PART II

Domestic Courts as Suspects:
State Responsibility for Judicial (Mis-)Conduct

II. INTRODUCTION INTO PART II

In the following three chapters, the inquiry shifts to those situations where the relationship between domestic courts and international tribunals becomes a "disharmonious" one – where investment tribunals begin to treat domestic courts' conduct and their decisions as "suspect", because such courts have purportedly engaged in improper or wrongful conduct vis-à-vis the foreign investor, and thereby engaged the responsibility of the State under international law.[1] Hence, the purpose of the next three chapters is to examine the practice of investment tribunals in scrutinizing the conformity of the conduct of domestic judicial authorities with the standards of treatment that States are to accord to investors under investment treaties. Before surveying this practice, it is necessary to consider, from a more general standpoint, the ways in which responsibility can arise under international law for the conduct of judicial organs, both as a question of attribution (II.1), and as a question of the nature of the obligation allegedly violated by the conduct of the judicial organs (II.2).

II.1. Responsibility of the State for the Conduct of Judicial Organs

The prevalent view today is that the conduct of domestic courts may engage the responsibility of the State on the ground that the acts of the judiciary are attributable to the State, just like the acts of any other State organ. The latter proposition is presently codified in Article 4(1) ARSIWA, which stipulates that "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, *judicial* or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."[2] This provision is now considered to be reflective of customary international law.[3]

Admittedly, due to enduring disagreements regarding the circumstances under which judicial acts were capable of engaging the responsibility of the State, one may not infrequently found pronouncements in the jurisprudence of international adjudicatory bodies suggesting that the State may possibly not be held responsible for wrongs committed by the judiciary, at least not in the same way as other organs.[4] Even as late as in 1984, the ICSID Tribunal in *AMCO v.*

[1] For a similar understanding, see LY Fortier, 'Investor-state Tribunals and National Courts: a Harmony of Spheres?' in DD Caron, SW Schill, A Cohen Smutny & EE Triantafilou (eds), *Practising Virtue: Inside International Arbitration* (OUP, 2015), 292-307, at 292 ('When each adjudicatory body understands and acts within its own sphere of competence, the relationship between national courts and international tribunals is in fact harmonious. However, when the court or tribunal deviates from its sphere of competence, the relationship is anything but harmonious. In fact, the tension is palpable.').

[2] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, art 4(1); Report of the ILC on the Work of its Fifty-third Session (2001), UN Doc A/56/10 (2001), at 43; and UN Doc A/RES/56/88 (2002); emphasis added.

[3] cf ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ Rep 62 (29 April 1999) [62] ('According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state. This rule, which is of a customary character…').

[4] See eg *Croft* case (7 February 1856), reported in A Lapradelle and N Politis, *Recueil des arbitrages internationaux* vol 2 (Pedone 1905), 1ff, at 24 ('Quand toute une série de questions juridiques sont, en vertu de celte Constitution et d'autres dispositions de même nature, soustraites aux tribunaux ordinaires et soumises à des tribunaux spéciaux institués pour en connaître, toutes les fois qu'elles s'élèvent en matière administrative, le fonctionnement de cette juridiction ne constitue qu'un exercice véritable du pouvoir judiciaire, puisqu'il dépend uniquement de la libre et indépendante interprétation de la loi par des personnes qui en sont régulièrement chargées et non de l'obéissance à des ordres supérieurs. Il est, par suite, impossible de rendre le gouvernement ou l'Etat responsables des sentences prononcées par cette juridiction.'); and *Yuille, Shortridge Company* case (21 October 1861), reported in ibid, 78ff, at 103 ('…Il serait donc tout à fait injuste de demander compte au gouvernement royal de P. des fautes commises par ses tribunaux. En vertu de la Constitution du royaume de P., les tribunaux sont parfaitement indépendants du gouvernement qui par conséquent ne peut exercer aucune influence sur leurs décisions; on ne peut donc pas l'en rendre responsable.')

Indonesia contended that it was "common ground in international law that the international responsibility of a State is not committed by the acts of its municipal Courts, except where such acts amount to a denial of justice."[5] The problem with such statements, however, is that they conflate the question of attribution with the identification of the primary norm violated as a result of the conduct on the part of the judiciary.[6] To be sure, no theory of limited responsibility (or perhaps even non-responsibility) of judicial organs ever gained traction in doctrinal writings.[7] Neither did it find actual adherence in the jurisprudence of international courts and tribunals in general. On the contrary, international judicial and arbitral decisions time and again confirmed that, as a general matter, responsibility can be engaged as a result of the conduct of every organ, regardless of the function that such organ performs within the domestic legal order;[8] and specifically, that responsibility can clearly be engaged by the conduct of the judiciary.[9]

A theory of limited responsibility for the conduct of judicial organs would also be difficult to uphold conceptually. The most commonly adduced argument in support of such theory is that premised on the domestic independence of the judiciary,[10] which finds its underpinnings in theories such as Montesquieu's separation of powers doctrine or the common-law doctrine of judicial independence. Such an argument, however, is incompatible with the prevailing international law conception of the State as a unitary actor, which presupposes that the State speaks with one voice on the international plane, regardless of the organ from which the voice emanates.[11] Specifically, the argument fails to take into account that, though perhaps independent

[5] Amco Asia Corporation and others v Republic of Indonesia (Award) (ICSID Case No ARB/81/1, 20 November 1984), [150].

[6] On careful reading, the views expressed in *Croft* (1856) and *Yuille* (1861) did not actually concern the question of possibility of judicial organs to engage the responsibility of the state as a subject of international law, but more properly concerned the question whether the judicial decisions in question constituted a breach of an international obligation. In both cases, the possibility was namely accepted that domestic courts could commit a denial of justice. Commenting on these cases, Eagleton appropriately observed: 'There can be no doubt that a court, as any other agency of the state, may, through an internationally illegal act, bring responsibility upon its state; the difficulty lies in determining which of its acts are illegal.' C Eagleton, *The Responsibility of States in International Law* (1928), at 71.

[7] For a comprehensive rejection of the doctrine, see *inter alia* D Anzilotti, *Cours de Droit International* (1929), at 479-80; or H Urbanek, 'Das völkerrechtsverletzende nationale Urteil' (1958– 59) 9 ÖZöR 213, at 246ff.

[8] See eg *Salvador Commercial Company (El Salvador/US)* (XV UNRIAA 455, 1902) 477 ('a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity'); or for a recent restatement of the principle, *LaGrand (Germany v United States of America) (Request for the Indication of Provisional Measures, Order)* [1999] ICJ Rep 9 (3 March 1999) [28] ('Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be'). For further examples, see cases cited in 'Third Report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, the internationally wrongful act of the State, source of international responsibility', A/CN.4/246 and Add 1-3, YILC 1971, vol II(1), at 246-47; and J Crawford, *State Responsibility: The General Part* (CUP 2013), at 117.

[9] See eg Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain) (III UNRIAA 1479, 9 May 1934) 1501; Différend concernant l'interprétation de l'article 79, par 6, lettre C, du Traité de Paix (Biens italiens en Tunisie — Échange de lettres du 2 février 1951) (Decision 196) (XIII UNRIAA 422, 7 December 1955) 438 ('La sentence rendue par l'autorité judiciaire est une émanation d'un organe de l'Etat, tout comme la loi promulguée par l'autorité législative, ou la décision prise par l'autorité exécutive. La non-observance d'une règle internationale, de la part d'un tribunal, crée la responsabilité internationale de la collectivité dont le tribunal est un organe, même si le tribunal a appliqué un droit interne conforme au droit international'). For more recent restatements of the principle, see US – Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/AB/R, 6 November 1998) [173] ('[t]he United States, like all other members of the WTO and of the general community of states, bears responsibility for acts of all of its departments of government, including the judiciary.'); or ICJ, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) [1999] ICJ Rep 62 [63] ('As indicated above, the conduct of an organ of a State – even an organ independent of the executive power [referring to the conduct of Malaysian courts] – must be regarded as an act of that State').

[10] For an example, see T Baty, *The Canons of International Law* (Murray 1930), 127-28; for a general discussion on this argument, see AV Freeman, *The international responsibility of states for denial of justice* (1938), 29-34.

[11] On this, see especially Anzilotti (n 6), 480. For confirmation, see Eagleton (n 6), 74; C De Visscher, 'Le déni de justice en droit international' (1935) 52(II) Recueil des Cours 365, 376-77.

of the government, the judiciary is not independent of the State.[12] Similar conceptual difficulties arise in relation to some other arguments that have occasionally been invoked in defense of a theory of limited judicial responsibility, such as those premised on the *res judicata* nature of domestic judicial decisions, or on limitations resulting from the internal (constitutional) structure of the State.[13] It does not take much to conclude that any such justifications would be difficult to reconcile with certain fundamental principles of international law, such as the principle of supremacy of international law and irrelevance of the domestic law defense in the context of state responsibility. Last but not least, as a matter of policy, a theory allowing judicial organs to be treated differently from other State organs in the ascertainment of a State's international responsibility would not be a desirable one, as it would clearly lend itself to abuse. Hence, it is of little surprise that a potential theory of limited State responsibility for judicial action has been rejected at an early stage during the latest codification of the Law on State responsibility.[14]

II.2. Obligations of States with regard to Judicial Organs

If, as discussed above, the responsibility of the State for improper or wrongful conduct on the part of judicial officials does not depend on the position that these occupy in the internal machinery of that State, it is convenient next to identify the type and nature of international legal obligations that can be violated by such conduct. In general, the wrongful conduct of judicial organs is most often associated with one particular delict – that of denial of justice. The association between the two is that strong that it was sometimes believed that denial of justice was capable only of being committed by judicial organs; or conversely, that denial of justice is the only way that the judiciary can engage the responsibility of the State.[15] Clinging to the latter opinion was, among other adjudicatory bodies, the Tribunal in the *AMCO v. Indonesia* case.[16] Yet, the responsibility of the State for acts of its judiciary does not exhaust itself in the concept of denial of justice. Not only in academic writings,[17] but also in international judicial and arbitral practice the possibility is now generally accepted that domestic courts can equally engage a State's responsibility through the misinterpretation or misapplication of treaties,[18] or else through violations of specific rules of customary international law.[19] In this respect, it must be said that the

[12] On this, Freeman (n 10), 31. This of course implies that the state cannot be held responsible for the conduct of judicial organs, which operate independent from it. cf *Salem Case (Egypt, USA)* (II UNRIAA 1161, 8 June 1932) at 1202-03, exonerating Egypt's responsibility for denials of justice allegedly committed by the Mixed Courts because, by agreeing to the capitulatory regime, Egypt resigned part of its jurisdictional sovereignty and was thus unable to prevent repetition of fault on the part of such courts, to remove the judges or punish them by disciplinary action, or to modify the laws in accordance to which the courts were composed and had to decide their cases.

[13] See Freeman (n 10), 34-38.

[14] See Ago, 'Third Report on State responsibility' (n 8), 246-49.

[15] See discussion in ch 6.1.

[16] *Amco v Indonesia (Award)* (n 5), [150].

[17] See eg E Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159(1) Recueil des Cours 1, at 278-79 ('The responsibility of the State for acts of judicial authorities may result from […] a decision of a municipal court clearly incompatible with a rule of international law.'); and more generally J Paulsson, *Denial of Justice in International Law* (CUP 2005), 69-73.

[18] See eg *SS 'Lotus' (France v Turkey) (Judgment)* (1927) PCIJ ser A, No 10, at 24 ('The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises.'); or *Martini Case (Italy v Venezuela) (Award)* (3 May 1930), reproduced in (1931) 25 AJIL 554, at 562-65.

[19] See eg *Costa Rica Packet case (UK/Netherlands) (Award)* (184 CTS 240, 13 February 1897) (finding that a Dutch court had violated the freedom of the high seas by ordering the preventive custody of a British captain on the belief that the latter had unlawfully appropriated goods from a vessel adrift in the territorial waters of the Dutch East Indies, which vessel later turned out to have been located on the high seas).

conduct of judicial organs can be contrary to a rule of international law, either due to the judges themselves, or due to the restrictions upon the capacity of the courts set by the State's own laws. Admittedly, in the latter case, the actual organ committing the wrongful act may not actually be the judiciary, but the legislative that adopted the legislation which is contrary to international law. This is especially the case in those domestic legal system where courts are not entitled to directly apply international law, and hence, in exercising their function of applying internationally non-conforming domestic law, they will be constitutionally compelled to violate international law. Thus, whether or not the application of domestic legislation in ways contrary to international law will count as a wrong committed on the part of judicial organs will largely depend on the extent to which these will be able to take account of international law in interpreting and applying domestic law. But in legal systems where courts will be able to do so, their conduct will in itself be capable of amounting to a violation of international law.

Applying these principles to the investment arbitration practice, one can observe that contemporary investment tribunals have by and large retracted from the view advanced in *AMCO* and generally accepted that the conduct of the domestic judiciary may give rise to breaches of specific investment treaty standards, even in circumstances where that conduct itself would not otherwise have met the threshold of denial of justice. This is not to say that the concept of denial of justice has not remained of central importance to scrutinizing judicial conduct, as attested by the fact that the majority of cases are still pleaded and considered under the rubric of denial of justice. It does however mean that investors have the option of relying – and in practice do rely – on more than one standard of treatment in seeking redress for wrongful judicial conduct.[20]

To take account of these developments, the inquiry proceeds in the following way. Chapter 6 examines the way in which the obligation not to deny justice has been construed and applied in the practice of investment tribunals. Thereafter, chapter 7 explores how the latter have applied other standards of treatment guaranteed by investment treaties in relation to judicial conduct. In both chapters, the emphasis of the inquiry is on the standard of review applied by investment tribunals to determining whether the judicial conduct in question violated international law. Studying the intensity by which tribunals exercise their supervisory powers is namely relevant to determining the proper scope of review that an international tribunal is to exercise over domestic judicial organs without assuming the role of a regular court of appeal. The last chapter in this part, chapter 8, deals with a matter that appears to be of relevance to at least some of the claims predicated on injuries committed by judicial organs: the question of local remedies and the extent to which these have been exhausted in order to prove violations of international law on the part of judicial organs.

[20] See eg *Romak SA (Switzerland) v The Republic of Uzbekistan (Award)* (UNCITRAL, PCA Case No AA280, 26 November 2009) [133]-[138], where the refusal on the part of Uzbek courts to enforce a commercial award rendered in the Claimant's favor was claimed to constitute a violation of art IV of the New York Convention (the improper interpretation and application of the NYC was qualified as constituting a breach of the umbrella clause in art 11 of the Switzerland-Uzbekistan BIT). It was further claimed that the conduct of the domestic Courts was incompatible with art 3 of the BIT, which required the host State to ensure a secure investment environment, the promotion of investments, and fair and equitable treatment before Uzbek courts. Moreover, it was argued to constitute an expropriation of contractual rights. Lastly, claiming that the impugned domestic decision contained gross defects in its substance, Romak argued the domestic courts' conduct amounted to a denial of justice, in violation of the BIT's FET standard and obligations under customary international law. The claims were dismissed for lack of jurisdiction, however.