felt confident to assessing whether the domestic courts' conduct was in conformity with Bangladesh's obligations under the 1958 New York Convention. For, it did not enjoy any more competence to consider violations of the latter than it would have over potential denial of justice claims. Arguably, the making of such pronouncements may be less of a problem where the jurisdiction of investment tribunals rests on broadly-formulated dispute settlement clauses, which extend to any or all disputes concerning an

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[121] ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan (Award) (ICSID Case No ARB/08/2, 18 May 2010) [121]-[132].

[122] ibid [125]-[126]. Notably, the Tribunal failed to specify which treaty standard had actually been breached. It merely noted that the preamble to the BIT provided that fair and equitable treatment of investment was desirable ([125]) and mentioned in the accompanying footnote that the Respondent 'had assumed the obligation' to accord to the Claimant's investment fair and equitable treatment and treatment no less favourable than that required by international law by virtue of the MFN clause contained in Art II(2) of the BIT. On the other hand, the Tribunal's use of the term 'deprivation' seemed to imply that the result of the domestic courts' decisions amounted to an expropriation. Yet, the Tribunal did not explicitly characterize it as such. The lack of substantiation in this respect may have something to do with the Tribunal's 'restorative' approach to resolving the underlying investment dispute. Namely, instead of awarding compensation to the Claimant, the Tribunal restored the Claimant's right to arbitration in relation to the dike dispute in accordance with the terms of the original arbitration agreement. See [131]-[132].

[123] ibid [124].

[124] ibid [123]. The Tribunal expressed such opinion despite jurisdictional constraint *ratione temporis*, which otherwise prevented it from fully reviewing the propriety of Jordanian courts' conduct. cf [94]-[120].

[125] cf *Saipem* (n 99), [121].

investment. But even in such circumstances, some investment tribunals considered themselves without jurisdiction to determine violations of the 1958 New York Convention as a predicate of expropriation claims.[126] The solution to this conundrum may be in accepting that, by determining the conformity of courts' conduct with specific international obligations binding upon the State, an investment tribunal is in fact not exercising jurisdiction over claims based on such violations, but is only taking such other violations "into account" as a necessary legal predicate of the treaty claims that do fall within its jurisdiction. Arguably, however, the tribunals in such cases could then equally examine whether the impugned judicial conduct conforms to other standards prescribed by international law, including international standards pertaining to the administration of justice.

7.3.2.3. Judicial Expropriations Predicated Upon Violations of Domestic Law

The question eventually arises as to whether the wrongfulness of a particular judicial act must necessarily be established by reference to international law, or whether this could also be by reference to its illegality as a matter of domestic law. As discussed in chapter 6, it is true that *mere* errors in the application of domestic law are essentially insufficient to establish a denial of justice. Yet, whether egregiously wrong or merely wrong, a judicial decision extinguishing an investor's proprietary rights will still be wrongful. This issue has not received much treatment in the jurisprudence of investment tribunals and their approach to the question of domestic legality has been somewhat varied.

In *Liman v. Kazakhstan* (2010), for example, the Tribunal emphasized that the judicial decisions invalidating the investor's licence, being acceptable under international law for not amounting to a denial of justice, "even if they might have been incorrect as a matter of Kazakh law", could not amount to an expropriation.[127] And so did other tribunals, too, suggest in their analysis that whether or not judicial decisions were in conformity with the applicable domestic law or with contractual stipulations was not determinative for the expropriation claim.[128] In *Saipem* (2008), in contrast, the Tribunal did explore as part of the expropriation claim whether the court intervention in the local arbitration could also have been regarded as illegal on account of the courts lacking jurisdiction under the Bangladeshi Arbitration Act. In the circumstances of that case, however, the unlawful character of the intervention could not have been established on those grounds.[129] Similarly, the Tribunal in *Al-Bahloul v. Tajikistan* (2009) rejected an expropriation claim predicated on the alleged illegality of the courts' dissolution of the Claimant's venture and the reduction of its shareholding interests in another joint venture, on the ground that both of those decisions appeared to have resulted from the application of Tajik law and the courts' position in both cases was not found to be "manifestly in contradiction with the Tajik legislation."[130] In other words, the expropriation claim was rejected by reference to the legality of the judicial acts as a matter of domestic law.

Conversely, there is at least one precedent attesting to the possibility that the domestic illegality of a judicial decision can be sufficient for a finding of expropriation. In *CCL v. Kazakhstan* (2004), a court-ordered termination of a concession agreement granting Claimant the

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[126] See eg *Kaliningrad Region v Lithuania (Final Award)* (ICC, 28 January 2009) (where the claim for expropriation arising out of the Lithuanian courts' handling of the enforcement of an earlier commercial award was purportedly rejected on the ground of alleged lack of competence to review the conformity of the host State's conduct with obligations under the 1958 New York Convention).

[127] *Liman Caspian* (n 109), [431]-[432].

[128] See eg *Schooner Capital v Poland* (n 112) [491] ('It is not for this Tribunal to rule on the correctness of those decisions as a matter of Polish law.'); or *İçkale İnşaat Limited Şirketi v Turkmenistan (Award)* (ICSID Case No ARB/10/24, 8 March 2016) [355].

[129] *Saipem* (n 99), [139]-[144].

[130] Al-Bahloul v Tajikistan (Partial Award on Jurisdiction and Liability) (SCC Case No V 064/2008, 2 September 2009) 284.

right to use and manage a previously state-owned oil refinery in Kazakhstan was found to have amounted to expropriation in breach of customary international law merely because it was not effected in conformity with the provisions of the contract. The termination was ordered by the Kazakh City Court following an application by the General Prosecutor of Kazakhstan, and later confirmed by the Supreme Court of Kazakhstan, pursuant to which the Committee for State Property and Privatization also proceeded to termination. The Tribunal held that the conduct of the Prosecutor General and subsequently by the Kazakh courts was tantamount to expropriation, because "the legal and factual effect" of their actions was that the agreement was terminated and that this was an act of Kazakhstan.[131] This conclusion was premised on the finding that the termination of the contract did not follow the terms of the contractual bargain.[132]

Nonetheless, one may wonder whether focusing the inquiry on the domestic legality of a judicial act is the proper way to proceed in the context of an expropriation claim predicated upon judicial conduct. An assessment of the domestic legality of a judicial measure could at the end of the day entail a correctness test, which investment tribunals may not be able to properly engage in. Indeed, when it comes to the *CCL* case, one may question the soundness of the Tribunal's conclusions, which ignored to examine the question whether the termination of the contract could have been valid as a matter of the applicable domestic law in the circumstances where such termination was purportedly provided for by the Civil Code of Kazakhstan in the event of a material breach.[133] In this respect, a sounder approach was that of the *Saipem* Tribunal, which refused to conclusively determine the issue of legality under domestic law where Claimant had not procured an expert opinion to rebut the Respondent's expert opinion on the contrary, considering the issue simply as "not established".[134]

Given the difficulties that investment tribunals may have with assessing impugned judicial conduct for conformity with domestic standards, a viable alternative may be to assess the propriety of such conduct by reference to general principles of law, such as that of proportionality. Attesting to such a possibility is the award in *İçkale İnşaat v. Turkmenistan* (2016), where the Tribunal proceeded to examine whether a Supreme Court's directive was "excessive and as such expropriatory", because – by preventing all Claimant's machinery and equipment from being removed from Turkmenistan – it may have gone beyond what would have been necessary for the purpose of recovering certain contractual penalties to which the Claimant's contractual counterparty was entitled.[135] In the circumstances of that case, the expropriation claim failed as the judicial measure was not found to have been excessive. But while the Tribunal failed to elaborate on the source of the standard it was applying, the approach will certainly prove attractive, especially in cases where the tribunals' jurisdiction will be limited to expropriation claims, and tribunals will have reservations to reviewing the propriety of judicial conduct from the perspective of denial of justice standards.[136]

7.3.2.4. Factual or Legal Predicate?

Before moving to considering the exceptions to the requirement of wrongfulness just discussed, it is necessary to briefly inquire whether the wrongfulness of the impugned judicial conduct must be considered a *legal* or a *factual* predicate of expropriation claims grounded in the conduct of judicial organs.

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[131] *CCL v Republic of Kazakhstan (Final Award)* (SCC Case 122/2001, 1 January 2004)174-175.

[132] ibid, 165.

[133] ibid, 159.

[134] *Saipem* (n 99), 143-144.

[135] *İçkale İnşaat v Turkmenistan* (n 128), 371-75.

[136] cf ibid, 355.

It must be noted that the question of propriety of judicial conduct can be relevant to determining whether the conditions for a lawful expropriation have been complied with. In some treaties, this link is even expressly spelled out. Pursuant to Article 1110(1) NAFTA, expropriatory measures are thus prohibited "except: […] (c) in accordance with due process of law *and Article 1105(1)* [on the minimum standard of treatment]". According to the Tribunal in *Eli Lilly* (2017), the relationship between the two provisions will hence be "engaged most acutely in circumstances in which the allegations at issue go to acts of the judiciary, inter alia, for the reason that an alleged breach of the minimum standard of treatment requirement of Article 1105(1) informs an alleged breach of Article 1110(1)."[137] One must not lose sight of the fact, however, that the requirement of due process, which is common to most expropriation clauses, is but one of the conditions for the lawfulness of an expropriation under international law. It does not have a bearing on the *existence* of an expropriation as such. One can therefore question the soundness of the reasoning adopted by the Tribunal in the *Middle Eastern Cement* case, according to which a seizure and auction ordered by a national court could "qualify" as a taking if they were not taken under due process of law, as required by the applicable BIT.[138]

An altogether different argument was raised in *RosInvest v. Russia* (2010). There, the treaty clause prohibiting uncompensated expropriations was considered in relation to the acts of the courts to be synonymous with the obligation not to deny justice, with the Tribunal arguing that the "obligation provided for in Article 5(1) IPPA [i.e. the expropriation clause] for measures which might be considered expropriatory implies that there is also no discrimination or taking without compensation by denial of justice."[139] The argument is not without merit, given that under customary international law, the prohibition of denial of justice and the prohibition of uncompensated expropriations were at a certain point considered both to be part of the same minimum standard of treatment.[140] Nonetheless, in the context of investment treaties, both obligations find their basis in different treaty standards and must conceptually be treated separately.

For analytical purposes, it seems in the end more appropriate to treat the element of wrongfulness as a factual, rather than legal predicate of expropriation claims based on judicial conduct – just as the finding of a breach or non-observation of a contractual obligation will be the necessary factual predicate of claims based on umbrella clauses.

This leads eventually to the question as to why an inquiry into the propriety of judicial measures *is* actually relevant to expropriation claims based on such measures. Arguably, there are two possible ways to look at this. One is to consider the issue of propriety relevant to determining whether or not the impugned judicial measure is *expropriatory in character*. This type of reasoning is implicit in the statements such as that of the Tribunal in the *Middle Eastern Cement* case (and subsequent decisions relying on that precedent, such as *Ares* or *Garanti Koza*) to the effect that "a seizure and auction ordered by the national courts *do not qualify as a taking*" as long as they are taken under due process of law.[141] It is also implicit in observations such as that of the Tribunal in *Swisslion* that a court's termination of the contract "*cannot be equated* to an expropriation of contractual rights simply because the investor's rights have been terminated".[142]

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[137] *Eli Lilly* (n 7), 417. cf also [225] ('As regards decisions of the national judiciary, the interplay between obligations under NAFTA arts 1105(1) and 1110 will be a matter for careful assessment in any given case, subject to the controlling appreciation that a NAFTA Chapter Eleven tribunal is not an appellate tier with a mandate to review the decisions of the national judiciary').

[138] *Middle East Cement Shipping* (n 117), [139].

[139] RosInvest Co UK Ltd v The Russian Federation (Final Award) (SCC Case No V079/2005, 12 September 2010), [273].

[140] See *supra* 2.2.2.

[141] *Middle East* (n 117), [139]; *Garanti Koza* (n 114), [365].

[142] *Swisslion* (n 100), [314]; emphasis added.

Another way is to consider the issue of propriety as one that is relevant to determining the *existence of a proprietary interest* that could possibly have been subject to a taking. This approach was followed for example in *Azinian v. Mexico*, where the Tribunal took the view that "if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law" – a complaint which would essentially require proving that the Mexican courts committed a denial of justice, or a pretence of form to achieve an internationally unlawful end – "there is by definition no contract to be expropriated."[143] The approach was later endorsed in *Arif v. Moldova*, with the Tribunal taking the view that:

> "In light of the fact that the agreements have been found to be invalid under Moldovan law this Tribunal *is not persuaded that there can be deprivation of invalid rights*. The invalidity of these agreements (and hence of the rights recognised under these agreements […]) resulting from the application of Moldovan law by the Moldovan courts as a result of lawsuits filed by private competitors cannot be interpreted as an expropriation of Mr. Arif's rights, as Claimant pretends. No wrongful taking results from the legitimate application of Moldova's legal system (which the Tribunal notes has not changed since the time the investment was made) and the subsequent invalidity of the rights at stake."[144]

In the end, which approach will be chosen may depend on the circumstances of the case. In the case of judicial annulment of contractual rights, for example, it may be more appropriate to approach the question as one concerning the existence of a proprietary interest that is the object of protection, whereas in the case of judicial termination of contractual rights, it may be more appropriate to pursue the inquiry into whether the judicial measure is expropriatory in character, given that the original validity of such rights has never been at issue.

7.3.3. The Relevance of the Origin of the Injury

In the context of many expropriation claims predicated upon judicial conduct, the cause of the injury will often lie in the wrongful treatment at the hands of domestic courts themselves. However, there may also be situations where the impugned judicial treatment will not *in itself* be inadequate from the perspective of international legal standards, yet the outcome still capable of being characterized as an internationally wrongful act. This can be the case, for example, because such outcome results from the application of domestic legislation that is itself confiscatory in character, or because the outcome legalizes interferences with the investors' proprietary rights that had already occurred at the hands of other State organs and that were wrongful on their own account. In such cases, the basis of the judicial injury will have been laid, not by the courts themselves, but, respectively, by the legislative (e.g. as a result of the enactment of in adequate laws) or the executive (e.g. on account of the failure of administrative organs to treat the investor fairly and equitably). Alternatively, the impugned judicial treatment may form part of a composite wrongful act – by being part of a series of actions or omissions, none of which necessarily wrongful on its own account, which in the aggregate qualify as wrongful.[145]

For the purpose of establishing the responsibility of the State for a particular judicial outcome, it is of course irrelevant whether the international wrong is one proceeding from the deficiencies of the judges, or from the failures of other State organs to abide by international obligations. The distinction concerns only the internal origins of responsibility. This is not to say, however, that the question of the origin of the injury is without analytical relevance. On the

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[143] Azinian, Davitian and Baca v The United Mexican States (Award) (ICSID Case No ARB(AF)/97/2, 1 November 1999), [100].

[144] *Arif v Moldova* (n 7), 417; original footnotes omitted; emphasis mine.

[145] cf ARSIWA, art 15(1).

contrary, the question will be determinative to the tribunal's scope of inquiry.[146] Specifically, it will be decisive as to whether the tribunal will have to assess the propriety of the impugned judicial act from the perspective of international legal standards as a predicate of the expropriation claim.[147]

7.3.3.1. Judicial Injuries resulting from Legislative Failure

Just as an international wrong can emerge if the domestic judges apply domestic laws *in a way* that gives rise to a violation of international law, it can also emerge because the laws applied are *in themselves* contrary to international law. In such a case, the international wrong is not one proceeding from the deficiencies of the judges, but from the failure of the legislature to enact laws that are compatible with the State's international obligations. Since the latter condition is sufficient to establish the responsibility of the State, there is no need to establish impropriety on the part of the judicial treatment as such.

In practice, arguments pertaining to inadequacies of domestic legislation have rarely been advanced in the context expropriation claims predicated upon judicial conduct. The issue was mostly considered at the level of principle. In *Azinian v. Mexico* (1999), for example, the question was touched upon in the context of determining whether the annulment of Claimant's concession contract as an act of expropriation. The Tribunal rejected such claim, on the ground that (1) the annulment was found by domestic courts to be consistent with the Mexican law governing the validity of public service concessions, that (2) Claimants neither contended nor proved that the Mexican legal standards for the annulment of concessions or the Mexican law governing such annulments were themselves expropriatory, and that (3) the conduct of the courts themselves (which the Tribunal examined *proprio motu*) was not reproachable at the international level.[148] Though the expropriation claim in *Azinian* was not in fact predicated upon the decisions of the domestic courts, the holdings attest to the possibility of a judicial measure amounting to an expropriation on account of legislation which is expropriatory in character, even where the conduct of the courts may not be reproachable as a matter of international law. The possibility of such a scenario was later also contemplated in *Arif v. Moldova* (2014). In evaluating a judicial expropriation claim, the Tribunal thus considered it "significant" that the Claimant did "not allege that there is any flaw in Moldovan law or that it is unfair in any way *per se*."[149]

Arguably, the prospects of judicial wrongs arising on account of the application of domestic legislation that itself fails to satisfy international standards may be more hypothetical than real, since in many legal systems, domestic courts retain some freedom in how they apply domestic laws. In many cases, courts will generally have the ability – and possibly be even bound by a duty – to reach decisions that are in conformity with, rather than contrary to, international law. Nonetheless, such prospects are not necessarily remote.[150]

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[146] See especially H Urbanek, 'Das völkerrechtsverletzende nationale Urteil' (1958– 59) 9 ÖZöR 213, 226, considering that any international adjudicatory body will have to take into account in their inquiry, as a practical matter, the distinction between injurious and non-injurious judgments of domestic courts. According to his view, a judgment that merely confirms an internationally wrongful act of another organ is irrelevant from the perspective of international law.

[147] The relevance of the distinction was noted in some cases. See particularly *Ares v Georgia* (n 107), [8.3.9], where the judicial expropriation claim was rejected precisely because the domestic rights affected 'had been brought to an end, *not by reason of any legislative, administrative, police or other action*, whether proper or improper, but by a series of decisions of the Georgian Courts, which decisions we find cannot properly be faulted under international law.' Emphasis in the original.

[148] *Azinian v Mexico* (n 143), [97]-[101].

[149] *Arif v Moldova* (n 7), [415].

[150] cf *Belokon* (n 40), [263]-[266], where the Respondent was found liable under the applicable BIT on account of decisions of Kyrgyz courts which merely resolve that the deposed former managers of the Claimant's bank had no standing in accordance with Kyrgyz law to challenge the imposition of temporary administration on the bank. While the way those decisions were reached was not in itself reproachable as a matter of international law, the Tribunal nonetheless concluded

7.3.3.2. Judicial Injuries resulting from Wrongful Acts of other Organs

In practice, it is perhaps more common for an injurious judicial act to proceed from the failure of executive organs to conform to the standards of treatment required by international law. This can be the case where domestic courts retrospectively validate interferences with an investor's property that had occurred as a result of improper actions of, say, an administrative agency or an enforcement body – such as where a judgment declares that the occupation of the investor's premises by the police has been legal, for example. It can also be the case, however, where interferences with an investment are directly attributable to the courts, yet the causes of such interference lie at the hands of some other organ – such as where a court terminates an investment contract on account of the investor's non-performance, but where the reason for the latter's default can be wholly or partly attributable to the conduct of, say, a municipality or a State-owned entity. Admittedly, the two scenarios are somewhat distinguishable, to the extent that, in the former case, the *source* of the injury itself will lie with the other organs, whereas in the latter case, the conduct of the other organs will be the *cause* of the judicial injury. In both cases, however, the impugned judicial conduct will be one proceeding from the conduct of other State organs that will itself be reproachable as a matter of international law. Since the latter condition will normally be sufficient to establish the responsibility of the State, there will again be no need to establish impropriety on the part of the courts as such.

The above proposition is supported by arbitral practice. In several cases where the impugned conduct of the courts formed part of a broader pattern of conduct involving different State organs, investment tribunals either refrained from making determinations on the propriety of judicial conduct itself, or upheld an expropriation claim despite the lack of any evidence of wrongdoing on the part of the judicial organs. In *AMCO v. Indonesia* (1984), where the expropriation claim was premised on the fact that Claimant's investment license was wrongfully revoked by the Indonesian Foreign Investment Board, the Tribunal actually excluded judicial acts from the inquiry altogether, even though it were the courts of Jakarta that actually terminated the lease and management contract that constituted the investment in that case. While finding that AMCO's investment was expropriated, the Tribunal did not consider that the infringement of Indonesia's obligations under international law could be imputed to the judiciary, since "it was not the Jakarta Courts which revoked the investment license; such Courts merely took into account the fact that the revocation had been decided by the proper administrative authority."[151] The main injury in that case was found to have been inflicted by the Foreign Investment Board, which revoked the license without affording AMCO the process that it was due.

Arbitral tribunals in later cases, however, did not exclude the conduct of the courts from the expropriation analysis, but equally did not require proof of impropriety on the part of the courts to uphold an expropriation claim. An example on point is the award in *Rumeli/Telsim v. Kazakhstan* (2008). In the circumstances of that case, the compulsory redemption of Claimants' shares in a Kazakh mobile telecommunications company, which was effected by a decision of the Presidium of the Supreme Court of Kazakhstan, was found to constitute a final act of taking and one amounting to an unlawful expropriation within the meaning of the applicable BIT,[152] in spite of there being no evidence of any wrongful conduct on the part of the courts: the Supreme Court judges were not found to have been involved in any conspiracy against the Claimant;[153] and there

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that the failure to provide for a practicable means to challenge the imposition of such administration amounted to an unreasonable impairment of the investment prohibited by the applicable BIT.

[151] AMCO Corporation and others v Republic of Indonesia (Award) (ICSID Case No ARB/81/1, 20 November 1984) [151].

[152] Rumeli AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan (Award) (ICSID Case No ARB/05/16, 29 July 2008) [705]-[708].

[153] ibid [709]-[715].

was no evidence that judicial decision was not made "in accordance with due process of law",[154] or else that it was "so egregiously wrong as to be inexplicable other than by a denial of justice".[155] What mattered, instead, was that the court process had been brought about as a result of a collusion between the Claimant's local partner and Kazakhstan's Investment Committee, which improperly terminated the Claimant's investment contract, so as to provide the ground for ordering the compulsory transfer of Claimants' shareholding. As in the *AMCO* case, the cause of the injury lay in the improper conduct of another State organ: the Tribunal established that the termination of the investment contract on the part of the Investment Committee itself breached the fair and equitable treatment standard on account of being arbitrary, unfair, unjust, lacking in due process, and not respecting the investor's legitimate expectations.[156]

7.4.3.3. Judicial Decisions Forming Part of Composite Wrongful Acts

A similar approach has generally been followed in situations where particular judicial decisions formed part of a broader set of acts of omissions involving various domestic organs, which only in the cumulative were held to amount to an expropriation of the investors' assets. In such cases, tribunals not only did not require proof of impropriety on the part of the courts to uphold an expropriation claim, but at times did not even engage in separately evaluating the propriety of the judicial procedures from the viewpoint of international standards. The overall approach has generally been the same, but the argumentation has somewhat varied, as shown in the following examples.

In *Sistem Mühendislik v. Kyrgiz Republic* (2009), the judicial invalidation of a contract through which Claimant obtained sole ownership of a Kirgiz hotel was held to be tantamount to an expropriation of property by the State, without the Tribunal expressing any opinion as to the propriety of the judicial process resulting in such invalidation.[157] While the Tribunal limited itself to observing that "[t]he Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree",[158] the situation was clearly one entailing a composite wrongful act, as noticeable also from the Tribunal's reasoning. Although the relevant judicial decisions did not actually deprive the Claimant of the whole of its interest in the hotel, but only of that part which it acquired through the (subsequently invalidated) contract from the local partner, the Tribunal namely considered "the only realistic characterisation of the position" to be that Claimant was deprived of all of its property rights, given that the investor's staff was ousted from the hotel by a group of armed men led by the chairman of the former local partner, and given that the hotel had been run since then by a new joint venture which was acting as the owner of the hotel and which was recognized as such by the Kyrgyz Ministry of Economy and Finance.[159]

More faithful in applying the logic of composite wrongful acts was the Tribunal in *Laboud & Laboud v. Congo* (2014), which dealt with a similar situation where interferences with investor's property, though originating in the conduct of third-parties, occurred with the acquiescence or collaboration of State organs. In the circumstances of that case, the expropriation claim was grounded in a court-ordered eviction of claimants' business from their leased premises in the DRC. Yet, while the judicial proceedings leading to the eviction did give rise to certain due process issues, the source of the injury was not concentrated solely in the conduct of the courts. Rather, the eviction was the combined result of acts and omissions of different Congolese organs

[154] ibid [705].

[155] ibid [619].

[156] ibid [708]; cf [612]-[615].

[157] *Sistem Mühendislik v Kyrgiz Republic (Award)* (ICSID Case No ARB(AF)/06/01, 9 September 2009) [117]-[118].

[158] ibid [118].

[159] ibid [121]-[128].

– including the Land Registry, the Office of Ill-Gotten Goods, and Congolese Courts – which improperly permitted that ownership of the premises reverted to a third-party which later set aside a long-term lease agreement. Hence, the Tribunal also concluded that it was not the eviction order itself, but the totality of the circumstances in which the eviction was ordered and executed that had an effect equivalent to an expropriation.[160] Indeed, the same circumstances gave rise, in their totality, also to a breach of the FET standard, whilst a claim of denial of justice was expressly dismissed.[161]

Further illustrations of investment tribunals desisting from separately evaluating the propriety of the courts' conduct can be found in the string of cases brought against the Russian Federation by various former shareholders of the Yukos oil company in relation to the demise of the latter. Though brought under different treaties, these cases were all premised upon the same series of events, and in large part, involved same or similar contentions: the abusive tax re-assessments, inspections, and other proceedings initiated by the Russian tax authorities against the Yukos company, which ultimately culminated in the latter's liquidation, were claimed to have been confiscatory measures that indirectly expropriated the Claimants' investments in the company. While the injury in that case was primarily attributable to the conduct of the tax authorities, the Russian courts, too, bore their share of responsibility: by imposing a wide-ranging asset freeze; by upholding the claims of tax authorities and subsequently allowing the enforcement of the judgments against the company; by endorsing the auctions of the company's assets; by accepting the company's bankruptcy; as well as by entertaining criminal proceedings against Yukos' shareholders, managers, and employees, the courts validated and compounded the measures that adversely affected the investment.

The three different treaty tribunals deciding the relevant expropriation claims essentially all followed the same approach – in that they evaluated the conduct of the courts in the context of the conduct of other State organs. The first of the three, the Tribunal in *RosInvest v. Russia* (2010), did contemplate the possibility of there being a "taking without compensation by denial of justice".[162] The Tribunal, however, considered that, regardless of whether the conduct of the courts had by itself breached the applicable BIT, it was not precluded from examining the decisions of the Russian Courts as part of the "totality of Respondent's measures in their cumulative effect.[163] Hence, without otherwise opining on the propriety of the judicial conduct as such, the Tribunal ultimately took the relevant judicial decisions into account when concluding that, on the whole, Respondent's measures amounted to an unlawful expropriation.[164] Likewise, in *Quasar de Valores v. Russia* (2012), the Tribunal took the courts' decisions into account in determining whether the steps that were taken by the Russian authorities, when viewed against the broader chronology of events, could "properly and fairly be characterised as part of an ordinary process of collecting taxes".[165] Similarly, in the consolidated cases of *Veteran Petroleum / Yukos Universal / Hulley Enterprises v. Russia* (2014), the treatment of Yukos by Russian courts was considered as part of the "totality of the evidence", on the basis of which the Tribunal concluded that the primary objective of the Russian Federation was, not to collect taxes, but to bankrupt Yukos and appropriate its valuable assets,[166] a

[160] Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v Democratic Republic of the Congo (Award) (ICSID Case No ARB/10/4, 7 February 2014) [501]-[505].

[161] ibid [466].

[162] *RosInvest v Russia* (n 139), [273]-[275].

[163] ibid [280].

[164] ibid [603]-[633].

[165] *Quasar de Valores v Russia* (SCC No 24/2007, 20 July 2012), [141].

[166] See identical awards in *Hulley Enterprises Limited (Cyprus) v The Russian Federation (Final Award)* (UNCITRAL, PCA Case No AA 226, 18 July 2014) [755]-[760]; *Veteran Petroleum v Russia (Final Award)* (UNCITRAL PCA Case No AA 226, 18 July 2014) [755]-[760]; and *Yukos Universal Limited (Isle of Man) v The Russian Federation (Final Award)* (UNCITRAL, PCA Case No AA 227, 18 July 2014) [755]-[760].

conclusion which supported the finding that the measures taken in respect of Yukos had an effect equivalent to nationalization or expropriation.[167] In determining whether the conduct of the Russian authorities amounted to an indirect expropriation, the Tribunal expressed no opinion as to the propriety of the judicial decisions as such.[168]

Finally, reference needs to be made to the *OAO Tatneft v. Ukraine* (2014) award, where the Tribunal in a somewhat unusual way refused to pass upon an expropriation claim which was brought with respect to a series of actions and omissions of the executive and judicial branches that purportedly assisted third-parties with the takeover of a Ukrainian refinery. The Tribunal accepted that "[t]o the extent that a judicial decision forms an integral part of a chain of acts that, taken together, might qualify as a composite act and result in a wrong inflicted on the affected individual, such acts can justify a finding of liability […] even if each of such acts individually might not be sufficient for that finding of wrongful conduct."[169] Yet, though finding that it were the judicial decisions that ultimately resulted in that case in the total deprivation of Claimant's shareholdings in the refinery, and though holding that those decisions even formed "an integral part of acts of greater complexity", the Tribunal concluded that there were "too many uncertainties" that made a finding of expropriation unwarranted.[170] In the circumstances of that case, of course, such a finding was in the end not necessary, as the Tribunal had already found that the impugned judicial acts violated other standards of treatment under the applicable BIT.

7.3.3.4. What Role for the Sole Effects Doctrine?

As attested to by the precedents just discussed, in circumstances where the impugned judicial acts are just an intermediary or final step in a series of acts or omissions adversely affecting an investment, tribunals are likely to revert to the traditional "sole effects" doctrine to establish the occurrence of an expropriation – by either avoiding the question of propriety of the judicial measures altogether, or even proceeding to upholding an expropriation claim in the absence of any indications of impropriety on the part of the courts.[171]

Particularly prone to such approach are cases where judicial decisions turn out to be nothing but *ex post facto* attempts to legalize or validate interferences that already physically affected the investor's property. Indeed, tribunals in such cases have frequently emphasized that they will not be stumped by domestic judicial characterizations, but will exercise their judgment in determining whether a taking of property has occurred. As the *AMCO* Tribunal was adamant to pointing out, "no matter how the legal position of a party is described in a national judgment, an international arbitral tribunal enjoys the right to evaluate and examine this position without accepting any *res judicata* effect of a national court."[172] Even more resolute was the *Quasar de Valores* Tribunal in highlighting that it was "not bound to accept such decisions to the extent that they sanction 'actions [that] breached international law by depriving the claimants of adequate

[167] ibid [1575]-[1580].

[168] In contrast, the Tribunal did opine on the propriety of the Russian judicial processes with a view to establishing that the measures in question failed to meet the requirements for a lawful expropriation under the applicable treaty: the treatment accorded to Yukos managers in Russian court proceedings attested to the conclusion that the expropriation of Yukos was not carried out under due process of law. ibid [1583].

[169] *OAO Tatneft* (n 95), [462].

[170] ibid [464]-[472].

[171] cf *Sistem Mühendislik v Kyrgyz Republic* (n 157), [118] ('[i]f the Claimant has been deprived of its property rights by an act of the State, it is irrelevant whether the State itself took possession of those rights or otherwise benefited from the taking.'); *Rumeli AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan (Annulment)* (ICSID Case No ARB/05/16, 25 March 2010) [116] ('The treaty protection from expropriation supplies an independent standard which must also be met, whether or not the [judicial] decision was the result of a fair procedure or was in compliance with national law').

[172] *AMCO* (n 151), 177.

compensation for the dispossession of which they complain."'[173] Of course, one can immediately notice the stark contrast between the pronouncements such as the above and assertions such as that of the *Liman Caspian* Tribunal, which held that the effect of domestic courts decisions "has to be accepted under international law",[174] or that of the *Arif* Tribunal, which saw "no compelling reason that would justify a new legal analysis" of a legal issue that "has already been repeatedly, consistently and irrevocably decided by the whole of the Moldovan judicial system."[175] What is that makes investment tribunals prone to accept the findings of domestic courts in one case, and disinclined to accept their pronouncements in others?

Arguably, the divergent attitude can best be explained by the degree of freedom available to investment tribunals in reaching a finding on the expropriation claim without having to conclusively determine the correctness of the impugned domestic judicial decision(s). As investment tribunals have often been keen to emphasize in the context of expropriation claims predicated upon judicial conduct, they are not sitting as courts of appeal.[176] The fact that the conduct of judicial organs can be contextualized within the broader pattern of conduct involving other organs of the State seemingly provides investment tribunals with the opportunity to determine the propriety of the domestic judicial outcome without slipping into a form of appellate review; indeed, possibly even without having to perform any review of the conduct of the courts as such. Where, on the other hand, an expropriation claim hinges solely on the impugned conduct of the courts, the only way for investment tribunals to avoid sitting as courts to appeal is by reviewing the propriety of domestic courts decisions by reference to external standards, such as that of denial of justice. Given that the latter imposes a high threshold for a finding of impropriety – indeed, one that goes far beyond mere misapplication of domestic law – investment tribunals will essentially accept domestic judicial outcomes as long as the underlying judicial conduct will not reached the required level of impropriety.

7.4. Other Treaty Obligations Aimed at Providing Legal and Economic Security to Investments

Having discussed the rich jurisprudence on expropriation claims predicated upon judicial conduct, what follows is a brief examination of claims equally predicated upon the actions of the judiciary but presented as violations of umbrella clauses (7.4.1.), or as breaches of legitimate expectations under the fair and equitable treatment standard (7.4.2.).

7.4.1. Umbrella Clauses

Securing protection of contractual obligations arising out of agreements that they have entered into with host States has been of lasting concern to foreign investors. The annulment of contractual rights was, under circumstances, capable of constituting an expropriation, for which the host State was liable to pay compensation. But regular breaches of contract did not violate international law, unless the State failed to provide a remedy for such breaches in domestic courts, in which case that failure itself could have amounted to a denial of justice.[177] To address the problem of enforceability of contractual obligations, many investment treaties therefore include what are known as "observance of obligations"-, or more commonly "umbrella" clauses, which require nothing more

[173] *Quasar de Valores* (n 165), [94].

[174] *Liman Caspian* (n 109), [431].

[175] *Arif* (n 7), [416].

[176] See eg *RosInvest v Russia* (n 139), [280], [603]; *Arif* (n 7), [416].

[177] Vandevelde (n 86), 256-57; FA Mann, 'State Contracts and State Responsibility' (1960) 54 AJIL 572; and RY Jennings, 'State Contracts in International Law' (1961) 37 BYBIL 156.

and nothing less than the State to observe any obligation into which it has entered into with respect to an investment.[178] Their purpose is therefore to secure that the investors' entitlements arising out of proprietary rights and interests are respected.

Though the intended object of protection are primarily obligations created by contracts between the host State and the investor or investment, depending on the language of the concrete provision, the protection can also extend to obligations unilaterally assumed by the host State in relation to the investment, such as through the enactment of legislation. Either way, such obligations are unavoidably susceptible of being affected by judicial actions. State contracts are commonly governed by domestic law (which not infrequently is also the law of the host State), and thus also enforceable to the extent provided by such law. Domestic courts, on their part, not only possess primary competence over the interpretation and application of domestic law, but in many State contracts are also granted exclusive jurisdiction over contractual matters. It has therefore not been uncommon for claims of violations of the umbrella clause to be predicated upon the conduct of domestic courts involved in contractual disputes.

Most of such cases thus far concerned situations where the contracts in question have either been annulled or terminated by means of judicial intercession. And in all of those cases, the claims for umbrella clauses were flatly dismissed on the ground that they were premised on rights that had effectively been extinguished by means of judicial decisions. In *Liman v. Kazakhstan* (2010), the Tribunal for example concluded that Claimant lacked standing to invoke breaches of a licence contract as a basis for an umbrella clause claim, insofar as the Kazakh courts had lawfully invalidated a previous transfer of the License from another entity to the Claimant.[179] Likewise, the Tribunal in *Arif v. Moldova* (2013) found the claim for violation of the umbrella clause "inadmissible", insofar as the Claimant's concession contracts relating to the exploitation of a network of duty free stores at the border with Romania had been irrevocably annulled by the whole of the Moldovan judicial system.[180] In a similar way, the tribunals in *Bosh v. Ukraine* (2012) and *Swisslion v. Macedonia* (2012) dismissed the claims under the umbrella clause in circumstances where the relevant contractual rights – in the former case, rights arising under an property renovation and redevelopment project; in the latter case, those arising under a share purchase agreement – were validly terminated by domestic courts.[181] In all of the cases, the decision of the investment tribunals to give effect to the domestic courts' judgments was premised, explicitly or implicitly, on their previous findings that the domestic judicial treatment of the contractual issues conformed to the international standards of administration of justice.[182] Most vocal in this respect was the tribunal in *Arif*, which "persuaded that there has been no denial of justice towards the investor and that the judiciary has applied Moldovan law legitimately and in good faith", considered that it "cannot and should not act as a court of appeal of last resort" and therefore "it does not consider appropriate to decide on Claimant's 'specific undertakings' claim to the extent it implies analysing *ex novo* the validity of these instruments under Moldovan law."[183]

The above cases concerned situations where the relevant contracts were annulled or terminated and could thus have been – and in some of the cases actually had been –also presented as expropriation claims. The purpose of the umbrella clause, however, is to also protect

[178] For examples, see 3.2.3.6.

[179] *Liman Caspian* (n 109), [442]-[443].

[180] *Arif* (n 7), [398].

[181] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine (Award)* (ICSID Case No ARB/08/11, 25 October 2012) [258]-[259]; and *Swisslion* (n 100), [265]-[275], and [323]-[325].

[182] cf *Liman Caspian* (n 109), 442; *Arif* (n 7), [398]; *Bosh* ibid, 258-259 and 276-286; and *Swisslion* (n 100), [265]-[275], and [323]-[325].

[183] *Arif* (n 7), [398].

contract breaches that do not necessarily constitute a repudiation of the contract.[184] Thus far, the situation where a domestic court had already pronounced upon contract breaches has not yet been presented to an investment tribunal under the heading of an umbrella clause claim. The jurisdictional award in *SGS v. Philippines* (2004) suggests, however, that investment tribunals may be prone to accept domestic court findings on contractual issues, as long as the court's pronouncements in question were irreproachable from the perspective of international law. In the circumstances of that case, the Tribunal namely accepted that the umbrella clause claim was subject to "the factual predicate of a determination" by the Regional Trial Court of Manila with respect to the amounts still owed to the Claimant by the Philippines pursuant to the concession contract.[185] Though the Tribunal in that case did not indicate under which conditions, if any, it would have revisited the findings of domestic courts, the Dissenting Arbitrator, Professor Crivellaro, held that the claims which were otherwise found inadmissible under the umbrella clause could only return to the treaty tribunal in case of a denial of justice by the Philippine courts; for, "they cannot certainly return in case of a wrong judgment in the merits; we are not a Court of Appeal in respect of domestic courts."[186]

Those umbrella clause claims that are predicated upon alleged non-observance of obligations unilaterally undertaken in domestic legislation would appear to be subject to similar considerations. In *Liman v. Kazakhstan* (2010), the Tribunal dismissed umbrella clause claims premised on alleged breaches of the Kazakh Foreign Investment laws, on the ground that the Kazakh courts had already decided on the application of those laws, and since the judicial decisions in question were found to be irreproachable as a matter of international law, the Tribunal considered it had to accept them as valid.[187] Practice at any rate suggests that in circumstances where umbrella claims hinge upon questions concerning the interpretation or application of domestic law, investment tribunals may show deference to domestic judicial decisions. In *Micula v. Romania* (2013), for example, where the question arose as to whether the withdrawal of financial incentives provided for under an emergency government ordinance relating to certain of Romania's "disfavoured" regions amounted to a breach of the umbrella clause, the Tribunal was "far from certain" whether it should revisit the validity of a Constitutional Court's decision, which found that similar incentives provided by Romania's Law on Foreign Investment did not provide beneficiaries with a vested right to such incentives, nor give them a right to compensation once such incentives are withdrawn.[188] In the circumstances of that case, though, the judicial decision in question did not directly concern the ordinance on which the umbrella clause claim was premised.

7.4.2. Protection of Legitimate Expectations

Apart from providing security to contractual commitments through the device of umbrella clauses, and to proprietary rights and interests by means of clauses prohibiting uncompensated expropriations, investment treaties also provide security to investors' legitimate expectations – such as those that could have possibly arisen on the basis of promises or assurances that a host States has made with a view to attracting investments, but also generally in relation to the state of the law and the totality of the business environment existing at the time of the investment. The

[184] Vandevelde (n 86), 258-259.

[185] SGS Société Générale de Surveillance SA v Republic of the Philippines (Decision on Objections to Jurisdiction) (ICSID Case No ARB/02/6, 29 January 2004), 174.

[186] *SGS v Philippines*, ibid. Dissenting Opinion of Professor Crivellaro, [12].

[187] *Liman Caspian* (n 109), [450].

[188] *Micula v Romania (Final Award)* (ICSID Case No ARB/05/20, 11 December 2013), [450]-[451].

protection of such expectations, alongside the maintenance of regulatory stability, belongs to the core elements of the FET standard.[189]

In the case of legitimate expectations, the scope of protection are not proprietary rights and interests as such, but the economic value of the investment more broadly, which can be reduced as a result of changes introduced by the State in the regulatory environment. Although such changes will typically be the consequence of legislative and administrative measures, they may equally be induced by particular judicial interventions – such as where courts pronounce as unconstitutional the legislative framework underpinning an investment, or where they annul the specific instruments underlying an investment. Investment tribunals thus readily accepted that, as a matter of principle, an investor's legitimate expectations can be frustrated on account of the conduct of the courts themselves.[190] The issue, however, is not in the courts' ability to frustrate such expectations, but rather in the possibility of an investor actually holding expectations in relation to whether or not the regulatory environment may be subject to change on account of courts' conduct – bearing in mind the fundamental characteristics of the judicial function. As a matter of general proposition, it is well established that not any adverse change may give rise to a breach of the FET standard, for investors cannot legitimately and reasonably expect that host State laws will never change. Whether or not an expectation is a legitimate one will depend on the circumstances of each case, and be heavily influenced by specific representations or commitments made by the State to the investor, on which the latter must have necessarily relied. The investor is expected to be aware of the general regulatory environment in the recipient country of its investment, and its expectations will at any rate have to be balanced against legitimate regulatory activities of the host country.[191]

Nonetheless, when it comes to the question of whether judicially-introduced changes into the regulatory environment could form the predicate of an FET claim based on a breach of legitimate expectations, two approaches have thus far arisen in the practice of investment tribunals. In *Arif v. Moldova* (2013), the Tribunal found that the suspension and subsequent annulment of the investor's lease agreement on the part of Moldovan courts *in itself* breached the investor's legitimate expectation of a secure legal framework to operate its duty free store in Moldova.[192] In the Tribunal's logic, in circumstances where the lease agreement had been entered into by a State entity, and been approved by a regulatory authority, the investor had a legitimate expectation that there was a secure legal framework for his investment. And this expectation was then breached as a "direct result" of the intervention of a State organ – i.e., the judgments of Moldovan courts – the Respondent incurred liability under the FET standard.[193] Curiously, in arriving at this finding, it mattered little to the Tribunal that the conduct of the courts was not

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[189] UNCTAD, *Fair and Equitable Treatment: A Sequel* (Series on Issues in International Investment Agreements III) 63. There is discussion whether the concept of legitimate expectations is a standalone element of the fair and equitable treatment standard in circumstances where the latter is linked to the minimum standard of treatment. P Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), 154-71. In other contexts, however, the legitimate expectation principle has become a recurrent, independent basis for a claim under the FET standard. K Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in Reinisch (ed) *Standards of Investment Protection* (2008), 111-130, 124.

[190] See *OAO Taftneft* (n 83), [407] ('A predictable, consistent and stable legal framework is a FET requirement which ought to be safeguarded in its integrity irrespective of which organ of the State might compromise its availability […] It does not matter […] whether such breach originates in the executive branch of government, which is the most common occurrence in contemporary practice given the sweeping powers of administration, or in autonomous services, such as the Public Prosecutor, or eventually in the courts themselves').

[191] cf *Saluka (Partial Award)* (n 39), [305]-[306]; *SD Myers, Inc v Canada (First Partial Award)* (UNCITRAL, November 13 2000), [263]; *Parkerings-Compagniet* (n 26), [332]; and *EDF (Services) Limited v Romania (Award)* (ICSID Case No ARB/05/13, 8 October 2009), [217]–[219].

[192] *Arif* (n 7), [547].

[193] ibid [541] and [547(a)].

otherwise reproachable as a matter of international standards. Indeed, the fact that the courts were merely exercising their regular judicial function was not considered to be of any relevance at all. The Tribunal expressly acknowledged that the agreement "was subject to Moldovan law and the proper jurisdiction to determine its legality were the Moldovan courts", as well as that "judicial review of administrative action is a normal occurrence in any State, and of course the administrative authorities of Moldova, […] have to respect and comply with the judicial decisions at the domestic level."[194] In the view of the Tribunal, however, "at the international level, the State has a unitary nature, and a contradiction in the actions of the State cannot be resolved on the international plane by reference to its internal legal order. It is well established that a State cannot rely on its internal law to justify an internationally wrongful act."[195]

A different approach was taken in *Hassan Awdi v. Romania* (2015), where the conduct of the courts was not taken to be the reason for the breach of the investor's legitimate expectations. In the circumstances of that case, the Romanian Constitutional Court declared as unconstitutional the Law by which the Claimant's companies were granted the right to conclude concession contracts with local municipalities in relation to land plots for the placing of kiosks used by the Claimant's press distribution business. The specific Law was adopted as part of an "all reasonable efforts" commitment that Romania had contractually undertaken in the privatization agreement it entered into with the Claimant. The Tribunal found that the judicial repeal of the Law was effected by an act that was valid under Romanian law and "not invalid or so egregiously wrong under international law as to leave room for a finding of a denial of justice or of an arbitrary or discriminatory treatment".[196] Unlike the *Arif* Tribunal, it did not hold, however, that the judicial repeal itself had breached the investor's legitimate expectations. Such breach occurred rather on account of Respondent's *failure to remedy the repeal* of that Law, such as by enacting a new organic law or an alternative normative act to the same effect.[197]

The approach adopted by the *Awdi* Tribunal appears to be better fitted to assessing violations of legitimate expectations predicated upon judicial acts. Given the nature of the judicial function, investors cannot possibly hold legitimate expectations as to whether and how domestic courts review the validity of domestic legal acts – be it particular pieces of legislation, be it individual legal instruments adopted in the investor's favour. Where legislative or executive organs act *ultra vires*, domestic courts cannot be faulted for annulling such acts. This is not to say that judicially-induced changes to the regulatory environment cannot frustrate the investor's expectations; it is merely to say that judicial measures alone cannot give rise to violations of such expectations in the absence of the conduct of some other State organ that must also be impugned – provided, of course, that the courts' conduct is not otherwise reproachable from the perspective of international standards. Furthermore, as demonstrated by the *Awdi* case, when the court conduct does affect the regulatory environment, the host State will be under an obligation to take steps so as to offset the adverse impact of the judicial intervention, or else its responsibility may be engaged.

This eventually begs the question whether expectations can legitimately arise also specifically in relation to how the courts will treat particular claims. Some investment tribunals were rather dismissive of any particularly demanding expectations as to the substantive treatment that investors' claims were to receive in domestic courts. In *Eli Lilly v. Canada* (2017), the Tribunal thus held, for example, that the investor "should have, and could have, anticipated that the law would change over time as a function of judicial decision-making" and thus rejected the claim based on

[194] ibid [547(c)].

[195] ibid.

[196] *Hassan Awdi v Romania (Award)* (ICSID Case No ARB/10/13, 2 March 2015) [326].

[197] ibid [332]-[333].

the breach of legitimate expectations on account of the courts' alleged departure from previous case law.[198] In *White Industries v. India* (2011), the Tribunal even dismissed the idea that the investor could have legitimately expected that Indian courts would have applied the New York Convention properly and in accordance with international standards, in the circumstances where these courts were known for regularly entertaining set-aside applications in respect of foreign awards, in spite of such applications probably not being in conformity with the said Convention.[199]

Somewhat contrary to this practice, however, the Tribunal in the same *Hassan Awdi* case did find in relation to a different domestic case, that the investor could legitimately have expected a particular judicial outcome. In the circumstances of that case, the ownership of a historical estate, which the Claimants acquired and developed into a luxury hotel, was eventually returned to the original heirs by force of a decision of the Romanian Supreme Court. Though finding no trace of denial of justice in relation to that decision,[200] and in spite of considering that the Claimants were aware of uncertainties relating to the property's ownership and the possibility of it ultimately being restituted to the original owner, the Tribunal still found that the investor had "a legitimate expectation that had the risk in question materialised, they should be returned the price agreed for the purchase" and hence, "[f]air and equitable treatment guaranteed by the BIT […] demands that the amount of the price originally paid be reimbursed to them."[201]

One can wonder, however, whether the protection of legitimate expectations under the FET standard can really lend itself to such applications, for this could imply that investors may be granted substantive rights that may not otherwise exist under domestic laws. Furthermore, it could easily transform investment tribunals into regular courts of appeal.

7.5. Other Obligations Potentially Requiring Judicial Treatment of a Defined Kind

Having examined in the previous sections the categories of investment treaty provisions most commonly engaged by the conduct of the judiciary, it is appropriate to complete the inquiry by discussing several other investment treaty obligations that can, under circumstances, be read as dictating the kind of treatment that domestic courts are to accord to foreign investors. The notion of "treatment" can obviously refer to the particular manner in which a judicial measure has been applied to the investor, as well as the results obtained through application of the judicial measure. Both aspects are sometimes difficult to distinguish, particularly in relation to certain treaty standards that are relevant to both aspects of treatment. This notwithstanding, the present section discusses the effect that certain treaty standards may have on the procedural treatment that a foreign investor ought to be accorded in domestic judicial proceedings. The following section (7.6.), in turn, discusses the demands that treaty standards may have in relation to specific judicial outcomes.

Of central interest to the issue of procedural treatment due to foreign investors is the question whether specific treaty standards add anything to the obligation not to deny justice (applied either as part of customary international law, or through the fair and equitable treatment standard). It is argued here that, in relation to judicial conduct, some treaty standards essentially replicate the protections already afforded by the prohibition of denial of justice (7.5.1.), while others, in contrast, require treatment that goes beyond what is required by the obligation not to deny justice (7.5.2.). This eventually also leads to the question as to whether, in relation to the

[198] *Eli Lilly* (n 7), [384].

[199] *White Industries* (n 56), [10.3.12]-[10.3.13].

[200] *Hassan Awdi* (n 196), [436].

[201] ibid [436]-[440].

administration of justice as such, the FET obligation imposes the same requirements as the customary international law obligation prohibiting denial of justice (7.5.3.).

7.5.1. More of the Same? Clauses Prohibiting Discriminatory and Arbitrary Treatment

A type of a treaty provision that in many cases will add little or nothing to what is already available to an investor as part of the prohibition of denial of justice pursuant to the fair and equitable treatment standard (or under customary international law), are clauses prohibiting the impairment of specific rights arising out of an investment – such as the management, operation, maintenance, use, enjoyment, acquisition, or disposal thereof – through the imposition of arbitrary/unreasonable and/or discriminatory measures.[202] Together with the obligations to provide fair and equitable treatment and full protection and security, the non-impairment obligation is one of the three fundamental rules through which the general principle of international law pertaining to the respect and protection of the property of foreign nationals was supposed to find expression in modern investment treaties.[203] Despite its ubiquity in present day investment treaties, the non-impairment obligation has not played a particularly prominent role in practice; mostly because liability pursuant to the clause was considered engaged by the same set of acts that separately had already amounted to a violation of fair and equitable treatment standard.[204]

In the context of judicial proceedings, the obligation would often be of little added value, since two of its normative elements – the prohibition of discrimination and arbitrariness – are already inherent to the doctrine of denial of justice itself.[205] Indeed, the prohibition against nationality-based discrimination in the administration of justice is probably one of the foundational elements of the doctrine,[206] just as is the absence of arbitrariness.[207] In the context of judicial proceedings, the free-standing treaty obligation not to impair the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of their investments by arbitrary

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[202] See eg Art 10(1) ECT ('no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal' of an investment); or Art 2(6) US-Poland BIT (1990) ('Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments').

[203] OECD 1967 Draft Convention, Commentary, 8.

[204] cf *Saluka* (n 39); *Belokon* (n 40), 257 ('257. The Tribunal notes that there is a considerable overlap between the provision of protections under the FET standard and the prohibition against unreasonable or discriminatory measures enshrined in Article 2(3) of the BIT.')

[205] See eg *Waste Management , Inc v United Mexican States (II)(Award)* (ICSID Case No ARB(AF)/00/3, 30 April 2004) [98], holding that 'a manifest failure of natural justice in judicial proceedings' would result from conduct which is '*arbitrary*, grossly unfair, unjust or idiosyncratic, is *discriminatory* and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety'; emphasis added. See generally also S. Montt, *State Liability in Investment Treaty Arbitration* (Hart, 2012), 302, suggesting there is no separate standard of arbitrariness additional to that provided under the FET standard.

[206] See C Eagleton, *The Responsibility of States in International Law* (NYU Press 1928), 84-85; EM Borchard, *The Diplomatic Protection of Nationals Abroad* (1919); 333-34; as well as Weiler (n 16), 296ff. See also art VI of Draft on 'International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners' prepared by the Institute of International Law (1927) and reproduced in (1956) Ybk ILC, vol. II, 227; and a similarly formulated Basis or Discussion No. 5 of the 'Bases of Discussion', drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law, reproduced at ibid 223, defining a judgment as manifestly unjust, and amounting to denial of justice 'if it has been inspired by ill-will towards foreigners as such or as citizens of a particular State'. See also *Loewen* (n 106), [135], confirming that a decision which is in breach of domestic law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.

[207] The description of arbitrary conduct formulated by ICJ's Chamber in the *ELSI* case (at 76) as conduct that displays 'a willful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety', has frequently been applied by investment tribunals in defining denial of justice. See *Mondev v USA (Award)* (ICSID Case No ARB(AF)/99/2, 11 October 2002), 127; *Loewen* (n 106), 131-134

and discriminatory measures is therefore necessarily subsumed under the more general obligation to treat investors fairly and equitably by not denying them justice. This is not to say, however, that the non-impairment obligation cannot make a difference in certain contexts. As attested to by the *Belokon v. Kyrgyz Republic* (2014) award, the obligation can be of added value where the investment itself is not the subject of the impugned judicial proceedings. In the circumstances of that case, the Tribunal considered that, insofar as the applicable BIT required FET to be accorded to "investments of investors of either contracting party", it did not have authority to consider the purportedly abusive criminal proceedings that the Respondent's authorities commenced against the former directors and managers of the Claimant's-owned bank. In the Tribunal's view, however, those actions could be considered as – and on the facts of that case have amounted to – a violation of the non-impairment obligation provided for by the BIT.[208]

Another instance where the non-impairment obligation could make a difference as opposed to the more general treatment standards is perhaps in the context of some US BITs, which contain language specifying that "[f]or the purposes of dispute resolution under Article VI and VII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party."[209] Such language could namely have the effect of relaxing the judicial finality requirement, which is otherwise a prerequisite to any claim of denial of justice. Yet, stipulations of this kind are rather exceptional and do not allow for generalizations.

7.5.2. No-Less-Favourable-Treatment Obligations – Value-Added Standards?

A specific set of treaty standards that, in contrast, would appear to impose more onerous obligations in relation to judicial treatment than those provided under the general FET standard, and would consequently appear to make a difference as to the treatment that an investor or its investment may expect in the course of judicial proceedings, are the relative standards requiring treatment "no less favourable" to that accorded to national investors and their investments (i.e. the national treatment (NT) standard), or to other foreign investors and investments (i.e. the most-favoured-nation treatment (MFNT) standard). Though belonging to the category of non-discrimination standards, the NT and MFNT obligations are contingent standards whose aim is in creating a level playing field between different investors in general, and therefore eliminating *any* difference in treatment as such (and not just proscribing nationality-based discrimination).[210] In that, the NT and MFNT obligations differ from the non-discrimination obligation that is considered to be inherent to the FET standard (or otherwise spelled out in the non-impairment clauses). This latter is not contingent upon differences of treatment received by others, but is based on an absolute or minimum standard prohibiting the abusive or discriminatory exercise of governmental authority that would cause loss or harm to an investor because (s)he is a foreigner.[211] That is, while the FET and non-impairment obligations prohibit the State to treat an investor differently merely because (s)he is foreign, they do not demand from the State to grant the investor the best treatment available to any of the investor's competitors operating in like circumstances.[212] Such treatment is only required by the NT and MFNT standards.

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[208] *Belokon* (n 40), [244]-[247]; [268].

[209] Art II(3)(b), US-Ecuador BIT.

[210] See on this Pope & Talbot v Canada (2nd Phase Merits Award) (UNCITRAL, 10 April 2001) [79].

[211] On this, see T Weiler, 'Saving Oscar Chin' in Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 180-181.

[212] cf specifically art 1(2) 1967 OECD Draft Convention, which expressly stipulated that '[t]he fact that certain nationals of any State are accorded treatment more favourable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter.'

That the distinctive scope of the two types of non-discrimination obligations can play a role in the administration of justice is attested by the *Loewen v. US* award (2003). In the circumstances of that case, the treatment accorded to the Canadian investor by a Mississippi court in the form of a procedurally unsound conduct of the jury trial was considered to have *prima facie* risen to a denial of justice, and thus to a violation of Article 1105 NAFTA.[213] In that, the fact that the proceedings before the Court of Mississippi were permeated with bias because of Loewen's Canadian origin were central to the Tribunal's finding that the whole trial and its outcome could not be squared with minimum standards of international law and fair and equitable treatment.[214] In contrast, the finding of discriminatory treatment was not in itself sufficient to establish a breach of the national treatment standard under Article 1102 NAFTA, which the Tribunal dismissed on account of the lack of materials that would enable it to compare the treatment that had been accorded to Loewen with treatment accorded to investors and investments of the United States in like situations.[215] By dismissing that claim for want of appropriate comparator, the Tribunal confirmed that the national treatment standard imposed a different type of obligations, which then necessarily entailed a different kind of inquiry.

At the practical level, the *Loewen* award underscores the difficulty in finding appropriate comparators in the assessment of potentially differential judicial treatment in situations where the investor is involved in disparate, non-recurring judicial proceedings. The *Loewen* Tribunal namely ruled out the possibility that the Loewen's local competitor could be treated as an appropriate comparator merely because it had been the litigant in the same case. As a matter of principle, such proposition is certainly valid, even though on the facts of the *Loewen* case, one may wonder whether the competitive position between the litigants was not actually evident from the nature of the civil suit.[216] In general, however, the problem encountered by the Claimant in *Loewen* will usually be less pronounced in circumstances where multiple investors are involved in similar judicial actions, such as those that frequently arise in the context of challenges of adverse regulatory measures.

7.5.3. Judicial Violations of the FET Standard Otherwise than Through Denial of Justice

Claims alleging unfair and inequitable treatment at the hand of the judiciary have almost axiomatically been considered through the prism of denial of justice.[217] But if courts violate the standard of fair and equitable treatment *through* denial of justice, the question eventually arises as to whether the denial of justice standard then also "exhausts" the FET obligation in relation to the acts of the judiciary. The problem has presented itself in two facets – as a question pertaining to the content of the FET standard (1) and as a question pertaining to its application to the conduct of the courts (2).

7.5.3.1. Can the FET Standard be Engaged on Account of Lesser Judicial Improprieties than those Required for Denial of Justice?

The question whether courts can violate the FET standard in other ways than through a denial of justice is itself a multifaceted one. In the first place, it is about whether or not the FET standard

[213] *Loewen* (n 106), [124]-[137].

[214] ibid [135]-[136].

[215] ibid [140].

[216] For a criticism of the *Loewen* award on that account, see Weiler (n 211), 170.

[217] See eg *Rumeli (Award)* (n 152), 427 ("The Arbitral Tribunal considers that these violations are better qualified and dealt with as issues falling under the fair and equitable treatment standard which also includes in its generality the standard of denial of justice.")

can be taken to impose requirements additional to, and substantively different from, the prohibition of denial of justice. In practice, however, it often revolves around the possibility that judicial conduct not otherwise meeting the high threshold of denial of justice could still amount to a violation of the FET standard. These questions have been touched upon in several awards, but received divergent answers so far.

In some cases, tribunals proceeded on the assumption that denial of justice must be taken as the only standard applicable to assessing whether a judicial decision conforms to the FET guarantee.[218] In others, the standards of denial of justice and FET were held to be distinguishable, but the conduct of the courts was nonetheless reviewed against a comparable threshold. According to the Tribunal in *Iberdrola v. Guatemala* (2012), for example, the fact that the investment treaty included the obligation of giving the investor a fair and equitable treatment did not "mean, *per se*" that the standard of denial of justice of the treaty was broader than that of customary international law.[219] In *Arif v. Moldova* (2013), on the other hand, the Tribunal first rejected the proposition that both standards could be taken to "have merged into one and that the prerequisites as well as the consequences of a claim for denial of justice and for the violation of a treaty standard of fair and equitable treatment have become identical".[220] At the same time, the Tribunal considered two "caveats" to apply when it comes to considering alleged breaches of the FET standard occasioned by the judiciary: first, that a large degree of deference had to be accorded to domestic courts on issues of application and interpretation of national law, and second, that before a potential breach of FET could be found, the judiciary had to have rendered a final and binding decision.[221] Eventually, the Tribunal proceeded to examining claims pertaining to judicial misconduct pursuant to the same high standard and subject to the same conditions that are normally applicable to denial of justice.

Yet, investment tribunals have increasingly begun to take the position that denial of justice is not the only way in which the conduct of the courts can give rise to a violation of the FET standard. In *OAO Taftnet v. Ukraine* (2014), for example, the Tribunal concluded that, in spite of there being "no sufficient reasons" to justify a finding of denial of justice, the FET standard had been "compromised" in that case by a number of court actions which deprived the investor of its management and control, and ultimately of its ownership rights in Ukraine's largest oil refinery.[222] The Tribunal took the view that the FET standard had "a broader meaning than the strict denial of justice as understood under traditional customary international law."[223] It interpreted the standard as one aiming "to ensure that the legal process governing the protected rights as a whole, including its judicial manifestations, is fair and reasonable, devoid of arbitrariness, discrimination or manipulation to the detriment of those rights."[224] In the circumstances of that case, that standard had been breached since the various Ukrainian court decisions invalidating the share purchase agreements through which Claimant previously acquired shareholding interests in the company could not be considered fair and equitable, and furthermore suffered from procedural defects, were found to be discriminatory, and frustrated the investors legitimate expectations to a predictable, consistent and stable legal framework.

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[218] *OI European Group BV v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB/11/25, 10 March 2015) [522] ('Aunque las Partes no lo señalan expresamente, el estándar internacional para valorar si una decisión judicial es conforme con la garantía de TJE es la denegación de justicia'). See also *Liman Caspian* (n 109), [268].

[219] *Iberdrola Energía SA v Guatemala (Award)* (ICSID Case No ARB/09/5, 17 August 2012) [427].

[220] *Arif* (n 7), [433]; emphasis added.

[221] *Arif* ibid, [440]-[442].

[222] *OAO Tatneft* (n 83), [481].

[223] ibid.

[224] ibid [395].

Furthermore, the aggregate of the events could only be considered as amounting to arbitrariness and unreasonableness.[225]

In a somewhat similar fashion, the Tribunal in *Eli Lilly v. Canada* (2017) did not wish to "shut the door" to the possibility for judicial conduct not otherwise amounting to a denial of justice to be nonetheless capable of qualifying as a violation of the minimum standard of treatment under Article 1105 NAFTA.[226] The Tribunal considered it "evident" that distinctions could be made "between conduct that may amount to a denial (or gross denial) of justice and other conduct that may also be sufficiently egregious and shocking", just as it deemed it "apparent" that "concepts of manifest arbitrariness and blatant unfairness are capable, as a matter of hypothesis, of attaching to the conduct or decisions of courts."[227] What needs to be borne in mind, however, is that these propositions were premised on the content of the international minimum standard as articulated in the *Glamis Gold* award. According to the latter, a breach of that standard required an act that is "sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons".[228] Yet, the *Glamis Gold* standard purports to be nothing more than a modern restatement of the *Neer* standard[229] – the general standard conventionally treated as one ostensibly applicable to all governmental acts and as one that, on its part, had actually been developed from the traditional rules relating to denial of justice.[230] Therefore, the discussion in that case boiled down to a question of labelling. As the *Eli Lilly* Tribunal itself noted, the debate about whether the State's liability for the decisions and actions of its courts is restricted to conduct that amounts to a denial of justice turned on how denial of justice was defined.[231]

In the end, the *Eli Lilly* Tribunal ended up examining the "promise utility doctrine" in patent law, developed by Canadian courts through a series of cases, against the yardsticks of arbitrariness and discrimination, without otherwise detailing whether the inquiry was pursued under the rubric of denial of justice or pursuant to some other test.[232] This notwithstanding, the *Eli Lilly* Tribunal did not suggest that a much less stringent test than that for a finding of denial of justice would otherwise apply to determining whether judicial misconduct would be violative of the minimum standard of treatment. According to the Tribunal, only in "very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct" it will be appropriate for a NAFTA Tribunal to assess judicial conduct against the obligations of the respondent State under Article 1105(1) NAFTA.[233] The same cannot be said, however, about the standard applied by the *Tatneft* Tribunal, which clearly interpreted the FET obligation as one that was additive to the minimum standard of treatment. As the Tribunal explained, in the present protection of rights under the FET standard, "[c]onduct which might not be as grave as to amount to egregiousness or bad faith but which nonetheless interferes with the legitimate exercise of rights of the protected individual might equally qualify as a kind of conduct resulting in liability" (albeit still adding that "mere misapplication of domestic law is not enough to give rise to liability absent some kind of adverse intention").[234] The lower threshold ultimately played

[225] ibid [403]-[413].

[226] *Eli Lilly* (n 7), 223.

[227] ibid.

[228] *Glamis Gold Ltd v US (Award)* (UNCITRAL NAFTA, 8 June 2009) [627].

[229] cf ibid [616].

[230] Paparinskis (11), 48-54.

[231] *Eli Lilly* (n 7), [218].

[232] ibid [416]-[442].

[233] ibid [224].

[234] *OAO Tatneft* (n 83), [411].

out differently on the facts of the case, as attested to by the Tribunal's findings on the issues of due process and discrimination. Hence, while certain procedural defects (in the form of *ex parte* decisions, and decisions not being properly served) were considered not to "necessarily" constitute a denial of justice, the same procedural defects were found to "cast important doubt on the degree of compliance with the FET standard".[235] Similarly, while the absence of evidence on nationality-based discrimination was reason not to find a denial of justice, the fact that there was a clear intent to force the exit of the interests originally associated with the foreign investor was "ground for an additional claim concerning the breach of FET".[236]

The *Tatneft* and *Eli Lilly* cases were not the only instances where alleged violations of the FET standard predicated upon the conduct of the courts were not examined through the lens of denial of justice. Earlier in the *Deutsche Bank v. Sri Lanka* (2012), the Tribunal already found that an interim injunction granted by Sri Lanka's Supreme Court on an *ex parte* application constituted a breach of the FET obligation "in form of a due process violation", without otherwise discussing conceptual distinctions between the FET standard and denial of justice.[237] In *Lahoud & Lahoud v. Congo* (2014), in contrast, the Tribunal did note that an eventual denial of justice claim would have failed (on account of the Claimants' failure to exhaust available judicial remedies), but eventually concluded that the violations of due process that occurred in domestic judicial proceedings (relating essentially to domestic courts' failure to provide the investor with adequate time and possibility to present its case), when combined with other actions attributable to the State, nonetheless gave rise to a violation of the FET standard.[238] It is of course difficult to speculate whether or not the due process failures which were at issue in the *Deutsche Bank* and *Lahoud & Lahoud* cases would in themselves have been sufficiently grave to meet the threshold of denial of justice, had this been pleaded. At least insofar as the *Deutsche Bank* is concerned, however, it would seem that the threshold applied by the Tribunal that led to the finding of due process violation was a lower one than the one usually applied in the context of denial of justice claims.[239] Arguably, if appraised through the lens of the denial of justice standard, there would have probably been nothing particularly unusual or shocking in the fact that the interim injunctions in that case had been granted on *ex parte* applications. Furthermore, in view of the temporary nature and reversibility of those injunctions, these could have hardly amounted to a serious due process violation under the denial of justice standard in the circumstances where the Claimant, albeit having had the chance, never attempted to challenge them.[240]

At the end of the day, the question whether or not courts shall be deemed capable of violating the FET standard in other ways than through denial of justice very much depends on one's understanding of the content of the FET standard. Academics, as well as tribunals, have long been divided on whether the latter must be seen as one that is equivalent or one that is additive to the minimum standard of treatment and it would serve little purpose to revisit this debate here.[241] Those treating the FET standard as additive to the minimum standard will be predictably less hesitant to accept that wrongful treatment by the judiciary can amount to a

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[235] See respectively, [351] and [406].

[236] See respectively, [351] and [408].

[237] Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka (Award) (ICSID Case No ARB/09/2, 31 October 2012) [478].

[238] *Lahoud* (n 160), [466]-[475], [488].

[239] cf *supra* 6.2.3.

[240] cf *Deutsche Bank* (n 237), [480]. See also the criticism expressed in this respect in the Dissenting Opinion of Arbitrator Makhdoom Ali Khan. Dissenting Opinion of Makhdoom Ali Khan of 23 October 2012, [102]-[118].

[241] For cogent reasons why the FET cannot be considered as additive to the minimum standard, see Paparinskis (11), 160-167; as well as Montt (n 205), 293-306, who considers the idea of an autonomous FET standard to be 'far too dismissive of the history of state responsibility in international law.' ibid, 306.

violation of the FET aside from the case of denial of justice.[242] However, as it is not disputed that the central tenets of denial of justice – arbitrariness, discrimination, and failure of due process – are commonly taken to be proscribed under both understandings of the FET standard,[243] the issue seems ultimately to be only one of degree: Is a *simple* due process violation sufficient to engage the responsibility of the State under this standard, or must the violation be a *serious* one? And can the standard be engaged on account of an individual instance of procedural irregularities, or is there more required to that end? The answers to these questions hinge strongly on how investment tribunals perceive themselves in relation to domestic courts, and specifically, how extensively they wish to engage in substantive review of domestic judicial processes without digressing into the role of courts of appeal.

7.5.3.2. Is Divergent Application of the Same Standard to Different State Organs Possible?

This, however, is not the end of the problems with the application of the FET standard to the conduct of domestic courts. If one takes as a starting point that it is only through denial of justice that courts can violate the FET standard, this is likely to introduce a distinction as to how the standard is applied to the conduct of different State organs.

The problem was touched upon in *Liman Caspian Oil v. Kazakhstan* (2010), where the Claimant contended that the standards of denial of justice and fair and equitable treatment could not be taken to be synonymous with regard to acts of courts "because this would introduce a distinction between acts of courts and acts of other State entities for which no support is provided by the ECT".[244] The Tribunal did see some "merit" in the Claimant's argument, but held that it was important "to take into account the different functions held by administrative organs and judicial organs of a state and the resulting differences in their discretion when applying the law and in the appeals available against their decisions".[245] Ultimately, the Tribunal did not deem it necessary to deal with the relationship between the FET standard and denial of justice "in general or, if that were at all possible, to make a clear-cut ruling in the abstract on this matter", and thus proceeded from the conventional proposition that denial of justice was "an example" of the FET standard in the sense that "fair treatment implies that there is no denial of justice".[246] As a consequence, the Tribunal also considered a judicial act capable of breaching FET only if the act attains the "high threshold" that is usually necessary for a finding of denial of justice.[247]

The suggestion that different considerations may apply to the appraisal of the conduct of different State organs was not a novel one. Already in the *Mondev* case (2002), the argument had been made that, in applying the international minimum standard, it was "vital to distinguish the different factual and legal contexts presented for decision", and in particular, that it was "one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State."[248] Along the same lines, other tribunals suggested that administrative and judicial organs may be held up to differing standards of

[242] For an example of such an approach, see Demirkol (n 89), 39. See also R Dolzer, 'Local Remedies in International Treaties: a Stocktaking' in DD Caron, SW Schill, A Cohen Smutny & EE Triantafilou, *Practising virtue: inside international arbitration* (OUP, 2015), 280-291.

[243] See P Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), 231-32, who accordingly does not distinguish substantively between denial of justice and due process.

[244] *Liman Caspian* (n 109), [268]. The same proposition was subsequently repeated in *RosInvest v Russia* (n 139), [274].

[245] *Liman Caspian* (n 109), [268].

[246] Ibid.

[247] See ibid, [285].

[248] *Mondev* (n 207), [126].

conduct, particularly when it comes to due process requirements.[249] Then again, not all tribunals were equally willing to accept such distinctions, nor the consequences that could potentially flow from them. In *Rompetrol v. Romania* (2013), for example, the Tribunal was unable to see "valid grounds" for distinguishing between the conduct of public prosecutors and that of the courts "on the basis that the courts enjoy judicial independence whereas prosecutors are in a more direct sense the agents of the executive power" as international law made "no distinction between executive, legislative or judicial organs for the purpose of attributing State responsibility".[250] The Tribunal was equally unable to find "any warrant" for reading into the treaty "an implied term that would subject some claims for breach of 'fair and equitable treatment' to conditions or restrictions, even of a purely temporal kind, that would not apply to other claims to the same standard of protection."[251]

The problem in the end boils down to the question whether the FET standard represents a homogenous standard which applies in one and the same way to the conduct of different State organs, or whether it is not but a composite standard that potentially imposes different obligations upon different State organs.[252] The problem is not just a conceptual one, but as evidenced by the issues raised in the *Rompetrol* award, does also have practical consequences when one is to take into account that denial of justice claims are subject to the condition of judicial finality, whereas other claims grounded in the FET standard are generally not. These are issues which I further discuss in chapter 8.

7.6. Obligations Requiring a Particular Judicial Result

Depending on the treaty language and the context of application, specific treaty standards can eventually be construed as imposing obligations to guarantee a determinate judicial result. At the most elementary level, the obligation of fair and equitable treatment already demands through the prohibition of denial of justice that domestic courts reach decisions which are not arbitrary, grossly unfair, or discriminatory. But there are also standards of treatment that can impose more concrete demands in relation to the substantive outcome of domestic proceedings. Among the treaty standards that would appear most susceptible to concrete materialization in a judicial decision are the various non-discrimination provisions (7.6.1.), compensation provisions (7.6.2.), transfers provisions (7.6.3.), as well as provisions relating to the operation of the investment (7.6.4.) – to remain limited to perhaps just the most obvious ones.

7.6.1. Provisions Requiring Non-Discriminatory Outcomes

A category of treaty obligations that is particularly prone to being construed as requiring a specific judicial outcome are the non-discrimination standards, which can be found in a variety of forms in most investment treaties.

In the first place, there are clauses such as those barring discriminatory impairment of investments, which essentially replicate the absolute non-discriminatory standard that is inherent to the FET obligation and is directed at ferreting out any nationality-based discrimination in the exercise of governmental authority. An example where one such clause has been applied to

[249] See especially *International Thunderbird v Mexico (Award)* (UNCITRAL, 26 January 2006) [200] (holding that the 'administrative due process requirement is lower than that of a judicial process'); and *Apotex v USA* (n 56), [9.22] (suggesting that certain due process requirements only make sense in the context of adjudicatory proceedings but not in the context of regulatory decision-making).

[250] *The Rompetrol Group NV v Romania (Award)* (ICSID Case No ARB/06/3, 6 May 2013) [164].

[251] ibid [160].

[252] On the different conceptualizations of the standard, see also Dumberry (n 243), 225-228.

reviewing the outcome of domestic judicial procedures is the award in *Noble Ventures v. Romania* (2005). The investor in that case claimed that the proceedings for judicial reorganization that resulted in it losing control of the steel mill that it had previously acquired from the Romanian State, were contrary to Article 2(2)(b) of the US-Romania BIT which prohibited discriminatory impairment of investments. The Claimant's grief was directed primarily against the budgetary creditors (i.e. various local employment, pension, social security, and health insurance agencies) that purportedly initiated the judicial reorganization proceedings for reasons other than those relating to ordinary commercial purposes. In determining whether the investment suffered from discriminatory impairment, however, the Tribunal took also into account the treatment that Claimant received through the Romanian court declaring the company insolvent and appointing a judicial administrator. On the facts of the case, the discrimination claim was dismissed (1) because Claimant failed to prove that there were other investors with debt problems as grave as that plaguing its own investment, but which were not subjected to judicial proceedings (which related to the question of deferential treatment by the budgetary creditors); and (2) because Claimant had not demonstrated that there were other investors that were left unaffected by judicial proceedings although they were in similar situations (which thus more directly related to the question of deferential treatment by the courts).[253] Apart from demonstrating that clauses prohibiting discriminatory impairments may under circumstances dictate specific outcomes, the *Noble Ventures* award above all attests to the difficulties that an investor may face in finding appropriate comparators to sustain its discrimination claim. The more recent award in *Eli Lilly v. Canada* (2017), where Claimant failed to prove on the facts that the promise utility doctrine applied by Canadian courts is discriminatory in its effects, attests to exactly the same problem.[254] A further difficulty in the context of discrimination claims will lie in the fact that arbitral tribunals will generally lack access to the evidentiary record on which the comparator cases had been decided. As the outcome of particular proceedings frequently depends on specific documentary evidence adduced by the parties, in the absence of this evidence, investment tribunals will have difficulties establishing that domestic cases involving similar issues were in reality also decided differently.[255]

As already mentioned above, among the non-discrimination provisions, a particular type are the NT and MFNT clauses, which prescribe treatment that is no less favourable to, respectfully, that accorded to national investors/investments, and that granted to other foreign investors/investments. As noted above, these contingent standards essentially demand from the State to grant the investor the best treatment available to any of the investor's competitors operating in like circumstances. This, of course, relates not only to the procedural treatment in courts, but also to the outcome of judicial proceedings. Whereas the former aspect stood more central in the *Loewen* award discussed above, the latter aspect was more directly considered in *International Thunderbird Gaming v. Mexico* (2006). In the circumstances of that case, the investor sought damages for injuries allegedly resulting from the regulation and closure of its gaming facilities by Mexican authorities. Part of the claims was based on the NT standard of Article 1102 NAFTA, which the Mexican authorities supposedly have breached in the enforcement of gambling laws. In support of the argument that the relevant investments were treated worse than those of Mexican nationals, Claimant relied on the fact that some Mexican gambling facilities had been able to gain temporary injunctive relief in Mexican courts, which thus allowed the competitors to continue their operations, whereas Claimant's challenges against the enforcement measures were generally denied.[256] The Respondent argued that the investor was not "in like

[253] *Noble Ventures v Romania (Award)* (ICSID Case No ARB/01/11, 12 October 2005) [180].

[254] *Eli Lilly* (n 7), [431]-[441].

[255] See *Ryan & Schooner Capital v Poland* (n 112), [494], where the investor for this reason failed to establish discrimination by Polish Tax courts.

[256] *Thunderbird v Mexico* (n 249), see [75]-[84].

circumstances" with the operators of facilities that had been granted temporary injunctive relief precisely because it was not granted such injunctive relief and because it eventually abandoned recourse to judicial proceedings for relief in Mexico.[257] Ultimately, the Tribunal found no violation of the national treatment standard of Article 1102 NAFTA, concluding that the Mexican authorities acted uniformly and consistently in pursuing the closure of gambling facilities. But to arrive at such conclusion, the Tribunal reviewed solely the conduct of the administrative authorities, which it found not to be discriminative, because the authorities invariably challenged all relevant court decisions in which injunctive relief had been granted. Curiously, however, it did not separately assess whether the Mexican courts themselves had accorded less favourable treatment through the granting of injunctions to other plaintiffs, and not the Claimant.[258] Therefore, the *International Thunderbird* case may not be the best example of the application of the NT standard to the judicial context – although, given that the emphasis was placed on the fact that the appeals in the cases involving the Claimant's Mexican competitors were still pending, the Tribunal might have just been suggesting that a violation of the NT standard could only be determined once judicial finality was achieved.

Apart from the more common types of non-discrimination provisions, there are also more specific ones, such as those granting national or MFN treatment solely in matters like taxation or compensation for losses resulting from war. The former are not particularly ubiquitous, as States frequently tend to exclude taxation matters from the ambit of their investment treaties. They are, however, a frequent occurrence in the BITs concluded by the Netherlands which aim to secure, by means of a separate treaty clause, that investors are granted national treatment and MFN treatment with regard to taxes and fiscal advantages in general.[259] This type of self-standing clauses have been interpreted as constituting *lex specialis* in relation to general standards of treatment, with the consequence that matters of taxation, fees, charges and fiscal deductions and exemptions were held to be subject only to the NT and MFNT obligations as required under the separate provision, and not to the general standards, such as the FET obligation.[260] Just as the general NT and MFNT obligations, these specific standards demand from the courts to grant the investor in taxation matters the best treatment available to any of the investor's competitors operating in like circumstances.

A more common occurrence are so-called "war clauses", which aim at ensuring non-discriminatory treatment in relation to losses arising from war, civil strife, or other type of emergencies. In most investment treaties, clauses of this kind do not grant foreign investors an absolute right to compensation for such losses, but require NT and/or MFNT as regards restitution, indemnification, compensation or other settlement.[261] As with the general non-discrimination standards, the effect of such clauses would be to demand from domestic courts – in the event that the matter comes within their purview, such as where judicial appeal is made possible

[257] ibid [174].

[258] ibid [179].

[259] See eg art 4 Netherlands-Nigeria BIT, which stipulates that '[w]ith respect to taxes, fees, charges and fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who have investments in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned.' Similar or identical provisions can be found in a great number of the Netherlands' BITs.

[260] ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela (Decision on Jurisdiction and Merits) (ICSID Case No ARB/07/30, 3 September 2013) [291]-[317]; and Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v Bolivarian Republic of Venezuela (Award of the Tribunal) (ICSID Case No ARB/07/27, 9 October 2014) [239]-[248].

[261] See eg art 1105(2) NAFTA; or art 7 Netherlands–Armenia BIT (2005).

in case of dissatisfaction with the awarded compensation – that any host State measures directed at offsetting or minimizing losses are applied in a non-discriminatory manner.

7.6.2. Compensation Provisions

Another type of treaty provisions that are capable of being construed as demanding a specific judicial outcome are those relating to compensation. Stipulations relating to the latter are most commonly found in expropriation provisions, which permit States to expropriate investments as long as the taking in question is effected, among other conditions, against the payment of compensation. The majority of investment treaties impose in this respect the standard of prompt, adequate and effective compensation (or what is commonly known as the Hull standard), while some treaties also explicitly spell out the investment's fair market value as being the appropriate measure for determining what constitutes an adequate compensation.[262] Insofar as judicial conduct is concerned, these provisions are directly relevant especially in situations where a formal transfer of title is effected by means of judicial decision. Failure to award in such cases adequate compensation by courts will engage the responsibility of the host State.[263]

Furthermore, stipulations concerning compensation are in some investment treaties found in "war clauses". While most such provisions, as discussed above, merely require non-discriminatory treatment in relation to compensation or other measures of reparation, some go a step further by granting investors an absolute right to restitution or compensation for a specific category of losses – most frequently those resulting from the requisitioning or unnecessary destruction of their investments by the armed forces or other authorities of the host state.[264] This concrete right is one that would have to be respected also by judicial organs in the event that they become involved, for example, in deciding entitlements to such compensation, or the quantum thereof.

7.6.3. Transfers Provisions

Another type of provisions that may in specific circumstances be capable of being construed as one imposing a determinate judicial result are those granting covered investors or investments freedom of monetary transfers. The right of transfers guaranteed by such provisions, which are otherwise present in nearly all investment treaties,[265] is often-times subject to specific exceptions and/or limitations, particularly as States want to retain regulatory autonomy in relation to balance-of-payments and other monetary matters.[266] In some investment treaties, however, the right is fairly unqualified.[267] In those situations, domestic courts will be bound to respect, and give effect to that right when its exercise becomes subject of domestic judicial proceedings. Of course, the unfettered exercise of such right can in itself obstruct the normal administration of domestic justice, which is why some investment treaties, such as the US-Uruguay BIT, provide for exceptions to the right to transfer when this is necessary to "ensuring compliance with orders or judgments in judicial or administrative proceedings."[268]

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[262] For an overview, see UNCTAD, *Expropriation: A Sequel* (Series on Issues in International Investment Agreements II, 2013).

[263] cf *Rumeli (Annulment)* (n 171), [116].

[264] See eg art 12(2) ECT; or art 4 UK–Albania BIT (1994).

[265] On this standard of treatment, see generally Salacuse (n 23), 256-70.

[266] See eg art 17 Korea-Japan BIT (2002).

[267] See eg art 6 UK-Albania BIT (1994); art 5 Netherlands-Armenia BIT (2005).

[268] Art 7(4)(e).

7.6.4. Specific Provisions relating to the Operation of the Investment

Further examples of treaty obligations that may dictate specified judicial outcomes can be found in provisions imposing specific conditions, or granting specific rights, in relation to how the investment is operated. One category of such provisions are those relating to performance requirements, which can occasionally be found in some BITs, particularly those concluded by the US.[269] These frequently contain stipulations that can be directly invoked in domestic proceedings and will have to be respected by judicial organs. An example of such commitments can be found in Article 8(1) of the US-Rwanda BIT, which prohibits a party to "impose or enforce any requirement or enforce any commitment or undertaking" relating to matters such as the export of a particular level of goods or services, the achievement of a particular level of domestic content in production, the purchase or use of particular domestic goods, but also relating to restrictions of sales of goods or services, as well as the transfer a particular technology, a production process, or other proprietary knowledge. Similar provisions are present in NAFTA,[270] and other US investment treaties, as well as in investment treaties concluded by other states.[271] That such requirements must be respected by judicial organs is confirmed by the exception in Article 1106(1)(f) NAFTA, which carves out from the prohibition requirements relating to the transfer of technology, production processes, or other proprietary knowledge when these are "imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement."

Another example in this category are provisions relating to the personnel associated with an investment. Provisions dealing with the entry and sojourn of foreign nationals associated with an investment are not a common occurrence in investment treaties; to the extent that they are present at all, they are usually formulated in language that is non-obligatory in nature.[272] In particular, very few treaties grant the right of entry to foreign investors or their employees; and to the extent that they do so, this right remains subject to the host country's immigration laws.[273] Some investment treaties do, in contrast, grant investors or their investments the right to employ key personnel of their choice, regardless of nationality or citizenship. Though such right is usually conditioned by the requirement that the persons in question had been granted permission to enter, stay, and work in the host State,[274] it nonetheless has the capacity of overriding domestic employment legislation, such as that limiting the ability of foreigners to work in certain sectors. In the event that the investor's treaty right to engage personnel of its choice becomes subject of domestic proceedings,[275] domestic courts will be bound to give effect to those provisions.

7.7. Standards of Review Applied to Determining Violations of Discrete Treaty Standards

As a final matter, it is necessary to consider the standards of review applied by investment tribunals in scrutinizing individual domestic decisions against the requirements imposed by

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[269] cf Salacuse (n 23), 331-33.

[270] NAFTA, art 1106(1).

[271] See eg Korea-Japan BIT (2002), art 9.

[272] On this provisions generally, see Salacuse (n 23), 333-36.

[273] See eg art 8(1) Korea-Japan BIT (2002).

[274] See eg art 11(2) ECT; or art 8(3) Korea-Japan BIT (2002). See also art 1107(2) NAFTA, which grants such right to the appointment of senior management positions, but provides for exceptions in relation to appointments to governing boards.

[275] cf *Sumitomo Shoji America, Inc v Avagliano*, 457 US 176 (1982), concerning the right of a US subsidiary of a Japanese company under the US-Japan FCN Treaty to employ executive personnel and technical experts of their choice.

discrete treaty standards. The focus here is on three specific types of claims, where scrutiny of individual judgments may be necessary with a view to establishing a treaty breach; namely, in relation to expropriation claims (7.7.1), claims relating to violations of variously construed obligations to provide a system of adequate judicial protection (7.7.2), and claims of purported arbitrariness of judicial conduct (7.7.3).

7.7.1. Standards of Review Applied to Establishing the Wrongfulness of Judicial Conduct as a Predicate of Expropriation Claims

As noted in 7.3.2., in relation to most expropriation claims predicated upon judicial conduct, the wrongfulness of such conduct was grounded in denial of justice. As the standards of review applicable to determining the propriety of judicial conduct in the context of denial of justice claims has already been subject of extensive discussion in 6.3., the present section concentrates on those cases where the wrongfulness was assessed by reference to other yardsticks; namely, domestic law and specific international obligations, respectively.

Where the propriety of judicial interferences with the investor's rights was assessed by reference to domestic law, investment tribunals adopted a variable approach. In *Saipem* (2008), the Tribunal was deferential, in that it refrained from conclusively establishing whether, under the applicable Bangladeshi law, the revocation of an arbitration agreement lay exclusively within the authority of a local arbitral tribunal, or whether such authority was one shared with the local courts.[276] In *Al-Bahloul v. Tajikistan* (2009), in contrast, judicial decisions were scrutinized against the test of manifest incorrectness, leading the Tribunal to conclude that the impugned decisions were not "manifestly in contradiction with the Tajik legislation."[277] In *CCL v. Kazakhstan* (2004), in turn, the test applied was one of correctness, resulting the Tribunal in finding the decision improper because the impugned termination of the contract did not follow the terms of the contractual bargain.[278]

Non-deferential were tribunals also in assessing the conformity of judicial decisions with international obligations other than those relating to the prohibition on denial of justice. In the same *Saipem* case, the Tribunal moved to assess whether the decisions of Bangladeshi courts amounted to an abuse of rights. This assessment proceeded on the basis of a *de novo* review of the matters decided by domestic courts. This resulted in the finding that there was not a "slightest trace of error or wrongdoing" on the part of the local arbitral tribunal and that, therefore, the Bangladeshi courts' decision to revoke that tribunal's authority "lack[ed] any justification", was based on "an ill-founded finding", and drew consequences that were "unfounded".[279] The Tribunal recognized that national courts have substantial discretion in ordering the revocation of an arbitrator's authority in case of misconduct, but nonetheless concluded that the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process.[280] '

The same findings subsequently informed the *Saipem* Tribunal's conclusion in that case that the courts' conduct violated the obligation to respect arbitration agreements under Article 2 of the 1958 New York Convention. Though acknowledging that Bangladeshi courts only revoked the authority of the arbitrators, and not the arbitration agreement as such, the Tribunal took the view that their conduct *de facto* frustrated the arbitration agreement, and was further of the opinion that, in light of the abusive way in which the courts exercised their supervisory

[276] *Saipem* (n 99), [143]-[144].

[277] *Al-Bahloul v Tajikistan* (n 130), [284].

[278] *CCL v Kazakhstan* (n 131), [165].

[279] *Saipem* (n 99), [155].

[280] ibid [159].

jurisdiction, it would have been unrealistic for the arbitration to be successfully pursued with a newly appointed arbitral tribunal.[281] Equally non-deferential was the Tribunal in *ATA Jordan* when it came to determining the Jordanian courts' compliance with the same obligations under Article 2 of the 1958 New York Convention. In the circumstances of that case, the courts annulled a pre-existing commercial award, as well as extinguished the underlying contractual arbitration clause, in accordance with the requirements of the then newly adopted Jordanian Arbitration Law. In finding that the Tribunal violated Article 2, the Tribunal applied a correctness test by taking the view that the Jordanian Court of Appeal and Court of Cassation could have complied with their duty in this case by refusing to apply retroactively the extinguishment rule introduced by the new law.[282]

7.7.2. Standards of Review Applied to Determining Failures to Provide a System of Adequate Judicial Protection

It is worth examining, next, the standards of review applied to the scrutiny of specific judgments in the process of determining whether the host State failed to provide a system of adequate judicial protection. While not all investment tribunals considered an inquiry into the propriety of individual judicial decisions to be relevant to establishing a failure of the system, those that did generally suggested that a review would have to be a deferential one.

Some tribunals thus maintained that the relevant assessment was at any rate not based on a test of correctness. The Tribunal in *Chevron I* thus explained that the test for establishing "effectiveness" in relation to the "effective means" provision required "that a measure of deference be afforded to the domestic justice system", and that accordingly a tribunal was not "empowered […] to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*."[283] The Tribunal in *Unglaube*, similarly posited that the test for establishing a failure to provide "adequate legal remedies" pursuant to the FET standard entailed proving more than that the court simply arrived at "the wrong result".[284] In other cases, investment tribunals formally endorsed the test of reasonableness. Thus, according to the Tribunal in *Frontier Petroleum*, the test for establishing a violation of the FPS standard was whether the court has acted in good faith and the decisions reached were "reasonably tenable".[285]

7.7.3. Standards of Review Applied to Determining the Arbitrariness of Judicial Decisions

The last instance of practice that must be considered is the standard of review applied by the Tribunal in *Eli Lilly v. Canada* in determining arbitrariness of judicial conduct – to the extent that the Tribunal may purportedly have assessed arbitrariness under a different heading than that of denial of justice. In reality, the standard was not any less deferential than that applied by investment tribunals in assessing the propriety of judicial decisions in the context of denial of justice claims, which was discussed in 6.3.

In the circumstances of the *Eli Lilly* case, Claimant alleged that the promise utility doctrine applied by Canadian courts in the context of patent applications was arbitrary because it was unpredictable and incoherent, as well as lacking a legitimate public purpose. The Tribunal evaluated the doctrine overall against a test of reasonableness. The interpretive process

[281] ibid [166]-[169].

[282] *ATA Construction v Jordan* (n 121), [128].

[283] Chevron (Contractual Claims) (n 57), [247].

[284] *Unglaube v Costa Rica* (n 18), [272].

[285] *Frontier Petroleum Services* (n 26), [273].

undertaken by Canadian courts was thus found to fall "well within the scope of duties that courts are asked to perform every day", while the purportedly inconsistent determinations were deemed to be "expected, especially in an adversarial system in which courts are presented with different evidence and expert testimony across cases".[286] Overall, the doctrine as such had a "legitimate public policy justification" and the Tribunal did not deem it necessary to opine on whether it was "the only, or the best, means of achieving these objectives", for what mattered was that the doctrine was "rationally connected to these legitimate policy goals."[287] Likewise, a specific rule under the doctrine preventing the post-filing of evidence of utility was held to be have "a rational connection" with the stated goal of preventing patents from being granted on the basis of speculation, whereas a rule requiring applicants to disclose the basis of a sound prediction of utility in the patent was deemed "whether or not […] the preferred approach", to be "plainly not an irrational one."[288] Eventually, the Tribunal's conclusion that the doctrine was not an arbitrary one had found support in the judicial decisions involving the Claimant. In the circumstances where those decisions were found to have a foundation in Canadian law and were coherent and consistent with the policy justifications stated by Respondent, the Tribunal did not deem it appropriate to "question the correctness of the policies or the courts' decisions."[289]

7.8. Conclusions

Based on the preceding discussion, it is thus possible to conclude that domestic courts are capable of violating concrete standards of treatment prescribed by investment treaties also in other ways than through denial of justice, and that such view finds sufficient support in the ever growing practice of investment tribunals. The chapter identified different categories of investment treaty obligations susceptible of being violated through the intermediary of domestic courts – each of which, however, giving rise to their own conceptual problems when it comes to their application to judicial conduct.

The first category of obligations that have appeared most susceptible of being engaged on account of judicial conduct are those imposing the maintenance of an adequate system of justice. Admittedly, none of the conventional standards of treatment presently found in investment treaties specifically addresses the question of the investors' right of access to domestic judicial procedures, or more concretely prescribes the treatment that the investor is entitled to receive at the hands of the judiciary. In following the customary international law requirement demanding the maintenance of a system of justice that adequately protects the rights of foreigners, however, many investment tribunals began to extrapolate a positive duty to provide and maintain an adequate system of justice from existing treaty standards, such as the fair and equitable treatment standard, the standard of full protection and security, the non-impairment standard, or even the due process obligation that commonly conditions the legality of expropriations. In most cases, the nature and scope of the obligation thus construed did not differ in their nature from the traditional duty under customary international law: the standard was not considered to be a particularly strenuous one, and certainly not one that would specifically prescribe as to how the domestic judicial system was to be organized, let alone dictate how this system was expected to perform.

Departing from this approach was the interpretation of the more specific treaty clauses demanding the provision of "effective means of asserting claims and enforcing rights", a provision which can otherwise be found with less frequency in the investment treaty landscape. In *Chevron* and *White Industries* cases, the tribunals interpreted such provisions as providing an

[286] *Eli Lilly* (n 7), [420]-[421].
[287] ibid [423].
[288] ibid [425], [428].
[289] ibid [430].

independent treaty standard – one that was held to impose a distinct and potentially less-demanding test for assessing the performance of the host State's judicial system. In both cases, the Respondent State was thus found liable for violating such provisions on account of judicial delays, and as demonstrated by the *White Industries* case, even in circumstances where such delays have not otherwise met the threshold for a denial of justice. It can be seriously debated whether construing the "effective means" clause in a way that imposes a more exacting standard than that demanded by customary international law, really accords with the intention of treaty drafters. Yet, given the *Chevron* and *White Industries* precedents, it is not surprising that the "effective means" clause has since become a particularly appealing alternative to denial of justice claims. In practice, it remains yet to be seen how the clause will be applied in circumstances other than those pertaining to judicial delays. However, in accordance with the *Chevron* award, where the test of "effectiveness" of a remedy was held to apply to a variety of State conduct, the clause may be capable of broader application. It remains to be seen whether investors will seize on this proposition in attempting to obtain redress for judicial misconduct.

Another category of treaty obligations that were deemed capable of being engaged on account of judicial conduct are those that are generally intended to provide legal and economic security to the investment as such – namely, the expropriation clause, the umbrella clause, and the fair and equitable treatment standard in its protection of investor's legitimate expectations. As explained in the chapter, with a view to preserving the economic value of the investment, these standards protect the proprietary rights forming the basis of the investment operation (as in the case of the expropriation and umbrella clauses), or the integrity of the legal framework in which the investment is imbedded (as in the case of the legitimate expectations component of the FET standard). Due to the fact that the courts, in their ordinary exercise of judicial functions, are susceptible of interfering in the rights that form the object of protection of those obligations, it is not surprising that violations of these standards have often been invoked in the face of purportedly improper judicial conduct. Yet, establishing violations of these standards has not proven any less difficult. This is because, in practice, the wrongfulness of the impugned judicial conduct will usually form the factual predicate that will be relevant to establishing such violations, and in order to establish such wrongfulness, investment tribunals have not infrequently had the habit of resorting to the demanding standards for denial of justice.

Admittedly, as also argued in this chapter, denial of justice is not the only measure on the basis of which such wrongfulness can be established. The impugned courts' conduct can arguably also fail to conform to other international obligation of the State. Hence, in the notorious *Saipem* case, the prerequisite wrongfulness was found in the courts' violations of specific obligations under the 1958 New York Convention. And as the latter was considered to impose a more exacting standard of conduct than that required by the prohibition of denial of justice, the *Saipem* case has allowed for the inference that recasting a challenge against improper judicial conduct in the form of an expropriation claim may provide an alternative to the demanding standard of denial of justice. But the alternative may be more apparent than real. The less demanding standard did not follow from the fact that the claim was brought as one concerning a judicial expropriation, but from the more exacting nature of the obligation that had been applied to determining the wrongfulness of the judicial conduct. The approach taken in the *Saipem* case may, conceptually, not be fundamentally incorrect when it comes to the question of how the propriety of judicial conduct could be measured. Where this approach can questioned, though, is in the Tribunal's competence to determine the propriety of such conduct by reference to the 1958 New York Convention in circumstances where the Tribunal's jurisdiction was limited solely to expropriation claims. The viability of judicial expropriation claims being presented in other ways than through the lens of denial of justice ultimately depends on the extent to which investment tribunals will be competent and able to pronounce themselves on violations of such other obligations.

The chapter eventually discussed also other investment treaty provisions; some capable of being construed as requiring judicial treatment of a particular kind, others as possibly demanding particular judicial outcomes. These provisions, as the analysis has shown, have thus far not proven particularly successful as a basis on which to bring claims predicated on judicial conduct. For one, the various claims concerning discrimination or non-equal treatment at the hands of the judiciary have turned out to be difficult to establish on the facts. Besides, quite a few of these specific treaty obligations – such as various treaty prohibitions prohibiting discriminatory or arbitrary treatment – seem to already form part of the general denial of justice standard, and to the extent that they have been applied as separate standards, they have not been interpreted as demanding a more exacting standard of treatment. The test of arbitrariness, for example, has been applied pursuant an equally deferential standard of review as the standard applied to assessing denial of justice claims. The question, in such cases, may then not necessarily be so much whether these additional standards hold the judiciary against more exacting standards of conduct, but whether their violations could be easier to establish. One key issue in that respect concerns the question whether individual judicial decision that are injurious to an investor will in itself be sufficient to hold the State responsible under international law, or whether such responsibility can only be engaged once the judicial system as a whole is tested, as in the case of denial of justice. This is a question that will be further addressed in the next chapter.