8. THE JUDICIAL FINALITY REQUIREMENT

One of the key questions that continue to permeate the discussions on host State liability for judicial conduct concerns the extent to which an individual decision of a domestic court, which on account of its content or the process through which it has been rendered is contrary to a State's obligation under international law, is *ipso facto* sufficient to engage that State's responsibility. As explained in the present chapter, the question has initially arisen in the context of denial of justice claims, where the principle has eventually been accepted that responsibility can only arise once judicial finality had been achieved – that is, once the investor had exhausted all available local remedies (8.1.). But this has soon led to the question whether judicial finality may also be applicable in relation to other claims premised on the conduct of judicial organs (8.2.). Furthermore, it has given rise to discussions whether a certain degree of resort to, or even exhaustion of local remedies could also constitute a necessary factual predicate of claims arising out of the conduct of non-judicial organs (8.3.). As this chapter intends to demonstrate, none of the currently advanced rationales for the judicial finality rule provides a sufficiently solid conceptual underpinning that would allow for a consistent application of the rule in relation to violations of investment treaty standards occurring through the medium of domestic courts but not in the form of denial of justice (8.4.). This notwithstanding, with a view to provide a comprehensive overview of the tribunal's approach to this issue, the chapter concludes by looking at how the judicial finality rule has been applied in practice (8.5.).

8.1. Judicial Finality as a Substantive Condition of Claims of Denial of Justice

As noted already in chapter 2, in the traditional law on the espousal of international claims, it was fairly uncontroversial that an injured foreigner had to first resort to the courts of the injuring State and exhaust the local remedies available before the foreigner's State of nationality could take up the claim in the exercise of diplomatic protection.[1] In the context of the latter, the local remedies requirement controlled the admissibility of an international claim. It was also more or less accepted that, where the foreigner would experience a denial of justice in the pursuit of those local remedies, such a denial of justice would compound an initial international wrong where such wrong already existed, or perpetrate an actionable international wrong where the initial wrong did not *per se* give rise to international responsibility.[2] As a matter of general proposition, what was also established was that at least some recourse to domestic remedies was necessary in order to substantiate a claim for denial of justice,[3] and that – except in extraordinary situations[4] – the mere existence of supposedly defective judicial procedures was not in itself sufficient to incur responsibility in the absence of such procedures being first tested.[5] What was not entirely

[1] See also E Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publishing 1915), 817ff.

[2] C Eagleton, The Responsibility of States in International Law (NYU Press 1928), 98-99; see also CF Amerasinghe, Local Remedies in International Law (2nd ed CUP 2004), 92-97.

[3] *Mexican Union Railway (Ltd) (Great Britain) v United Mexican States February* (V UNRIAA 115, 1930), 122 ('there can be no question of denial of justice or delay of justice, as long as justice has not been appealed to').

[4] 'This would arguably include situations where there is a state of anarchy or previously established instances of denials of justice manifesting a total absence of justice in a State. See C Durand, 'La responsabilité internationale des Etats pour déni de justice' (1931) 5 Revue Générale de Droit International Public 694, at 721.

[5] For a general discussion, see AV Freeman, *The International Responsibility of States for Denial of Justice* (Longman 1938), 436-41, concluding on the basis of an examination of practice that 'as a general proposition, no defects in judicial procedure or organization can be invoked by the State of the alien except to support a demand based upon a judicial decision already handed down' at 441.

established, on the other hand, was whether responsibility for denial of justice arose only after the local remedies had been fully *exhausted*, or whether it already existed as soon as a lower court had committed an act of denial of justice.[6] At that time, however, the issue was without much consequence in practice as claims of denial of justice could at any rate only be espoused upon the exhaustion of local remedies.[7]

The conundrum began to have practical implications in the context of investment arbitration. Insofar as recourse to local remedies has generally been dispensed with as a procedural requirement conditioning access to such arbitration,[8] the question arose whether exhaustion of such remedies was necessary to establish a State's responsibility on account of judicial misconduct. In face of the dispensation of the requirement, some have come to suggest that recourse to the domestic judicial system became "ancient history" with respect to denial of justice claims.[9] As the following sections will demonstrate, the latter suggestion has not materialized, as the obligation to exhaust domestic remedies has largely been maintained as a substantive element of claims of denial of justice and potentially other claims predicated upon the wrongful conduct of domestic courts.

8.1.1. The *Loewen* Case and the Endorsement of the Judicial Finality Rule

Notwithstanding the important procedural changes that investment arbitration brought about in the settlement of investment disputes, when the responsibility of a State for the conduct of its courts was invoked before an investment tribunal in the *Loewen* case, the view was eventually taken that responsibility for denial of justice could only arise if there was *final action of the judicial system as a whole*.[10] This conclusion was premised on the distinction – initially introduced by the Respondent, but eventually accepted by the Tribunal – between the "substantive requirement" that allegedly existed under customary international law and demanded finality of judicial action if acts of the judiciary were to rise to a breach of international law, on the one hand; and the requirement of exhaustion of local remedies that was purportedly merely a procedural condition precedent to invoking the responsibility of a State, on the other.[11] The substantive requirement – opportunely described as the rule of "judicial finality", to emphasize its distinction with the traditional local remedies rule – was claimed to derive from the alleged absence of any "instance […] in which an international tribunal has held a State responsible for a breach of international

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[6] For the latter view, see especially CC Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little Brown and Co 1922), at 509 ('when an inferior court, like any other authority of a State, denies justice, national responsibility is established, but the reasonableness of interposition seems to depend upon the opportunity for redress obtainable by appeal to the court of last resort'); and E Kaufmann, 'Règles générales du droit de la paix' (1935) 54 Recueil Des Cours 309, at 457. Some contemporary writers seemingly adhered to the same view. See Amerasinghe (n 2), 101. For a general discussion of the different views, see Freeman (n 5), 445-46; H Urbanek, 'Das völkerrechtsverletzende nationale Urteil' (1958-59) 9 ÖZöR 213, 235-46.

[7] Discussions on denial of justice were so tightly interwoven with the rule of exhaustion of local remedies as a condition of a claim that many arbitral precedents lend themselves to different interpretations. See eg *Spanish Zone in Morocco (Claim LIII, Ziat, Ben Kiran)* (II UNRIAA 729, 29 December 1924), 731 speaking of an established principle, but formulating it in terms of admissibility ('c'est un principe reconnu du droit international que celui suivant lequel […] une réclamation d'ordre international présentée sur la base d'une allégation de déni de justice, *n'est recevable* que si les différentes instances de la juridiction locale compétente ont été au préalable épuisées'; emphasis added).

[8] See *infra* III.2.

[9] D Wallace, 'State Responsibility for Denial of Substantive and Procedural Justice under NAFTA Chapter Eleven' (1999-2000) 23 Hastings Int'l & Comp L Rev 393, at 397.

[10] Loewen Group, Inc and Raymond L Loewen v United States of America (Award) (ICSID Case No ARB(AF)/98/3, 26 June 2003) [142]-[154], [158]-[159].

[11] ibid [143]-[144].

law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system".[12]

Once the finality rule was thus conceived as forming part of the primary obligation itself, the *Loewen* tribunal could not uphold a presumption that the rule may have been dispensed with in the context of the NAFTA, either expressly or implicitly – not even in the face of Article 1121(1)(b) NAFTA which otherwise required a waiver of domestic proceedings as a condition of making a claim to a NAFTA tribunal. According to the Tribunal,

> "If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law."[13]

Thus, while presented in a different guise, the *Loewen* decision effectively re-imposed the local remedies requirement with respect to a specific class of claims.

Expectedly, the decision was not met with uniformly positive reactions. While some have praised it for being the correct confirmation of well-established jurisprudence,[14] others have criticized it for resting on an unwarranted distinction between the substantive and procedural aspects of the local remedies rule,[15] questioning the policy implications of requiring exhaustion with respect to the conduct of courts and not with respect of other State organs,[16] and doubting about the validity of some of its conceptual underpinnings.[17] Indeed, the Tribunal itself appeared not entirely convinced that the principle of judicial finality could be distinguished from the local

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[12] ibid [154].

[13] ibid [162].

[14] See eg C Greenwood, 'State Responsibility for the Decisions of National Courts' in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart 2004), 61; J Paulsson, *Denial of Justice in International Law* (CUP 2005), 101 (asserting that the correctness of the principle was not open to doubt); or N Rubins, *Loewen v United States: The Burial of an Investor State Arbitration Claim* (2005) 21 Arbitration International 1, at 16 (noting that the idea of judicial finality appears to be 'solidly grounded in customary law').

[15] See eg BK Gathright, 'A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven' (2005) 54 Emory Law Journal 1093, at 1115-29 (arguing that there is no precedent for distinguishing the exhaustion requirement that applies in denial of justice claims from that of other claims for state responsibility, and that the purposes advanced by the *Loewen* Tribunal for the finality requirement are already included in the local remedies rule); or C McLachlan, L Shore and M Weininger, *International Investment Arbitration* (OUP 2009), at 232 (criticizing the decision's reliance upon 'cases which predate the advent of investor-State arbitration, and were therefore predicated on a system of remedies which that system was […] designed to supersede.')

[16] See especially AK Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2005) 45 Virginia Journal of International Law 809, at 858 (arguing that from a policy perspective 'it is difficult to distinguish the desirability of requiring a decision of the highest body within a court system from requiring a final decision from the highest official in an administrative system'); and Gathright (n 15), 1108-17 (criticizing the *Loewen* decision specifically for being inconsistent with the modern understanding that denial of justice can also be committed by other organs than courts).

[17] See eg M Sattorova, 'Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct' (2012) 61 ICLQ 223, 228-33 (questioning the soundness of construing the obligation not to deny justice as one resting on the duty to provide a fair system of justice). See also U Kriebaum, 'Local Remedies and the Standards for the Protection of Foreign Investment', in C Binder et al. (ed), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 417-462, at 443 (criticizing the tribunal for having failed to provide a meaningful distinction between the requirement to exhaust local remedies and the finality requirement).

remedies rule. While first admitting in its Decision on jurisdiction (2001) that the finality rule was "no different from the local remedies rule",[18] the Tribunal eventually backtracked from this proposition in its Final Award (2003), suggesting that regardless of the similarities in their content, each rule served "different purposes"[19] – only to admit in another part of the Final Award that the purpose of the finality rule was essentially the same as that of the local remedies rule – which was "to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."[20]

8.1.2. The Rationale for the Judicial Finality Rule in the Context of Denial of Justice

Nonetheless, if one is to follow the reasoning of the *Loewen* Tribunal, the main explanation why an aberrant decision of a lower court was capable of occasioning merely an inchoate breach of international law (which was to become complete when judicial finality is fully achieved), was to be found in the *very nature* of the duty that is violated through denial of justice. Relying on the views expressed by James Crawford in the context of his work with the ILC, the *Loewen* Tribunal namely endorsed the proposition that the duty incumbent upon States under customary international law was to provide "a fair and efficient *system* of justice".[21] This being an obligation to maintain "a system of a certain kind", it followed that "systematic considerations" enter into the question of breach, with the consequence that "an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act".[22]

Loewen's rationale for the judicial finality rule in the context of denial of justice claims has subsequently been endorsed by academic commentators without much questioning.[23] In his now famous modern treatise on the topic, Paulsson endorsed the judicial finality rule by reference to the fact that it is "in the very nature of the delict that a state is judged by the final product – or at least a *sufficiently* final product – of its administration of justice."[24] As the following section will further demonstrate, investment tribunals accepted the finality rule by reference to the same proposition. But it is worth noting that, in earlier writings, one can find other rationales as to why exhaustion of remedies was necessary to establish a denial of justice. In considering whether a judgment emanating from a court of first instance was capable of violating international law in such a way, Freeman, for instance, queried whether "in a realistic sense, justice can be considered as *denied* when in fact justice has not finally spoken".[25] Others related it to the natural fallibility of judges.[26]

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[18] Loewen Group, Inc and Raymond L Loewen v United States of America (Decision on Hearing of Respondent's Objection to Competence and Jurisdiction) (ICSID Case No ARB(AF)/98/3, 5 January 2001) [71]. Elsewhere in its decision on jurisdiction, the Tribunal identified support for the view that 'no distinction should be drawn between the principle of finality and the local remedies rule' [66] and considered that the 'content of the two rules is similar, if not the same' [67].

[19] *Loewen (Award)* (n 10), [159].

[20] ibid [156].

[21] ibid [153], relying on UN Doc A/CN 4/498, [75]; emphasis added.

[22] ibid.

[23] See LC Delanoy and T Portwood, 'La responsabilité de l'Etat pour déni de justice dans l'arbitrage d'investissement' 2005(3) Revue de l'Arbitrage 603, at para 29; C Focarelli, 'Denial of Justice' *Max Planck Encyclopedia of Public International Law* (online, October 2013), [29]; M Stevens and RD Bishop, 'Fair and Equitable Treatment: Denial of Justice' in MN Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 295, at 295; H Haeri and R Dağli, 'Fairness and the Final Word: State Responsibility for Court Action in Investment Arbitration' (2016) 2(1) Turkish Commercial Law Review 3, at 7-9.

[24] J Paulsson, *Denial of Justice* (CUP 2005), 108. For a similar argument, see Greenwood (n 14), 61.

[25] Freeman (n 5), 445; emphasis in original. Though perhaps semantically an interesting one, the argument overlooks the fact that even a single wrongful decision, once it obtains *res judicata* effect as a matter of domestic law, in its effects *finally* denies justice.

8.1.3. Application of Judicial Finality to All Claims of Denial of Justice

Following the *Loewen* decision, the judicial finality rule has subsequently been accepted by a great majority of investment treaty tribunals as constituting a *substantive* component of claims of denial of justice, regardless of whether such claims have been based on the customary international law standard of denial of justice, or on the treaty-based fair and equitable treatment standard.[27] This general acceptance of the finality rule in practice appears to have been based on the understanding that the State's international obligation is to ensure an adequately functioning system of justice, with the necessary consequence that liability could arise only once the whole system is put to test.[28] The Tribunal in *Waste Management* (2004) thus held that, with respect to a claim of denial of justice,

> "...what matters is the system of justice and not any individual decision in the course of proceedings. The system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim."[29]

This is not to say that the judicial finality rule has also consistently been applied as a constitutive component of the international wrongful act. In some cases, judicial finality was actually considered a prerequisite of an inquiry into the denial of justice claim.[30] In others, the principle appears to have been used more as an admissibility criterion, as tribunals proceeded with the inquiry into whether the impugned judicial conduct passed the threshold of denial of justice, before eventually dismissing the claim for lack of exhaustion of local remedies.[31] In either

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[26] See E Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 Recueil des Cours 1, at 282, seeing the reason for the exhaustion of local remedies requirement in denial of justice claims in the need for States to 'provide in their judicial organization remedies designed to correct the natural fallibility of its judges.'

[27] Jan De Nul NV and Dredging International NV v Arab Republic of Egypt (Award) (ICSID Case No ARB/04/13, 6 November 2008) [195], [255], [258]; Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania (Award) (ICSID Case No ARB/07/21, 31 July 2009), 96; Toto Costruzioni Generali S.p.A. v Lebanon (Decision on Jurisdiction) (ICSID Case No ARB/07/12, 11 September 2009) [164]; ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan (Award) (ICSID Case No ARB/08/2, 18 May 2010) [107]; Frontier Petroleum Services Ltd v The Czech Republic (Final Award) (UNCITRAL, 12 November 2010) [293]; Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Partial Award on the Merits) (UNCITRAL, PCA Case No 34877, 30 March 2010) [321]; Alps Finance and Trade AG v The Slovak Republic (Award) (UNCITRAL, 5 March 2011) [251]; Spyridion Roussalis v Romania (Award) (ICSID Case No ARB/06/1, 7 December 2011) [472]; Oostergetel v Slovak Republic (Award) (UNCITRAL, 23 April 2012) [225], [275]; Arif v Moldova (Award) (ICSID Case No ARB/11/23, 8 April 2013), [442]-[43]; The Rompetrol Group NV v Romania (Award) (ICSID Case No ARB/06/3, 6 May 2013) [165]; ECE Projektmanagement v The Czech Republic (Award) (UNCITRAL, PCA Case No 2010-5, 19 September 2013), [4.746]; Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v Democratic Republic of the Congo (Award) (ICSID Case No ARB/10/4, 7 February 2014), [466]; Flughafen Zurich AG v Venezuela (Award) (ICSID Case No ARB/10/19, 18 November 2014), [392], [600], [628], [635]; OI Group v Venezuela (Award) (ICSID Case No ARB/11/25, 10 March 2015), [524], [526]. cf also Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar (Award) (ASEAN ID Case No ARB/01/1, 31 March 2003), [40].

[28] See eg *Jan de Nul* (n 27), [258]-[259]; *Pantechniki* (n 27), [94], [96]; *Spyridion Roussalis* (n 27), [472]; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan (Award)* (ICSID Case No ARB/07/14, 22 June 2010) [279]; *Alps Finance* (n 27), [250]; *Oostergetel* (n 27), [225]; *Arif* (n 27), [434], [443]; *Apotex Inc v The Government of the United States of America (Award on Jurisdiction and Admissibility)* (UNCITRAL, 14 June 2013), [282]-[284]; *Flughafen v Venezuela* (n 27), [392], [635]; implicitly also *Parkerings-Compagniet AS v Republic of Lithuania (Award)* (ICSID Case No ARB/05/8, 11 September 2007) [317].

[29] Waste Management Inc v United Mexican States (II) (Award) (ICSID Case No ARB(AF)/00/3, 30 April 2004), [97].

[30] See eg *Alps Finance v Slovakia* (n 27), [251]; *OI European Group v Venezuela* (n 27), [533]-[536].

[31] See particularly *Loewen (Award)* (n 10), [119]-[137], [142]-[157], and [207]-[217]. cf Rubins (n 14), 15 (suggesting that '[a]s addressed in the final award, the question of 'finality' or 'exhaustion of remedies' appeared to be primarily one of admissibility'). For the same approach, see eg *Jan De Nul v Egypt* (n 27) [255] (considering that the inquiry into the requirement of exhaustion of local remedies 'supported' its previous conclusions that the local judicial proceedings did not give rise to a denial of justice) and [256] (explaining that the requirement of exhaustion of local remedies would not have

type of cases, however, judicial finality was accepted as determinative for a potential finding of denial of justice.

Admittedly, there were a few cases where judicial finality was seemingly rejected as a substantive component of a denial of justice claim. Most of those holdings, however, are either *obiter dicta,* or explicable by the specific circumstances of each case, or simply the result of semantic inaccuracy. An example of the former is certainly the somehow perplexing assertion in the *Mondev* award (2002) that "under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule 'are interlocking and inseparable'."[32] The reasons for this argument are not entirely evident and were certainly not dictated by the circumstances of the case, since the exhaustion of local remedies was not an issue given that the investor pursued all possible appeal mechanisms, including by petitioning the US Supreme Court for certiorari.[33] Yet, it is precisely by reference to the *Mondev* award that the Tribunal in *Binder v. Czech Republic* (2011) later considered that the investor was "not required" to have attempted and exhausted all local remedies, even if otherwise acknowledging that a claim of denial of justice necessitated that the State's judicial system as a whole is tested.[34]

According to the *Binder* Tribunal, sufficient for the purpose of establishing a denial of justice, instead, was "evidence of failure of the judicial or administrative system as a whole", which could be gathered from "a set of decisions or procedures in relation to the same investor (or class of investors) or in relation to the same issue" revealing "a state of a manifestly defective judicial or administrative process, *irrespective of whether all local avenues for redress have been pursued*."[35] Though formulated as a statement of principle, the suggestion that the exhaustion of local remedies was not required to establish denial of justice seems to have been influenced by the particular circumstances of the case: the investor was involved in "hundreds of cases", whereby not all of which were pursued up to the highest available judicial instance.[36] Moreover, that statement was qualified by the Tribunal's own admonition that an isolated instance of a judicial organ committing a gross error would not otherwise have been sufficient for a denial of justice to arise where an adequate and effective remedy to redress such error existed.[37] In the end, the *Binder* Tribunal's approach would seem to be consistent with some of the early arbitral precedents,

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been a 'bar' to a claim of denial of justice on the basis of excessive delays); *Peter Franz Vocklinghaus v Czech Republic (Final Award)* (UNCITRAL, 19 September 2011) [207]-[209] (finding that the Claimant did not avail himself of all available local remedies, but ultimately rejecting complaints of denial of justice on the merits); *Oostergetel v Slovakia* (n 27), [275], [298] (considering it appropriate to first analyze the Claimant's allegations of denial of justice and '[d]epending on the outcome of this analysis' only subsequently reviewing whether local remedies were exhausted) and [298] (after already rejecting the denial of justice claims on the merits, holding that the determination whether the local remedies rule was met could be 'dispensed with'); and *Flughafen v Venezuela* (n 27), [627]-[721]. cf also *Saipem SpA v The People's Republic of Bangladesh (Award)* (ICSID Case No ARB/05/07, 30 June 2009), [133]-[184] (using the same approach in the context of a judicial expropriation).

[32] Mondev International Ltd v United States of America (Award) (ICSID Case No ARB(AF)/99/2, 11 October 2002) [96].

[33] ibid [1].

[34] *Binder v Czech Republic (Final Award)* (UNCITRAL, 15 July 2011) [449]-[450].

[35] ibid [451]; emphasis added. Applying its analytical approach, however, the Tribunal found no denial of justice ([461]-[467]). This analytical approach resembled that taken in *Limited Liability Company Amto v Ukraine (Final Award)* (SCC Case No 080/2005, 26 March 2008) where the Tribunal explained it would examine whether the treatment of the investor in various domestic judicial proceedings 'cumulatively' met the standard of denial of justice ([78]), but later found that Claimant 'has failed to demonstrate any denial of justice in the handling by the Ukrainian courts of the bankruptcy proceedings or any series of circumstances that cumulatively amount to a denial of justice' ([84]). In contrast to the *Binder* Tribunal, however, the *AMTO* Tribunal made clear that the exhaustion of domestic means was 'relevant to the assessment of the propriety of the outcome' and that '[t]he investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law' ([76]).

[36] cf ibid [433].

[37] ibid [451].

where proof of courts not being able to offer the guarantees indispensable to the proper administration of justice was in very exceptional circumstances accepted to be furnished in other forms than through recourse to local courts.[38]

Apart from the awards in *Mondev* and *Binder*, no other investment treaty tribunal appears to have *explicitly* discarded the duty to exhaust local remedies as a substantive precondition of denial of justice claims. Admittedly, some awards categorically stated that the requirement of exhaustion of local remedies does not apply to claims of procedural denial of justice arising from delays in the proceedings.[39] But this appears to be more a consequence of inaccurate formulation. It has long been accepted that undue delays constitute a good reason for not exhausting local remedies – yet, this is not an issue of non-application of the local remedies rule, but of the application of one of the exceptions to the rule traditionally recognized by the rule itself. Somewhat unusual, however, is the decision in *Deutsche Bank* (2012), in which an injunction of the Supreme Court of Sri Lanka was found to constitute a violation of the fair and equitable treatment standard in the form of a due process violation, in spite of the temporary nature of the measure, and notwithstanding the fact that the Claimant, albeit having had the chance, never attempted to appeal it. Then again, peculiar to the case was that, although affecting the contractual payments to the Claimant, the injunction was not specifically addressed to it, but to the national petroleum company of Sri Lanka, which was the Claimant's contractual partner. This might explain why neither the Claimant nor the Respondent attempted to plead the case as one concerning a denial of justice.[40]

8.2. Judicial Finality for Violations of other Treaty Standards premised on Judicial Conduct

While there is in fact considerable consistency in the application of the finality rule as a substantive component of claims concerning denial of justice, there is greater divergence of views on the question whether the obligation is equally applicable to other claims predicated on the conduct of judicial organs. The question is certainly a valid one, since – as the previous chapter demonstrated – modern investment treaties provide aggrieved investors with a whole array of legal standards that are not the same as the customary prohibition of denial of justice. In arbitral practice, the question has thus far been considered in three specific contexts: in relation to claims under the NAFTA, which can generally only be made in relation to "measures adopted or maintained" by a Party relating to an investor or an investment; in relation to the "effective means" provision; and in relation to expropriation claims.

8.2.1. Judicial Finality, NAFTA, and Measures "Adopted or Maintained"

It is perhaps a lesser known fact, but in the *Loewen* case, the Tribunal actually considered the finality rule to be applicable to all causes of action founded on the impugned conduct of domestic courts, including therefore those pertaining not only to violations of Article 1105 NAFTA (minimum standard of treatment), but also of Articles 1102 NAFTA (non-discrimination) and 1110 NAFTA (expropriation).[41] But if, in the *Loewen* Tribunal's own logic, the finality requirement made sense in the context of denial of justice claims, where it was due to the nature of the primary obligation itself that finality of action by the State's judicial system was purportedly required, the same logic did not necessarily apply in relation to other NAFTA

[38] Freeman (n 5), 440-441.

[39] *Jan de Nul* (n 27), [195], [256]; *Oostergetel v Slovakia* (n 27), [275]; *Flughafen* (n 27), [642]; *OI Group v Venezuela* (n 27), [527].

[40] *Deutsche Bank v Sri Lanka (Award)* (ICSID Case No ARB/09/2, 31 October 2012) [478]-[480].

[41] *Loewen (Award)* (n 10), [156].

obligations. The *Loewen* Tribunal omitted to explain why the finality rule would equally be applicable to the claims of discrimination and expropriation as well.

Possibly, the reasons for the *Loewen* Tribunal's unqualified holdings may lie in the manner in which the finality rule was originally introduced by the Respondent. Relying on the threshold requirement under Article 1101 of the NAFTA that there be a measure "adopted or maintained by a Party", the US argued that judicial action had to be considered "a single action from beginning to end so that the State has not spoken until all appeals have been exhausted", and that therefore, only judicial decisions that were accepted or upheld by the judicial system as a whole could be said to possess that degree of finality justifying the description "adopted or maintained".[42] This would possibly explain why the Tribunal concluded that the finality requirement had "application to breaches of Articles 1102 and 1110 as well as Article 1105."[43] Admittedly, however, the Tribunal did not expressly endorse the measure "adopted or maintained" argument. The proposition that finality was required with regard to all causes of action was seemingly advanced, instead, as a general proposition under customary international law.

The issue received consideration again in *Apotex v. USA* (2013). In the context of that case, both disputing parties asserted that the finality rule applied to all causes of action premised upon judicial acts, inferring such requirement not only from Article 1101 NAFTA, but also customary international law.[44] Save from noting that the scope of the judicial finality rule was a "live issue in the context of NAFTA", the Tribunal did not wish to take a firm position on the matter in light of the concurrence of the parties' opinions.[45] At the end of the day, however, it effectively adopted the same position as the *Loewen* Tribunal when it ultimately held that Apotex's claims for judicial breaches of Articles 1102, 1105, and 1110 of the NAFTA should have been dismissed for failure to exhaust available judicial remedies.[46]

Within the limits of the NAFTA, the finality rule has thus been accepted as applicable to all causes of action premised upon judicial acts. It is not clear, however, whether such acceptance had been premised on the understanding that this was the general position under customary international law, or merely because of the specific requirement under Article 1101 NAFTA that there be a measure which is "adopted or maintained".

8.2.2. Judicial Finality and the "Effective Means" Provision

Outside the NAFTA context, in contrast, there has been lesser willingness on the part of investment tribunals to uphold an extensive application of the finality rule. Yet, one of the contexts where the requirement of exhaustion of local remedies was considered to be applicable, was in the application of treaty standards that are similarly deemed to impose an obligation to provide for a system of a certain kind. Thus, the Tribunal in *Chevron v. Ecuador* (2010) found that a "qualified" requirement of exhaustion of local remedies applied to claims pertaining to breaches of the "effective means" provision; for, a failure on the part of the Claimant to use the means placed at its disposal could otherwise prevent a proper assessment of the "effectiveness" of the system for asserting claims and enforcing rights.[47] While the requirement was held not to be applicable in the same way as in the context of denial of justice claims, which was seen as imposing a "strict" requirement of exhaustion, it was still held that a claimant was required to "make use of all remedies that are available and might

[42] ibid [143]-[144].

[43] ibid [156].

[44] *Apotex v USA* (n 28), [280]-[282].

[45] ibid fn 139 to [282].

[46] ibid [298].

[47] *Chevron (Contractual Claims)* (n 27), [323]-[324].

have rectified the wrong complained of'.[48] Since in the circumstances of that case, the wrong complained of related to undue delays that Claimant experienced in Ecuadorian courts, the remedies comprised particularly those procedural mechanisms that could have expedited domestic court proceedings, such as requests for recusals for delay.[49]

Similar considerations would seem to be applicable to claims of breaches of the full protection and security standard on account of the conduct of the judiciary. The Tribunal in *Frontier Petroleum* (2010), which interpreted the standard as imposing upon the State an obligation to make a functioning system of courts and legal remedies available to the investor, did not expressly consider the question of exhaustion. Yet, that some degree of exhaustion would be expected from the Claimant is implicit in the Tribunal's observation that a decision which might be "wrong" in the eyes of an outside observer "would not automatically lead to state responsibility", as well as in its ultimate finding that Respondent made a functioning system of courts and legal remedies available to Claimant.[50]

8.2.3. Judicial Finality and Expropriation Claims

A matter on which tribunals have come to hold different opinions was the extent to which the finality rule was applicable to expropriation claims predicated upon judicial conduct. In *Saipem* (2008), the Tribunal queried whether the local remedies requirement could be applicable "by analogy" to a claim concerning a judicial expropriation, but "tended" to consider that not to be the case (without ultimately making a final determination on the issue), essentially agreeing with the Claimant that a denial of justice claim was not to be treated as being one and the same illegality as expropriation carried out by domestic courts.[51] Less hesitant to express its opinion, in contrast, was the Tribunal in *Arif* (2013), which held that "[a] court may violate a BIT standard directly and this breach will be attributable to the respondent State without there being any requirement to exhaust local remedies, unless it is a breach for denial of justice".[52] It therefore rejected Respondent's objections that the investor's claims for expropriation and breach of specific undertakings were not ripe for arbitration due to their still being the subject of judicial proceedings in Moldova.[53] Insofar as expropriations occurring by dint of judicial decisions were concerned in particular, the *Arif* Tribunal advanced three reasons why the judicial finality rule ought not to be applied as a substantive requirement to such claims. First, unlike in a claim for denial of justice where the conduct of the whole judicial system was relevant, "decisive" for a claim for expropriation was the "individual action" of a State organ. Second, "according to ICSID case law" (as the single decision in the *Saipem* case was conveniently branded), no substantive requirement was considered applicable to expropriation claims. And third, "as a matter of principle", court decisions were capable of engaging the responsibility of a State in accordance with Article 4 of the ILC Articles on State Responsibility without there being any requirement to exhaust local remedies (except in relation to claims for denial of justice).[54]

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[48] ibid, [321], [326]. As explained elsewhere, the Tribunal required proof that Claimants had 'adequately utilized' the means made available to them to assert claims and enforce rights in Ecuador. See ibid [268].

[49] ibid [330]-[331].

[50] *Frontier Petroleum* (n 27), [273] and [466].

[51] *Saipem* (n 31), [176]-[182]. Similarly hesitant was the Tribunal in *Chevron (Contractual Claims)* (n 27), [323], which decided to express no view no view on whether or to what extent the requirement of exhaustion of local remedies might apply under other provisions of the BIT.

[52] *Arif* (n 27), [334].

[53] ibid [348].

[54] ibid [345]-[347].

Given the complexity of the legal issues raised by situations of so-called "judicial expropriations",[55] one cannot categorically reject the substantive requirement of judicial finality as simply being inapplicable to expropriation claims predicated upon judicial conduct. What matters, as the *Arif* Tribunal validly pointed out, is indeed the "individual action" of a State organ, and in particular, the origin of the actual injury. Take for example the situation where the courts apply a statute which is itself confiscatory in nature. The result of its application would amount to an expropriation, without there necessarily being any fault on the part of the judiciary. In such cases, little purpose would arguably be served to require from the investor to exhaust local remedies, for the superior courts deciding on the investor's appeals would likely remain bound by the relevant legislation, probably rendering a revised outcome that would still be confiscatory in effect. In the absence of any flaws of that kind in domestic legislation, however, the situation changes. As set out in 7.3, where an expropriation claim is premised solely on an injury attributable to the conduct of judicial organs themselves, the wrongfulness of the impugned conduct becomes a necessary predicate of the claim.[56] Since this predicate is most commonly provided through the medium of denial of justice,[57] judicial finality will necessarily be required as an intermediate step to sustain an expropriation claim. The situation may be different where the prerequisite wrongfulness can be based on a violation of another concrete international obligation, which may not require judicial finality as an element essential to proving its breach. In the *Saipem* case, for example, the impugned judicial interferences were deemed contrary to Respondent's obligations under the 1958 New York Convention,[58] which arguably imposes discrete obligations that are directly binding on individual courts – a matter, to which I revert in 8.4.

Last but not least, there are also alternative reasons for considering (some form of) judicial finality applicable as a substantive condition of expropriation claims premised upon judicial conduct. Where one is to approach the question of judicial expropriations through the lens of the sole effects doctrine, the question whether the investor had pursued available judicial remedies may become a factor relevant to determining whether the judicial interference with investor's rights was sufficiently permanent to be treated an expropriation. The view that merely ephemeral judicial interferences – such that could easily be overturned by way of judicial appeal – will not be sufficient to establish an expropriation is not only in advanced in academic writings,[59] but finds also some limited support in arbitral practice.[60]

8.3. Judicial Finality and Claims Premised on the Conduct of Non-Judicial Organs

As opposed to the conduct of judicial organs, the idea that the finality rule could also be applicable to claims predicated upon the conduct of other State organs has not garnered support by investment tribunals. On the contrary, attempts to demand any form of exhaustion of local

[55] See discussion *supra* 7.3.

[56] Following the discussion in 7.4.1, more or less the same considerations attach to the application of the judicial finality rule in relation to claims concerning breaches of the umbrella clause grounded in purportedly wrongful judicial decisions.

[57] Indeed, it was due to Claimant's failure to establish a denial of justice on the part of the Moldovan judiciary that the *Arif* Tribunal in rejected the expropriation claims. ibid [415]-[417].

[58] *Saipem* (n 31), [145]-[173].

[59] B Demirkol, Judicial Acts and Investment Treaty Arbitration (CUP 2018) 103-6.

[60] See *Achmea B.V. v. The Slovak Republic (Award)* (UNCITRAL, PCA Case No. 2008-13, 7 December 2012), [292] (the Tribunal considering that '[w]hile there is no duty to exhaust local remedies under the Treaty, there is no reason to ignore such remedies as have in fact been obtained', and further explaining that, since the impugned measure was quashed by the Constitutional Court, it was thus 'not to be regarded as having resulted in a permanent deprivation of the investor of its investment', such analysis being 'consistent with the approach adopted by other tribunals to the question of the necessary characteristics of an expropriation and the significance of the permanence of interference with property right').

remedies for the purpose of challenging the conduct of non-judicial organs were usually opposed, even in circumstances where the impugned conduct would have otherwise been capable of being characterized as amounting to a denial of justice, such as in the event of irregularities occurring in the context of administrative decision-making procedures.[61] This is not to deny, however, that there were a number of cases where the omission on the part of the investor to make recourse to domestically available remedies ultimately had – or was considered capable of having[62] – a bearing on the finding of a violation of the relevant treaty standard. Thus, in a number of cases, the treaty claims failed, as in the absence of any attempt on the part of the investor to resort to domestic remedies – in order to challenge impugned administrative decisions,[63] or inactions of the local administration;[64] to obtain pronouncements from the contractually-agreed forum with respect to contractual breaches relevant to the treaty claim;[65] or else, to conclusively establish the enjoyment of rights allegedly being interfered with[66] – the conduct complained of was not considered sufficiently grave to give rise to a treaty breach. But while resort to domestic remedies was thus an element relevant to the analysis of the treaty claim, it must also be added that in most of these cases Claimants were not unsuccessful solely because of their negligence in pursuing them.[67]

In most of these cases, investment tribunals expressly disclaimed that there would have been any obligation on the part of the investor to exhaust available local remedies.[68] They did, however, differ in their justifications as to why in the circumstances of the specific case, the investor's neglect of such remedies was relevant to the question of treaty breach. In many of these precedents, the omission to seek a ruling from domestic courts was thus suggested to constitute one of the "relevant" circumstances that had been taken into account in finding the absence of a treaty breach.[69] In some cases, instead, the suggestion was made that the issue was one of due diligence and that the investor's failure to attempt available local remedies had the

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[61] See eg *Rompetrol* (n 27), [160]; or *ECE Projektmanagement* (n 27), [7.473]. Tribunals in such cases considered that it was for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit.

[62] Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar (Award) (ASEAN ID Case No ARB/01/1, 31 March 2003) [40]; Jan De Nul v Egypt (Decision on Jurisdiction) (ICSID Case No ARB/04/13, 16 June 2006) [121]; Abengoa SA y COFIDES SA v United Mexican States (Award) (ICSID Case No ARB(AF)/09/2, 18 April 2013) [626]-[635]; or ECE Projektmanagement (n 27), [4.747]. See also Rompetrol (n 27), [245].

[63] MCI Power Group LC and New Turbine, Inc v Republic of Ecuador (Award) (ICSID Case No ARB/03/6, 31 July 2007) [297], [301]-[302], [349]; Helnan International Hotels A/S v Arab Republic of Egypt (Award) (ICSID Case No ARB/05/19, 3 July 2008) [148], [162].

[64] *Generation Ukraine, Inc v Ukraine (Award)* (ICSID Case No ARB/00/9, 16 September 2003) [20.30]-[20.33].

[65] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Vivendi I) (Award)* (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v Argentine Republic) (ICSID Case No ARB/97/3, 21 November 2000), [78]; *Waste Management II* (n 29), [174]-[177]; or *Parkerings-Compagniet* (n 28), [319], and [449]-[454].

[66] *Marvin Roy Feldman Karpa v United Mexican States (Award)* (also known as *Marvin Feldman v Mexico*) (ICSID Case No ARB(AF)/99/1, 16 December 2002) [113], [111]; or *EnCana Corporation v Republic of Ecuador (Award)* (UNCITRAL, LCIA Case No UN3481, 3 February 2006) 194; see also fn 138.

[67] With the exception of *Vivendi I* (n 65).

[68] *Feldman,* ibid [140]; *Vivendi I (Award)* (n 65), [81]; *Generation Ukraine* (n 64), [20.33]; *Waste Management II* (n 29), [116]; *EnCana*, ibid fn 138; *Abengoa* (n 62), [626]; *ECE Projektmanagement* (n 27), [4.745]-[4.747].

[69] *Feldman*, ibid [111], [134] (the fact that it was not clear that Claimant had a right under Mexican law to tax rebates and that Claimant omitted to seek a formal administrative and judicial ruling in that respect was held to be one of the factors, none of them alone 'necessarily conclusive', but which taken together tipped the expropriation / regulation balance away from a finding of expropriation); *Waste Management II* (n 29), [116] ('the availability of local remedies to an investor faced with contractual breaches is nonetheless relevant to the question whether a standard such as Article 1105(1) has been complied with by the State'); *EnCana* (n 66) fn 138 ('The question is not whether the claim is admissible but whether the relevant rights have been expropriated as a matter of substance.'); and *ECE Projektmanagement* (n 27), [4.745] ('the extent to which an investor pursued available domestic remedies (and to which it in fact obtained a remedy for its complaint) has been treated as constituting one element which is relevant for the assessment of whether the investor has been treated in a manner which constitutes a breach of the respondent State's obligations for the protection of the investment.').

effect of disqualifying a particular treaty claim,[70] or otherwise indicating that the investor acquiesced in the impugned measures.[71] Most notable in this respect is the admonition of the Tribunal in *Generation Ukraine v. Ukraine* (2003) that

> "it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction."[72]

Then again, in other cases, the suggestion was made that the investor may even be under an obligation to resort to (albeit not necessarily exhaust) available local remedies. In *Vivendi v. Argentina I* (2000), the Tribunal thus contended that, by dismissing the claim on account of the investor's failure to resort to the contractually stipulated forum, it did "not impose an exhaustion of remedies requirement", but that the "*obligation* to resort to the local courts" was "compelled" by the mandatory forum selection clause and by the "impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts."[73] Along similar lines, the Tribunal in *Parkerings-Compagniet* (2007) argued that, in relation to treaty claims premised on contractual breaches, "a preliminary determination" by a competent domestic court would have been "necessary" or "a prerequisite" for determining the treaty claim.[74]

Not unexpectedly, the practice of placing emphasis on investors' efforts to obtain redress against the impugned misconduct in the host State's legal system has attracted strong criticism – not only in academic writings,[75] but also in arbitral decisions and opinions of individual arbitrators.[76] Most forceful in this respect have been the decisions of the ICSID Annulment Committees in the *Vivendi* and *Helnan* cases, which ultimately annulled the respective awards on ground of manifest excess of powers.

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[70] See eg *Helnan* (n 63), [162] (speaking of a potential 'disqualification' of an international claim in the absence of a reasonable effort to obtain correction in domestic courts); or *Abengoa* (n 62), [627] (explaining that the failure to attempt available local remedies could be considered as 'negligence' that might have the effect of 'depriving the investor of its right to compensation').

[71] *MCI Power Group LC v Ecuador* (n 63), [297], [301]-[302] (failure to challenge the revocation of its operating permit was seemingly viewed as proof that the revocation was a legitimate one and attesting to fact that the subsidiary actually acquiesced in such measure).

[72] *Generation Ukraine* (n 64), [20.30]; emphasis in the original.

[73] *Vivendi I (Award)* (n 65), [81]; emphasis added.

[74] *Parkerings-Compagniet* (n 28), [316] and [448].

[75] See eg C Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4(1) LPICT 1, at 15-16 (arguing that '[o]nce it is accepted that the investor should make an attempt at local remedies it is only a small step to require that the attempt should not stop at the level of the lowest court' and warning that, while it is 'not inherently unreasonable to require that the investor make some efforts domestically to obtain redress before seizing an international tribunal', the decision to do away with the domestic remedies rule 'was made consciously and for good reason'); Kriebaum (n 17), 457, 460 (considering such practice to 'deprive the arbitral procedure of its character as an alternative to local remedies', and as preventing arbitral tribunals to 'function as the neutral alternative dispute settlement forum they were meant to be' and to 'exercise a subsidiary control function', respectively);

[76] See eg *EnCana Corporation v Republic of Ecuador* (LCIA Case No UN3481, UNCITRAL) Partial Dissenting Opinion of Horacio A Grigera Naón of 30 December 2005, [28]-[36], who considered that such practice amounted to re-imposing, although in a different guise, the exhaustion of local remedies rule.

In the *Vivendi* case (2002), the Annulment Committee thus concluded that, by dismissing the claims on the ground that the investor was purportedly obliged to first resort to local courts, the Tribunal effectively failed to decide the treaty claims.[77] According to the Committee, the question whether particular conduct violated the treaty was not dependent upon the showing of a breach of the concession contract, for the treaty set an independent standard. Accordingly, it was "open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT" and faced with such a claim, the Tribunal "was obliged to consider and to decide it."[78] The Committee acknowledged that, by having failed to challenge "various factual components" of its treaty cause of action in local courts, the Claimant "took the risk" that the Tribunal would have found that the acts complained of neither individually nor collectively rose to the level of a treaty breach; but this was a risk that the Claimant was entitled to take, with its associated burden of proof.[79] The Committee eventually conceded that the availability of local courts might have been "a relevant circumstance in determining whether there has been a breach of international law", but as such it was "not dispositive" and it did "not preclude an international tribunal from considering the merits of the dispute."[80]

Building on that proposition, the Annulment Committee in the *Helnan* case (2010) later reiterated that "[a]n ICSID tribunal may not decline to make a finding of breach of treaty on the ground that the investor ought to have pursued local remedies or otherwise validated the substance of its claims by recourse to the courts of the host State".[81] In finding that the Tribunal for that reason had manifestly exceeded its powers, the Committee did also not miss out on the opportunity to mount a wholesale critique against the practice of considering the pursuit of local remedies as a factual element relevant for the assessment of a treaty breach.[82] The Committee's primary point of criticism was that such a requirement would be contrary to the express provisions of Article 26 of the ICSID Convention, for this would have the effect of substituting domestic courts for the remedy provided under the applicable investment treaty, and thus effectively "do by the back door that which the Convention expressly excludes by the front door".[83] Allowing such practice would arguably "empty the development of investment arbitration of much of its force and effect" and "would inject an unacceptable level of uncertainty" into the way in which an investor ought to proceed in relation to an adverse administrative decision.[84]

Furthermore, the *Helnan* Committee expressly rejected the idea that a treaty claim concerning an alleged failure on the part of executive organs to afford fair and equitable treatment would necessitate some form of "judicial finality" as in the case of judicial organs. The Committee conceded that, in a general sense, "a claimant's prospects of success in pursuing a

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[77] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Decision on Annulment)* (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic) (ICSID Case No ARB/97/3, 3 July 2002) [111].

[78] ibid, [112].

[79] ibid, [113].

[80] ibid.

[81] *Helnan International Hotels A/S v Arab Republic of Egypt (Decision of the ad hoc Committee)* (ICSID Case No ARB/05/19, 14 June 2010), see [9]; cf [55]. It is debatable whether this conclusion logically follows from the award of the Tribunal, given that the latter did not decline to make a finding, but instead found on the facts that the conduct of the executive did not breach the relevant standards of treatment prescribed by the treaty. In spite of the finding of a manifest excess of powers, the Committee did not set aside the award since the impugned part was not essential to the Tribunal's decision to dismiss Helnan's claims ([56]-[57]).

[82] See ibid [34] (the Committee found itself compelled to deal with 'a question of importance to the arbitration of investment treaty claims under the ICSID Convention, namely the extent to which an investor may be required, as a matter of substance rather than jurisdiction, to pursue local remedies in order to sustain a valid claim for breach of treaty').

[83] *Helnan,* ibid [47].

[84] ibid, [52].

treaty claim based on the decision of an inferior official or court, which had not been challenged through an available appeal process, should be lower, since the tribunal must in any event be satisfied that the failure is one which displays insufficiency in the system, justifying international intervention."[85] But these were essentially questions of probative value, which in the Committee's view were not to be confused with the "entirely different matter" whether the investor was actually under a "requirement" to pursue local remedies to prove a violation of the fair and equitable treatment as a result of an administrative decision.[86] Referring to the principle that the characterisation of an act as unlawful under international law was not affected by its characterisation as lawful under internal law, the Committee did not see the application to local courts as potentially determinative – for, "a decision by a municipal court that the Minister's decision was lawful (a judgment which such a court could only reach applying its own municipal administrative law) could not preclude the international tribunal from coming to another conclusion applying international law."[87]

Still, treating recourse to local courts as a factual element relevant to the assessment of a treaty breach is not the same as imposing such recourse as a legal requirement. Common to most of the precedents discussed is that, in the circumstances of those cases, the impugned conduct of executive organs simply did not rise to the level of a treaty breach.[88] Hence, it could only have been on account of the potentially adverse treatment that the investor would have received in seeking local redress against such conduct that the responsibility of the State could have therefore arisen. Obviously then, the investors' efforts to seek redress for their grievances in domestic court will frequently be a factor of relevance in determining potential treaty breaches, particularly where such grievances originate in the conduct of private parties, or do not clearly transcend "mere breaches" of domestic law. Indeed, behind the stance taken by many of the investment tribunals has been a general understanding that investment treaty arbitration was intended to provide redress only against the more serious instances of misconduct on the part of administrative organs, and not to form an international form of administrative appeal.[89] Then again, it is also clear that any more firm expectations of investors' pursuit of local remedies will run against the assumption of investment arbitration being an alternative to domestic judicial procedures and be ultimately difficult to reconcile with treaty provisions demanding a concrete choice for any of the two procedures (as in the case of fork-in-the-road and no U-turn clauses).[90]

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[85] ibid, [48]. In that respect, the Committee took the position that the fair and equitable treatment standard was 'concerned with consideration of the overall process of the State's decision-making', was therefore 'unlikely' to be breached by 'a single aberrant decision of a low-level official' – unless the investor was capable of demonstrating that such decision 'was part of a pattern of state conduct applicable to the case or that the investor took steps within the administration to achieve redress and was rebuffed in a way which compounded, rather than cured, the unfair treatment.' [50] The Committee added, on the other hand, that even a single decision of a low-level administrative official could amount to a breach of FET.

[86] ibid [48], [51].

[87] ibid [51].

[88] See also O Spiermann, 'Premature Treaty Claims', in C Binder et al. (ed), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 463-489, suggesting that the tribunals' emphasizing of neglect of effective local remedes has not been only a 'rhetorical device' for dismissing marginal treaty claims, but equally noting that the weight to be given to the investor's neglect of such remedies is ultimately determined by the specific standards of protection.

[89] See *Generation Ukraine* (n 64), 20.33 (in the absence of any acts or omissions transcending the threshold of a treaty breach, it was not for the Tribunal to 'exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. That function is within the proper domain of domestic courts and tribunals that are cognisant of the minutiae of the applicable regulatory regime.'); or *Waste Management II* (n 29), [116] (The Tribunal emphasizing the importance of the contractually-agreed remedy being resorted to in the event of regular contractual breaches, for '[w]ere it not so, Chapter 11 would become a mechanism of equal resort for debt collection and analogous purposes in respect of all public (including municipal) contracts, which does not seem to be its purpose.').

[90] See on this specifically *EnCana Corporation v Republic of Ecuador* (LCIA Case No UN3481, UNCITRAL) Partial Dissenting Opinion of Horacio A Grigera Naón of 30 December 2005, [30] (suggesting that the applicable treaty 'cannot offer the possibility of obtaining substantive relief under international law in case of expropriation, require a waiver of legal actions

8.4. Judicial Finality – Is a Consistent Approach Actually Possible?

The divergent practice just discussed gives rise to the question of whether a consistent and sound approach to the application of the judicial finality rule can actually be achieved in practice. The answer to this question is closely associated with one's understanding of the theoretical rationale for the judicial finality rule. In following the reasoning of the *Loewen* award, one could thus model the application of the rule by reference to the nature of the primary obligation in question (1). The alternative, on the other hand, is to link its application to the specific nature of the judicial function as such, as some commentators have suggested (2). Each of the approaches raises its own difficulties and will be considered in turn.

8.4.1. Judicial Finality as a Condition Relating to Determining Breaches of the Primary Obligation

One way to determine the rule's applicability is by reference to the content of the primary obligation: whether or not the achievement of judicial finality should apply as a substantive requirement for the emergence of a violation of the particular treaty obligation on account of judicial conduct could therefore depend on the nature of that obligation.[91] Here, the underlying logic is that, in being organs of the State as any other, courts are capable of violating concrete obligations that a State owes to investors under an investment treaty and that claims grounded in violations of the latter, unlike claims of denial of justice, may not necessarily require judicial finality in order to be proven. This was also the logic that seemingly underpinned the reasoning in the *Saipem* and *Arif* cases.

In giving effect to this logic, some have proceeded to suggest that the applicability of the finality rule therefore depends on the type of the *claim*.[92] Such a formal approach, however, stumbles upon the problem that some undertakings under distinct treaty standards overlap in their application to the conduct of the judiciary and may essentially be equivalent to those underpinning the prohibition of denial of justice.[93] Conditioning the applicability of the finality rule on the formal head of the claim runs therefore the danger of leading to artificial outcomes. More faithful to the logic of the *Loewen* award is rather an approach that considers whether the

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before national courts of the respondent State as a condition for seeking and obtaining such substantive relief, and in the same breath deny such relief because the investor would have failed to obtain first a final determination from the courts of such State on whether there is merit or not for the interpretation of the local law on which the State relies upon to deny the existence of the grievances on which the investor bases its expropriation Treaty claim. Otherwise, if the national courts would reach the conclusion that the conduct of the State is in keeping with the national legal system, and have done so without incurring a denial of justice, there would be no room left for an international expropriation claim under the Treaty.')

[91] For a recent restatement of this proposition, see B Demirkol, *Judicial Acts and Investment Treaty Arbitration* (CUP 2018) 82 and 103.

[92] See eg A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009) 243, approaching the question of exhaustion of local remedies as one pertaining to the 'type of claim being made', distinguishing thereby denial of justice from other standards of treatment that can be violated by a court 'as a direct breach of the IIA attributable to the respondent state with no requirement to exhaust local remedies.' cf *Arif* (n 27), at 334 ('there is no general requirement to exhaust local remedies for a treaty claim to exist (unless such a claim is for denial of justice). […] A court may violate a BIT standard directly and this breach will be attributable to the respondent State without there being any requirement to exhaust local remedies, unless it is a breach for denial of justice.').

[93] The same Newcombe and Paradell, for example, hold the judicial finality rule to be applicable to breaches of protection or security arising out of deficiencies in the administration of justice by considering such deficiencies to be equivalent to the delict of denial of justice. ibid, 314. But they have problems with the treaty standard prohibiting impairment of legally acquired rights by arbitrary, unreasonable or discriminatory measures, admitting that '[w]hat remains unclear is whether arbitrariness or discrimination by a judicial authority, would automatically breach the standard, or whether, as in claims involving denial of justice, there would be a requirement to exhaust local remedies before the action of judicial authorities would be considered arbitrary or discriminatory for the purposes of the IIA.' ibid, 301.

concrete obligation alleged to be violated is one of those where systematic considerations enter into the question of breach.[94] It can be recalled that such considerations derive from the conceptual distinction between obligations of conduct and obligations of result. The latter are distinguishable from the former, insofar as their breach does not occur at the moment where a State's conduct diverges from that required by the primary norm, but only after the State fails to take any of the opportunities available to it to produce the required result.[95]

The problem, however, is that there is no simple formula for determining to which of the two categories particular obligations under investment treaties belong. One solution is to apply the distinction in categorical terms. Hence, Judge Schwebel's dissent in the *ELSI* case provides some authority for the proposition that treaty obligations concerning the protection of aliens and their interests "normally" belong to obligations of result.[96] Indeed, in the circumstances of that case, both the ICJ' Chamber and Judge Schwebel treated as falling into that category the obligation proscribing "arbitrary or discriminatory measures".[97] Along the same lines, Demirkol more recently suggested that, as a matter of principle, investment treaty undertakings do not require host states "to guarantee a specific outcome for specific circumstances" but "to establish a system of a certain kind that functions in compliance with certain standards."[98] This conclusion supposedly follows from that fact that an investment treaty undertaking is "a so-called *standard of treatment*" which as such "entails that the misconduct of the relevant state organ has reached a certain threshold of wrongfulness."[99] The term "treatment", in his view, refers to "something in the nature of a course of action",[100] and therefore implies "the position or stance of the system vis-à-vis the investor".[101]

Yet, insofar as the conduct/result distinction is concerned, it is debatable whether one can really treat all investment treaty obligations as belonging to the category of obligations of result. As argued already in Chapter 7, many treaty standards are susceptible of being concurrently construed as demanding both specific results and specific conduct, rendering the distinction often difficult to sustain in practice.[102] Furthermore, investment treaty jurisprudence is replete with examples where

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[94] This was seemingly also the Chevron tribunal's approach in considering the applicability of the rule in the context of claims pertaining to the 'effective means' standard. cf *Chevron (Contractual Claims)* (n 27), [323]-[327].

[95] On this distinction, see ILC, 'Report on the Work of the Twenty-ninth Session' (9 May–29 July 1977) UN Doc A/32/10, 11-9.

[96] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 94, Dissenting opinion of Judge Schwebel at 117.

[97] The consequence of this treatment was that, in the analysis of the Chamber, the impugned requisition of ELSI's plant was not an arbitrary act, because in the circumstances where the order for the requisition was 'consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts', albeit found illegal by Italian courts on the ground of excess of power, such order could not even be considered as arbitrary in the first place. *Elettronica Sicula SpA (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Rep 15 (20 July 1989), [129]. In contrast, in Judge Schwebel's analysis, the requisition violated the obligation, but not because the order of requisition was itself found by him to be 'unreasonable and capricious and hence arbitrary', but by reason of the fact that the administrative and judicial proceedings, which followed the requisition, did not relieve ELSI of the requisition's effects. Schwebel, Dissent, ibid 115, 118. In spite of the requisition order as such not being a judicial measure, both Judge Schwebel and the ICJ's Chamber applied something akin to a judicial finality rule in determining violations of the treaty on that ground.

[98] Demirkol (n 91), 103.

[99] ibid 75.

[100] ibid 76.

[101] ibid 107.

[102] See also Delanoy and Portwood (n 23), at [30], citing instances of where a host State, contrary to its obligations under an investment treaty, refuses an investor the right to enter into its territory to manage his investment, prohibits the investor from repatriating the benefits of his investment, or expropriates an investment without compensation, as pertaining to those types of obligations where a single judicial decision will commit a definitive and instantaneous violation of the

individual instances of injurious conduct were sufficient to establish violations of concrete treaty obligations,[103] suggesting that at least some obligations under investment treaties prescribe obligations of conduct. More fundamentally, it can be debated whether international obligations *in general* are capable of being meaningfully distinguished between those demanding particular conduct and those requiring a particular result.[104] In the human rights context, for instance, the distinction has been considered unworkable as a means for establishing concrete violations of treaty standards.[105] Indeed, though treating the obligation to provide a fair and efficient system of justice as one belonging to the category of obligations of result, Crawford himself admitted that "on further analysis" the obligation in reality contained diverse elements, some possibly qualifying as obligations of result, others of conduct.[106] It is not without reason that the distinction has ultimately been abandoned by the ILC in the final set of rules on State responsibility.[107] Given these problems, it is thus questionable whether the distinction is capable of providing a convincing basis for the application of the judicial finality rule.[108]

Demirkol's approach is not without problems either. First, it is debatable whether investment treaty undertakings take *all* the form of "standards". And second, it is debatable whether the concept of "treatment" itself presupposes that the obligation is one to establish a system of a certain kind. To one tribunal the entire concept may admittedly be "one that can and often does envisage something in the nature of a course of action", with the consequence that a failure to accord to the investor fair and equitable treatment would have to be the product of more than one item of conduct taking the form of an action or omission.[109] Yet, to others, in turn, the concept can be taken to refer in its ordinary meaning to "behavior in respect of an entity or a person",[110] or to include "the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty",[111] or "the manner in which the officials direct conduct to a specific investor or claimant."[112]

Irrespective of the difficulties with classifying concrete investment treaty obligations according to their nature, the question further arises about the extent to which judicial finality needs to be actually achieved for the purpose of establishing a breach. That is, where systematic considerations enter into the question of breach, do such considerations always entail that the system as a whole needs to be tested, or is it possible that some treaty standards require that a lower threshold be applied? The question, which itself raises a number of problems, has not

applicable investment treaty, for which the investor will be immediately entitled to complain of, without having to exhaust domestic remedies.

[103] cf *Helnan* (n 81), [48].

[104] For further discussion, see E Wyler, *L illicite et la condition des personnes privées* (Pedone 1995), 17-43.

[105] For the same reason, the distinction has proven unworkable in determining violations of human rights obligations. See C Tomuschat, 'What is a 'Breach' of the European Convention on Human Rights?' in Lawson & Blois (eds), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G Schermers* vol 3 (Brill 1994), 315-35.

[106] 'Second report on State responsibility, by Mr. James Crawford, Special Rapporteur' UN A/CN.4/498 and Add.1–4, fn 158, 26.

[107] See 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', (2001) ILC Ybk, vol. II, Pt. 2, 56-57, [11].

[108] This has not escaped commentators. For an elaborate criticism on this point, see M Sattorova, 'Denial of justice disguised? Investment arbitration and the protection of foreign investors from judicial misconduct' (2012) 61 ICLQ 223, at 231ff.

[109] Victor Pey Casado and President Allende Foundation v Republic of Chile (Award) (ICSID Case No ARB/98/2, 13 September 2016), [209].

[110] Siemens AG v The Argentine Republic (Decision on Jurisdiction) (ICSID Case No ARB/02/8, 3 August 2004) [85].

[111] Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua SA v Argentina (Decision on Jurisdiction) (ICSID Case No ARB/03/17, 16 May 2006) [55].

[112] Canfor Corporation v United States and Terminal Forest Products Ltd v United States (Decision on Preliminary Question) (Consolidated Proceedings, UNCITRAL, 6 June 2006) [150].

received much treatment. The *Chevron* case – in which a "qualified" requirement of exhaustion of local remedies was found to apply to claims pertaining to breaches of the "effective means" standard that was purportedly not the same "strict" requirement applicable to denial of justice claims[113] – suggests the latter may be the case. And so does Demirkol, which posits that each particular obligation may possibly require a different threshold to be reached in order for it to be breached on account of judicial misconduct. His starting point is that

> "the allegation that the host state has breached an investment treaty undertaking, or a so-called *standard of treatment*, entails that the misconduct of the relevant state organ has reached a certain threshold of wrongfulness. The question is not how incorrect is the state organ's conduct. The threshold of wrongfulness rather relates to the rigorousness (severity), endurance (continuity), determinacy (finality) and efficacy (influence) of this conduct. Thus, the threshold tests the maturity of the misconduct. The question is whether the misconduct qualifies as a complete breach instead of being a merely isolated action."[114]

In accordance with this understanding, the extent to which domestic judicial remedies will have to be tested or exhausted essentially applies on a sliding scale.[115] So far, so arguable. Yet, due to the vagueness of many standards of treatment, one can wonder whether it is possible to devise an objective test for determining the exact point on the scale where a violation has been completed. Especially in the case of standards which have been found capable of being violated through individual instances of improper conduct, the question is whether one can actually move beyond a fact- and context-specific approach. Attesting to this are the difficulties into which Demirkol's sliding scale model stumbles upon once it comes to the fair and equitable treatment standard. Initially, Demirkol posits that "[w]hat should be taken into account and qualified in respect of the breach of the fair and equitable treatment standard is the whole record throughout the process of state function" and that, as a result, "a single action, ruling or decision" will "mostly" be insufficient to establish its breach.[116] Yet, he eventually comes to the conclusion that the breach of the standard can arise even in case where further effective remedies are available, arguing that "[c]ompleteness of the breach is rather an issue of whether the misconduct can be imputable to the system established by the state" and that "[a]n improper ruling or decision would become a treatment imputable to the system through the investor's resort to remedies, such as objections, complaints, appeals."[117] Accordingly, he concedes that single instances of due process violations may constitute an independent internationally wrongful act and a separate basis for a fair and equitable treatment claim, despite the existence of further effective remedies that have remained unutilized.[118] Ultimately, he admits that "[i]t is very difficult to define an objective and general test for the

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[113] *Chevron (Contractual Claims)* (n 27), [323]-[26].

[114] Dermirkol (n 91), 75.

[115] According to Demirkol, in following this approach, denial of justice claims require strict exhaustion of all effective local remedies because the failure to provide judicial protection becomes manifest only at the moment when there remains no remedy within the judicial system (ibid, 84). Claims concerning breaches of the 'effective means' standard, in turn, require an attempt on the part of the investor to use the means available within the host State's legal system, but the test and threshold applied for the completeness of such breaches may not necessarily be the same as the one required for denial of justice (ibid, 110-113). Then again, in the case of expropriation, the completeness of the breach does not depend on the system being tested, but on the effects of the expropriatory judicial acts, which hence requires that such acts be challenged if the investor is to establish that the judicial conduct has given rise to an irrevocable and definitive deprivation (ibid, 55, 105).

[116] ibid 107.

[117] ibid 110.

[118] ibid 195-96.

completeness of a breach of the fair and equitable treatment standard", which according to him has to do with "the vague content of this particular investment treaty standard."[119]

The difficulties that Demirkol encounters in his application of the finality rule to the FET standard, of course, derive primarily from ambiguities concerning the application of that standard to judicial acts. Specifically, they relate to the question whether violations of that standard can also materialize through the intermediary of the courts in other forms than through denial of justice – a question on which I touched upon in 7.5.3. Proceeding from the assumption that in such cases, the FET standard is not consummated in the delict of denial of justice, Demirkol thus argues that a violation of the FET standard must be capable of being completed despite existence of further effective remedies, for "[o]therwise, this breach would have been equivalent to denial of justice."[120] The problem that this creates, however, is that it allows investors to avoid the application of the judicial finality requirement by simply re-characterizing the impugned judicial decision as an arbitrary or discriminatory violation of the FET standard.

This in the end discloses the key problem with the application of the judicial finality rule in the event that its application is to depend on the content of the primary norm in question: as long as uncertainty will exist with regard to the norm, a consistent approach to the application of the judicial finality rule will be difficult to achieve. Especially in the case of the standards of treatment that entail similar protections as those comprised under the prohibition of denial of justice – namely, the FET and non-impairment standards – difficulties will continue to arise in practice. Hence, it is not surprising that, in opposing the practice of challenging acts of administration of justice on the basis of other investment treaty standards as a way of circumventing the judicial finality rule, some have suggested replacing overlapping treaty provisions by a unified standard of treatment.[121]

8.4.2. Judicial Finality as a Condition Attaching to the Special Nature of Judicial Activity

The alternative is to treat judicial finality as a condition attaching to the exercise of the adjudicative function as such, and thus apply it to every claim predicated upon an injurious act or omission resulting from the exercise of that function, regardless of the content of the primary obligation purportedly violated by such act or omission.

The idea that the adjudicative process by domestic courts may have to be judged with greater circumspection than the conduct of other State organs is not a new one and has historically appeared in a variety of guises. It underpins the arguments such as that advanced by Borchard, that only the highest court may involve the responsibility of a State,[122] or the argument once made by De Visscher that judicial action has to be viewed as "a single action from beginning to end", with the consequence that a State could not be said to have "spoken finally until all appeals had been exhausted"[123] – an argument later relied upon by the US in the *Loewen*

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[119] ibid 110.

[120] ibid.

[121] Sattorova (n 108), 241-44.

[122] See Borchard (n 1), 197-98, where the author refers to a 'fundamental principle' that the acts of inferior judges or courts do not render the State internationally liable absent the exhaustion of local judicial means of redress, 'for only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state.' This principle was supposedly applicable, not only to cases of denial of justice, but with respect to judgments 'in violation of a treaty or of international law' as well.

[123] Borchard, 'Responsibility of States, at the Hague Codification Conference' (1930) 24 AJIL 517, at 532. This argument was reportedly first advanced at the 1930 Hague Codification conference where an attempt was made at the codification of the subject of Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners. Article 9 of the proposed Convention, which stipulated that the international responsibility could be incurred by a State on

case,[124] and recurrently appearing in the context of NAFTA cases.[125] As De Visscher at one point explained, the purpose is purportedly not to distinguish, from the point of view of the principle of responsibility, between the wrongful act committed in the exercise of the judicial function and that committed by any other organ of the State, but merely that

> "…in the field of evidence, the very nature of the judicial function will not be without influence. In fact, the general presumption of conformity with international law will often be less easy to undermine here than in other areas. The allegation of miscarriage of justice will, particularly if it relates to the content of the sentence, encounter particular difficulties of proof. These difficulties can be explained by the complexity of the questions submitted to the judges and by the freedom of appreciation which is inseparable from the exercise of their functions. It is not, strictly speaking, an obstacle in principle; it is merely a greater difficulty than expected."[126]

Nonetheless, some contemporary commentators advance the argument that it is precisely in the nature of the judicial function that the rationale for the application of the judicial finality rule must be sought. Sattorova thus considers the "central tenet" of the judicial finality rule to lie in the "special nature of the judicial activity" and, positing that the exercise of judicial power ought to be subject to special treatment in international law, argues in favour of extending the rule to "*all* forms of judicial function".[127] Douglas develops the argument further, by suggesting that the additional burden of the finality rule finds justification in the *specific character of adjudication*, as a particularly exacting but also most vulnerable form of decision-making.[128] According to Douglas, who borrows on his part from Fuller's theory on adjudication, it is the "particular 'burden' of rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, that sets adjudication apart from other institutions of social ordering within the State."[129] The finality rule is thus one of the ways in which international law is "deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces."[130]

Not insignificantly, these arguments find some resonance in the practice of investment tribunals. As noted in 7.5.3., some tribunals already drew distinctions in their assessment of the conduct of State organs on the basis of the functions that these perform in the application of the

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account of damage sustained by a judicial decision that was clearly incompatible with the international obligations of the state, thus required that the impugned decision be 'not subject to appeal'. The latter phrase was then objected by the Swiss delegate, who apparently believed that a court decision in first instance, if contrary to an international obligation, would already entail international responsibility. With a view to induce withdrawal of this objection, the Belgian delegate, De Visscher, therefore made the suggestion that judicial action be viewed as a single action from beginning to end.

[124] *Loewen (Award)* (n 10), 143.

[125] cf *supra* 8.1.3.1.

[126] C. De Visscher, 'Le Déni de justice en Droit International' (1935) 52(II) Recueil des Cours 365, 381 ('Nous avons dit qu'il n'y a pas de raison pour distinguer, au point de vue du principe de la responsabilité, entre l'acte illicite commis dans l'exercice de la fonction juridictionnelle et celui commis par tout autre organe de l'Etat. Telle est bien la règle. Toutefois, sur le terrain des preuves, la nature même de la fonction juridictionnelle ne sera pas sans influence. En fait, la présomption générale de conformité avec le droit international sera souvent moins facile à ébranler ici que dans d'autres domaines. L'allégation de déni de justice rencontrera, surtout si elle vise le contenu de la sentence, des difficultés particulières de preuve. Ces difficultés s'expliquent par la complexité même des questions soumises à l'examen des juges et par la liberté d'appréciation qui est inséparable de l'exercice de leurs fonctions. Ce n'est donc pas, à proprement parler, un obstacle de principe; c'est simplement une difficulté plus grande de prévue.')

[127] Sattorova (n 108), 235, 241.

[128] Z Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63 ICLQ 867, 869 and 875-78.

[129] ibid 876; original footnote omitted.

[130] ibid 877.

law. According to the *Mondev* Tribunal, in applying the international minimum standard, it was thus "vital to distinguish the different factual and legal contexts presented for decision"; and hence, it was "one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State."[131] Similarly, in the view of the *Liman* Tribunal, in the application of the FET standard, it was equally important "to take into account the different functions held by administrative organs and judicial organs of a state and the resulting differences in their discretion when applying the law and in the appeals available against their decisions".[132]

Admittedly, one is tempted to ask oneself whether the theory of the "special nature" of adjudicatory activity does not effectively result in judicial acts ultimately being judged with a different yardstick than the conduct of other domestic organs.[133] Such distinction would find little support in the secondary rules of the Law of State Responsibility, where no differentiation is made in relation to the function or position that an organ holds in the organization of the State,[134] or, for that matter, in the primary norms prescribed in the applicable investment treaties. Then again, it is also possible to argue that the distinction does not pertain to the different organs, but to the different functions performed by them. If judicial finality necessary attaches to all forms of exercise of adjudicative functions, it also applies in circumstances where such functions are performed by non-judicial organs, such as in the context of administrative appeals. Hence, the theory may not necessarily be inconsistent with rules on State responsibility,[135] and potentially also explains why investment tribunals may insist on the necessity of some limited exhaustion of local remedies in relation to claims predicated upon the conduct of administrative organs – an issue I touched upon in 8.3.

Nonetheless, justifying the application of the judicial finality rule in the special protection of the adjudicative function is not without complications either. Most significantly, it raises the question as to what one must understand under the scope of this function. Since the functions performed by courts are by definition adjudicative ones, should the finality rule then not apply to establishing just any violation of international law occurring through the medium of domestic courts – such as where a Court fails to respect the jurisdictional immunities of a foreign State by permitting attachment of its assets? Or should the application of the rule be limited solely to those violations occurring in the treatment of foreign nationals/investors by such courts? Douglas does not directly address these questions; though, the solution that he adopts – in the form of the theory of procedural rights as the object of international protection through the delict of denial of justice[136] – would suggest that judicial finality would only be applicable in the latter case. Pursuant to his theory, denial of justice should namely be taken to represent "the sole form of international delictual responsibility towards foreign nationals for acts or omissions within an adjudicative procedure for which the State is responsible", whereby such denial of justice should be taken to occur where "a foreign national has suffered a procedural injustice, according to the standards of international law, in seeking to vindicate a substantive right within an adjudicative procedure for which the State is responsible in international law" and only where this substantive right "has been finally denied within the adjudicative procedure".[137] This theory is perhaps an appealing one since,

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[131] Mondev (n 32), [126].

[132] *Liman* (n 28), [268]. For a similar statement, see also *RosinvestCo UK Ltd v Russia (Award)* (SCC Case No V079/2005, 12 September 2010), at 274.

[133] cf Freeman (n 5), 446, who similarly pointed to the artificial distinction that such arguments necessarily create between lower courts and other low-level officials, whose conduct instead would immediately be taken to produce acts of international consequence.

[134] cf ARSIWA, Art 4.

[135] See also Douglas' distinction between adjudicatory and prescriptive / enforcement functions, (n 128), 875-84.

[136] ibid 888.

[137] ibid 900.

by excluding the possibility that improprieties occurring in the adjudicative process could engage a State's responsibility otherwise than through denial of justice, it prevents that such improprieties be presented as violations of specific treaty standards. Following Douglas, the procedural treatment in the adjudicative process can thus only be appraised through the standard of denial of justice, to which the condition of judicial finality attaches.

Where Douglas' theory is less convincing, however, is in his argument that it is supposedly irrelevant whether the substantive right denied through the domestic adjudicative procedure has its source in domestic law or international law.[138] Based on this view, substantive rights granted to individuals under international treaties, such as the right to have one's agreement to arbitrate respected in accordance with the 1958 New York Convention, would accordingly be subject to the finality rule whenever such rights were denied through an adjudicative procedure.[139] Somewhat surprisingly, Douglas' argument in this respect is that "[a] decision of a national adjudicatory body that is simply inconsistent with a rule or norm of international law does not, without more, entail the international responsibility of the State in question."[140] Yet, there is not much authority for a proposition of such kind. Already in the classic writings of the early twentieth century, the view had been accepted that the responsibility of a State could be engaged because of a single judgment that is contrary to a norm of international law binding upon the State, even where the norm is misapplied by a lower court.[141] Modern writers follow the same view.[142] Moreover, the proposition finds support in the practice of adjudicatory bodies. Most significantly perhaps, in the practice of both the PCIJ and the ICJ, one can find nothing to suggest that individual judicial decisions would not be capable of engaging the responsibility of the State. In fact, one can find in that practice no indication of anything akin to judicial finality being considered applicable in the circumstances where individual substantive rights provided for under international law – such as various rights concerning the employment conditions of railway workers that were governed by a bilateral treaty,[143] the right to consular communication pursuant to Article 36(1)(b) of the Vienna Convention of Consular Relations,[144] or the right to personal immunities under customary international law[145] – had been denied in the context of an adjudicative process.

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[138] ibid 893-900.

[139] ibid 896-900.

[140] ibid 896.

[141] See GG Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 BYBIL 93, 110 (considering it 'generally admitted' and supported by 'ample authority' that 'the judgments of municipal courts applying international law will, if they misapply international law, *ipso facto* involve the responsibility of the state (at any rate if acted upon) even though rendered in perfect good faith by an honest and competent court.'). See also Strupp, *Das Völkerrechtliche Delikt* (1920), 81-82 ('Begründet ist die völkerrechtliche Haftung für Handlungen von Gerichten, die völkerrechtlichen verpflichtungen zuwiderlaufen, in dem Augenblicke, in dem jene Handlung begangen wurde. […] Es macht dabei nach früheren Ausführungen keinerlei unterschied, ob die Handlung von einem Gerichte erster (mittlerer) oder höchster Instanz begangen wurde.'); Eagleton (n 2), 72 ('Responsibility, however, may have appeared with the internationally illegal action of the lower court, though the establishment of such responsibility is not decisive of the procedure to be followed in securing redress.'). For a similar conclusion, H Urbanek (n 6), 242-43.

[142] See eg R Jennings and A Watts, *Oppenheim's international law* (9th ed, OUP, 1992), 545; Paulsson (n 24), 72; or Demirkol (n 91), 25-26.

[143] *Jurisdiction of the Courts of Danzig (Advisory Opinion)* PCIJ Series B No 15, at 24. The PCIJ acknowledged the possibility of a right of action arising where "a judgment of the Courts of Danzig were in conflict with any of these rules [ie. the rules of the Bearntertabkommen, the bilateral treaty that regulated the employment conditions of Danzig railway employees who had passed into the service of the Polish Railways Administration]".

[144] *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12 (31 March 2004), at [40]. The ICJ acknowledged that the rights to consular communication were rights that were 'to be asserted, at any rate in the first place, within the domestic legal system of the United States'. The Court held that in order to espouse the individual claims of its nationals through the procedure of diplomatic protection, Mexico would generally have to await that local remedies were exhausted. However, as Mexico was submitting a claim in its own name with respect to the violation of

Ultimately, the better view would thus be to apply judicial finality to all instances of *procedural treatment* of an investor's claim in domestic courts, but not to situations where a judicial outcome is contrary to an international obligation granting specific substantive rights. Admittedly, however, this brings the discussion back to distinction between obligations of result and of conduct, raising again the question whether obligations entered into under investment treaties grant investors specific substantive rights that have to be given effect in the outcome of specific judicial decisions.[146]

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To sum up the analysis up to this part, investment tribunals have generally accepted the judicial finality rule as constituting a substantive component of claims concerning denial of justice and claims pertaining to those treaty standards that can be taken to impose an obligation to provide for a judicial system of a certain kind. With regard to other types of claims predicated upon the conduct of domestic courts, judicial finality has generally not been endorsed as a condition relevant to establishing a claim – at least not as a matter of principle. In practice, of course, achievement of judicial finality may nonetheless be necessary, to the extent that the showing of a denial of justice may in such cases be a precondition for establishing such claims. Taking account of the rule's current conceptual underpinnings, however, it can be expected that its application in practice will continue to give rise to problems.

8.5. The Application of the Judicial Finality Rule in Practice

To conclude the analysis, it is worth briefly examining how the judicial finality rule was actually also applied in the context of claims predicated upon the conduct of the judiciary. In general, the practice exhibits considerable variation. One of the issues, on which investment tribunals have adopted different approaches, concerns the scope of the obligation to achieve judicial finality, both in relation to the types of local remedies that the investor is supposed to resort to, and the procedural devices that the investor is expected to use (8.3.1). Furthermore, investment tribunals took different views as to the circumstances under which resort to local remedies can be dispensed with (8.3.2), while in determining the applicability of exceptions to the local remedies rule, they also differed in their standard of review (8.3.3).

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rights which it purportedly suffered both directly and through the violation of individual rights conferred on Mexican nationals under Art 36(1)(b) VCCR, the duty to exhaust local remedies was deemed not to apply. While it is clear that the Court considered the application of the local remedies rule in that case as a condition of the admissibility of the claim, it is also clear that the Court did not otherwise consider exhaustion of local remedies as a substantive element necessary to prove concrete violations of individual rights under Art 36(1)(b) VCCR.

[145] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgment)* [2002] ICJ Rep 3 (14 February 2002), where an arrest warrant issued by a Belgian investigating judge was sufficient to engage the responsibility of Belgium on account of the failure to respect the personal immunities to which the Congolese Minister of Foreign Affairs was entitled under customary international law, regardless of the fact that the warrant was still open to appeal and judicial finality in challenging the warrant has not been achieved.

[146] cf also Demirkol (n 91), 76 who considers the 'judicial function' distinguishable from the outcome in a particular judicial decision, and takes the view that such a judicial decision, even when taking the form of a single act, can result in a violation of a norm of international law when such norm calls for application in the particular dispute. In his view, however, the outcome of the judicial proceeding matters solely where the international norm imposes an obligation of result. Accordingly, a breach of an investment treaty standard of treatment by domestic courts will arguably be different from the breach of a specific rule in an international convention, because the standard concerns the functioning of domestic courts in their adjudicatory process and not directly the outcome in the judicial decision.

8.5.1. Scope of the Judicial Finality Requirement

In the practice of investment treaty tribunals, the obligation to achieve judicial finality has been understood as a comprehensive one. It was primarily the question of effectiveness that seemed to be determinative of the types of remedies that the investor was expected to use. Claimants were thus expected to make use not only of regular forms of appeal, but where necessary also have recourse to extraordinary procedures – such as the *amparo* which is commonly used in certain Latin American jurisdictions,[147] or petitions for constitutional review.[148] Furthermore, the achievement of judicial finality was not considered to be a mere formality, as tribunals were prepared to take into account the Claimant's own diligence in the pursuit of domestic remedies.[149]

Admittedly, the scope of the remedies that the investor was expected to use might occasionally have been construed too broadly, particularly in relation to the extent to which recourse should have been made to indirect remedies. Particularly demanding in this regard was the Tribunal in *Loewen,* which not only expected the Claimant to have recourse to remedies that were capable of directly redressing the underlying judicial wrong (in that case, this was in the form of an ordinary appeal against the Trial Judges decision before the Mississippi Supreme Court), but since such recourse proved unavailing in the circumstances of the case (since Claimant was facing a genuine risk of immediate execution on its assets as it could not afford the *supersedeas* bond required under Mississippi law to stay execution of the judgment pending appeal), also to remedies that would have indirectly enabled it to have access to the direct remedies. The Claimant was thus expected to have resorted to US Federal Courts – by either petitioning the US Supreme Court for *certiorari*, or alternatively, by seeking to obtain collateral review before a Federal District Court – where it could have challenged the bonding requirement on the ground that it prevented, inconsistently with due process, appellate review in the Mississippi courts.[150] Not any less demanding appeared to be the Tribunal in *Alps Finance v. Slovakia* (2011) which would have accepted (had it not already lacked jurisdiction over the claims) that Claimant had failed to exhaust local remedies, not because of failing to appeal the impugned judgment (the Claimant in fact brought an appeal to the Supreme Court, but this was denied), but essentially because of failing to commence judicial procedures that would have mitigated its adverse effects.[151] In *Pantechniki*, however, Sole Arbitrator Paulsson expressed scepticism about the reasonableness of requiring resort to indirect remedies, considering that "[i]t may not be necessary to initiate actions which exist on the books but are never in fact used" and that "[o]blique or indirect applications to parallel

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[147] See *Abengoa* (n 62), [635] (discussing the possibility of an *amparo* appeal against the revocation of an operating license); cf also *Waste Management II* (n 29), [118]-[140].

[148] See eg *Alps Finance* (n 27), [157], [251] (accepting as 'convincing' the Respondent's argument that remedies were still available; among the latter, Claimant mentioned the possibility of petition to the constitutional court). cf also complaints to the Chairman of the court.

[149] See eg *Peter Franz Vocklinghaus v Czech Republic (Final Award)* (UNCITRAL, 19 September 2011) [207] ('There can be no doubt that PV [Claimant] was afforded very wide access to the Czech civil and criminal judicial system. However, it is equally clear from the record in this Arbitration that he did not avail himself of all available local remedies – or else to the extent that he did so, submissions were, on occasion, later or incomplete or both.')

[150] *Loewen (Award)* (n 10), [210]-[217].

[151] *Alps Finance* (n 27). The Tribunal concluded that Respondent had 'convincingly objected' that other remedies were still available and that non-exhaustion of local remedies was therefore *per se* sufficient to exclude the State's responsibility for the conduct of the judiciary ([251]). The claim of denial of justice concerned a decision of a regional court that was alleged to have unjustifiably overruled a previous bankruptcy declaration of a district court. While the relevant company was later declared bankrupt anew, the second bankruptcy trustee rejected the recognition of Claimant's claims to debts on the ground that these became statute barred. The essence of Respondent's defence was that Claimant could have challenged the bankruptcy trustee's non-recognition of the debt, or could have commenced ordinary civil action against the bankrupt company to claim the receivables and thus interrupt statute of limitation (see [156]-[158]).

jurisdictions […] may similarly be held unnecessary" – although also cautioning that such determinations "must perforce be made on a case-by-case basis."[152]

Investment tribunals also differed in their treatment of procedural resources that Claimant was expected to use. Divergence of opinion is notable especially on the question of remedies that should be used in circumstances where claims of denial of justice concern delays in judicial proceedings. While some have categorically stated that the requirement of exhaustion of local remedies was not applicable to such claims at all,[153] others expected that Claimant made use of procedural devices that could have accelerated domestic court proceedings. In *Toto v. Lebanon* (2009), the Claimant was expected to have shown diligence in making use of local remedies to speed up its contractual suits before the Lebanese *Conseil d'Etat* – by petitioning that court to issue its report on the case or review the matter quickly, or by requesting the President of that court's Chamber to cause prompt issuance of the decision of the relevant Juge-Rapporteur.[154] Similarly, in *Chevron v. Ecuador* (2010), the exhaustion requirement was found to extend to any procedural devices that could have expedited Claimants' domestic court proceedings. Of the various procedures invoked by the Respondent (such as motions for "hearing in stands", requests for written closing arguments, or disciplinary and monetary sanctions against judges), the Tribunal considered only applications for recusals of judges to have had the potential of resolving delay, but was eventually satisfied that in the specific circumstances of the case such applications would have made no difference.[155] The Tribunal explained that "[p]roving the availability of remedies extends to proving a direct and objective relationship between the proposed device and the resolution of the wrong"; but this did not imply that the pursuit of indirect remedies might necessarily be exempted from the exhaustion requirement "due simply to their indirect nature" – determinative was whether the remedies could have had a "significant effect" on the expediency of the court proceedings.[156]

8.5.2. Exceptions to the Judicial Finality Requirement

While investment tribunals largely recognized "futility" as a circumstance discharging a claimant from the obligation to achieve judicial finality, there has been considerable divergence in the way the exception has been applied in practice. Conceptually, there has been some confusion in the use of terms since futility may relate, on the one hand, to the *availability* of a remedy, but it may also concern, on the other hand, its *adequacy and effectiveness*.[157] As to the former aspect, there has been no doubt that a Claimant is not expected to exhaust remedies that are non-existent, or to which it is formally barred access.[158] The difficulty, however, is with local remedies that, albeit formally available, are practically foreclosed. The test adopted by investment tribunals has therefore been that of *reasonable availability* of a remedy.[159] The issue was extensively considered in the *Loewen* case, where the question of availability arose, not only in relation to the potential appeal to the Mississippi Supreme Court against the verdict and judgment of the trial court, but

[152] *Pantechniki* (n 27), [96].

[153] See *Jan de Nul* (n 27) [195], [256]; *Oostergetel v Slovakia* (n 27), [275]; *Flughafen* (n 27), [642]; *OI Group v Venezuela* (n 27), [527].

[154] *Toto v Lebanon (Jurisdiction)* (ICSID Case No ARB/07/12, 11 September 2009), [167].

[155] Chevron (Contractual Claims) (n 27), [329]-[31].

[156] ibid [329].

[157] See thus *Loewen (Award)* (n 10), [168], identifying the inquiry as one concerning whether a remedy was 'effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated.'

[158] See eg *Flughafen* (n 27), [642]; and *OI Group v Venezuela* (n 27), [527] (acknowledging that the claimant is not required to pursue local remedies when it is refused access to justice).

[159] See eg *ATA Construction* (n 27), [107] (holding that 'a denial of justice occasioned by judicial action occurs when the final judicial instance, which is *plausibly available*, has rendered its decision'; emphasis added).

also in relation to the alternative local remedies that Loewen could have pursued, particularly about the possibility of petitioning the US Supreme Court for *certiorari*. The Tribunal considered that availability was "not a standard to be determined or applied in the abstract" but meant "reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy."[160] In particular, a remedy was thus not available if conditions were attached to it that rendered its exercise impractical, or if the exercise of the remedy exposed the complainant to severe financial consequences.[161] This seemingly implied an objective test. And indeed, in the view of the Tribunal, the exercise of the right of appeal before the Mississippi Supreme Court would not have been considered "a reasonably available remedy" in circumstances where Claimant was facing a genuine risk of immediate execution on its assets as it could not afford the *supersedeas* bond required under Mississippi law to stay execution of the judgment pending appeal.[162] In subsequently applying the same test to the alternative local remedies that Loewen could have pursued, however, the Tribunal did not inquire anymore whether the alternative remedy was reasonably available, but whether Claimant believed that the alternative remedy was reasonably available – thus turning the objective test into a subjective one. In the end, the claim failed because Loewen purportedly failed to present evidence disclosing the reasons for entering into a settlement agreement with its local competitor instead of pursuing other options (especially resort to the Supreme Court which it had seriously considered).[163] The *Loewen* Tribunal's approach stumbled upon much criticism,[164] and was also challenged during the Claimant's unsuccessful attempt to have the award vacated.[165] It was generally also not followed by other investment tribunals, which generally preferred to assess reasonableness by reference to the objective circumstances of each case.[166]

In the practice of investment tribunals, however, it was more often the adequacy and effectiveness of a specific remedy that had to be considered. The approaches adopted in this regard suffer from some conceptual confusion, as the same notions seem to be used to denote what in effect are different test for determining inadequacy/ineffectiveness of a remedy.[167] Nonetheless, one can roughly identify three approaches that have been used in practice, each of which imposing differently stringent requirements on the investor.[168]

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[160] *Loewen (Award)* (n 10), [168]-[169].

[161] ibid [170].

[162] ibid [208].

[163] ibid [215]-[216]. Only if 'entry into the settlement agreement was the only course which Loewen could reasonably be expected to take' would have allowed the conclusion that Loewen had no reasonably available remedy.

[164] See eg N Rubins, 'Loewen v. United States: the Burial of an Investor-State Arbitration Claim' (2005) 21 Arbitration international 1; or See Paulsson (n 24), 120-124.

[165] See *Motion to Vacate and Remand Arbitration Award*, dated 25 February 2004, available at <http://www.italaw.com/sites/default/files/case-documents/ita0473.pdf>, 21-27 (arguing that by applying the subjective test the Tribunal manifestly disregarded the law that it had deemed controlling). The petition was dismissed because the motion was time barred. Memorandum Opinion (dismissing Claimant's Motion to Vacate Award) of 31 October 2005.

[166] But see *Saipem* (n 31), [184], where the Tribunal considered that, had that been relevant, it would have been legitimate for the Claimant to take any threats to its security into account when deciding whether or not to appeal from the two disputed court decisions, implying that the inquiry could have included whether or not 'Saipem could reasonably have relied on its perception of hostility' to justify its failure to exhaust the local remedies.

[167] Particularly the notion of *probability* of a remedy has in some cases been used in relation to *prospect of success* (eg *Saipem* (n 31), [182]-[183]), while in others as the possibility of an effective remedy (eg *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador (Award)* (ICSID Case No ARB/04/19, 18 August 2008 [400]-[401]).

[168] The practice accords with the different approaches traditionally taken in the application of exceptions to the local remedies rule in the context of diplomatic protection. See 'Third report on diplomatic protection, by Mr. John Dugard, Special Rapporteur' UN Doc A/CN.4/523 and Add1, 56-61.

8.5.2.1. Reasonable Prospect of Success

The first, and least demanding is the criterion of *reasonable prospect of success*. The concept of "reasonable prospect" was formally adopted as a criterion determining the potential futility of a remedy in several cases,[169] but it was only in *Saipem* that it was actually applied in practice. Recalling that Claimant had "already litigated the issue of the arbitral misconduct for more than two and a half years in front of different courts in Bangladesh", the Tribunal deemed Saipem to have exerted "reasonable local remedies", since it "spent considerable time and money seeking to obtain redress without success although the allegation of misconduct was clearly ill-founded" and that therefore, "[r]equiring it to do more and file appeals would amount to holding it to 'improbable' remedies."[170]

8.5.2.2. Reasonable Possibility of an Effective Remedy

On the second approach, remedies have been considered as futile if offering no *reasonable possibility of an effective remedy*. This approach, which is concerned with the existence of a possibly effective remedy in the circumstances of the case, and not the possibility of the claimant actually obtaining that remedy, is also one that is probably most commonly applied in practice.[171] In *Duke Energy* (2008), the inquiry was focused on whether the Ecuadorian courts would have annulled a commercial award by assimilating an erroneous dismissal of jurisdiction to an excess of power. Since Claimants had not established that it was improbable that the Ecuadorian courts would have made such assimilation (for, the Claimant was not obliged "to pursue 'improbable' remedies"), the Tribunal concluded that they have failed to show that no adequate and effective remedies existed, rejecting the claim of denial of justice.[172] In *Pantechniki* (2009), the sole Arbitrator Paulsson similarly focused the inquiry (whether expecting the Claimant to have pursued a remedy would have been "beyond a point of reasonableness"), not on whether the Claimant would have succeeded with its appeal before the Supreme Court of Albania, but onto the narrower question whether the Supreme Court, being a court of cassation rather than a full court of appeal, could have done "no more than to send the case back to the appellate level".[173] In *Abengoa v. Mexico* (2013), in turn, the futility question was considered in relation to the practical effects of a potential judgment. Recourse to the *amparo* remedy would have been completely futile because it would have taken several weeks to obtain any kind of interim decision, by which time the situation of the facility would not have been economically viable.[174] Finally, in *Chevron v. Ecuador* (2010), the test of reasonable possibility of an effective remedy was seemingly used to determining the futility of procedural remedies. Thus, a "high likelihood of success" of a

[169] See eg *Jan de Nul* (n 27), [258] ('An exception to this rule may be made when there is no effective remedy or "*no reasonable prospect of success*"'; emphasis in the original); *Flughafen v Venezuela* (n 27), [642] ('el recurrente no está obligado a agotar los recursos internos […] cuando ulteriores recursos prometen ser fútiles, por existir *dudas razonables* sobre su existencia o sobre su *posibilidad de éxito*'); or *OI Group v Venezuela* (n 27), [527] ('el recurrente no está obligado a agotar los recursos internos […] cuando ulteriores recursos prometen ser fútiles, por existir *dudas razonables* sobre su existencia o *sobre su posibilidad de éxito*').

[170] *Saipem* (n 31), [183].

[171] The approach was sometimes adopted also on the formal level. See eg *Flughafen v Venezuela* (n 27), [642]; and *OI Group v Venezuela* (n 27), [527], both considering that domestic resources would have been futile because there was 'reasonable doubt about their existence'. However, in both cases this approach was combined with that of *reasonable prospect of success*, which is a different test.

[172] *Duke Energy* (n 167), [400]-[402].

[173] *Pantechniki* (n 27), [96], [101]-[102]. This is not surprising since Paulsson has also supported in his such understanding of the futility exception. See Paulsson (n 24), 118.

[174] *Abengoa* (n 62), 635.

procedural device was not required in order to expect a Claimant to attempt it; of relevance was solely whether the remedy could have had a "significant effect" on the resolution of the wrong.[175]

8.5.2.3. Obvious Futility

The third, most stringent approach to determining the inadequacy of a remedy has been that of *obvious futility*, which requires that ineffectiveness of the remedy be clearly shown. While it was the Tribunal in *Loewen* that identified a body of opinion supporting the view that a complainant was bound to exhaust any remedy that was "adequate and effective" so long as it was not "obviously futile",[176] it was only the Tribunal in the *Apotex* case (2013) to actually apply it. According to that Tribunal, determining the "obvious futility" of a remedy turned on the "*unavailability* of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief."[177] Unavailability in this sense implied "an actual unavailability of recourse, or recourse that is proven to be 'manifestly ineffective'", whereby manifest ineffectiveness required "more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued." Therefore, it was not enough for the Claimant "to allege the 'absence of a reasonable prospect of success or the improbability of success, which are both less strict tests'"; what was necessary, instead, was to demonstrate that there "was no justice to exhaust."[178] This was admittedly a high threshold to meet, but as explained by the Tribunal, such high threshold "necessarily follows" from the nature of the judicial finality rule to which it is an exception; and as an exception, it "must be construed narrowly."[179]

In applying this stringent test, however, the Tribunal conflated the question of effectiveness with that of availability of a remedy, by failing to distinguish between the Claimant's chances of being granted *certiorari* by the Supreme Court and its chances of succeeding with the constitutional appeal, in case *certiorari* had been granted.[180] The Tribunal eschewed the issue of availability, by arguing that "even if the chance of the U.S. Supreme Court agreeing to hear Apotex's case was remote, the availability of a remedy was certain."[181] Arguably, however, its availability was far from certain, taking into account, as also noted by Apotex, the very small number of cases in which *certiorari* is granted each year by the Supreme Court.[182] It may be that determining the effectiveness of a remedy by reference to merely the Claimant's chances of a successful outcome might not be the correct enquiry, but there is no reason why a tribunal should avoid embarking on a prediction whether or not *certiorari* would have been granted for the purpose of determining whether a remedy was "actually unavailable". Indeed, in determining the "reasonable availability" of a remedy, the Tribunal in *Loewen* previously looked not only at practical considerations relating to its exercise, but took also account of the likelihood of obtaining relief. Namely, the absence of any certainty about the outcome of petitioning the US Supreme Court for certiorari or seeking collateral review in a Federal District Court was held to be "a significant consideration" in deciding whether either of the options was a reasonably available remedy.[183]

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[175] Chevron (Contractual Claims) (n 27), [326], [329].

[176] *Loewen* (n 10), [165], [168].

[177] *Apotex* (n 28), [276]; emphasis in the original.

[178] ibid [284]-[288]. Support for the 'no justice to exhaust' test was found in *Robert E Brown Case (US v UK)* (23 November 1923).

[179] ibid [279] [284].

[180] ibid [288]-[289].

[181] ibid [287].

[182] ibid [274] and fn 132.

[183] *Loewen* (n 10), [212].

8.5.3. Standard of Review Adopted in Determining the Applicability of Exceptions to the Judicial Finality Requirement

To complete the picture, it must be mentioned that investment tribunals, not only differently defined the conditions under which a Claimant would be exempted from the obligation to achieve judicial finality, but also adopted different approaches in assessing whether the relevant factual circumstances satisfied those conditions. In most cases where the inquiry turned on questions of domestic law (which was usually relevant for determining the availability of a particular remedy), tribunals have frequently adopted a deferential approach, as attested to by their tendency to avoid making conclusive decisions as to points of domestic law, and generally to resolve uncertainties in Respondent's favour. In *Duke Energy*, for example, the Tribunal refused to accept the argument that resort to the local judiciary would have been futile because it was improbable that Ecuadorian courts would have annulled a commercial award on the ground of an erroneous dismissal of jurisdiction. The Tribunal noted that none of the grounds for annulment provided for under Ecuador's Mediation and Arbitration Law expressly addressed jurisdiction. Yet, it was not willing to assume that the award could not be challenged in Ecuadorian courts on that ground, noting that "lack of clarity" was "not sufficient to demonstrate that a remedy is futile."[184] In *Pantechniki,* the Tribunal did not wish to conclusively establish whether or not pursuant to the Albanian Civil Code, the Supreme Court of Albania had the option of rendering a final judgment, as argued by the Respondent, or whether it was bound to send the Claimant's contractual dispute back to the appellate court, rendering recourse to the Supreme Court an exercise in futility. The Tribunal was satisfied by noting that "[i]ndeed the practice of *renvoi* does not appear to be an inevitable feature of cassation systems."[185] Then again, differing from this is the award in *Apotex*. In embarking for the sake of completeness on a prediction as to the likely outcome of the domestic judicial ruling, the Tribunal resolved without reluctance that the US Supreme Court could "obviously" have heard a case relating solely to procedural matters, finding support for such conclusion in academic commentary and the Rules of the Supreme Court themselves.[186]

As on the question of availability of a domestic remedy, divergent approaches have also been adopted by investment tribunals in determining the effectiveness of a remedy. Such determinations were not difficult in cases where the effectiveness of a domestic remedy turned on specific factual circumstances on which courts had little or no influence. In *Abengoa v. Mexico* (2013), for example, the Tribunal concluded that recourse to domestic judicial procedures would have been completely futile, among other reasons, because it was evident that due to the overwhelming opposition of the municipal government against the Claimants waste processing facility, the execution of any judicial decision would have been impossible in practice.[187] In contrast, difficulties have arisen in circumstances where the assessment of a remedy's effectiveness necessitated an inquiry into domestic law, which might require the drawing of inferences from past domestic court proceedings and potentially stepping into the shoes of the domestic courts. The approach of investment tribunals on these issues has varied. A somewhat deferential approach was noticeable in *Loewen*, for example, where the Tribunal was provided with competing opinions on the part of the parties' experts as to the prospects of success of an application for *certiorari* before the US Supreme Court and the availability of collateral review in a Federal District Court. The Tribunal considered it was "not in a position" to decide whether the opinion of the Claimant's expert, which had described such prospects as being "very unlikely",

[184] *Duke Energy* (n 167), [400]-[401].

[185] *Pantechniki* (n 27), [102].

[186] *Apotex* (n 28), [290] and fns 158 and 159.

[187] *Abengoa v Mexico* (n 62), [635].

were to be preferred over the opinion of the Respondent's expert, which had claimed there was "a reasonable opportunity" of obtaining review. In the end, the Tribunal clung on the fact that even the Respondent's expert had not asserted that either of the courts would have granted the relief, which tended to confirm that none of them was a reasonably available remedy.[188] Deferential was also the sole Arbitrator Paulsson's decision in *Pantechniki* in its appraisal whether the Claimant's further pursuit of local remedies was bound to be an exercise in futility, due to the possibility that the Supreme Court of Albania, being a court of cassation rather than appeal, might have sent its case back to the appellate level where the Claimant could allegedly not have expected due process. The sole Arbitrator was not willing to assume that the Supreme Court "invariably sends censured cases back to the appellate level", nor was it able to assume that the appellate courts "would always be unable or unwilling to conduct themselves in accordance with the minimum international standard."[189] Especially in relation to the latter, though, the Arbitrator could well have assumed a different stance, given that in an earlier part of the award he expressed concern about the "clear violation of fair procedure" that had apparently occurred in proceedings before the Court of Appeal when this had rejected a claim on a ground which the Claimant had not invoked and had no occasion to address.[190]

Contrary to sole Arbitrator Paulsson in *Pantechniki*, the Tribunal in *Saipem* proved more inclined to drawing inferences as to the potential outcome of the Claimant's pursuit of local remedies from the previous conduct of domestic courts. The question in that case was whether Saipem had exhausted available local remedies, given that two degrees of appeals were still available from the contested domestic court decision that revoked the authority of arbitrators in the commercial arbitration that Saipem brought against the State-owned company Petrobrangla. The ICSID Tribunal considered that Saipem had exerted "reasonable local remedies" by spending considerable time and money seeking to obtain redress without success against a "clearly ill-founded" decision, which the Tribunal already determined had constituted an abuse of supervisory jurisdiction and a direct violation of Bangladesh' obligations under the 1958 New York Convention. Saipem, indeed, litigated the issue of alleged arbitral misconduct for more than two and a half years in front of different courts in Bangladesh. On the face of it, such duration of local proceedings did not appear outrageously excessive. Nonetheless, the Tribunal held that requiring Saipem to lodge further appeals would amount "to holding it to 'improbable' remedies," particularly so "knowing that Saipem's case was precisely that the local courts should never have become involved in the dispute."[191] The Tribunal's conclusion as to the lack of probability seems to have been premised on the fact that the Supreme Court had previously issued injunctions restraining Saipem from pursuing the commercial arbitration,[192] which could have been interpreted as suggesting that the Supreme Court would likely not have overturned the lower court's decision.

A similar willingness on the part of an investment tribunal to assess the potential futility of a remedy by reference to the previous conduct of domestic courts could also be noted in *Flughafen Zürich v. Venezuela*. In the circumstances of that case, the Tribunal had to consider whether Claimant, as concession-holder of an airport on the Venezuelan Isla Margarita, should have further pursued the appeals it had brought before a lower administrative court against certain actions taken by the local government of Nueva Esparta in relation to the airport, considering that the Supreme Court of Venezuela in the meanwhile transferred the administration and control of the airport to the Central Government. Having found that the

[188] *Loewen* (n 10), [210]-[211].

[189] *Pantechniki* (n 27), [102].

[190] ibid [100].

[191] *Saipem* (n 31), [183].

[192] ibid [37]-[39].

Supreme Court's decision of 2009 ordering such transfer amounted to a denial of justice, the majority of the Tribunal concluded that future pursuit of the administrative appeal would have been futile inasmuch as there was "no reasonable expectation" that those proceedings could result in a reversal of the transfer. According to the Supreme Court's decision, the transfer was not intended to be permanent and was said to depend on the ultimate resolution of the underlying dispute in the administrative court. However, the Tribunal viewed the transfer as irreversible, since the Central Government had already assumed factual control over the airport and, by means of an Executive Decree, included the airport among the assets held by a newly created state airport company.[193] According to the Tribunal, it was not reasonable to assume that the administrative court could have decided against the Supreme Court that control over the airport should revert to the Claimants, nor would the court actually have the power to order a transfer in circumstances where neither the Government nor the state airport company were party to the proceedings.[194] The Tribunal's lack of confidence in the successful pursuit of domestic remedies seemed to have been attributable to the perceived bias of the Supreme Court in favour of the Central Government. The legal basis for the Government's taking over of the airport was actually made possible by the Supreme Court's novel interpretation of certain constitutional provisions in 2008 that expanded the Central Government's powers in the field of airport management. Furthermore, the 2009 decision ordering the temporary transfer already anticipated in an *obiter dictum* on the possibility that the transfer would have become permanent, in spite of the lack at that time of a legal basis for the Central Government to assert control over the airport. The Tribunal seemed disturbed by the fact that nowhere had the Supreme Court questioned the competence of the Central Government to take such steps, and the fact that the Court anticipated on any decisions that the Government might issue regarding the airport, in circumstances where the Government was not even party to the proceedings before the Supreme Court, demonstrated that the Court's bias.[195]

8.6. Concluding Observations

The applicability of the judicial finality rule in investment treaty arbitration is certainly one of the main fault lines in the discussion on the relationship between domestic courts and investment treaty tribunals. While largely dispensed with as a procedural precondition for the presentation of claims, the obligation to exhaust local remedies has been reintroduced in the guise of the judicial finality rule, which is now accepted to operate as a substantive requirement in relation to some claims premised on judicial conduct – essentially those concerning denial of justice, but potentially also certain others. Conceptually, the finality rule has usually been linked to the specific nature of the international obligation at issue: where this obligation is taken to entail the maintenance of a system of a particular kind, or more broadly the achievement of a particular result – such as may be the case with the customary international law obligation to provide an adequate system of justice – judicial finality applies as a substantive condition of a claim, for only when the system as a whole has been tested, and the required result not achieved, can one say that the violation of the obligation has materialized. Pursuant to such understanding, the application of the finality rule becomes then contingent on whether one interprets the concrete treaty standard to demand a defined conduct, or to require a defined result. As many treaty standards are capable of being interpreted either way, the imposition of the finality rule becomes then dependent on the circumstances of each case, and the opinion of each individual tribunal. Most problematic perhaps, the application of the rule under such conditions essentially permits claimants to re-categorize their claims, so as to avoid the rule altogether.

[193] *Flughafen* (n 27), [709]-[721].
[194] ibid [718]-[719].
[195] ibid, [700]-[706].

The alternative view, which is to treat judicial finality as a condition applicable to the exercise of adjudicatory functions as such, resolves some of these problems by requiring exhaustion of local remedies in relation to all claims predicated upon the conduct of judicial (and other adjudicative) organs. When applied in this way, however, the condition of judicial finality creates the impression that injuries resulting from one type of State activities should be seen as less reprehensible than those resulting from other types. Eventually, it also leads to the situation where the same treaty standard may be taken to impose different requirements upon different state organs – a proposition which was usually resisted in the practice of investment tribunals.[196] Unless, of course, one sees judicial organs to be fundamentally different from others, so that the judiciary could only be understood to act as a whole (in the sense of one single conduct comprising the lowest to the highest judicial decision). But this proposition has not received much support either. The necessary consequence of either of these propositions is that domestic courts turn out to be treated with greater deference than other state organs. Albeit difficult to accept, such a consequence may not necessarily lack rationale, at least if one takes the admonition seriously that investment tribunals are not courts of appeal.

Ultimately, it is on the question of deference that the judicial finality rule ultimately turns. With the benefit of hindsight, it is clear that in devising its litigation strategy in the *Loewen* case, the US was well aware that the approach that they would have taken could "not only have significant implications on the nature and extent of investor protections afforded by the NAFTA, but may also affect the long-term viability of the NAFTA itself."[197] In particular, the US Justice Department was concerned that a negative outcome of the case would likely have generated a political hostility toward the NAFTA, "particularly if the NAFTA is construed to effect a waiver of sovereignty that would permit an international tribunal effectively to sit in review of decisions of United States courts at the election of foreign investors."[198] The issue was therefore one of ensuring a trade-off between preventing NAFTA tribunals from turning into courts of appeal, while retaining the ability of US investors to challenge arbitrary, expropriatory, or otherwise unfair court judgments abroad. As to the latter, the Department of State and the US Trade Representative deemed it especially important not to undermine the protection of US investors in Mexico, where there remained evidence of judicial corruption.[199] Framing the objection in relation to the lack of judicial finality seemed crucial to achieving that aim. At the same time, the US Justice Department was aware of the conceptual weaknesses of the finality argument, warning that it will be "difficult to argue that a final trial court judgment – which is a fully executable action – is less 'final' for purposes of state responsibility than a statute or regulation that has not been challenged in court". Furthermore, the Department realized that "since the NAFTA explicitly waived the traditional requirement that a claimant must first exhaust domestic legal remedies before proceeding to arbitration, it would be difficult to persuade the tribunal that exhaustion of the judicial process is required before a court judgment becomes a measure under the NAFTA."[200]

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[196] See eg *Rompetrol* (n 27), [160] (not finding any warrant to read into the treaty 'an implied term that would subject some claims for breach of "fair and equitable treatment" to conditions or restrictions, even of a purely temporal kind, that would not apply to other claims to the same standard of protection') and [164] (suggesting it would 'defy logic to suppose that international law lays down a more demanding standard for the actions of prosecutors than it does for the operation of the courts before which their prosecutions are brought'). But see *Liman Caspian* (n 28), *Loewen* (n 10).

[197] See Memorandum for John D Podesta from Beth Nolan, et al, regarding 'Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration' dated 10 February 2000, at 1, available at <www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=13377>.

[198] ibid, 3.

[199] ibid.

[200] ibid, 5.

As if aware of the US concerns, and of the relatively thin reasoning sustaining its re-introduction of the judicial finality rule, the *Loewen* Tribunal sought to justify its decision in a postscript at the end of its award by expressing the following opinion:

> "Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands."[201]

In its origins, therefore, the case for the judicial finality rule has been a case for preventing international treaty tribunals from sitting as regular courts of appeal from decisions emanating from domestic courts, and for preserving the integrity of the domestic legal system, without at the same time preventing such tribunals from ultimately exercising some form of external control. Its occasional semi-extension to non-judicial conduct – though not in the sense of a legal obligation, but as a circumstance relevant to proving a juridical fact – pursues the same underlying logic: confirming that investment treaty tribunals are not a new form of administrative appeal against mistakes of executive organs.

As in the case of the traditional local remedies requirement, the finality rule thus operates in its essence as a balancing principle. But this balancing obviously does not sit well with the system of investor-State arbitration where the requirement to exhaust local remedies has been precisely dispensed with as a condition for resorting to the international forum. Indeed, it is frequently by reference to the functional argument – i.e., that fact that investment arbitration was introduced precisely as a functional alternative to domestic litigation – that the extension of the finality rule has generally been resisted.[202] Yet, the finality rule is not any less about substance – the question whether the concrete treaty standards, to which States agreed in their investment treaties, shall be deemed to impose more onerous demands upon courts than in the case of denial of justice, meaning that such standards would have to be equally complied with at the level of each individual judicial decision.

Ultimately, the application of the finality rule seems also to revolve around trust. This can be seen in the distinction between cases brought against States possessing a developed judicial system such as that of the US, where the exceptions to the rule have been construed narrowly,

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[201] *Loewen* (n 10), [242].

[202] See Schreuer (Calvo's Grandchildren) (n 75), 16 ('It is not inherently unreasonable to require that the investor make some efforts domestically to obtain redress before seizing an international tribunal. But then neither is the domestic remedies rule inherently unreasonable. The decision to do away with it in investor-State investment arbitration was made consciously and for good reasons. Therefore, we should think twice before making the use of local remedies a constitutive element or substantive requirement of a violation of international standards.')

and capital-importing States, where exceptions to the rule have been applied more liberally. The distinction is obvious when one compares the *Apotex* decision involving the US, where the very high threshold of "obvious futility" was applied, to the *Saipem* decision rendered against Bangladesh, where the lack of "reasonable prospect of success" was sufficient for the dispensation of the local remedies requirement. At the end of the day, the dynamic behind the strict or loose application of the finality rule is again one dependent on the proper scope of arbitral intervention.[203] It is therefore not surprising that discrepancies in how strictly the rule has been applied will beg questions as to whether investment-treaty arbitration has really been functioning as a genuinely neutral international forum, or instead simply as a means of enabling investors from developed states to bypass judicial and administrative procedures in less-developed treaty partners.[204]

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Reflecting more broadly on situations in which domestic courts performed the roles of *suspects,* a two-fold development can be observed. On the one hand, an unaltered tendency to review domestic courts conduct with great deference and restraint in the context of denial of justice claims; and on the other hand, the increasing inclination to review their conduct against other treaty standards of treatment that, on their part, are frequently construed as imposing more rigorous and demanding obligations than those imparting upon courts' pursuant to a State's duty to provide an adequate system for the administration of justice. The lesser deference thus accorded to domestic courts when their conduct is scrutinized against these standards, however, is still nothing compared to the investment tribunals' defiance towards them in the context of jurisdictional competition – that is, when courts are in the position where they compete with investment tribunals for adjudicatory authority. This latter will be the subject of the last part of the present inquiry.

[203] See *Apotex* (n 28), [278] (justifying strict construction of the 'futility exception' by reference to the need to preclude an international tribunal 'to act as a supranational appellate court').

[204] For this critique, see in particular M Sattorova, 'Return to the Local Remedies Rule in European BITs? Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law' (2012) 39 Legal Issues of Economic Integration 223.