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INVESTMENT TREATY ARBITRATION: AN EFFECTIVE TOOL FOR
THE
ENFORCEMENT OF PRIVATE ARBITRATION AWARDS?

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ABSTRACT

International tribunals, whose jurisdiction is based on international treaties that address issues relevant to cross-border investments (“**Investment Treaties**”), have recently dealt with investment arbitration crossing with international commercial arbitration (so-called cross-over arbitration). More precisely, the cases brought before the said investment tribunals concerned the assessment of whether the actions of national courts, which interfered with the recognition and/or enforcement of a commercial award, could constitute a breach of Investment Treaties. In fact, such treaties normally contain a set of provisions aimed at protecting foreign investments, including the right of the private investor to bring a claim before an arbitral tribunal against the State that hosted its investment and violated the standard of protections and other provisions set out in said instruments.

This work analyses these cases in order to understand if the cross-over between commercial arbitration and investment arbitration in the sense explained above represents a viable and grounded solution for an award winner of a commercial arbitration frustrated by the actions of the local judiciary, or if those investment tribunals dealing with cross-over arbitration that accepted jurisdiction can be seen as part of the strongly criticised over-expansion of investment arbitration. The work is divided into two parts. The first part focuses on the jurisdictional thresholds to access investment arbitration. In particular, since the presence of an investment seems to be an essential element for an investment tribunal to accept jurisdiction, it investigates whether a commercial arbitral award can qualify as an investment, also in light of the most common wordings of Investment Treaties and the rules applied by ICSID and non-ICSID tribunals. The second part of the work makes the assumption that the conditions relevant for the acceptance of jurisdiction are met, and analyses which standards of protection included in Investment Treaties may be relevant for the assessment of a liability of the State for the wrongful interference by its municipal courts in the recognition and enforcement of arbitral awards. This part also inquires if

investment tribunals can find a State liable where provisions of public international law, different from those included in the Investment Treaty on which the jurisdiction of the tribunal itself is based, have been breached, such as customary international law or provisions of treaties not primarily dealing with investments (at least in their ordinary meaning).

This work is innovative as it systematically addresses the topics referred to above from a critical and analytical perspective, and as it reaches a number of conclusions that differ, in some respects, from those of other scholars who have considered the same matters.

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CHAPTER I – INTRODUCTION

1. The issue

Nowadays most international investment and commercial agreements provide for dispute settlement clauses, pursuant to which claims arising from, or connected to, the transactions contemplated thereby shall be settled through arbitration, rather than by national courts.

There are several reasons underlying this trend. First of all, private parties may deem that arbitrators are more qualified than ordinary national judges. Indeed, most of the times arbitrators are appointed among persons of specialised knowledge or experience in the specific sphere relevant to the claim. Second, national courts may be perceived as lacking impartiality, and therefore the parties may prefer a neutral venue to have their dispute solved. However, it may be argued that the main advantage of arbitration for private parties is represented by the ease of enforcing arbitral awards, principally due to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹ (the “**New York Convention**”). In more than half a century since its signing, the New York Convention – which is currently in force in more than 150 countries all over the world² – has created a largely uniform legal regime for, *inter alia*, the recognition and enforcement of foreign arbitral awards, imposing on the courts of the contracting States a public international law obligation to recognise and enforce awards rendered in other States, subject to limited exceptions.³ Moreover, according to the New York Convention, contracting States are also obliged to recognise valid written arbitration agreements concerning a subject matter capable of settlement by arbitration,⁴ which also facilitates recourse to international arbitration, preventing interference by national courts.

¹ Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

² For a list of the contracting States, *see* <http://www.newyorkconvention.org/countries>.

³ For more on the topic, *see* section 4 of this Chapter I.

⁴ For more on the topic, *see* section 4 of this Chapter I.

With reference to this latter aspect, however, in recent years there has been a number of cases in which national courts of States have unduly interfered with the recognition and enforcement of arbitral awards and/or arbitration agreements, entailing a breach by the State of its obligations under investment treaties, the New York Convention and customary international law.

A sequence of recent decisions issued by arbitral tribunals set up on the basis of investment treaties suggests that public international law has a substantial role in the cases, with the purpose of protecting international commercial arbitration rights against wrongful interferences by States, through actions of their domestic courts. Indeed, there are various investment treaty cases in which investment arbitral tribunals have examined whether the non-enforcement of arbitral awards and/or active State interference with recognition and enforcement proceedings may amount to a breach of investment treaties. Some of the tribunals that dealt with these cases found the existence of a breach of the applicable investment treaty, others believed that no provision of the applicable investment treaty was breached and others again simply declined jurisdiction on the grounds that an arbitral award and/or an arbitration agreement cannot be qualified as an investment, which is one of the obvious requirements to access investment arbitration. Interestingly, in none of the cases did the tribunals investigate whether the conduct of the States' courts implied a violation of the New York Convention and/or customary international law that could *per se* be sanctioned by the tribunal under the investment treaty arbitration.⁵

Also in light of the cases referred to above, this work aims at analysing: (i) as to the jurisdiction, in which cases an aggrieved award creditor may access investment treaty arbitration; and, (ii) as to the merits, which conducts of a State's national courts can entail the relevant State's responsibility for unlawful interference with arbitration.

More precisely, this work will focus, with respect to jurisdictional requirements, on the concept of investment. Indeed, only if an award can qualify as an

⁵ For more on this aspect, *see* Chapter III, sections. 10 and 11.3.

investment can the frustrated award winner access investment arbitration.⁶ With respect to the merits, the attention will be shifted to the analysis of the situations in which the interference by the national courts may entail a breach of the State's international obligations, which may be enforced before investment arbitral tribunals.⁷

Before that, in this Chapter, I will introduce certain concepts that will be useful to understand the topics that will be treated in the main Chapters of this work. More precisely, I will briefly illustrate: (i) what an investment arbitration is; (ii) the differences between investment and commercial arbitration and the main *fora* for international arbitration; (iii) the role that a State can play in relation to commercial arbitration and how the State can interfere with it; and (iv) the main provisions regarding recognition and enforcement of international arbitration agreements and awards.

2. Investment arbitration: main features and differences with commercial arbitration

In the field of international arbitration, a distinction can be made between international investment arbitration and international commercial arbitration.

International investment arbitration is a dispute settlement mechanism for claims concerning investments made by an investor in a foreign State. There are two main typologies of disputes concerning investments on the basis of the parties thereto: those between two States, and those between a private investor and a State.⁸ The former is the traditional manner for the peaceful resolution of State disputes.⁹ The latter is more recent¹⁰ and allows a private investor to bring a direct claim against the State hosting its investment.

⁶ For more on the topic, *see* Chapter II.

⁷ For more on the topic, *see* Chapter III.

⁸ Disputes between private parties arising from investments are not discussed here.

⁹ According to J.W. SALACUSE, *The Law of Investment Treaties*, Oxford University Press, 2010, at p. 362, the modern history of interstate arbitration dates from the 1974 Jay Treaty between the United States and Great Britain, which provided for the final settlement of disputes between two States by an arbitral tribunal and indicated the standards to be applied in arriving at a decision.

The possibility for an investor to bring a claim against a State represented a remarkable achievement from the investors' perspective in the protection of its rights. Indeed, State-to-State arbitration proved deficient in several ways. First, the remedy is highly politicized, for it requires the involvement of the investor's home government. In addition, no State would pursue an interstate arbitration solely on the basis of one investor's claim; a more comprehensive evaluation of the States' diplomatic, political and economic relations would be taken into consideration.

Like any other form of arbitration, investor-State arbitration is based on consent both parties granted to it. Consent is, thus, an indispensable requirement for the tribunal's jurisdiction. Obviously, the kind of disputes that can be submitted to investment arbitration depends on the breadth of the consent granted by the parties.

In practice, consent to investor-State arbitration may be given in one of the following three ways: (i) in a direct agreement between the parties; (ii) in national legislation of the host State; and (iii) in investment treaties.¹¹

With respect to the first source of consent, an arbitration agreement may be included in a clause provided in an investment contract between the host State and the foreign investor. Nowadays, most investment contracts contain provisions allowing either party to the contract to settle the dispute arising therefrom via arbitration. Notably, the parties may also submit to investment arbitration a dispute that has already arisen through consent expressed in a compromis.

¹⁰ It is after the adoption of the ICSID Convention (as defined hereinafter in this section) that investment treaties began to provide the settlement of investor-State disputes through arbitration. According to A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, Kluwer Law International, 2009, at p. 42, the first bilateral investment treaty that expressly incorporates provisions for investor-State arbitration is the Agreement on economic cooperation (with protocol and exchanges of letters dated on 17 June 1968) between The Netherlands and Indonesia, signed in Jakarta on 7 July 1968 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3329>).

¹¹ On this topic, *see* also section 2 of Chapter II.

The host State may also offer consent to arbitration to foreign investors in its national legislation. A legislative provision containing consent to arbitration must be read as a mere offer to arbitrate to the foreign investor. In order to realize the arbitration agreement, the investor must accept the offer.

However, the documents that most often enshrine the host State's consent are investment treaties that can either be bilateral (“**BITs**”) or multilateral, including free trade agreements, which may contain chapters protecting investments. This work will focus exclusively on investor-State arbitration based on investment treaties, which will be hereinafter referred to as investment arbitration, investment treaty arbitration or investor-State arbitration.

An investment treaty is an agreement embodied in one or more written documents by which two or more States agree to certain legal rules to govern investments undertaken by nationals of one treaty party in the territory of another treaty party.¹² With specific reference to BITs, they are considered the most important source in contemporary investment law.¹³ BITs started to be entered into in the late 1950s, but became common during the 1980s and 1990s as a means of encouraging capital investments in developing markets. Most of the time, their aim is to encourage and create favourable conditions for the investors of each contracting party to make investment in the territory of the other contracting party.

Besides BITs, there are also multilateral treaties that, *inter alia*, protect investments at regional level¹⁴ or with respect to industry sectors.¹⁵ Most of the

¹² Definition retrieved from J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, at p. 126.

¹³ C. SCHREUER, *Investments, International Protection*, Max Planck Encyclopedia of Public International Law (voice of), Oxford Public international Law, para. B.1.

¹⁴ This is the case, for instance, of the North American Free Trade Agreement, signed on 17 December 1992 (available at: <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=1&secid=539c50ef-51c1-489b-808b-9e20c9872d25#A1101>) (the “**NAFTA**”).

¹⁵ *See*, for instance, the Energy Charter Treaty, signed on 17 December 1994 (available in its consolidated version at:

investment treaties¹⁶ contain obligations that each government undertakes towards investors of the other contracting States to this end.¹⁷ Consent to investment arbitration is part of the protection afforded to the foreign investor. According to a scholarly work, '[i]nvestor-State arbitration is the defining mark of modern international investment protection.'¹⁸ Indeed, in the absence of international arbitration mechanisms, dispute settlement between a foreign investor and the host State would take place before the national courts of the relevant host State, which may not be perceived as sufficiently impartial and with sufficient knowledge of investment law and international law.¹⁹

<http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>

("ECT").

¹⁶ The expression 'investment treaties' is used through this text to refer to standalone BITs, bilateral and regional free trade agreements that include foreign investment obligations such as the NAFTA, and sectorial treaties such as the ECT, that include investment obligations.

¹⁷ As to the substantial protection accorded to international investments, in many investment treaties, governments make a commitment to provide foreign investors with:

- national treatment (i.e., treatment no less favourable to that provided to the host State's citizens);
- most favoured nation treatment (i.e., treatment as favourable as that given to other States' citizens);
- fair and equitable treatment;
- full protection and security for the investment; and
- treatment at least as favourable as that accorded by international law.

In addition, States often agree not to engage in arbitrary, unreasonable or discriminatory conduct that limits the operation, management, maintenance or expansion of the investment. Standards for lawful expropriation are also set out. Some investment treaties also provide for the so-called 'umbrella clause', pursuant to which the host State shall comply with any obligation it has undertaken vis-à-vis the investor (including through an investment agreement).

¹⁸ J.C. THOMAS Q.C., M. EWING-CHOW, *The Maturation of Investment Treaty Arbitration*, ICSID Review, Vol. 25, Issue 1, pp. 3-20, at p. 5.

¹⁹ As is better explained in section 5 of this Chapter I, an investor also has the right to seek redress before the courts for the protection of human rights. However, as will be illustrated hereinafter, the scope of such protection is narrower than the one provided under investment treaty arbitration, as it exclusively concerns cases of illegal expropriation and

Alternatively, the aggrieved investor has the possibility to obtain redress through diplomatic protection, by means of which the investor requires the aid of its home State to assist him.²⁰ Diplomatic protection represents the traditional international technique to settle international disputes originating from disagreements between States and private parties. Diplomatic protection does not require advance agreement between disputing parties, but does have several disadvantages.²¹ First, the availability of diplomatic protection depends entirely on the State's willingness to extend assistance to the investor in a given situation. Indeed, international law considers diplomatic protection as a right of the State. Therefore, there is no duty on the State to embrace a claim, no matter how egregious the misconduct has been. Second, once the claim has been espoused, the State owns it, which means that the State can decide on settlements of the claim and whether any portion of any settlement will be paid to the investor. Third, before diplomatic protection, the foreign investor must have exhausted all local remedies in the host State, which entails a possible waste of time and resources for the aggrieved investor. Finally, facts have shown that diplomatic protection does not necessarily result in meaningful redress for the investor: it often ends with the exchange of oral or written

lack of due process. Additionally, access to such courts may be more complicated and the aggrieved investor shall have first exhausted all available local remedies.

²⁰ More precisely, pursuant to the definition provided in Art. 1 of the Draft Articles on Diplomatic Protection (adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10)): 'diplomatic protection consists in the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.' For an analysis of the interaction between diplomatic protection and investment treaties, *see, inter alia*, B. JURATOWITCH, The Relationship between Protection and Investment Treaties, ICSID Review, Vol. 23, Issue 1, 2008, pp. 10-35.

²¹ As noted by J.W. SALACUSE, The Law of Investment Treaties, *supra*, note 9, at p. 358, diplomatic protection can be considered 'far from perfect means of resolving [...] disputes'.

statements and the injured investor does not receive any material compensation.²²

As to the mechanism of investment arbitration, the consent of the State is usually presented through an irrevocable standing offer to refer to arbitration disputes with the investor who is a national of the other contracting State(s) concerning a pre-defined range of investments.²³ Notably, the investor is not a party to the investment treaty; therefore, the investors' consent to arbitrate is usually provided by means of submission of a dispute to arbitration through the presentation of a request of arbitration under the applicable rules. A State is consequently unaware of the identity of the potential claimants until it is notified of the submission of a claim under a given investment treaty. This type of arbitration is also referred to as 'arbitration without privity'²⁴ since there is no need for a direct contractual link between a State and the investor to establish the arbitration.

Depending on how the consent clauses are drafted under the relevant investment treaty, investors are granted with different rights.²⁵ Very often, the State's offer is broad and provides the investor with a variety of dispute resolution options. More precisely, investment treaties often provide that, after a so-called 'cooling-off' period during which the concerned State and the investor shall try to negotiate an amicable solution to the dispute,²⁶ the investor

²² J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, p. 359. As already seen, also State-to-State arbitration is available to the investor, with the illustrated downsides.

²³ For more on the topic, *see* C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary* (2nd Edition), Cambridge University Press, 2009, *passim*; M. NOLAN, F.G. CAIVANO, *Limits of Consent – Arbitration without Privity and Beyond*, in M.A. FERNANDEZ-BALLESTEROS, D. ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, Kluwer Espana; La Ley, 2010, pp. 873-991.

²⁴ Professor J. PAULSSON, in its seminal writing 'Arbitration Without Privity' (*ICSID Review*, Vol. 10, Issue 2, 1995, pp. 232-257) was the first to coin this term, which has been unanimously employed by subsequent writings.

²⁵ For more, *see* Chapter III, section 10.

²⁶ As noted by N. BLACKABY, *Investment Arbitration and Commercial Arbitration (or the tale of the dolphin and the shark)*, in L.A. MISTELIS, J. LEW (eds.), *Pervasive Problems in International Arbitration*, Kluwer Law International, 2006, pp. 217-233, at pp. 220-221, this

is entitled to sue the State before different arbitral tribunals and according to different procedures.²⁷

In most instances, investment treaties provide for the competence of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the “**Convention**”, the “**ICSID Convention**” or the “**Washington Convention**”). ICSID is not a permanent arbitral tribunal: the settlement of investment disputes is not carried out by the Centre itself, but by arbitral tribunals that are constituted on an *ad hoc* basis for each dispute.²⁸ Rather, the Centre provides facilities for the arbitration of investment disputes,²⁹ including: keeping lists of possible arbitrators,³⁰ screening and registering arbitration requests,³¹ assisting in the constitution of the tribunals and the conduct of the

period has not been seriously considered by States to explore potential settlements and its purpose appears to have been largely ignored by States. Indeed, some tribunals considered this requirement as procedural rather than jurisdictional, so that they could assess the merits without being blocked from an excessive formalism.

²⁷ See, for instance Art. 24(3) of the 2012 US Model BIT, according to which: ‘[p]rovided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

- (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules; or
- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.’

²⁸ Notably the Convention foresees also the possibility to set up conciliation commissions, but these are rarely used. Conciliation is a flexible and informal method designed to assist the parties in reaching an agreed settlement.

²⁹ Art. 1 of the Convention.

³⁰ Art. 12 and following of the Convention.

³¹ Art. 36(3) of the Convention.

proceedings,³² and adopting rules and regulations.³³ Many investment treaty dispute settlement clauses also provide for *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Arbitration Rules**”)³⁴ and/or arbitration under the rules of other administering arbitration institutions, such as the International Chamber of Commerce (“**ICC**”),³⁵ the Stockholm Chamber of Commerce (“**SCC**”), the Permanent Court of Arbitration (“**PCA**”) or the London Court of International Arbitration (“**LCIA**”).³⁶

In case of multi-tiered dispute settlement clauses, the investor has, thus, the right to decide which route to follow, but, when a forum is selected, the choice is final and made to the exclusion of any other option. Therefore, the investor shall carefully evaluate which is the most appropriate dispute settlement mechanism in light of all circumstances.

In particular, the option of ICSID arbitration entails some specific features, which distinguish it from non-institutional proceedings and proceedings administered by other arbitration institutions.³⁷ Interestingly, the ICSID regime

³² Art. 38 of the Convention.

³³ Art. 6(1) of the Convention.

³⁴ The United Nations Commission on International Trade Law (“**UNCITRAL**”) is a subsidiary organ of the United Nations General Assembly, created with the purpose of removing disparities in national laws governing international trade. The text of the revised UNCITRAL Arbitration Rules adopted in 2010 by GA Res 65/22 is available at: <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (the “**UNCITRAL 2010 Rules**”).

³⁵ The rules of arbitration from time to time issued by the ICC are hereinafter referred to as the ICC Rules.

³⁶ A distinction can be made between institutional arbitration, which is administered by an arbitration institution such as ICSID or the ICC, and non-institutional arbitration, where the proceeding is conducted without any supervision or support from a specialized institution. *Ad hoc* arbitration is, for the purposes of this work, one that is not administered by an institution, even if technically also ICSID and SCC arbitrations are *ad hoc*.

³⁷ In this work, unless otherwise specified, any reference to ICSID arbitration shall be deemed made exclusively to arbitration under the Rules. However, on 27 September 1978 the Administrative Council of ICSID adopted the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for

has been referred to as the ‘sleeping beauty’³⁸ of investment arbitration, as until the mid-1990s only a couple of cases were filed annually.³⁹ Nowadays the situation is different: one needs only to consider that, in 2015, 52 cases have been filed under the ICSID Convention and the Additional Facility Rules.⁴⁰ The reason for this success probably rests in the system’s peculiar features, which in principle makes it advantageous to both investors and host States. First, ICSID is an arbitral institution specialised in international investment disputes, which is different to all other institutions that deal with both commercial and investment arbitration. More precisely, the Centre’s

Settlement of Investment Disputes (the “**Additional Facility Rules**”), (available at: https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf), which allow the resolution of disputes under the auspices of the Centre even when not all the jurisdictional conditions set out in Art. 25 of the Convention are met, provided that the ICSID Secretary General has given approval for the use of the Additional Facility Rules in a specific case. For instance, although Mexico has not ratified the Convention, NAFTA disputes concerning Mexico may be brought before an ICSID tribunal. The same holds true for other jurisdictional requirements, such as the necessity for the underlying transaction to be an investment, which is not needed under the Additional Facility Rules, provided that the transaction from which the dispute arose is not an ordinary commercial transaction. Indeed, pursuant to Art. 4(3) of the Additional Facility Rules, the Secretary General shall deny its approval if the transaction underlying the dispute is an ‘ordinary commercial transaction.’ Proceedings pursuant to the Additional Facility Rules, despite being administered by the Centre, are not governed by the Convention. Therefore, *inter alia*, awards rendered under the Additional Facility Rules are subject to review by the domestic courts and the enforcement thereof shall be made through the application of the New York Convention.

³⁸ C. MCLACHLAN, Investment Treaty Arbitration: The Legal Framework, in A.J. VAN DEN BERG (ed.), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, Volume15, Kluwer Law International 2009, pp. 95-145, at p. 96.

³⁹ Data retrieved from ICSID, The ICSID Caseload – Statistics (Issue 2016-2), available at: [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-2%20\(English\)%20Final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-2%20(English)%20Final.pdf).

⁴⁰ Data retrieved from ICSID, The ICSID Caseload – Statistics (Issue 2016-2), available at: [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-2%20\(English\)%20Final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-2%20(English)%20Final.pdf).

jurisdiction is limited ‘to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.’⁴¹ The presence of an investment represents an objective requirement that cannot be replaced by the parties’ will.

Second, the ICSID Convention is an international treaty and, therefore, the State party to the dispute is bound to respect its obligations under the ICSID Convention not only vis-à-vis the State of the investor’s nationality, but also to all other State parties. The non-enforcement of an ICSID award may invoke the international responsibility of the non-enforcing State, which is different from the responsibility for breach of the investment treaty undertakings.

Moreover, ICSID is a division of the World Bank and, therefore, States tend to voluntarily comply with its awards ‘so as not to give offense to the World Bank.’⁴² But probably the most important feature of ICSID is that arbitration proceedings under the Convention are self-contained. This means that they are independent from the intervention of any outside body and, in particular, they are free from interference of national legislation and domestic courts. This entails a number of consequences. For instance, any provisional measure is to be established by the ICSID tribunal and not by any domestic court, unless otherwise agreed between the parties.⁴³ In addition, each and any contracting State is obliged to recognise and enforce an ICSID arbitration, independently

⁴¹ Art. 25(1) of the Convention. The jurisdictional requirements of the Centre are better described in Chapter II.

⁴² R.D.R. BISHOP, J. CRAWFORD, W.M. REISMAN, *Foreign Investment Disputes: Cases, Materials and Commentary*, Kluwer Law International, 2005, p. 11. With specific reference to compliance with interim measures, *see* J. LEW, *ICSID Arbitration: Special Features and Recent Developments*, in S.M. KROLL, N. HORN (eds.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*, Studies in Transnational Economic Law, Vol. 19, Kluwer Law International, 2004, pp. 267-282, at p. 271, whereby it is stated that: ‘[i]n practice parties will tend to comply given the possibility that the World Bank may take any inaction into account in its future economic dealings with that state.’

⁴³ Art. 47 of the Convention provides that: ‘[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.’

of the New York Convention.⁴⁴ In addition, ICSID awards are binding and final and cannot be reviewed by national courts: the ICSID Convention itself provides an entirely separate and autonomous regime for the recognition, enforcement and annulment of awards. The only recourse available to a party is to apply to the Centre to have the award annulled by an ICSID annulment committee. In this respect the ICSID arbitration is a truly delocalised proceeding. In a nutshell, national courts are not expected to play any role in a dispute submitted to ICSID arbitration, except for the implementation of the ICSID award.⁴⁵

As mentioned, outside the ICSID system, there may be other options available to settle investor-State disputes. *Ad hoc* arbitration requires an arbitration agreement that regulates a number of aspects, including the selection of the arbitrators, applicable law, applicable fees, as well as several procedural questions. Institutions have developed standard rules that may be incorporated in the parties' agreements. The UNCITRAL Arbitration Rules are the most popular *ad hoc* arbitration option found in BITs and multilateral international instruments.⁴⁶ Their success is probably due to the fact that they are considered to reflect a modern, universally established set of international arbitration rules.

⁴⁴ This represents another upside of ICSID arbitration. The Convention requires each contracting State to 'recognise that an award rendered pursuant to this Convention is binding' and 'to enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of court in that State.' This mechanism may not yield flawless enforcement in every case: sovereign immunity may protect State assets and any domestic law ground ordinarily available to challenge final judgments may also be used against ICSID awards. Still, it remains superior to the alternatives that exist today and, more precisely, to the enforcement mechanism for ordinary commercial arbitration, which leaves much more room for domestic courts to overturn arbitral awards (also in case of application of the New York Convention).

⁴⁵ Please note that the scope of this work is limited to the non-enforcement of commercial arbitration. On the contrary, issues connected to the non-enforcement of investment arbitration will not be dealt with in this dissertation.

⁴⁶ H.A. GRIGERA NAÓN, *The Settlement of Investment Disputes between States and Private Parties. An Overview from the Perspective of the ICC*, *The Journal of World Investment*, Issue 1, 2000, pp. 59-101, at p. 83.

Moreover they are a comprehensive set of articles that should address all issues that may arise in international arbitration, from the appointment of the arbitrators to the decision on costs. The UNCITRAL Arbitral Rules *per se* do not entail the intervention of any administered institution. However, treaties may provide support for an institution helping to administer the application of the UNCITRAL Arbitral Rules.⁴⁷ Available institutions may include ICSID, as well as the ICC,⁴⁸ SCC, LCIA and PCA⁴⁹. Indeed, institutions dealing primarily with commercial arbitration do not exclude investor-State arbitration.

The main advantage of having the arbitration supervised or supported by an institution is the fact that the institution is charged with taking certain measures aimed at permitting the arbitration to be carried out within a self-contained framework, thereby avoiding, to the maximum extent possible, the intervention of municipal courts. This task is performed in several ways, including taking care of the financial aspects of the arbitration and deciding on challenges against or replacement of arbitrators. In the absence of support of an institution, the relevant decisions would have required the involvement of

⁴⁷ For a summary of the content of the Rules, *see* U. ONWUAMAEGBU, International Dispute Settlement Mechanisms – Choosing Between Institutionally Supported and Ad Hoc; and Between Institutions, in K. YANNACA-SMALL (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, 2010, pp. 63-88, at pp. 83-87.

⁴⁸ For more on the ICC, *see* H. A. GRIGERA NAÓN, The Settlement of Investment Disputes between States and Private Parties. An Overview from the Perspective of the ICC, *supra*, note 46, at pp. 89-100.

⁴⁹ For a brief outline of the main features of these institutions, *see* R.D. BISHOP, J. CRAWFORD, W.M. REISMAN, *Foreign Investment Disputes: Cases, Materials and Commentary*, *supra*, note 42, pp. 365-379; R. DOLZER, C. SCHREUER, *Principles of International Investment Law* (2nd Edition), Oxford University Press, 2012, p. 242; U. ONWUAMAEGBU, *International Dispute Settlement Mechanisms – Choosing Between Institutionally Supported and Ad Hoc; and Between Institutions*, *supra*, note 47, at pp. 63-82. For a comparative analysis of the manner in which various international institutional rules address issues regarding fees, composition of the tribunals, arbitral authority to determine jurisdiction and arbitrability *see* J.M. GAITIS (ed. in chief), *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (3rd Edition), JurisNet, 2013, pp. 404-413.

national courts. The downside is represented by the fact that the proceeding may be less flexible and that the institution requires the payment of administrative fees to compensate the services provided.

In all cases of *ad hoc* arbitration or arbitration administered by an institution different from the ICSID, investment treaty arbitration is in the same position as any other international arbitration and, therefore, as it will be more thoroughly explained in the next section, the arbitration is ultimately governed by municipal law in the seat of the arbitration.⁵⁰ In addition, the awards rendered by non-ICSID tribunals are subject to challenges and to control by the courts according to local arbitration statutes in the country where they are rendered. These often follow the UNCITRAL Model Law on International Commercial Arbitration (the “**UNCITRAL Model Law**”),⁵¹ which limits courts intervention in the arbitral process except where expressly provided in law.⁵² The recognition and enforcement abroad of the arbitration agreements

⁵⁰ For more on the relationship between national courts and the arbitration proceeding, please refer to section 3 of this Chapter I.

⁵¹ UNCITRAL Model Law on International Commercial Arbitration (United Nations documents A/40/17, annex I and A/61/17, annex I), as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006 (available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf). By means of this document, which represents a proposal for national legislation, UNCITRAL has strongly influenced the development of international arbitration. This model law is considered as having had a significant impact on the progressive harmonization of the law relating to the review of international arbitral awards.

⁵² Art. 5 of the UNCITRAL Model Law, titled ‘Extent of court intervention’, provides that: ‘[i]n matters governed by this Law, no court shall intervene except where so provided in this Law.’ In addition Art. 34 of the Model Law provides a close-end list of grounds upon which recourse against an award can be made and it excludes appeal on a point of law. Please however note that legal systems that have not adopted the UNCITRAL Model Law may provide for grounds for annulment different from those identified in the UNCITRAL Model Law. For an outline of the annulment provisions included in certain main jurisdictions, see P. BERNARDINI, *ICSID Versus Non-ICSID Investment Treaty Arbitration*, in M.A. FERNANDEZ-BALLESTEROS, D. ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, Kluwer Espana; La Ley, 2010, pp. 159-188, at paras. 52-58 (available

and arbitral awards are based on the local laws and international conventions, the most important of which is the New York Convention.⁵³ Such conventions introduce uniform criteria for ensuring the extraterritorial effectiveness of arbitration agreements, and furthering the recognition and enforcement of arbitral awards by reducing controls exercised by the courts of the country of recognition or enforcement of the minimum safeguards needed to protect national public policy. However, also in case of application of the New York Convention, the role for national law has been left relatively open and thus there is room for national courts' intervention. Not surprisingly, it has been deemed that "this has contributed to the failure in reaching a truly international standard for arbitration".⁵⁴

In light of the above, it is clear how the investor should carefully decide, if so allowed by the relevant investment treaty, how to bring an investment claim against the host State. Indeed, while the ICSID seems the most specialised and effective system, its costs and the length of its process⁵⁵ may persuade an investor to opt for a non-ICSID arbitration. Another challenge of the ICSID system is the annulment of awards, which may be perceived to be unsteady. In fact, in recent times, the annulment of investment awards before national

at: http://www.arbitration-icca.org/media/4/30213278230103/media012970223709030bernardini_icsid-vs-non-icsid-investent.pdf.

⁵³ Indeed, as noted in C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration: Substantive Principles*, Oxford University Press, 2008, p. 65, domestic courts have consistently maintained that non-ICSID investment arbitrations are considerable as 'commercial' for the purposes of the application of the New York Convention. For more on the New York Convention, see section 4 of this Chapter I.

⁵⁴ L. SILBERMAN, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, *The Georgia Journal of International and Comparative Law*, Vol. 38, 2009, pp. 25-46, at p. 26.

⁵⁵ In fact, as remarked by P. BERNARDINI, *ICSID Versus Non-ICSID Investment Treaty Arbitration*, in M.A. FERNANDEZ-BALLESTEROS, D. ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, *supra*, note 52, at para. 81, '[t]he long time normally needed for a tribunal to be constituted and operational is another critical aspect of the ICSID system'.

courts has produced a more consistent jurisprudence.⁵⁶ One of the reasons for this result is that decisions on challenges to non-ICSID awards are within the competence of a body of judges normally of the higher level of jurisdiction, who are expected to follow, at least in the common law system, the precedents established by other courts of the same State, thus ensuring a higher level of consistency.⁵⁷ On the contrary, ICSID annulment decisions are entrusted to arbitrators that have to review the work performed by other arbitrators who may possibly have greater experience. Furthermore, prior ICSID decisions do not have precedential value. Another aspect that may depose investors against ICSID is the fact that access to its jurisdiction is rather complex, as the Convention itself sets out its own mandatory conditions that must be met in order for a dispute to fall within the competence of the Centre, while in non-ICSID arbitration the agreement of the parties to arbitrate is sufficient.⁵⁸ Additionally, ICSID is an option open when the State party to the dispute and the State of the private disputing party have both ratified the Convention.⁵⁹ In all cases where either of the two States has not ratified the Convention, the investor can only start another institutional or *ad-hoc* proceeding according to the provisions of the applicable treaty.

Despite its increasing growth in importance, investment arbitration represents only a small fraction of all international arbitrations. The vast majority of international arbitration is still represented by international commercial arbitration, which is an alternative form of resolution of disputes having one or

⁵⁶ P. BERNARDINI, ICSID Versus Non-ICSID Investment Treaty Arbitration, in M.A. FERNANDEZ-BALLESTEROS, D. ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, *supra*, note 52, at paras. 83 and following.

⁵⁷ P. BERNARDINI, ICSID Versus Non-ICSID Investment Treaty Arbitration, in M.A. FERNANDEZ-BALLESTEROS, D. ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, *supra*, note 52, at para. 84.

⁵⁸ Interestingly, also non-ICSID tribunals seem to require additional conditions to establish their jurisdiction. *See* Chapter II, section 4.

⁵⁹ For a list of the 161 States that have signed the Convention, *see*: <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>.

more transnational aspects between two or more parties that prefer to rely on decisions taken by arbitrators rather than national courts.

However, there are several differences between investment arbitration and commercial international arbitration. The first difference concerns the parties to the dispute. While in commercial arbitration the dispute concerns two private individuals, investment arbitration sees an investor as the claimant, and a State as the respondent. The second major difference regards the interests involved: as a State is one of the parties to the dispute, there are public interests that come into play in the arbitral proceedings which must be considered by the tribunal. The third major difference concerns the law to be applied by the tribunal. While in international commercial arbitration the panel is to apply a municipal law which is determined by the parties, or by the lack of a parties' decision by the tribunal itself, investment treaty arbitration is essentially decided on the basis of public international law. In the first instance, such public international law rules are to be found in the treaty where the State's consent to jurisdiction is granted, but customary international law, international conventions stipulated by the parties and the general principles of law can also be applied.⁶⁰ This does not mean that national law does not also find room for application in investment arbitration;⁶¹ however, international law has the predominant role with respect to procedural and substantial matters. Another important difference lies in the subject matter of the dispute: in investment arbitration there must be a foreign investment, otherwise arbitrators shall decline their jurisdiction, while in commercial arbitration the transaction underlying the claim shall be a commercial transaction (which may also take the form of an investment).⁶²

⁶⁰ For more *see* Chapter III, section 10.

⁶¹ On the role played by national law in investment arbitration (as well as on other differences between the two kinds of arbitration), *see, inter alia*, K. BÖCKSTIEGEL, Commercial and investment Arbitration: How Different are they Today? The Lalive Lecture 2012, *Arbitration International*, Vol. 28, No. 4, 2012, pp. 577-590.

⁶² For a detailed analysis of the various differences between investment and commercial arbitration, *see, inter alia*, H.V. HOUTTE, M. BRUNETTI, *Investment Arbitration – Ten Areas*

Yet, as mentioned, a group of recent cases has shown how these two forms of arbitration are not entirely distinct. Reference is made to investment arbitration cases where the claimants invoked provisions of the applicable investment treaty to challenge actions of national courts with respect to the recognition or enforcement of commercial arbitral awards. These are the so-called ‘cross-over arbitration’ cases, which represent the subject matter of this work.⁶³

3. The relationship between national courts and arbitration (a first look)

Even if one of the main purposes of arbitration agreements is to avoid the involvement of national courts, which are often perceived as non-independent, municipal courts of the seat of the arbitration or where enforcement of an award is sought also have a role to play in the context of international arbitration. Indeed, the support of the courts is widely considered as an indispensable part of the arbitration mechanism, as no arbitration can achieve its aims without the assistance of the domestic juridical system.⁶⁴ This

of Caution for Commercial Arbitrators, *Arbitration International*, Vol. 29, Issue 3, 2013, pp. 553-574.

⁶³ With this term are defined those ‘arbitrations where international commercial arbitration meets investment arbitration, which is used to obtain redress against unlawful actions by State courts against commercial arbitration’ (L.G. RADICATI DI BROZOLO, Remedies against State Interference with International Arbitration (text of the talk given at the Fountain Court Chambers Arbitration Seminar on 15 May 2014), pp. 1-15, at p. 6, available at:

http://clients.squareeye.net/uploads/fountain/Remedies_against_state_interference_FountainCourt_May_15_2014.pdf).

⁶⁴ A.J. BĚLOHLÁVEK, Seat of Arbitration and Supporting and Supervising Function of Courts, in A.J. BĚLOHLÁVEK, N. ROZEHNALOVÁ (eds.), *Czech (& Central European) Yearbook of Arbitration*, Vol. 5 (2015), JurisNet, 2015, pp. 21-48, at p. 21; G. CARBONE, The Interference of the Court of the Seat with International Arbitration, *Journal of Dispute Resolution*, Vol. 2012, 2012, pp. 217-244, at p. 1; W.M. REISMAN, H. IRAVANI, The Changing Relation of National Courts and International Commercial Arbitration, *American Review of International Arbitration*, Vol. 21, Issues 1-4, 2010, pp. 5-46; and S. SATTAR, National Courts and International Arbitration: A Double-edged Sword?, *Journal of International Arbitration*, Vol. 27, Issue 1, 2010, pp. 51-73, at pp. 51 and 52.

statement is widely accepted by the advocates of both the territorialism theory and the delocalised theory.⁶⁵

There are several ways in which national courts may interact with arbitration. The interaction may come to existence before the arbitration begins, in the course of the proceeding itself or in the post-arbitration phase (i.e., in the context of the enforcement of the award).

Before the commencement of arbitral proceedings themselves, municipal courts may settle claims regarding the jurisdiction of an arbitral tribunal in a specific case, for example, examining whether the arbitration agreement is valid and enforceable and whether the dispute submitted for adjudication is included in the scope of the arbitration agreement. This role rests within the competences of national courts as illustrated in Art. 2(3) of the New York Convention, pursuant to which: '[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, *unless it finds that the said agreement is null and void, inoperative or incapable of being performed*' (emphasis added). The national courts can also assist the parties with establishing an arbitral tribunal if they have not previously selected any appointing authority or arbitral rule.

⁶⁵ S. SATTA, National Courts and International Arbitration: A Double-edged Sword?, *supra*, note 64, at p. 52. For clarification purposes, the traditional territorialism theory envisages that arbitrators derive their powers from the law of the seat of the arbitration. According to the most rigid fringe of this theory, the law of the seat determines the procedural rules, which govern the arbitral procedure in the absence of a different agreement between the parties, and the choice of law rules, which identifies the law applicable to the merits of the dispute. Delocalization theory, on the contrary, maintains that international arbitral tribunals are detached from the law of the State in whose territory the arbitral proceedings are conducted. According to this approach the sources of the arbitrators' powers derive from the international legal community. Nowadays, even without embracing the full delocalised theory, court practice seems to suggest that international arbitration has achieved a certain degree of independence from national law systems. As a final remark, it is worth noting that the only de-localised arbitration is ICSID arbitration, for the reasons given in section 2 of this Chapter I.

In the course of the arbitral proceedings, it may be necessary for the municipal courts of the State of the seat to issue orders with the purpose, for instance, of preventing a party from destroying evidence or requesting documents under the control of third parties that are not subject to the powers of the arbitrators. Finally, once the award has been rendered, if a party to arbitration proceedings does not voluntarily enforce an award issued against it, the winning party may seek the enforcement of the award before the courts of the State(s) where the losing party holds its assets. Analogously, if a party intends to challenge an arbitral award, that party shall bring an action before the courts of the State in whose territory the arbitration was placed.

In light of the above, it emerges that national courts and international arbitration are complementary and the former should act with the aim of ensuring that the arbitration proceedings are carried out in accordance to the will of the parties, intervening only and to the extent it is necessary to supplement the powers of the arbitrators or supervise the exercise thereof.

However, it is possible that national courts pathologically interfere with international arbitration, which occurs when courts exercise their powers to impede the effectiveness of the arbitration proceedings, rather than to support and supervise them. There are several ways in which the national courts may interfere in international arbitration. For instance, they can unduly revoke the authority of the arbitral tribunal, issue anti-arbitration injunctions for parochial local law reasons, or deny enforcement to arbitral awards.

As illustrated, this work will focus on the possibility of having recourse to investment arbitration in the event of wrongful interference of national courts in the arbitration process.

In fact, in all the cases of wrongful activity by national courts, the State may be held liable therefor. Indeed, it is a well-established principle⁶⁶ that the conducts of any organ of a State, including the judiciary, are attributable to the State they

⁶⁶ The principle that States are responsible for the conduct of their organs is considered as the typical case of State responsibility and an indispensable part of international law. *See, for instance, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Serbia and Montenegro)*, Judgment, 2007, I.C.J. 43 (February 26).

belong to. This principle is also codified in Art. 4 of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (the "**ILC Articles**"), which reflects one of the basic customary rules concerning the responsibility of States under international law.⁶⁷ According to this article, '[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.'

4. The New York Convention

Without prejudice to what has been described in section 3 of this Chapter, the role and the degree of the powers that courts may exercise relating to arbitration vary from State to State, depending mainly on the content of national legislation. In particular, with reference to the recognition of arbitration agreements and arbitral awards and on the enforcement thereof, it should be noted that besides the New York Convention, there are no overarching international obligations and mechanisms capable of ensuring the non-interference of national courts in international arbitration.

The New York Convention is widely considered as the centrepiece of the legal regime governing international arbitration.⁶⁸ It provides for a speedy and efficient method of obtaining recognition and enforcement of both arbitration

⁶⁷ See, for instance, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Serbia and Montenegro)*, Judgment, 2007, I.C.J. 43 (February 26), paras. 385, 398 and 401 (available at: <http://www.icj-cij.org/docket/files/91/13685.pdf>); and *MCI v. Ecuador* (*see, infra*, note 231), para. 85.

⁶⁸ G.B. BORN, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Kluwer Law International, 2013, at p. 141. It should be noted that the success of modern international commercial arbitration is considered to be also based on the UNCITRAL Model Law, which contributed to the harmonization of international arbitration law which, in turn, assists in achieving certainty and predictability in decisions (*see, inter alia*, N. KAPLAN, Introduction, in N. KAPLAN (ed.) *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, International Council for Commercial Arbitration, 2011, pp. ix-xiv, at p. x).

agreements and arbitral awards. Notably, it is not the only international treaty dealing with this matter,⁶⁹ but it is undoubtedly the most successful one.⁷⁰ In broad outline, the New York Convention requires national courts to recognise and enforce international arbitration agreements, subject to certain exceptions. In addition, it limits the grounds of judicial review of binding foreign awards by local courts, as national courts are due to recognise and enforce foreign arbitral awards, and enforcement may only be refused if basic notions of justice have been violated or public policy reasons prevent enforcement.

The New York Convention is based on a pro-recognition and pro-enforcement bias. It is probably due to the New York Convention that arbitration has become a very attractive alternative to traditional litigation. Indeed, one of the most important advantages of arbitration over litigation as a means of resolving trans-border business disputes is the degree of certainty a party can have that an award will be recognized and enforced in all the many contracting States.

⁶⁹ Since 1958 a number of regional conventions have followed. In the European context, for instance, the European Convention on International Commercial Arbitration of 1961 was elaborated with the aim of facilitating trade between Eastern and Western Europe (even if also non-European States can become a party to it). This convention has the merit that it limits the grounds for setting aside an award in the country of origin, as they must also be recognized in the country where recognition is sought. Another important instrument in the American context is the Inter-American Convention on International Commercial Arbitration of 1975 (the “**Panama Convention**”), which has been ratified by the United States and 20 South and Central American States. The Panama Convention was conceived at a time when many South American States were reluctant to ratify the New York Convention, and it was aimed at being a more acceptable regional alternative. The Panama Convention largely reproduces the content of the New York Convention with respect to the treatment of international arbitration agreements and awards. For an outline of the main regional conventions, *see* E. GAILLARD, J. SAUVAGE, Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, 1999, pp. 963-965; J. KLEINHEISTERKAMP, Recognition and Enforcement of Foreign Arbitral Awards, in Max Planck Encyclopedia of Public International Law (voice of), 2008, para. C.

⁷⁰ The New York Convention is considered one of the most successful instruments in the history of international treaties. At the date of this work, more than 140 States are party to it.

On the contrary, there is no almost universal instrument on recognition and enforcement of national court decisions.

The scope of the New York Convention is not related to the nationality of the parties to the arbitration. Pursuant to Art. 1 thereof,⁷¹ it applies to all ‘foreign’ awards, which include both: (i) awards made in the territory of a State other than the State where recognition or enforcement is sought; and (ii) awards that are not considered as domestic awards in the State where recognition or enforcement is sought. With respect to the first category of awards, in the absence of an explanation by the New York Conventions itself of where an award is deemed to be made, the vast majority of contracting States consider that an award is made at the seat of the arbitration, regardless of where hearings, deliberations and other parts of the arbitral process effectively take place.⁷² With respect to the category of non-domestic awards, the New York

⁷¹ Art. 1 of the New York Convention provides that: ‘(1) This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

(2) The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

(3) When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.’

⁷² See H. BAGNER, Article I, in H. KRONKE, P. NACIMIENTO, D. OTTO, N.C. PORT, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Kluwer Law International, 2010, pp. 19-36, at pp. 20-23; and N. KAPLAN, *The New York Convention as an Instrument of International Law*, in N. KAPLAN (ed.) *ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, International Council for Commercial Arbitration, 2011, pp. 12-31, at p. 20).

Convention does not provide for a definition thereof and each Contracting State is, therefore, free to decide which awards it does not consider as non-domestic. States generally consider all or some of the following awards as non-domestic: (a) awards made under arbitration laws of another State; (b) awards involving a foreign element; (c) a-national awards.

Contracting States may limit the scope of their obligations under the New York Convention, adopting either of the following two reservations: (a) first, the reciprocity reservation, which allows contracting States only to recognise and enforce foreign awards made in other Contracting States;⁷³ and (b) second, the commercial reservation, which limits recognition and enforcement of foreign awards to those disputes that arise out of a commercial relationship, and it is left to the national law of the reserving State to determine what a ‘commercial relationship’ is in this context.⁷⁴

Notably, the New York Convention does not apply only to international arbitral awards, but also to written arbitration agreements, provided that they are not merely domestic. The internationality of the agreement may result either from the nationality or domicile of the parties or from the underlying transaction, while there is no need that the arbitration agreement will result in a foreign award.⁷⁵ Art. 2 of the New York Convention governs the recognition and enforcement of arbitration agreements.⁷⁶ Provided that certain conditions

⁷³ According to N. KAPLAN, *The New York Convention as an Instrument of International Law*, *supra*, note 72, at p. 23, approximately two-thirds of the Contracting States have made this reservation.

⁷⁴ According to N. KAPLAN, *The New York Convention as an Instrument of International Law*, *supra*, note 72, at p. 24, approximately one-third of the Contracting States have made this reservation.

⁷⁵ This proposition is supported by national courts of various countries, including the United States, India and France (for more on this, *see* UNCITRAL, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), 2014, available at: http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=729&opac_view=-1).

⁷⁶ Art. 3 of the New York Convention provides that: '1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to

are satisfied, the New York Convention mandates contracting States to recognize an agreement in writing to submit disputes to arbitration and to enforce such an agreement by referring the parties to arbitration. According to Art. 2(3) of the New York Convention, national courts are not obliged to refer the parties to arbitration if they find that the relevant agreement is ‘null and void, inoperative or incapable of being performed.’

Turning to the analysis of the provisions regarding the recognition and enforcement of arbitral awards, the cornerstone is laid down in Art. 3, pursuant to which contracting States shall recognize arbitral awards as binding.⁷⁷ This Article obliges Contracting States to recognize and enforce foreign arbitral awards under the rules of procedure in the country where the award is being relied on, unless one of the grounds expressly indicated in the New York Convention is proven to exist. Interestingly, upon the existence of any such grounds, the New York Convention does not oblige, but only allows, the foreign national courts to deny recognition and enforcement.⁷⁸ These basic

arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.’

⁷⁷ Art. III of the New York Convention provides that: ‘[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.’

⁷⁸ This proposition is not unanimously supported by scholarly writings. As will be illustrated in Chapter III, section 4.2.4, some authors believe that, once an award is annulled in the State of the seat, it ceases to exist and, thus, cannot be recognised and enforced anywhere.

provisions ensure that the arbitral award will finally resolve the dispute between the parties and that no revision of the merits of the award can be made by foreign domestic courts in the context of recognition and/or enforcement proceedings. In order to benefit from the New York Convention, the award winner is not required to initiate any proceedings in the country of origin of the award (i.e., there is no need to achieve a ‘*double exequatur*’), as it only needs to have ‘a binding award’⁷⁹ to be presented before the foreign courts from which recognition and/or enforcement is sought.⁸⁰

As already mentioned, once a party seeking recognition or enforcement has complied with the procedure outlined in the New York Convention,⁸¹ a court may (on its discretion) refuse enforcement only if a party proves the existence of one of the grounds expressly listed in the New York Convention.⁸² In this

⁷⁹ Notably, the New York Convention does not clarify when an award is to be considered as ‘binding’. This ambiguity had generated controversy as to whether the word ‘binding’ should be given a specific meaning under the Convention or whether, on the contrary, an award can only be considered as ‘binding’ for the purposes of the Convention if it is binding under the law of the country of origin. For more on the interpretations given to the word ‘binding’, see E. GAILLARD, J. SAUVAGE, Fouchard Gaillard Goldman on International Commercial Arbitration, *supra*, note 69, pp. 971-977.

⁸⁰ The Convention on the Execution of Foreign Arbitral Awards, signed in Geneva on 26 September 1977, on the contrary, required the ‘double exequatur’ in order to apply for recognition or enforcement. Therefore, a party was asked to initiate proceedings in the country of origin of the award.

⁸¹ Art. 4 of the New York Convention provides that: ‘1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.’

⁸² Art. 5 of the New York Convention provides that: ‘1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

respect, it is worth noting that the New York Convention makes a distinction between two types of grounds on which recognition and enforcement may be refused: (i) those which must be raised by the party resisting recognition or enforcement; and (ii) those which can be raised by the courts of the host country on their own motion. The list of grounds is exhaustive, and it of course excludes any revision of the merits of the award. The effects of a refusal of recognition and enforcement pursuant to Art. 5 remain limited to the country where it occurs.

Interestingly, while the New York Convention offers parameters for recognition and enforcement of an arbitral award before foreign courts, it does not regulate the grounds for setting aside an award at the place of arbitration.

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.’

Therefore, each State is free to determine, with its national rules, on which grounds an arbitral award can be annulled. However, once the award is annulled in the State of the seat, then its recognition or enforcement may be refused⁸³ by a foreign State.

In light of the above, it is clear that the New York Convention has created an international framework in which arbitral awards can circulate and be easily recognised and enforced by the contracting States, except when any of the limited grounds for non-recognition or non-enforcement set out by the New York Convention are met.

As already mentioned, there are cases in which the New York Convention system breaks down, as the courts of the State in which the award is to be recognised and enforced wrongfully fail to do so. In the absence of a provision in the New York Convention establishing a body allowed to supervise the application of the New York Convention itself, it is essential to outline the remedies available to the frustrated award winner or aggrieved party to the arbitration agreement.

5. Alternative remedies

As already illustrated, the purpose of this work is to analyse if, and subject to which conditions, an investor whose arbitral award and/or arbitration agreement was/were set aside on specious grounds by local courts and/or whose arbitral award was wrongfully non-enforced can bring an investment treaty claim against the State whose courts have acted improperly.

This work will focus only on the remedy of investor-State arbitration based on the dispute settlement clause set out in an investment agreement.

It is however worth recalling that the aggrieved award creditor may also have recourse to other remedies. As illustrated in section 3 of this Chapter, investors may seek their home State's diplomatic protection, although, as seen, this is a less than perfect remedy.⁸⁴ Alternatively, a public international law option

⁸³ Or *must* be refused, according to a line of thought (*see, supra*, note 78).

⁸⁴ With respect to diplomatic protection in cases of non-compliance with arbitral awards, *see* R. ECHANDI, Non-Compliance with Awards: The Remedies of Customary International

potentially available is to seek redress before one of the regional human rights courts.⁸⁵ The three major institutions established by international human rights treaties are: the European Court of Human Rights (the “**ECtHR**”), whose jurisdiction extends to all 47 States of the Council of Europe;⁸⁶ the Inter-American Court of Human Rights (the “**IACtHR**”), with competence in respect of the 20 States within the Organization of American States that have adhered to its jurisdiction;⁸⁷ and the African Court of Human and Peoples’ Rights (the “**ACtHPR**”), covering the 29 Member States of the African Union.⁸⁸ Any claim before these tribunals must be brought under the relevant constituent treaty, i.e., respectively, the European Convention on Human

Law, in Proceedings of the Annual Meeting, American Society of International Law, Vol. 16, American Society of International Law, March 2012, pp. 118-122; and D.B. KING, R. MOLOO, Enforcement after the Arbitration: From National Courts to Public International Law Fora, in F. FERRARI (ed.), Forum Shopping in the International Commercial Arbitration Context, pp. 393-457, at pp. 439-444.

⁸⁵ For a comparative analysis of the protection afforded under the investor-State arbitration and the European Court of Human Rights, see U. KRIEBAUM, Is the European Court of Human Rights an Alternative to Investor-State Arbitration?, in P.M. DUPUY, E.U. PETERSMANN, F. FRANCONI (eds.), Human Rights in International Investment Law and Arbitration, Oxford University Press, 2009, pp. 219-245.

⁸⁶ *I.e.*, Albania; Andorra; Armenia; Austria; Azerbaijan; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Georgia; Germany; Greece; Hungary; Iceland; Ireland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Republic of Moldova; Monaco; Montenegro; Netherlands; Norway; Poland; Portugal; Romania; Russian Federation; San Marino; Serbia; Slovak Republic; Slovenia; Spain; Sweden; Switzerland; The former Yugoslav Republic of Macedonia; Turkey; Ukraine; and the United Kingdom.

⁸⁷ *I.e.*, Argentina; Barbados; Bolivia; Brazil; Chile; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; Guatemala; Haiti; Honduras; Mexico; Nicaragua; Panama; Paraguay; Peru; Suriname; and Uruguay.

⁸⁸ *I.e.*, Algeria; Benin; Burkina Faso; Burundi; Cote d’Ivoire; Comoros; Congo; Gabon; Gambia; Ghana; Kenya; Libya; Lesotho; Mali; Malawi; Mozambique; Mauritania; Mauritius; Nigeria; Niger; Rwanda; Sahrawi Arab Democratic Republic; South Africa; Senegal; Tanzania; Togo; Tunisia; Uganda; and Cameroon.

Rights (the “**ECHR**”),⁸⁹ the American Convention on Human Rights (the “**ACHR**”),⁹⁰ and the African Charter on Human and Peoples’ Rights (the “**ACHPR**”).⁹¹

As to the gateway conditions, there are substantial issues limiting access to the IACtHR and the ACtHPR,⁹² while the ECtHR affords a greater degree of access, allowing both natural and legal persons to bring direct claims before the Court on their own initiative, provided that the offending State is a party to the ECHR.⁹³ As to the substantive protection, it shall be noted the ECHR grants protection against illegal dispossession⁹⁴ and enshrines the right to a fair and

⁸⁹ Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950, as subsequently amended and supplemented (available at: https://ec.europa.eu/digital-single-market/sites/digitalagenda/files/Convention_ENG.pdf).

⁹⁰ American Convention on Human Rights, “Pact of San José, Costa Rica” signed on 22 November 1969 (available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf).

⁹¹ African Charter on Human and Peoples’ Rights (also known as the Banjul Charter), signed on 27 June 1981 (available at: <http://www.unhcr.org/refworld/docid/3ae6b3630.html>) and Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights signed 9 June 1998 (establishing the Court).

⁹² For more *see, inter alia*, A.A. CANÇADO TRINDADE, The Rights of Access to Justice in the Inter-American System of Human Rights Protection, in B. CONFORTI ET AL. (gen. eds.), Italian Yearbook of International Law, Vol. 17 (2007), Martinus Nijhoff Publishers, 2007, pp. 9-24; D.B. KING, R. MOLOO, Enforcement after the Arbitration: From National Courts to Public International Law Fora, *supra*, note 84, at pp. 427-428.

⁹³ For more on, *inter alia*, the gateway conditions of the three Courts, *see* D.B. KING, R. MOLOO, Enforcement after the Arbitration: From National Courts to Public International Law Fora, *supra*, note 84, at pp. 427-428.

⁹⁴ Art. 1 of Protocol 1 of the ECHR provides that: ‘[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.’

reasonably timely trial.⁹⁵ On these grounds, the ECtHR has found on several occasions that a State's wrongful annulment of an arbitral award or agreement, or its failure to enforce a binding award in full and within a reasonable timeframe, can result in liability under either Art. 1 of Protocol 1 or Art. 6 of the ECHR.⁹⁶ Despite the fact that the IACtHR and the ACtHPR have not yet encountered a case involving the non-enforcement of an arbitral award, one scholarly work⁹⁷ argued that an approach similar to that of the ECtHR may be expected, since the constitutive elements under those instruments are reasonably similar to the ECHR.

In any event, one should consider that the regional human rights courts are not an easily available remedy or one involving a short path to enforcement. In addition, before accessing such courts, the investor must have first exhausted

⁹⁵ Art. 6(1) provides: '[i]n the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]'].

⁹⁶ The trailblazer of this jurisprudential line is *Stran Greek Refineries and Stratis Andreadis v. Greece*, ECtHR, No. 13427/87, Judgement, 9 December 1994, paras. 59-62 ("**Stran v. Greece**"), which concerned the validity and enforcement of a purely domestic arbitral award, although the Court extended the same principles to international arbitral awards in its subsequent jurisprudence: *See also*, *Regent Company v. Ukraine*, ECtHR, No. 773/03, Judgement, 3 April 2008; and *Kin-Stib & Majkić v. Serbia*, ECtHR, No. 12312/05, Judgement, 20 April 2010. For an analysis of the mentioned jurisprudence, *see* D.B. KING, R. MOLOO, *Enforcement after the Arbitration: From National Courts to Public International Law Fora*, *supra*, note 84. *See also*, *inter alia*, A. ÇOBAN, *Protection of Property Rights within the European Convention on Human Rights*, Ashgate Publishing, 2004, pp. 244-247; D. GOMIEN, *Short Guide to the European Convention on Human Rights*, Council of Europe Publishing, 2005, pp. 125-131; P. LEMMENS, *The right to a fair trial and its multiple manifestations, Art. 6(1) ECHR*, in E. BREMS, J. GERARDS (eds.), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, 2013, pp. 294-314; M.W. JANIS, R.S. KAY, A.W. BRADLEY, *European Human Rights Law. Text and Materials* (3rd Edition), Oxford University Press, 2008, pp. 519-553 and 718-826; and S. KONRAD, M.M. BIRCH, *Non-Enforcement of Arbitral Awards: Only a Pyrrhic Victory?*, *Transnational Dispute Management*, Vol. 7, Issue 1, April 2010, pp. 1-9.

⁹⁷ D.B. KING, R. MOLOO, *Enforcement after the Arbitration: From National Courts to Public International Law Fora*, *supra*, note 84, at pp. 438-439.

all local remedies. It is for these reasons that this work will not focus on diplomatic protection and to the recourse to treaties for the protection of human rights, but exclusively to investor-State arbitration pursuant to provisions of investment treaties, which seems, *prima facie*, to be the most effective remedy. However, it is noted that human rights treaties often complement investment treaties, and investment arbitration refers to decisions of the ECtHR.⁹⁸ Indeed in many cases investment tribunals relied on human rights jurisprudence to support their findings.⁹⁹ This shows how investment treaties do not operate in isolation from other treaties that party States have concluded: non-investment treaties may provide jurisprudential explanation for substantive rules and principles that are common to both treaties.¹⁰⁰

6. Outline of the work

All this premised, to conclude this introductory Chapter, it is useful to briefly outline the content of the following Chapters of this work.

In Chapter II, the gateway conditions to investor-State arbitration will be analysed. In particular, since all investment treaties require as the jurisdictional pre-condition at least the existence of an investment, the Chapter will analyse if an arbitral award and/or an arbitration agreement can qualify as such. Notably, investment treaties may provide for different definitions of investment and, thus, different solutions may be reached depending on the wording of the specific treaty that may be enforced by the frustrated award winner. In addition, the Convention itself sets out its own jurisdictional requirements that add to those provided in the applicable investment treaty in the context of ICSID arbitration.

⁹⁸ See, for instance, *Mondev v. US* (*see, infra*, note 318).

⁹⁹ In particular with respect to the concepts of protection of property and fair trial that have both been developed considerably by human rights' courts in the last fifty years.

¹⁰⁰ For more on this interaction, *see* A. GHOURI, *Interaction and Conflict of Treaties in Investment Arbitration*, International Arbitration Law Library, Vol. 32, Kluwer Law International, 2015, at pp. 103-148; C. MCLACHLAN, *Investment Treaty Arbitration: The Legal Framework*, *supra*, note 38, at pp. 121-122.

Notably, the topic of the subject matter jurisdiction is particularly relevant within the ambit of this work since the possibility to consider an arbitral agreement or award as an investment is rather controversial. In fact, the Convention does not clarify what an investment is for its purposes and, analogously, the vague provisions of investment treaties give leeway to different interpretation. After an analysis of the positions of scholars in this regard, the work will examine the positions taken by the few ICSID and non-ICSID tribunals that dealt with the topic. The Chapter will only cursorily mention the other jurisdictional requirements, as they are not specific to the topic.

After having dealt with the jurisdiction, Chapter III will analyse which conducts of the State can entail its liability and which provisions of the applicable investment treaty may be breached by the conduct of the municipal courts. More precisely the work will preliminarily give an outline of the standards of treatment included in investment treaties (and, in particular, in BITs), which may be invoked by the aggrieved investor. In this respect, it should be noted that, although the specific provisions of individual investment treaties are not uniform, virtually all contemporary investment treaties afford the investor with certain general standards of treatment (such as fair and equitable treatment, full protection and security, and protection from unreasonable measures) and protect the investor from unlawful expropriation and dispossession. Of course, the wording of each BIT is different, and thus the protection afforded by each of them is different, even when the same standards of treatment are envisaged. However, there are certain basic features that qualify each standard, regardless of the specific language, that is useful to identify before turning to the analysis of how these standards can be invoked in the specific context of cross-over arbitration.

Also in Chapter III, the analysis will focus on how tribunals have reacted to the claims of investors and when a breach of the treaty has been found.

The scrutiny will then turn to the possibility of bringing a claim under an investment treaty, even in the absence of a breach of the treaty itself, because the State has infringed, through the actions of its national courts, other international obligations, with a particular focus on the New York Convention.

In fact, as will be better illustrated on the following pages, investment tribunals in some of the cases on which this work focuses have recognised that the national courts have misapplied the New York Convention, but such a violation has been taken into account exclusively in the context of the assessment of the existence of a treaty breach. It is clear that the possibility for an investor to bring an investment claim for a direct breach of the New York Convention would represent an enormous advantage.

As a final remark, it is clear that this work will focus on the analysis of the first six (and to date only published) cases that dealt with this topic in order to draw consequences on the effectiveness of investment arbitration as a remedy in cases of wrongful non-enforcement of arbitral awards. In this respect, it will be noted that on the international plane, arbitral awards do not have precedential value. However, like all other judicial decisions in international law,¹⁰¹ investment arbitral awards can be looked at for an elucidation of the law. As stated by an eminent author, precedent does not ‘command respect, but rather [it] is useful’.¹⁰²

Currently, arbitral awards cannot be considered as norms in and of themselves, but they can contribute to the development of norms. Indeed, arbitral pronouncements, also outside of a system of binding precedents, have an influence beyond the case concerned. In addition, with the growing success of investment arbitration and the consequent increase in the number of decided cases, reliance on case law has expanded. Of course the relevance of the decision will depend on the authority of the arbitrator(s), on the quality of the award itself and on the reliance that the parties to the case have made on certain previous decisions (arbitrators have no duty to look at previous decisions unless they are pleaded by the parties). In light of the above, it seems

¹⁰¹ As clarified by Art. 38 of the Statute of the International Court of Justice, doctrine and jurisprudence do not create the law; rather, they assist in determining rules which already exist. For this reason, for instance, the judgements of the ICJ were not given binding effects, except for upon the disputing parties.

¹⁰² J. PAULSSON, *The Role of Precedent in Investment Arbitration*, in K. YANNACA-SMALL (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, 2010, pp. 699-718, at p. 710.

justified that six awards rendered in a few years on the same topic and in which the relevant arbitrators expressly referred to previous decisions may be considered as a material sample for this analysis.

CHAPTER II – COMMERCIAL AWARDS AS INVESTMENTS

1. Preliminary remarks

As is well known, in order to access investor-State arbitration provided under investment treaties certain gateway conditions, namely *ratione materiae*, *ratione personae*, and *ratione voluntatis*, must be met.¹⁰³ The content of such conditions depends on the norms governing the relevant arbitration, as set out, *inter alia*, in the ICSID Convention, the rules to be applied by the relevant investment tribunal, and the applicable investment treaty.

However, there are certain gateway conditions to investment arbitration that must always be met, regardless of whether the arbitration will be made under the auspices of the ICSID Convention and its rules or of other institutions that adopt different rules.¹⁰⁴ In particular, with specific reference to the conditions *ratione materiae*, it must be highlighted that in order to access investment arbitration there must always be an investment. Jurisdictional questions relating to the scope of arbitrable investment disputes may arise, no matter which forum of arbitration is selected, since the jurisdiction of an arbitral tribunal under an applicable investment treaty relies on showing the existence of an ‘investment’.¹⁰⁵ In the event of a lack of an investment, the relevant tribunal

¹⁰³ Depending on the wording of the applicable investment treaty, the access to investor-State arbitration may also depend on *ratione temporis* conditions.

¹⁰⁴ As illustrated in Chapter I, section 2, in investment treaties and agreements that do not submit disputes to the ICSID tribunals, reference is frequently made to the rules of arbitration of the ICC, the SCC or *ad hoc* arbitration under the UNCITRAL Arbitration Rules. *See* Definition of Investor and Investment in International Investment Agreements, OECD, 2008 (available at <http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf>), at p. 53 and following.

¹⁰⁵ Another essential condition that must always be met is that the party seeking protection must be a foreign investor (*see* D.B. KING, R. MOLOO, Enforcement after the Arbitration: From National Courts to Public International Law Fora, *supra*, note 84, at p. 413). The analysis of the concept of investor is not included within the scope of this work, as the existence of an investor was not controversial in the Relevant Cases (as defined below in

will not have the jurisdiction over the case, and it goes without saying that the jurisdiction of the tribunal is essential to the authority and decision-making of the arbitrators: an award rendered without jurisdiction has no legitimacy and can be set aside and/or non-recognised for enforcement by courts.¹⁰⁶ In light of the above, it is clear that, to a large extent, the definition of investment outlines the boundaries of a country's exposure to investor-State claims.

The above premised, it is not always easy to determine whether a given activity or asset qualifies as an investment. This is due to the fact that there is no common agreed understanding on what constitutes an investment. Customary international law does not refer to the concept of investment, but rather to that of property;¹⁰⁷ the ICSID Convention does not provide for a definition of investment at all, despite the term being used in the context of the Convention and, in particular, in Art. 25 which deals with the jurisdiction of the Centre;¹⁰⁸ neither the ICC, nor UNCITRAL nor SCC arbitration rules filter claims through their own autonomous notion of investment;¹⁰⁹ and investment treaties use a wide range of non-consistent wordings for defining

this section).

¹⁰⁶ See D.A.R. WILLIAMS, S. FOOTE, Recent Developments in the Approach to Identifying an “Investment” Pursuant to Article 25(1) of the ICSID Convention, in C. BROWN, K. MILES (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, 2011, at p. 42, citing J. LEW, L.A. MISTELIS, S.M. KROLL, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003. See also C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 83, whereby it is clarified that in ICSID arbitration ‘[a] question of jurisdiction may also be raised in the context of a request for annulment: a violation of Art. 25 may have the consequence that the tribunal has manifestly exceeded its powers in accordance with Art. 52(1)(b) of the Convention [...]’

¹⁰⁷ K. YANNACA-SMALL, Definition of “Investment”: An Open-ended Search for a Balanced Approach, in K. YANNACA-SMALL (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, 2010, pp. 243-269, at pp. 243-244. For an outline of the customary international rules applicable to the protection of foreign investment, see, *inter alia*, R. DOLZER, M. STEVENS, *Bilateral Investment Treaties*, Kluwer Law International, 1995, at p. 10.

¹⁰⁸ See section 3 of this Chapter II.

¹⁰⁹ See OECD, *supra*, note 104, p. 54.

investments.¹¹⁰ In addition, in many countries the term ‘investment’ is not even legally defined, while the terms ‘property’, ‘assets’ or ‘goods’ are usually defined as an established concept in national civil and constitutional laws.

The difficulties in finding a common agreed understanding of investment are due to a number of reasons. First, the concept of investment is at the crossroads between economics, law and international relations; therefore any definition should not disregard any of these areas.¹¹¹ Second, it is by itself a broad term invoking different meanings in everyday economic and legal usage. Finally, it is not a concept static in time, but it is subject to evolution with the passing of time and the development of trade exchanges and techniques. Recent ICSID statistics show that the subject matters of foreign investments tend to be more heterogeneous than they were in the past, when transactions dealing with property in sectors like oil, gas, mining, productive infrastructures, transportation and/or construction constituted the typical subject matters of foreign investments. Nowadays, transfer of intellectual property rights, trade in services or in foreign financial assets may also be considered as investments.¹¹²

¹¹⁰ See section 2 of this Chapter II.

¹¹¹ According to R. DOLZER, C. SCHREUER, *Principles of International Investment Law*, *supra*, note 49, at p. 60: ‘[e]conomic science often assumes that a direct investment involves (a) the transfer of funds, (b) a longer term project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) a business risk. These elements distinguish foreign direct investment from a portfolio investment (no element of personal management), from an ordinary transaction for purposes of sale of a good or a service (no management, no continuous flow of income), and from a short-term financial transaction.’ As better described in sections 2 and 3 of this Chapter II, States have, in whole or in part, relied on the economic understanding of investment for drafting the definition thereof in investment treaties and tribunals have applied it in order to identify the salient features of an investment.

¹¹² According to the statistics contained in the ICSID 2016 Annual Report (available at: https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR16_EN_G.pdf) the distribution of ICSID cases registered in the 2014 financial year by economic sector has been as follows:

- electric power and other energy sector: 35%;
- oil, gas, and mining sector: 20%;

In this context of uncertainty, arbitral tribunals have tried to reach a conclusive definition of investment or, at least, to identify certain hallmarks that must be present in order for a transaction to qualify as an investment, but, as better described below, no satisfactory outcome has yet been achieved.

All the above premised, it must be noted that for the purposes of this work, the concept of investment is particularly important. Indeed, only if a commercial award can be considered as a protected investment will it be possible for the aggrieved award creditor to bring a direct claim against the State that wrongfully set aside the award or refused its enforcement.

To date, six arbitration tribunals have come to a decision on this specific issue, adopting different approaches in their respective awards (the “**Relevant Cases**”). In the following sections, the parts of the awards rendered by such tribunals relevant for this topic will be analysed.

However, prior to deepening this analysis, it is necessary to identify the legal framework relevant for this matter and, in particular, what can be considered as an investment pursuant to investment treaties and the ICSID Convention. This is due to the fact that, as better illustrated below, the definition of investment under investment treaties is relevant for both ICSID and non-ICSID tribunals. Analogously, the concept of ‘investment’ set out in the Convention, as elaborated by ICSID practice, has shown to be relevant to a certain extent for jurisdictional purposes, also in the context of non-ICSID cases.

In this Chapter, I will first examine what an investment is: (i) in investment treaties; (ii) for the purposes of the ICSID Convention and in the jurisprudence of ICSID tribunals; and (iii) in the context of non-ICSID cases.

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- variety of industries (such as retail, textile manufacturing and voucher services): 11%;
 - construction industry: 9%;
 - transportation, financial sector, and information and communication sectors: 7% each;
 - tourism and agriculture: 2% each.

On this topic and for an outline of the sectors for which ICSID protection was sought in years 2012/2013, *see* P. ACCONCI, The Unexpected Development-friendly Definition of Investment in the 2013 IDI Resolution, Italian Yearbook of International Law, Vol. 23 (2013), Martinus Nijhoff Publishers, 2013, pp. 69-90, at pp. 71-74.

I will then analyse the cases (ICSID and non-ICSID) that have directly dealt with the specific issue concerning the possible qualification of a commercial award as an investment itself.

Finally, I will consider if there is a territoriality requirement connected to the concept of investment and the possible consequences thereof.

2. Investment under investment treaties

As briefly illustrated in Chapter I,¹¹³ arbitration under investment tribunals, including ICSID tribunals, is entirely voluntary. The basis of the parties' consent to investor-State jurisdiction can be found in a variety of sources, in particular, domestic investment laws,¹¹⁴ contracts concluded between a foreign

¹¹³ See section 2 thereof.

¹¹⁴ A State may give consent to arbitration in the form of a standing offer in its domestic investment promotion laws. Accordingly, some States have passed laws on the promotion of foreign investment, which usually provide for ICSID arbitral proceedings as well as other types of proceedings in order to resolve investor-State disputes. When consent to the ICSID's or to other investment tribunal's jurisdiction is granted in national legislation, such legislation often also contains a description of the investment to which it relates. Some of these definitions are quite terse (*see*, for instance, Art. 3 of the Tanzania Investment Act 1997 pursuant to which "investment means the creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise"); while others are more elaborate and follow the pattern of modern BITs (*see*, for instance, Art. 1 of the Albania Law on Foreign Investments of 1993, according to which "[f]oreign investment" means every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor, consisting of:

- (a) moveable and immoveable, tangible and intangible property and any other property rights;
- (b) a company, shares in stock of a company and any form of participation in a company;
- (c) loans, claim to money or claim to performance having economic value;
- (d) intellectual property, including literary and artistic works, sound recordings, inventions, industrial designs, semiconductor mask works, know how, trademarks, service marks and trade names; and
- (e) any right conferred by law or contract, and any license or permit pursuant to law) (translation from the original).

On the topic, *see, inter alia*, M. DIMSEY, *The Resolution of International Investment Disputes: Challenges and Practical Solutions*, in I. SCHWENZER (series ed.), *International*

investor and the State hosting the investment,¹¹⁵ and BIT or multilateral investment treaties.

Investment treaties are, and have historically been, the predominant source of consent to jurisdiction.¹¹⁶ This was confirmed most recently by the ICSID 2014 annual report,¹¹⁷ according to which in the financial year 2014: (a) in 49% of the cases investors asserted ICSID jurisdiction on the basis of a BIT; (b) in 22% of the cases this happened on the basis of a multilateral investment treaty

Commerce and Arbitration, Vol. 1, Eleven International Publishing, 2008, at p. 23; and C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at pp. 121-122 and 196-205.

¹¹⁵ If the consent to investment arbitration is included in a clause of a contract, there is a strong presumption that the parties have considered the transaction contemplated thereunder as an investment and therefore there should not be much room for arbitrators to deny subject matter jurisdiction on the case. However, the ICSID Model Clauses (available at: <https://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/main-eng.htm>) suggests, for the avoidance of any doubts, to insert in the contract the following specific language: '[i]t is hereby stipulated that the transaction to which this agreement relates is an investment.' This language should demonstrate that the parties have carefully considered the nature of the project and that, when adopting the ICSID clause, were aware of the Convention's jurisdictional requirements. In any event, it shall be highlighted that even in this case, certain tribunals verified whether the transaction envisaged in the relevant contract can effectively qualify as an investment regardless of the parties' intent. On the topic, *see* C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at pp. 192-196.

¹¹⁶ C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 122; M. MALIK, *Definition of Investment in International Investment Agreements*, in IISD Bulletin, No. 1, August 2009; and M.K. HARWOOD, S.N. BATIFORT, *Jurisdiction and Procedure in Investment Arbitration: New Developments*, in J.H. CARTER (ed.), *The International Arbitration Review* (5th Edition), Law Business Research, 2014, pp. 1-17, at pp. 6-7.

¹¹⁷ Available at: https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR14_EN_G.pdf

(in particular, the ECT); (c) in 18% of the cases on the basis of investment contracts; and (d) in 11% of the cases on the basis of investment laws.¹¹⁸

In light of the above and in view of the fact that in the vast majority of cases in which tribunals had to face the issue connected to their jurisdiction consent by the State was granted in investment treaties (including the Relevant Cases), this work will focus exclusively on the definition of investment under international investment treaties.

As will be discussed below, the definition of investment has a material impact on investment tribunals' jurisdiction. Of course, the more stringent the definition is, the harder it is for an investor to bring a claim against the host State. This is evidently of particular relevance with specific reference to the possible qualification of an award as an investment.

2.1 International investment treaties

With the exception of few earlier treaties,¹¹⁹ almost all investment treaties contain a definition article and provide for a definition of investment. Though the definitions differ from one to another, it is possible to outline certain trends in the manner that they are drafted, directly connected to the object and objectives of the relevant investment instrument.¹²⁰

¹¹⁸ However, certain cases relied on the multiple basis of jurisdiction. For an outline of the situation in the previous years, *see* the relevant ICSID annual reports available at: <https://icsid.worldbank.org/apps/icsidweb/resources/pages/ICSID-Annual-Report.aspx>.

¹¹⁹ Some of the earlier investment agreements (*see*, for instance, the OEDEC Draft Convention on the Protection of Foreign Property, OECD, 1967) did not use the notion of investment, but, rather, they referred to 'foreign property', treating imported capitals and other properties of resident foreign nationals analogously: substantially, no distinction was made between investments and other forms of property and economic activity. For more on this topic, *see* N. RUBINS, The Notion of 'Investment' in International Investment Arbitration, in S. M. KRÖLL, N. HORN (eds.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*, Studies in Transnational Economic Law, Vol. 19, Kluwer Law International, 2004, pp. 283-324, at pp. 283-287.

¹²⁰ For an explanation of the different purposes and objectives of investment treaties and their evolution in time, *see* P. BERNARDINI, Investment Protection under Bilateral Investment Treaties and Investment Contracts, *The Journal of World Investment & Trade*, Vol. 2,

A narrow approach was followed by earlier instruments, which aimed at the gradual liberalisation of capital movements and enumerated the transactions covered by them. More precisely, treaties signed before the 1990s usually provided a relatively restricted definition of investment, sometimes expressly linking the concept to ‘capital’ or requiring a local business enterprise to be established to qualify.¹²¹ The same approach was taken by the ICC in the 1972 International Chamber of Commerce Guidelines for International Investments. The ICC document was ‘quite clearly directed at foreign nationals who wish to establish businesses and investments in the ordinary sense of the world bringing capital into the host State and having a management role in the business enterprise in which they have a clear stake.’¹²²

Today, most international investment treaties lay down a broad definition of investment, which – in certain cases – is limited at a second step.¹²³ This can be easily explained by making reference to the main purpose that most of the recent investment treaties (especially BITs) have, i.e., the encouragement of foreign investments. In this context, it is clear that the broader the definition is,

Issue 2, 2001, pp. 235-247; R. DOLZER, M. STEVENS, *Bilateral Investment Treaties*, *supra*, note 107, at p. 11 and following; R. ECHANDI, *Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements : Recent Developments in Investment Rulemaking*, in K. YANNACA-SMALL (ed.), *Arbitration Under International Investment Agreements: A Guide To the Key Issues*, Oxford University Press, 2010, pp. 3-35, at p. 6 and following; K. YANNACA-SMALL, *Definition of “Investment”: An Open-ended Search for a Balanced Approach*, *supra*, note 107, at pp. 243-244; and UNCTAD, *Scope and Definition (a sequel)*, UNCTAD Series in Issues in International Investment Agreements II, United Nations Publications, 2011 (available at http://unctad.org/en/Docs/diaeia20102_en.pdf), at p. 5.

¹²¹ See World Bank, *Legal Framework for the Treatment of Foreign Investment*, Vol. I: Survey of Existing Instruments, Progress Report and Background Studies, the World Bank, 1992 (available at: <http://documents.worldbank.org/curated/pt/790571468782168106/pdf/multi-page.pdf>).

¹²² N.V.S.K. NATHAN, *Submissions to the International Centre for the Settlement of Investment Disputes in Breach of the Convention*, *Journal of International Arbitration*, Vol. 12, Issue 1, 1995, pp. 27-52, at p. 29.

¹²³ See K. YANNACA-SMALL, *Definition of “Investment”: An Open-ended Search for a Balanced Approach*, *supra*, note 107, p. 244.

the more kinds of foreign investments can be attracted in the countries party to the treaty.¹²⁴

According to the categorization made by one author¹²⁵, current international investment treaties use three main approaches to defining investment, i.e., treaties: (i) provide an ‘illustrative list’ of investments; (ii) opt for an ‘exhaustive list’; or (iii) contain an ‘hybrid list’.

The approach referred to under (i) above is still the most-used in investment treaties.¹²⁶ It consists in giving a broad and open-ended definition of investment. Most treaties included in this category refer to ‘every kind of assets’¹²⁷ followed by a list of types of covered assets which is indicative rather

¹²⁴ See, *supra*, note 120.

¹²⁵ N. RUBINS, ‘The Notion of ‘Investment’ in International Investment Arbitration’, *supra*, note 119, p. 292-295, quoted also by K. YANNACA-SMALL, ‘Definition of “Investment”: An Open-ended Search for a Balanced Approach’, *supra*, note 107, at p. 245.

¹²⁶ See, *inter alia*, R. ECHANDI, ‘Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements : Recent Developments in Investment Rulemaking’, *supra*, note 120, at p. 11; M. MALIK, ‘Definition of Investment in International Investment Agreements’, *supra*, note 116, at p. 3; and UNCTAD, ‘International Investment Agreements: Flexibility for Development’, United Nations Publications, 2000, at p. 70 (available at: <http://unctad.org/en/Docs/psiteiid18.en.pdf>).

¹²⁷ As noted by R. DOLZER, M. STEVENS, ‘Bilateral Investment Treaties’, *supra*, note 107, at p. 27, this broad formula has become a standard definition in most European treaties. See, for example, the Agreement Between the United Kingdom of Great Britain and Northern Ireland and Bosnia and Herzegovina for the Promotion and Protection of Investments, signed on 2 October 2002 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/499>), whereby investment is defined in Art. 1 as: ‘every kind of asset and in particular, though not exclusively, [it] includes:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other form of participation in a company;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual property rights, goodwill, technical processes and know-how;
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.’

than exhaustive. Despite the fact that the covered assets included in the list of each treaty slightly differ, it is still possible to identify the following categories of assets that are usually present in the definition:¹²⁸

- real estate and other property rights. Both movable and immovable properties are included in this category, which covers the tangible property traditionally safeguarded by international customary law and earlier investment agreements;
- shareholdings and other forms of participation in companies. Not only are shares in companies included in the definition, but a broader variety of interests and rights in companies are also encompassed. In particular, the reference to other forms of participation in companies is wide and may be interpreted to include not only foreign direct investments, but also portfolio investments;¹²⁹

¹²⁸ See C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 123; K. YANNACA-SMALL, *Definition of “Investment”: An Open-ended Search for a Balanced Approach*, *supra*, note 107, at p. 2; and N. RUBINS, *The Notion of ‘Investment’ in International Investment Arbitration* *supra*, note 119, at pp. 292-293. For examples of wordings used by various treaties, see R. DOLZER, M. STEVENS, *Bilateral Investment Treaties*, *supra*, note 107, at pp. 27-31.

¹²⁹ According to the definition granted by the World Trade Organization (“WTO”) in the report on trade and foreign investment issued in 1996 (see WTO News: Press Releases, Press/57, 9 October 1996 “Trade and foreign direct investment”, New Report by the WTO, available at: https://www.wto.org/english/news_e/pres96_e/pr057_e.htm) foreign direct investment is a situation in which an investor, resident in its parent country, owns assets in another country (i.e., the host country) and aims to manage these assets. The management of the assets distinguishes foreign direct investment from portfolio investment that mainly focuses on the purchase of foreign stocks, bonds or other financial instruments and/or the making of loans in another country without the possibility or intent of influencing the running of the local enterprise. For a further analysis of the distinction between portfolio investments and direct investments, see, *inter alia*, M. DEKASTROS, *Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention*, *The Journal of World Investment & Trade*, Vol. 14, Issue 2, 2013, pp. 443-466; H. QI, *The Definition of Investment and Its Development: for the Reference of the Future BIT between China and Canada*, *Revue Juridique Themis*, Vol. 45, Issue 3, 2011, pp. 541-564, at p. 545 and following; and G. SACERDOTI, *The concept of foreign*

- claims to payment or performance having a financial value. The reference in this category to claims to money or to any performance having a financial value potentially covers a variety of commercial contracts and transactions, even including those for the sales of goods transactions. It should be highlighted that this category is particularly important in the context of the Relevant Cases, as in most of them the claimant argued that the rights arising from a commercial award were comprised therein and that, therefore, the commercial award, and the claims arising therefrom, were a protected investment;¹³⁰
- intellectual property rights. This category may also include trademarks, patents and copyrights which are not legally protected as traditional forms of intellectual property,¹³¹ and

investment and the definition of the investor in recent BITs, in *The Hague Academy of International Law, Collected Courses of the Hague Academy of International Law*, Vol. 269, Brill Nijhoff, 1997, pp. 298-320. However it should be noted that the fact that the wording of the definition of investment expressly refers to shares and other interests does not automatically imply that portfolio investments are to be deemed as covered by the treaty. According to a restrictive interpretation that can be granted to such a definition, only majority stakes or shares to be held by the investor for a medium-long period of time fall within the scope of the definition. Such an interpretation mainly relies on a particular reading of the purpose of the treaty, which according to certain tribunals is principally aimed at fostering the economic development of the host country, so that portfolio investments are per se excluded from the scope of the treaty. Indeed, as noted by M. SORNARAJAH, *Portfolio Investments and the Definition of Investment*, *ICSID Review*, 2009, Vol. 24, Issue 2, pp. 516-520, at p. 516, the possibility of fitting portfolio investment into the scheme of investment protection does not depend on the differences in drafting, but rather on “different attitudes that arbitrators adopt towards the cases they have to decide” (*see* the mentioned article also for an outline of the arguments for inclusion of portfolio investments within the scope of the definition of ‘investment’ present in BITs or their exclusion therefrom and for an analysis of relevant case law).

¹³⁰ *See* section 5 of this Chapter II and its sub-sections.

¹³¹ *See*, for example, Art. 1 of the 2008 UK Model BIT (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847>), according to which: (a) “investment” means every kind of asset, owned or controlled directly or indirectly, and in particular, though not exclusively, includes: [...] (iv) intellectual property rights, goodwill, technical processes and know-how?

- business concessions under public law. This category may include connections to search for, extract and exploit natural resources.¹³² Therefore, a concession, for example to search for gas, in itself would be an investment even if the investor has not provided the funds or resources necessary for actual exploration.

This drafting manner is directly linked to the acknowledgement that the concept of investment continues to evolve and, as technologies, markets and commerce develop, there will be new forms of investments that are to be included within the scope of the treaty.¹³³

However, it has its downsides: terms in the definition such as ‘every kind of assets’ encourage claimants to seek protection under the treaty, and claimants have a high chance of achieving protection, since if any asset or anything bearing a financial value is considered as an investment, the definition of investment is substantially limitless and any transaction could fall within its scope, even a mere sale and purchase of assets.¹³⁴

With respect to the approach referred to under (ii) above, reference is made to those treaties that set forth a broad but exhaustive list of covered economic

¹³² See, for example, Art. 1 of the 2008 German Model BIT (available at: <http://www.italaw.com/sites/default/files/archive/ita1025.pdf>), according to which the term “investments” comprises every kind of asset which is directly or indirectly invested by investors of one Contracting State in the territory of the other Contracting State. The investments include in particular: [...] ‘(f) business concessions under public law, including concessions to search for, extract or exploit natural resources’.

¹³³ B. LEGUM, *Defining Investment and Investor: Who is Entitled to Claim?*, *Arbitration International*, Vol. 22, Issue 4, pp. 521-526, at p. 523, believes that these broad definitions reflect ‘an effort to accommodate the endless creativity of the capital markets. Put in slightly different terms, the broad definition of investment reflects a desire to encourage foreign investment in all its form, present *and future*’. See also UNCTAD, *Scope and Definition (a sequel)*, *supra*, note 120, at p. 24 and following, where the downsides of the broad open-ended definition are highlighted.

¹³⁴ However, tribunals in order to assess their jurisdiction tend to verify whether the operation in question is expressly mentioned in the exemplificative list (*see*, for instance, among the Relevant Cases, *White v. India*, *infra*, note 444) and they do not rely on the catch-all reference.

and financial activities.¹³⁵ The leading example of closed-end definitions is provided by Art. 1193 of the NAFTA,¹³⁶ which is quite broad and includes:

¹³⁵ Yet, as stated by B. LEGUM, *supra*, note 133, at p. 523, it is worth noting that the majority of these closed lists are so comprehensive that it is difficult to think about an investment covered by the open-end lists that would not be encompassed in the closed-end lists as well.

¹³⁶ Art. 1139 of the North American Free Trade Agreement, signed on 17 December 1992 (available at: <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=1&secid=539c50ef-51c1-489b-808b-9e20c9872d25#A1101>)

(“NAFTA”), pursuant to which “[i]nvestment means:

- (a) an enterprise;
- (b) an equity security of an enterprise;
- (c) a debt security of an enterprise
 - (i) where the enterprise is an affiliate of the investor, or
 - (ii) where the original maturity of the debt security is at least three years,but does not include a debt security, regardless of original maturity, of a state enterprise;
- (d) a loan to an enterprise
 - (i) where the enterprise is an affiliate of the investor, or
 - (ii) where the original maturity of the loan is at least three years,but does not include a loan, regardless of original maturity, to a state enterprise;
- (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
 - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
 - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;but investment does not mean,
 - (i) claims to money that arise solely from
 - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

foreign direct investments; portfolio investments; partnerships and other interests that give the owner a right to a share in profits and/or liquidated assets; as well as tangible and intangible property ‘acquired in the expectation [...] of economic benefit or other business purposes.’ Loan financing falls within the definition of investment for the purposes of the NAFTA only if funds flow within a business group or if debt is issued over a medium-long term (i.e., more than 3 years). In addition, contract rights are protected by the NAFTA, but only if they involve a ‘commitment of capital or other resources in the territory of a Party [...] to economic activity in such a territory’. NAFTA complements its exhaustive list with a negative definition, identifying certain kinds of property that are not to be considered as investments, such as money claims arising from commercial contracts for the sale of goods and services. Certain post-NAFTA bilateral treaties entered into by a State party to the NAFTA have followed the exhaustive-list model for defining investment.¹³⁷ It must also be mentioned that nowadays a revival of the ‘NAFTA model’ is occurring, mainly due to the fact that the term investment has been extensively interpreted in ICSID arbitral awards and this has given rise to concerns about the breadth of its coverage.¹³⁸ In order to contrast this practice, some newer

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- (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
 - (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).²

For a recent comment on the NAFTA’s definition of investment and a recent case dealing with this definition, see C.T. KOTUBY JR, J. EGERTON-VERNON, *Apotex Inc v The Government of the United States of America. Will Barriers to Jurisdiction Inhibit an Emerging Trend*, in ICSID Review, Vol. 30, Issue 1, 2015, pp. 21-29, whereby the authors highlight how, by means of the restrictive terms included in the NAFTA and in the 2012 U.S. Model BIT, ‘the USA may be attempting to row back from the wider definition of ‘investment’ it has adopted in older BITs.’

¹³⁷ See, for instance, Art. G-40 of the Canada-Chile Free Trade Agreement, signed on 6 February 1997 (available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en>).

¹³⁸ See section 3.2 of this Chapter II. A broad interpretation of the notion of investment is only one of the manners by means of which ICSID tribunals have expanded their jurisdiction. For an analysis of the topic, see, *inter alia*, C. HUIPING, *The Expansion of*

treaties have adopted the ‘closed-list’ definition with a wide, but finite, asset-based list of examples and/or expressly excluded specific types of assets (such as certain commercial contracts or short-term investments) from the definition.¹³⁹ This drafting manner ensures that anything not listed in the definition of investment cannot qualify as an investment. The approach is therefore more predictable than the typical broad non-exhaustive asset-based definition.

Other techniques used in order to address this issue and narrow down the scope of protected investment include, *inter alia*:¹⁴⁰ (a) applying protection only to investments made in accordance with host country law and made within the contracting State’s territory;¹⁴¹ (b) restricting the asset-based approach to direct

Jurisdiction by ICSID Tribunals: Approaches, Reasons and Damages, *The Journal of World Investment & Trade*, Vol. 12, Issue 5, 2011, pp. 671-687.

¹³⁹ See Art. 1 of the 2004 Canadian Model BIT (available at: <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>).

¹⁴⁰ For a more detailed analysis of each technique, see UNCTAD, *Scope and Definition* (a sequel), *supra*, note 120, at pp. 21-48.

¹⁴¹ See, for instance, Art. 1 of Accord entre le Gouvernement de la République Française et le Gouvernement de la République d’Afrique du Sud sur l’Encouragement et la Protection Reciproque des Investissements, signed on 11 October 1995 (available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1280>), whereby investment is defined as ‘tous avoirs, tel que les biens, droits et intérêts de toutes nature et, plus particulièrement mais non exclusivement:

- a) Les biens meubles et immeubles, ainsi que tous autres droits réels tels que les hypothèques, privilèges, usufruits, cautionnements et tous droits analogues;
- b) Les actions, primes d’émission et autres formes de participation, même minoritaires ou indirectes, aux sociétés établies sur le territoire de l’une des Parties contractantes;
- c) Les obligations, créances et droits à toutes prestations ayant valeur économique;
- d) Les droits de propriété intellectuelle, commerciale et industrielle tels que les droits d’auteur, les brevets d’invention, les licences, les marques déposées, les modèles et maquettes industrielles, les procédés techniques, le savoir-faire, les noms déposés et la clientèle;
- e) Les concessions accordées par la loi ou en vertu d’un contrat, notamment les concessions relatives à la prospection, la culture, l’extraction ou l’exploitation de richesses naturelles, y compris celles qui se situent dans la zone maritime de la Partie contractante concernée.

investment only;¹⁴² (c) restricting covered investments depending on the time of their establishment;¹⁴³ and (d) granting protection only to investments of a certain magnitude or regarding particular sectors of interest.¹⁴⁴

Il est entendu que lesdits avoirs doivent être ou avoir été investis *conformément à la législation de la Partie contractante sur le territoire ou dans la zone maritime de laquelle l'investissement est effectué*, avant ou après l'entrée en vigueur du présent accord.⁷

With respect to the requirement that the investment is to be made 'in accordance with host State laws', it is however worth noting that, according to A. CARLEVARIS, Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals, *The Journal of World Investment & Trade*, Vol. 9, Issue 1, 2008, pp. 35-50, on the basis of the relevant scarce arbitral practice, it is still possible to maintain that the requirement of conformity with domestic law refers to the legality of the investment, and not to its definition and, therefore, to exclude jurisdiction, it is not sufficient for the State to show that the investment does not fit into the national definition. This relies on the assumption, on which the arbitral practice seems to be consistent, that the notion of investment for the purposes of establishing the tribunal jurisdiction can only be construed in accordance with international law. Of a different view is B. STERN, Are There New Limits on Access to International Arbitration?, *ICSID Review*, Vol. 25, Issue 1, 2010, pp. 26-36, at p. 33, who believes that '[a] distinction has to be drawn between illegalities or fraudulent behaviour committed in the initiation of the investment and illegalities or fraudulent behaviour committed during the lifetime of the investment. In my view, if the initiation of the investment is against the law or not in good faith, the investment itself is not to be protected and the tribunal should not have jurisdiction. If the illegalities or the bad faith behaviour are committed during the life of the investment, the determination of whether investment protection may properly be secured should be made during the merits phase.' An analogous opinion is expressed by the same author in B. STERN, Scope of Investor's Protection under the ICSID/BIT Mechanism: Recent Trends, in A.W. ROVINE (ed.), *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 2010*, Martinus Nijhoff Publishers, 2010, pp. 33-49, at pp. 45-48. *See also* S.W. SCHILL, Illegal Investments in Investment Treaty Arbitration, *The Law and Practice of International Courts and Tribunals*, Vol. 11, 2012, pp. 281-323, which considers that the illegality affects the tribunal's jurisdiction *ratione materiae* or *voluntatis*. The author also highlights how the illegality depriving an investment of treaty protection and a treaty-based tribunal of jurisdiction must relate to the admission of the foreign investment in the host State. On the contrary, incidental, peripheral or minor breaches of domestic law do not trigger the operation of the 'in accordance with State law' clause.

¹⁴² This limitation may be included in an agreement where a host country is concerned about the possible detrimental effects of applying treaty provisions to certain portfolio

investment. For instance, Art. 4 of the Free Trade Agreement Between the European Free Trade Association and Mexico, signed on 27 November 2000 (available at: <http://www.efta.int/media/documents/legal-texts/free-trade-relations/mexico/EFTA-Mexico%20Free%20Trade%20Agreement.pdf>) states that: '[f]or the purposes of this Section, investment made in accordance with the laws and regulations of the Parties means direct investment, which is defined as investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof.'

¹⁴³ The inclusion of a limitation based on the time of establishment of the treaty is not new. For instance, Art. 13 of the Agreement Between the Government of the Russian Federation and the Government of the Arab Republic Of Egypt on the Encouragement and Mutual Protection of Capital Investments signed on 23 September 1997 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1105>) provides that: '[t]he present Agreement shall be applied with respect to all capital investments carried out by the investor of one of the Contracting Parties on the territory of the other Contracting Party, beginning in January 1, 1987.' Developing countries sometimes seek to exclude investments established prior to entry into force of an investment protection instruments. *See*, for instance, Accord entre le Gouvernement de la République Française et le Gouvernement de la République d'Afrique du Sud sur l'Encouragement et la Protection Reciproque des Investments, signed on 11 October 1995, *supra*, note 141; Art. 12 of the Agreement Between the Arab Republic of Egypt and the Republic of Cyprus For the Promotion and Reciprocal Protection of Investments, signed on 21 October 1998 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/921>), whereby it is provided that: '[t]his Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party after its entry into force.' Other reference dates (e.g., the date in which the host country's investment law will enter into force) are also taken into consideration by other BITs. Finally, some agreements may also deal with the time of disputes. Thus, the agreement may specify that it applies only to disputes that arise after the entry into force of the agreement itself (*see*, for instance, Art. II(2) of the Acuerdo para la Promoción y la Protección Reciproca de Inversiones entre el Reino De España y la Republica Argentina of 1991 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/119>) which states that: 'el presente Acuerdo no se aplicará a las controversias o reclamaciones que se hubieran originando antes de su entrada en vigor.' In this case the tribunal shall determine when the dispute actually arises, since its jurisdiction is limited to those arisen after the treaty has entered into force.

The last approach to subject matter scope in investment treaties occupies a middle ground between the open-ended language approach and the exhaustive list approach. Treaties included in this category:¹⁴⁵ (i) specify that a transaction must have the typical characteristic of an investment such as the commitment

¹⁴⁴ The solutions under letter (d) are suggested by P. RANJAN, Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion, *Journal of International Arbitration*, Vol. 26, Issue 2, 2009, pp. 217-235.

¹⁴⁵ See, for instance, Art. 1 of the 2012 U.S. Model BIT, where investment is defined as ‘every asset that an investor owns or controls, directly or indirectly, *that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.* Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) *futures, options, and other derivatives*;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) *other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges*’ (emphasis added).

In addition, Footnote 1, relating to letter (c) of the definition above, stipulates that: ‘[s]ome forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.’ Footnote 2, relating to letter (f) of the definition above, provides indication as to whether a particular type of license, authorization, permit, or similar instrument has the characteristics of an investment and it clarifies that it ‘depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment’. Finally, Footnote 3, concerning letter (g) of the definition, explains that: ‘[t]he term “investment” does not include an order or judgment entered in a judicial or administrative action.’

of capital or other resources, the expectation of gain or profit, or the assumption of risk;¹⁴⁶ (ii) besides the typical ‘core’ investment types, also cover various debt instruments, futures, options, and other derivatives; and (iii) provide for explanatory notes, designed to clarify and narrow the apparently boundless definition. Such treaties remove the doubts as to whether certain very modern forms of economic activity can qualify as investments, and provide guidance to arbitrators in their case-by-case analysis, directing them to look past the ‘form’ to the economic essence of each project operation.

3. Investment for the purposes of ICSID arbitration

Art. 25(1) of the ICSID Convention states that: ‘[t]he jurisdiction of the Centre shall extend to any dispute *arising directly out of an investment* between a contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre’.¹⁴⁷

Therefore, in order for an ICSID tribunal to have jurisdiction over a dispute under the Convention three conditions must be met:

- first, a condition *ratione personae*: the dispute must oppose a contracting State and a national of another contracting State¹⁴⁸;

¹⁴⁶ The Preamble reflects some of the most recognised jurisprudential outcomes of the concept of investment by ICSID tribunals (*see* section 3 of this Chapter II). As noted by C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration: Substantive Principles*, *supra*, note 53, 2008, at p. 173: ‘the preamble to this definition takes up the *Fedax* criteria, albeit without referring to the cases directly. This more specific definition is likely to lead to more certainty by crystallizing issues that have been developed in the case law into the wording of the BITs.’ The definition is also in line with the economic definition of investment (*see, supra*, note 111)

¹⁴⁷ ICSID Convention, Art. 25(1) (emphasis added). For a comment as to the fact that the Convention refers to the jurisdiction of the Centre (which is an administrative body), rather than that of the tribunals, *see* C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, pp. 531 and 532. *See also, infra*, note 218.

¹⁴⁸ The Convention itself provides for a definition of a ‘national of another Contracting State’ in Art. 25(2), but does not specify how the nationality can be identified. It is worth noting

- second, a condition *ratione materiae*: the dispute must be a *legal* dispute arising *directly* out of an *investment*;
- third, a condition *ratione voluntatis*: the contracting State and the investor must consent in writing that the dispute is submitted to ICSID arbitration.¹⁴⁹

As already illustrated, this work will focus exclusively on the limitation to the jurisdiction *ratione materiae* and, in particular, on the concept of investment.¹⁵⁰

that while ICSID's nationality requirement has not traditionally been the subject of much litigation (at the time when the Convention was drafted investors were natural persons and, therefore, the requirement was easier to be verified), tribunals are nowadays more and more often dealing with that issue, especially in relation to veil piercing and corporate form issues. Indeed, Art. 25 is silent on the criteria to define corporate nationality. For an analysis of this topic, *see, inter alia*, P. GHAFFARI, Jurisdictional Requirements under Article 25 of the ICSID Convention: Literature Review, *The Journal of World Investment & Trade*, Vol. 12, Issue 4, 2011, pp. 603-625, at p. 609-611 and 617-621; OECD, Definition of Investor and Investment in International Investment Agreements, *supra*, note 104; M. SASSON, Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law, Kluwer Law International, 2010, pp. 51-64; E.C. SCHLEMMER, Investment, Investor, Nationality and Shareholders, in P. MUCHLINSKI, F. ORTINO, C. SCHREUER, *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008, pp. 51-87; C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at pp. 268-302; UNCTAD, Scope and Definition (a sequel), *supra*, note 120, pp. 72-98; and K. YANNACA-SMALL, Who is Entitled to Claim? Nationality Challenges, in K. YANNACA-SMALL (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, 2010, pp. 211-242.

¹⁴⁹ The ICSID process is available whenever both parties have agreed to submit their disputes to the Centre. That consent can arise in three principal ways: (i) it can be embodied in the settlement clause provided in a specific contract; (ii) it can occur on an *ad hoc* basis if both sides agree to submitting an existing controversy to ICSID; and (iii) it can take the form of a standing offer to arbitrate future disputes mainly included in the arbitration clause of a BIT or a multilateral investment treaty whereby signatory States commit to arbitrate any future claims raised by investors under the treaty's substantive provision (which is the most frequently used; *see, supra*, notes 116 and 117). As better described in the body of this work, the consent to arbitrate is strictly linked to the concept of investment.

¹⁵⁰ As highlighted by J.D. MORTENSON, The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law, *The Harvard International Law Journal*, Vol.

However, this topic is tightly connected to the consent to arbitrate. As described above, the consent to ICSID arbitration is often included in bilateral or multilateral treaties providing investment protection, which contain their own definition of investment. The main issue is therefore to reconcile the definition of investment contained in the treaty with the jurisdictional requirement set out under the Convention.

The starting point of the analysis is that the Convention, despite requiring the presence of an investment to establish the Centre's jurisdiction, does not actually define investment. This lack of a definition was intentional.¹⁵¹ During the preparation of the Convention, various proposals were made by the delegates and the draft of the Convention circulated in September 1964¹⁵² contained a very generic definition along the following lines: 'any contribution of money or other asset of economic value for an indefinite period, or, if the period be defined, not less than five years'. However, many delegates considered the draft unsatisfactory: in particular there was considerable opposition to the word 'contribution' and to the introduction of a specific time element. In addition, a few delegates argued that reference to determined

51, Issue 1, 2010, pp. 257-318, at footnote 32, '[t]he requirement that the matter submitted constitutes a "legal dispute" that "aris[es] directly out of" an investment is even less frequently [compared to the nationality requirement] a significant issue.' In any event, for an analysis of the other elements of the subject matter jurisdiction of the Centre, *see, inter alia*, C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at pp. 41-112; A.M. STEINGRUBER, *Consent in International Arbitration*, Oxford University Press, 2012, pp. 256-259.

¹⁵¹ *See*, among others, L. BURGER, *The Trouble with Salini (Criticism of and Alternatives to the Famous Test)*, *ASA Bulletin*, Vol. 31, Issue 3, 2013, pp. 521-536, at p. 521; A. GRABOWSKI, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, *The Chicago Journal of International Law*, Vol. 15, Issue 1, 2014, pp. 287-309, at p. 289; and L.J.E. TIMMER, *The Meaning of 'Investment' as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre*, *Journal of International Arbitration*, Vol. 29, Issue 4, 2012, pp. 363-374, at p. 365.

¹⁵² *Draft Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (11 September 1964)*, in *ICSID, History of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-1, 1968, at p. 623.

criteria should be included, such as the risk or profit or the contribution to the host State's development. Certain attempts to insert a detailed definition were made,¹⁵³ but ultimately it proved impossible to agree on a definition and therefore the definition-less version of the Convention prevailed.¹⁵⁴ Delegates felt comfortable omitting a definition because it was expected that each State party to the dispute would have to specifically consent to the arbitration and the terms of that consent in most cases would include a definition of investment.

The only possible indication of a meaning that can be retrieved from the Convention is contained in the Preamble's first sentence which refers to 'the need for international co-operation for economic development and the role of private international investment therein.' This declared purpose is also confirmed by the Report of the Executive Directors, which highlights that the Convention was 'prompted by the desire to strengthen the partnership between

¹⁵³ Notably, the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and National of other States, 18 March 1965 (available at: <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm>) that accompanied the final version of the Convention ("**Report of the Executive Directors**") states that: '[n]o attempt was made to define the term "investment" [...]'. However, as pointed out by C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 116, this statement of the position is historically inaccurate: 'there were a number of attempts but they all fail.'

¹⁵⁴ According to J.D. MORTENSON (*The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, *supra*, note 150, at p. 257) there is no real lack of definition. Indeed, 'the drafters adopted a clear – and extremely broad – meaning of "investment." It is not that all parties agreed on this broad understanding from the start. Rather, the broad definition was part of a compromise reached after long and contentious negotiations over what that definition should be.' In a nutshell, according to this author, the Convention embraced the broadest definition of investment which includes all sorts of transaction (also purely commercial ones) and left it to the Contracting State to narrow the scope of this definition through: (i) arbitration agreements; (ii) notification to the Centre under Art. 25(4) of the ICSID Convention (according to which any Contracting State at any time can 'notify the Centre the class or classes of disputes which it [...] would *not* consider submitting to the jurisdiction of the Centre' (emphasis added)); and (iii) reservation from the Convention.

countries in the cause of economic development.¹⁵⁵ In light of the above, it can be argued that the Convention's purpose indicates that there should be some positive impact on development. However, tribunals dealing with this topic have taken different views: some of them, in line with Prof. Schreuer's thoughts, believe that the Preamble's wording does not 'necessarily imply that an activity which does not contribute to the host State's development cannot be an investment for the purposes of Art. 25';¹⁵⁶ others have interpreted the reference to the economic development included in the Preamble as a *conditio sine qua non* for the existence of an investment.¹⁵⁷

The relevance of the contribution to the host State's economic development in the definition of investment will be discussed in detail in the following section 3.1. For the moment, it is noted that, in the absence of a definition and given the importance granted to the consent of the parties, tribunals have tried to identify the scope of the subject matter jurisdiction of the Centre and, in particular, have dealt with the issue if the definition included in treaties was sufficient to rely on to determine ICSID's jurisdiction, or rather if such a definition should in any event be tested as there are *outer limits* to ICSID jurisdiction that cannot be circumvented by the will of the contracting States.

Tribunals that have attempted to define the term investment and clarify the aforementioned issue have failed to come up with a consistent approach on the matter, which has generated significant disharmony in jurisprudence. When reviewing the jurisprudence and scholarly writings on the term investment within the meaning of Art. 25 of the ICSID Convention, several approaches can be discerned.¹⁵⁸ It is therefore difficult to categorize arbitral decisions based

¹⁵⁵ See para. 9 of the Report of the Executive Directors.

¹⁵⁶ C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 117. For tribunal practice in this sense, see section 3.1.2 of this Chapter II.

¹⁵⁷ See section 3.1 of this Chapter II.

¹⁵⁸ The interpretation of the term 'investment' in ICSID and non-ICSID tribunals shall be based on Arts. 31 and 32 of the Vienna Convention on the Law of Treaties signed in Vienna on 23 May 1969 ("**Vienna Convention**"). According to Art. 31 (General Rules of Interpretation) thereof:

on the conceptual approach adopted by each tribunal. However, it seems possible to find two main lines of reasoning and an intermediate approach, i.e.:

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- ‘1. A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context *and in the light of its object and purpose*.
 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
 3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
 4. A special meaning shall be given to a term if it is established that the parties so intended’ (emphasis added).

Art. 32 (Supplementary Means of Interpretation) complements the provisions of Art. 31, setting out that: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) *Leaves the meaning ambiguous or obscure, or*
- (b) *Leads to a result which is manifestly absurd or unreasonable’* (emphasis added).

Though all tribunals have explicitly or implicitly applied these rules, the outcomes of their analysis have largely differed.

¹⁵⁹ While there is a large consensus among scholars on the fact that there is an objectivist and subjectivist approach, authors may not agree on the content of the third category, on possible sub-division of the objective approach as well as on the ICSID awards supporting any of those groups. The distinction between the typical characteristic approach and the jurisdictional approach is also reflected in several awards, including *MHS v. Malaysia Award on Jurisdiction* (*see, infra*, note 187). However, in such an award, the sole arbitrator concluded (para. 71) that the differences between the two approaches are likely to be academic and in practice it is unlikely that any difference in juristic analysis would alter the findings of the tribunal. More precisely: (i) if on the basis of the factual situation it is

- the so-called ‘objectivist’, ‘objective’, ‘restrictive’ or ‘jurisdictional’ approach, according to which investment has a self-standing meaning, that does not depend on the instrument containing consent to ICSID jurisdiction. The meaning of investment is based on a number of criteria which distinguish it from an ordinary commercial transaction and the absence of any of them means that the operation at issue cannot qualify as an investment;

possible to find the occurrence of all the hallmarks, the tribunal will embrace the jurisdictional approach; (ii) if, on the contrary, the facts show that one or more of the hallmarks are missing, the tribunal will opt for the typical characteristics approach. Nevertheless, this reconstruction cannot be accepted as a general rule. Precedent cases show that jurisdiction has been denied due to strict application of the objectivist approach. The same MHS v. Malaysia Award on Jurisdiction proves the contrary: in that case the tribunal denied its jurisdiction since it deemed the existence of a ‘significant contribution to the host State’s economy’ necessary, which in its opinion was lacking. Notably, the MHS v. Malaysia Award on Jurisdiction has been subsequently annulled by MHS v. Malaysia Decision on Annulment (*see, infra*, note 241). For a critical analysis to MHS v. Malaysia Award on Jurisdiction *see* J.P. GIVEN, *Malaysia Historical Salvors Sdn., Bhd. v. Malaysia: An End to the Liberal Definition of “Investment” in ICSID Arbitrations?*, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 31, Issue 3, 2009, pp. 467-500. Among the authors that support the reconstruction of this paragraph *see* M. DEKASTROS, *Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention*, *supra*, note 129, pp. 290-299; B. DEMIRKOL, *The Notion of ‘Investment’ in International Investment Law*, *Turkish Commercial Law Review*, Vol. I, Issue 41, 2015, pp. 41-50, at pp. 42-46. For different reconstructions and/or the use of other names to label each approach, *see, inter alia*, L. BURGER, *The Trouble with Salini (Criticism of and Alternatives to the Famous Test)*, *supra*, note 151, p. 522 and following; E. GAILLARD, *Identify or define? Reflections on the evolution of the concept of investment in ICSID practice*, in C. BINDER ET AL. (eds.), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, pp. 403-416; M. HWANG S.C., J. FONG LEE CHENG, *Definition of “Investment” – A voice from the Eye of the Storm*, *Asian Journal of International Law*, Vol. 1, Issue 1, January 2011, pp. 99-129; B. STERN, *Scope of Investor’s Protection under the ICSID/BIT Mechanism: Recent Trends*, *supra*, note 141, at pp. 35-41; L.J.E. TIMMER, *The Meaning of ‘Investment’ as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre*, *supra*, note 151, at p. 363 and following; and K. YANNACA-SMALL, *Definition of “Investment”: An Open-ended Search for a Balanced Approach*, *supra*, note 107, at p. 254 and following.

- the so-called ‘subjectivist’, ‘subjective’ or ‘consensual’ approach, according to which, since the Washington Convention has not given any definition of the concept of investment, it is left to the subjective definition, which may be given by the parties in the legal instruments embodying their consent to ICSID jurisdiction, to identify what an investment is; and
- the so-called ‘typical characteristics’, ‘holistic’ or ‘flexible’ approach, which falls between the two opposite approaches referred to above. According to this understanding, the criteria that have been developed by tribunals for the clarification of the notion of investment should not be considered as mandatory conditions of an investment, but rather as descriptive features. Therefore, the absence of any of them would not *per se* impair the qualification of a given transaction as an investment.

In the following sections, the different approaches summarised above will be described in more detail in order to assess which of them (if any) provide the most valuable solution. It goes without saying that the application of one approach, rather than another, has an impact on the possibility to qualify a given asset (including an arbitral award) as an investment and that the ICSID tribunals that dealt with the issue concerning the possible qualification of a commercial arbitral award as an investment have, implicitly or explicitly, referred to one or more of these approaches.

3.1 The objectivist approach

According to this approach, the word investment has an intrinsic meaning that distinguishes it from other transactions and, therefore, the parties are not free to expand the jurisdiction of ICSID tribunals bilaterally, by consent, as much as they desire. In other words, there are outer limits beyond which parties’ consent is ineffectual in creating an ICSID investment.

The problem still is to identify this intrinsic meaning of investment, given the silence of the Convention. Tribunals adhering to this approach have tried to detect the core content of an investment, outlining certain hallmarks that need to be present in order for a transaction to qualify as such; the absence of even one of them is sufficient for the tribunal to deny its jurisdiction.

This conceptualisation of the term investment by tribunals has led to the application of the so-called ‘double keyhole’ or ‘dual’ or ‘double-barrelled’ test, pursuant to which the investment has to fit both the definition of the ICSID Convention and that of the investment treaty. Therefore, tribunals in the exam of their jurisdiction shall first determine whether the investment from which the dispute arises would satisfy the definition of investment under Art. 25(1) of the ICSID Convention, and then whether it would also satisfy the definition under the relevant treaty. In a nutshell, the jurisdiction *ratione materiae* of the tribunal rests on the intersection of the two definitions of investment.

It is largely acknowledged that the background of this approach can be found in the first edition of Prof. Schreuer's commentary to the ICSID Convention.¹⁶⁰ In the analysis of Art. 25(1), the author identified five features that are typical to most of the operations that have been the subject of ICSID proceedings: (i) a certain duration of the enterprise; (ii) a certain regularity of profits and returns; (iii) an assumption of risk; (iv) a substantial commitment by the investor; and (v) some significance for the host State's development. However, it is worth noting, as the author expressly stated, that ‘these features should not be necessarily understood as jurisdictional requirements, but merely as

¹⁶⁰ See, among others, L. BURGER, The Trouble with Salini (Criticism of and Alternatives to the Famous Test), *supra*, note 151, at p. 521. See also E. GAILLARD, Identify or define? Reflections on the evolution of the concept of investment in ICSID practice, *supra*, note 159, especially at pp. 404 and 405, whereby scholarly positions that, prior to Prof. Schreuer, identified the criteria put forward in the objective approach are also described. The same *Fedax v. Venezuela* award (*see, infra*, note 163) expressly refers to C. SCHREUER, Commentary on the ICSID Convention, ICSID Review, Vol. 11, 1996, at p. 316 and following.

characteristics of investments under the Convention’,¹⁶¹ while the supporters of the objectivist approach turned such features into prescriptive requirements.¹⁶² All this premised and coming to the analysis of the exact content of the objectivist approach, it should be first remarked that that there are several variants to it: different hallmarks have been considered (as better explained below, depending on the tribunal, three, four, five or six mandatorily required elements of an investment have been applied) and the different tribunals made a more or less rigid application of these. The sub-sections below will outline these different trends.

3.1.1 The Salini test

The first case in the history of ICSID in which the jurisdiction of the Centre was contested on the grounds that the underlying transaction did not qualify as an investment under the Convention was *Fedax v. Venezuela*,¹⁶³ which can also be considered as the trailblazer of the objectivist approach. Until then, the term ‘investment’ had been broadly understood in the ICSID practise and by scholars.¹⁶⁴ In that case, the tribunal had to decide whether the holding of

¹⁶¹ C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 128. It is worth noting that in a footnote to the quoted sentence in the Commentary, it is stated that: ‘[t]his paragraph is substantively identical with para. 122 at p. 140 of the First Edition of this Commentary.’ Indeed, Prof. Schreuer seems to be more favourable to the typical characteristics approach that will be described in section 3.3 of this Chapter II.

¹⁶² The authors of the 2009 edition of the Commentary have also expressly pointed out that: ‘The First Edition of this Commentary cannot serve as authority for this [i.e., the objectivist] development’ (*see* C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 133).

¹⁶³ *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/03, Decision of the Tribunal on Objections to Jurisdiction, 11 February 1997 (available at: http://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf) (“**Fedax v. Venezuela**”).

¹⁶⁴ *Fedax v. Venezuela*, para. 25, whereby it is stated that: ‘[p]recisely because the term "investment" has been broadly understood in the ICSID practice and decisions, as well as in scholarly writings, it has never before been a major source of contention before ICSID Tribunals. This is the first ICSID case in which the jurisdiction of the Centre has been

promissory notes issued by the respondent was an investment under Art. 25(1). The tribunal examined the Convention and its application in previous arbitrations and identified five features that must always be present for a transaction to qualify as an investment:

- (i) a certain duration;
- (ii) a certain regularity of profits and return;
- (iii) an assumption of risk;
- (iv) a substantial commitment; and
- (v) a significance for the host State's development.¹⁶⁵

In this case, the tribunal made express reference to the descriptive characteristics of an investment identified by scholars¹⁶⁶ and transformed them into a precondition for the valid exercise of jurisdiction by ICSID tribunals. The tribunal came to the conclusion that in light of the above criteria there was an investment and, as a consequence, jurisdiction over the transaction.

The criteria identified in the *Fedax v. Venezuela* case were reformulated for the first time by the tribunal in *Salini v. Morocco*.¹⁶⁷ In that case the tribunal reduced the five elements mentioned in *Fedax v. Venezuela* to four, and the four criteria identified have begun to be referred to as the so-called 'Salini test',

objected to on the ground that the underlying transaction does not meet the requirements of an investment under the Convention. On prior occasions ICSID Tribunals have examined on their own initiative the question whether an investment was involved, and in each such case have reached the conclusion that the "investment" requirement of the Convention has been met.' *See also*: Definition of Investor and Investment in International Investment Agreements, OECD, at p. 62 and *Salini v. Morocco*, *infra*, note 167, para. 52, whereby the tribunal specified that: '[t]he criteria for the characterization are [...] derived from cases in which the transaction giving rise to the dispute was considered to be an investment *without there ever being a real discussion on the issue*' (emphasis added).

¹⁶⁵ *Fedax v. Venezuela*, para. 43.

¹⁶⁶ Many scholarly writings are mentioned in the body of the award. With specific reference to the elements characterising an investment, reference was made to C. SCHREUER, *Commentary on the ICSID Convention*, *supra*, note 160.

¹⁶⁷ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001 (available at: <http://www.italaw.com/cases/documents/959>) ("**Salini v. Morocco**").

which has been extensively used, with few variations, in a vast number of cases.¹⁶⁸ The transaction underlying the case concerned the construction of a road in Morocco. In this context the tribunal relied on the ICSID precedents and on scholarly writings to infer that an investment must involve the following four elements:

- (i) a ‘contribution’;
- (ii) a ‘certain duration of performance of the contract’;
- (iii) a ‘participation in the risks of the transaction’; and
- (iv) a ‘contribution to the economic development of the host State of the Investment’.¹⁶⁹

More precisely, according to the tribunal, the first three elements stemmed from international law concepts implicit in older decisions that the tribunal considered, while the fourth arose out of the ICSID Convention’s Preamble,

¹⁶⁸ See *Salini v. Morocco*, in this section 3.

¹⁶⁹ *Salini v. Morocco*, para. 52. C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 130, on the basis of arbitral practice, managed to describe the content of the hallmarks of the Salini test criteria. In particular, according to the authors the requirement of a substantial contribution did not in general pose any problem; it may only be worth noting that the required commitment is not only financial, but can also consist of know-how, equipment, personnel and services. As to the duration, a period of 2-5 years can be considered sufficient and, in order to verify if this criterion is met, reference is to be made not only to the duration of the core period activity, but also time necessary for the tender, any work interruptions and extensions, as well as the duration of the contractor’s guarantees (depending on the type of investment under consideration). According to the authors, the existence of a risk is not a controversial element; indeed, tribunals found that long-term contractual relationships always entail an element of risk (*see, inter alia*, *Fedax v. Venezuela*, para. 40) and that the economic climate and the need to rely on the national courts of the host State always imply a risk (*see, inter alia*, *Consortium Groupement L.E.S.I.- DIPENTA (Italy) v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, para. 14(iii) (available at: <http://www.italaw.com/cases/323>) (“**L.E.S.I. - DIPENTA v. Algeria**”). The last criterion is considered by the authors as the most controversial one, not only because of the difficulty in determining its exact content, but also because certain tribunals have expressly excluded it from the number of features which must always be present in an investment to qualify as such (*see* section 3.1.2 of this Chapter II).

which had already made special mention of the role played by private investments in the economic development of host States.¹⁷⁰ On the other side, the arbitrators did not consider the *Fedax v. Venezuela* requirement of the regularity of profits and returns among the characteristics of an investment.¹⁷¹

In addition, the tribunal slightly amended the fifth criteria identified in the *Fedax v. Venezuela* award, limiting it to a contribution to the ‘economic’ development of the host State and not requiring it to be ‘significant’. In light of the above criteria, the *Salini v. Morocco* tribunal found the existence of an investment in the relevant case, as the project in question: (i) required heavy capital investments, services and other long undertakings; (ii) involved a manifest risk; (iii) had a duration of 36 months; and (iv) contributed to Morocco’s economic development.¹⁷²

The *Salini* test is sometimes considered as very rigid, but it should be noted that the tribunal after listing the criteria added that ‘[i]n reality, these various elements may be interdependent [...] [a]s a result, these various criteria *should be assessed globally* [...]’.¹⁷³ The acknowledgment of the interdependent character of the various hallmarks identified by the tribunal and the preference for a global assessment indicates that the tribunal was approaching the issue concerning the actual existence of an investment from an empirical perspective and that it did not look at the criteria as ‘distinct jurisdictional requirements each of which must be met separately’,¹⁷⁴ but rather as elements to be looked at in conjunction.

However, several tribunals followed the *Salini* test in a strict way: they verified the existence of an investment was verified through the analytical check of the occurrence of all the criteria identified in that case.¹⁷⁵ Others adopted a more

¹⁷⁰ *Salini v. Morocco*, para. 52.

¹⁷¹ No reference to this criterion is made at all in the award.

¹⁷² *Salini v. Morocco*, paras. 53-57.

¹⁷³ *Salini v. Morocco*, para. 52 (emphasis added).

¹⁷⁴ *See, infra*, note 254.

¹⁷⁵ *See*, for instance, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0439.pdf>) (“**Jan de Nul v.**

flexible and pragmatic approach, pursuant to which the criteria developed for clarifying the content of the term investment under the ICSID Convention should not be considered as mandatory legal requirements, but rather as descriptive criteria. This second approach (i.e., the flexible approach) will be analysed in more detail in section 3.3 of this Chapter.

In addition, as already mentioned, arbitral tribunals have declined several variants to the Salini test: some of them have added additional criteria, while others have reduced the Salini test's criteria to three,¹⁷⁶ not taking into account the criterion concerning the contribution to the economic development of the host State.¹⁷⁷

Egypt'), para. 91, where however the fourth criterion was considered a 'contribution to the *host State's development*', while in *Salini v. Morocco* it was identified in the 'contribution to the *economic development*' (paras. 52; 57) (emphasis added). In *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 53 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0441.pdf>) (**Joy Mining v. Egypt**'), the objectivist approach was followed in a rigid manner, but the criteria adopted by the tribunal were those identified in *Fedax v. Venezuela*, rather than *Salini v. Morocco*.

¹⁷⁶ According to K. YANNACA-SMALL, Definition of "Investment": An Open-ended Search for a Balanced Approach, *supra*, note 107, pp. 243-244, those tribunals that have not included the fourth criterion of the Salini test have adopted a 'flexible objectivist' or 'pragmatic' approach. Of the same opinion, I.U. MUSURMANOV, The Implications of *Romak v. Uzbekistan* for Defining the Concept of Investment, *Australian International Law Journal*, Vol. 20, Issue 8, 2013, pp. 105-129, who labels this as 'an intermediate approach, which combines both above mentioned approaches' (p. 109).

¹⁷⁷ In relation to the fourth criterion, it shall further be noted that even the tribunals that accepted its existence did not agree on its exact content, requiring, depending on the case: (i) a contribution to the host State's development (*Fedax v. Venezuela*, para. 42; *Jan de Nul v. Egypt*, para. 91); (ii) a contribution to the host State's economic development (*Salini v. Morocco*, para. 52); (iii) a significant contribution to the host State's development (*Joy Mining v. Egypt*, para. 53); and (iv) a significant contribution to the host State's economic development (*MHS v. Malaysia Award on Jurisdiction (see, infra, note 187)*, para. 123). In this latter case, the tribunal replaced the reference to the contribution to the host State's development by the contribution to its economy, as, in its opinion, it is 'impossible to ascertain' a contribution to the host State's development. However, tribunals seem to confuse the two parameters and use the reference to the economic development and to the

3.1.2 The Salini-less test

The relevance of each individual criteria of the Salini test is often contested. In particular, the relevance of the contribution to the economic development of the host State has been a divisive issue in ICSID arbitration. The rationale behind the exclusion of the fourth element is not consistent in precedents: some cases provide interpretative grounds on which they disagree with *Salini v. Morocco*, while others adopt a more practical approach, arguing for instance that it is a difficult condition to verify.

This is the case for example of the two L.E.S.I. Cases,¹⁷⁸ in which the tribunal did not accept a separate requirement for the contribution to the economic development of the host State, stating that it was not necessary for the investor to give evidence of the existence of this requirement, as it is difficult to establish and is implicitly covered by the other three elements.¹⁷⁹

On the contrary, in the more recent *Quiborax v. Bolivia* case,¹⁸⁰ the tribunal, in line with the *Victor Pey v. Chile* case,¹⁸¹ examined the Preamble of the Convention and argued that, while the ICSID Convention attempts to foster economic development via international investment, such development is not a

State's development interchangeably. On the relevance of the inclusion of the contribution to the host State's development among the hallmarks of the Salini test see P. ACCONCI, *The Unexpected Development-friendly Definition of Investment in the 2013 IDI Resolution*, *supra*, note 112, at p. 78 and following.

¹⁷⁸ L.E.S.I. - DIPENTA v. Algeria; and *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision, 12 July 2006 (available at: <http://www.italaw.com/cases/618>) (“**L.E.S.I. ASTALDI v. Algeria**”), which are jointly referred to as the “**LESI Cases**”.

¹⁷⁹ L.E.S.I. - DIPENTA v. Algeria, para. 13; and L.E.S.I. ASTALDI v. Algeria, para. 72.

¹⁸⁰ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf>) (“**Quiborax v. Bolivia**”).

¹⁸¹ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 232 (available at: <http://www.italaw.com/cases/829>) (“**Victor Pey v. Chile**”).

necessary element of the investment. Economic development is according to the tribunal a consequence and not a condition of the investment.¹⁸²

The arbitral tribunal in *Saba Fakes v. Turkey*¹⁸³ went even further since it clearly rejected the fourth condition arguing that it would be excessive to attribute to the reference included in the Preamble of the Convention a meaning and function that is not obviously apparent from its wording.¹⁸⁴ Indeed, ‘in the Tribunal’s opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate. [...] Taken in isolation certain individual investments might be useful to the State and to the Investor itself; certain might not. Certain investments expected to be fruitful may turn

¹⁸² Quiborax v. Bolivia, paras. 225; 227. For a comment on the sentence see J.D. MORTENSON, QUIBORAX SA et al. v Plurinational State of Bolivia: *The Uneasy Role of Precedent in Defining Investment*, ICSID Review, Vol. 28, Issue 2, 2013, pp. 254-261, whereby the role that the award has given to precedents is strongly criticised by the author. See also A. GRABOWSKI, The Definition of Investment under the ICSID Convention: A Defense of Salini, *supra*, note 151, where the author supports the traditional Salini test.

¹⁸³ *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0314.pdf>) (“**Saba Fakes v. Turkey**”). This award is also relevant for the weight conferred by the tribunal to previous ICSID decisions which addressed the matter. On this point see E. SAVARESE, The Arbitral Practice of the International Centre for Settlement of Investment Disputes (ICSID) in 2010, in B. CONFORTI ET AL. (eds.), *The Italian Yearbook of International Law Online*, Vol. 19 (2010), Martinus Nijhoff Publishers, 2010, pp. 379-407, according to whom ‘this is a particularly apposite approach insofar as it focuses on the central role nowadays played by the jurisprudence of arbitral tribunals’ (at p. 385). Along the same lines of *Saba Fakes v. Turkey* is the 2012 Decision on Jurisdiction, Applicable Law and Liability issued in the case *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, para. 5.43 (available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf>).

¹⁸⁴ *Saba Fakes v. Turkey*, para. 110.

out to be economic disaster. They do not fall, for that reason alone, outside the ambit of the concept of investment.¹⁸⁵

Recent tribunals have followed the Salini-less criteria, which seems to be predominant in the ambit of the objectivist approach nowadays.¹⁸⁶ It is however worth noting that there are also ICSID tribunals that have referred to the contribution to the host State's development as the most important criteria to be met.¹⁸⁷

¹⁸⁵ Saba Fakes v. Turkey, para. 111.

¹⁸⁶ See, among others, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 (available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf>) (“**DB v. Sri Lanka**”), para. 295, where the tribunal stated that “[t]he development of ICSID case law suggests that *only three of the above criteria, namely contribution, risk and duration should be used as the benchmarks of investment*, without a separate criterion of contribution to the economic development of the host State and without reference to a regularity of profit and return’ (emphasis added). See also *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (available at: <http://www.italaw.com/sites/default/files/case-documents/italaw3006.pdf>), paras. 160-223 (“**KT Asia v. Kazakhstan**”), where the tribunal adopted the jurisdictional approach with three elements and declined its jurisdiction mainly due to the lack of a contribution.

¹⁸⁷ See, for example, *Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, para. 123 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0496.pdf>) (“**MHS v. Malaysia Award on Jurisdiction**”). The tribunal argued that: ‘[i]n unusual situations such as the present case, where many of the typical hallmarks of “investment” are not decisive or appear to be only superficially satisfied, the analysis of the remaining relevant hallmarks of “investment” will assume considerable importance.’ Also Makhdoom Ali Khan in his Dissenting Opinion to *DB v. Sri Lanka* (available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1273.pdf>) stated that the contribution to the economic development is a key feature of an investment that cannot be disregarded. Therefore, he concluded that the hedging agreement entered into by the claimant did not constitute an investment under Art. 25 of the Convention.

3.1.3 The Salini-plus test

On the opposite side stands the ‘Salini-plus’¹⁸⁸ approach, which was first introduced in *Phoenix v. the Czech Republic*¹⁸⁹. In that case the tribunal examined the term ‘investment’ both under customary international law and the general principles of international law. According to the tribunal, ‘ICSID Convention’s jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles’.¹⁹⁰ In the tribunal’s perspective, this implied that two analyses needed to be conducted in order to assess the existence of an investment. More precisely, the tribunal noted that: ‘sometimes relying on the ordinary meaning of the term ‘investment’ is insufficient’ and the tribunal must conduct a ‘*contextual analysis of the existence of a protected investment*’ and ‘must also take into consideration *the purpose of the international protection of the investment*, whether it is the specific purpose of the ICSID system or the general purpose of the protection granted by international law’.¹⁹¹ The fact that the tribunal was dealing with the general principles of international law implied that the case also needed to be analysed with due regard to the principle of *good faith*, which requires that the ICSID system is not abused.¹⁹² The tribunal then considered that the purpose of the ICSID/BIT system, in light of the general principles of international law, was to protect foreign investments: (i) whose aim is the development of an economic activity; (ii) performed in accordance with the laws of the host State; and (iii) made in good faith.

In light of the above, the tribunal identified six elements that have to be present in order for an investment to benefit from the protection granted by the Convention:

¹⁸⁸ This term was coined by K. YANNACA-SMALL in Definition of “Investment”: An Open-ended Search for a Balanced Approach, *supra*, note 107, at p. 256.

¹⁸⁹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0668.pdf>) (“**Phoenix v. Czech Republic**”).

¹⁹⁰ *Phoenix v. Czech Republic*, para. 78.

¹⁹¹ *Phoenix v. Czech Republic*, para. 79.

¹⁹² *Phoenix v. Czech Republic*, para. 77.

- (i) a contribution in money or other assets;
- (ii) a certain duration;
- (iii) an element of risk;
- (iv) an operation made in order to develop an economic activity in the host State;
- (v) assets invested in accordance with the laws of the host State; and
- (vi) assets invested in good faith.¹⁹³

Substantially, the tribunal supplemented the Salini test with two additional requirements. First, States cannot be deemed to offer access to the ICSID protection to investments made in violation of local laws. This is to be considered as an implicit condition, to be taken into account even when the relevant BIT does not mention it. In addition, no ICSID protection can be afforded if the foreign investment is not a *bona fide* investment.

In the case, the tribunal declined its jurisdiction, notwithstanding the fact that the hallmarks of the four-prong Salini test were seemingly met. Indeed from an analysis of the factual circumstances, the tribunal understood that an abuse of right was committed: certain transactions had been performed by the claimant with the sole purpose of benefiting from the protection granted by the Israel-Czech Republic BIT.¹⁹⁴ Therefore, the investment was not a ‘bona fide’ foreign

¹⁹³ Phoenix v. Czech Republic, para. 114.

¹⁹⁴ Agreement Between the Government of the Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments, signed on 23 September 1997 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/943>) (“**Israel-Czech Republic BIT**”). According to the reconstruction of the events made by the tribunal, the Claimant restructured its ownership in two Czech companies and became embroiled in various disputes with the Czech authorities with the sole purpose of seeking protection under the BIT. For a detailed summary of the factual circumstances and of the case, *see, inter alia*, E. SAVARESE, The Arbitral Practice of the International Centre for Settlement of Investment Disputes (ICSID) in 2009, in B. CONFORTI ET AL. (eds.), The Italian Yearbook of International Law Online, Vol. 18 (2009), Martinus Nijhoff Publishers, 2009, pp. 353-377, at p. 354-360.

investment, as required by the ICSID Convention and general principles of international law.¹⁹⁵

It is however worth mentioning that the necessity to prove the existence of the two additional requirements identified in the case under discussion has been consistently denied, implicitly or explicitly, by subsequent awards.¹⁹⁶ The Phoenix v. the Czech Republic award remains therefore an insulated case, which nevertheless is useful to understand how case law has found it difficult to determine the constitutive elements of the notion of investment and how things are yet to be set in stone.

3.1.4 Criticism of the objectivist approach

The objectivist approach has been welcomed by part of the doctrine¹⁹⁷ according to which: (i) defining the notion of investment is necessary as it is a ‘question of legal security for foreign investors and capital-importing countries’;¹⁹⁸ and (ii) ‘in order to really define the notion of investment [...] one has to reason according to criteria. [...] And if several criteria are necessary to define, as seems for the notion of investment, the absence of one of them means that the analysed transaction does not correspond to the definition.’¹⁹⁹

¹⁹⁵ Phoenix v. Czech Republic, paras. 100-116.

¹⁹⁶ See, for instance, Saba Fakes v. Turkey, paras. 112-114, where the tribunal expressly takes a position on this aspect.

¹⁹⁷ See, among others, P.E. DUPONT, The Notion of ICSID Investment Ongoing ‘Confusion’ or ‘Emerging Synthesis’?, The Journal of World Investment & Trade, Vol. 12, Issue 2, 2011, pp. 245-272; and B. DEMIRKOL, The Notion of ‘Investment’ in International Investment Law, *supra*, note 159, pp. 41-50. According to B. STERN, Are There New Limits on Access to International Arbitration?, *supra*, note 141, at p. 36: ‘the current trend of setting some limits is absolutely necessary for mature treaty arbitration in order to monitor the treaty arbitration mechanism and to deal with investment disputes in a balanced way, taking into account both state sovereignty and the necessity to protect foreign investment and its continuing flow.’

¹⁹⁸ S. MANCIAUX, The Notion of Investment: New Controversies, The Journal of World Investment & Trade, Vol. 9, Issue 6, 2008, pp. 443-466, at p. 448.

¹⁹⁹ Phoenix v. Czech Republic, at p. 449.

However, it is not possible to deny the various weaknesses of this approach.²⁰⁰ In my opinion, its main problem regards the fact that it follows a highly disputed methodology in a strict manner in order to limit the scope of the term investment, whose content had not been agreed by the parties to the ICSID Convention. When it came to the contracting States to lay down the criteria used to ascertain an investment, they failed; so, how is it possible that tribunals identify certain must-have criteria and deny their jurisdiction where any of them are absent? As noted by the tribunal in *Biwater v. Tanzania*, how can ‘arbitral tribunals sitting in individual cases impose one such definition which should be applicable in all cases and for all purposes’?²⁰¹ In addition, this approach is only allegedly ‘objective’: from the described precedents²⁰² it is clear that arbitrators have a broad margin of autonomy in determining whether the requirements of the Salini test are satisfied, and they have made great use of this autonomy, as each tribunal has given its own interpretation based on its own views. As noted by C. Schreuer: ‘the development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate [...]. A rigid list of criteria that must be in any event met is not likely to facilitate the task of tribunals or to make decisions more predictable. *Each individual criterion carries out a considerable margin of appreciation that may be applied at tribunal’s discretion.*’²⁰³ In a nutshell,

²⁰⁰ In addition to the critics set out below, H. JUNG ENGFELDT, *Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Investments Including Those Spurred on by Social Media? Applying an Industry-Specific Lens to the Salini Test to Determine Article 25 Jurisdiction*, *Berkley Journal of International Law*, Vol. 31, Issue 1, 2014, pp. 44-63, pointed out how the Salini test would not be adequate to verify investment activities in the entertainment business. In the words of the author: ‘[e]ntertainment project disputes should not be shut out of ICSID on account of a jurisdictional test that may not be well suited for these new activities’ (at p. 63).

²⁰¹ *See, infra*, note 234, para. 130.

²⁰² This weakness of the objectivist approach results also from the Relevant Cases. *See*, for instance, the considerations on *Saipem v. Bangladesh*, in section 5.1 of this Chapter II.

²⁰³ C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at pp. 132-133 (emphasis added). *See also* D.A. DESIERTO, *Development as an International Right: Investment in the New Trade-Based IIAs*, *Trade,*

although the approach is reportedly ‘objective’, it tends to become quite subjective in its actual applications. Professor Fadlallah²⁰⁴ in addition pointed out that imposing a mandatory criterion necessarily requires assigning a precise definition to that criterion, and it would take many years to reach this definition without any certainty of ever obtaining a uniform result.

Finally, the simple fact there is no consensus on the ‘objective content’ of the term investment and that tribunals, even when invoking the Salini test, have not used the same number of criteria cast serious doubts on the defensibility and existence of objective criteria. At the same time, the removal or the addition of items from the Salini test creates uncertainty over the definition of investment and entails that it is difficult for companies to plan their international operations. Therefore this approach is to be discouraged.

Specific criticisms have also been raised against the Salini-less and Salini-plus tests. With respect to the first one, according to one author,²⁰⁵ the Vienna Convention makes it necessary to make reference to the wording of the Preamble to determine the content of the term ‘investment’, and this cannot be simply disregarded. In relation to the Salini-plus, it has been noted that the newly-identified requirements are not really connected with the definition of investment, but rather with the one of protected investment. The conformity with the host State law, in particular, refers to the legality of the investment and

Law *and* Development, Vol. 3, Issue 2, 2011, pp. 296-333, who at p. 332 states that: ‘[w]hile the aim of preserving the balance of investment protection and host State development is laudable, it is more than likely that the *inherent imprecision and subjectivities of the Salini test would not be the most advisable way of achieving this balance*’ (emphasis added).

²⁰⁴ I. FADLALLAH ‘La notion d’investissement: vers une restriction à la compétence du CIRDI?’, in G. AKSEN ET AL. (eds.), *Liber Amicorum Robert Briner* (2005), p. 259 and following, at p. 267, quoted by E. GAILLARD, *Identify or define? Reflections on the evolution of the concept of investment in ICSID practice*, *supra*, note 159, especially at pp. 409-410.

²⁰⁵ A. GRABOWSKI, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, *supra*, note 151, at p. 302.

not with its existence. Therefore, there can be an investment that is not made in compliance with national laws.²⁰⁶

3.2 The subjectivist approach

A diametrically opposed approach is put forward by the tribunals that adhere to the subjectivist approach.

According to them, there are no outer limits to the Centre's jurisdiction and the term investment should have the meaning that the parties to the arbitration granted to it when they consented to ICSID's jurisdiction. This approach therefore does not rely on the Salini test, but rather on the intent of the parties. The roots of this jurisprudential line, which is also supported by certain scholarly writings,²⁰⁷ can be found in the Report of the Executive Directors, where, regarding the lack of any definition of investment, it was stated that: 'No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanisms through which contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).'²⁰⁸ This was interpreted as a suggestion that the term investment is wholly under the control of the parties to the arbitration: if the States have agreed to an investment treaty where consent to ICSID's jurisdiction is granted to a given transaction that is said to represent an investment, then the treaty controls the constitution of an ICSID investment.

Accordingly, no double-barrelled test is made. Tribunals merely look at the treaty's definition of investment, assess if it covers the asset or transaction in question and, on that basis, determine their jurisdiction. Any challenge by the contracting State to the jurisdiction in the context of the investor-State arbitration is irrelevant, as these tribunals focus on the State's ex-ante policy decision that created a legitimate expectation on the part of the investors.

²⁰⁶ For a more detailed analysis of the 'in accordance with the host State law' clause, *see, supra*, note 29.

²⁰⁷ M. SASSON, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*, *supra*, note 148, at p. 32 and following.

²⁰⁸ *See, supra*, note 153, para. 27.

Substantially all tribunals prior to *Fedax v. Venezuela* adhered to this approach. However, this is not prevalent today, as most decisions recognise that it is difficult to reconcile with the specific language of Article 25(1) of the Convention, which requires a ‘dispute arising directly out of an investment.’²⁰⁹ Tribunals following this approach have encompassed within the Centre’s jurisdiction an extraordinarily wide range of transactions, such as an unconsummated office construction project mainly consisting of plans and regulatory approvals;²¹⁰ an advertising agency and print shop;²¹¹ and a

²⁰⁹ See, *inter alia*, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 68 (available at: <http://www.italaw.com/cases/238>) (“**CSOB v. Slovakia**”); and *Salini v. Morocco*, para. 52. As noted by N.V.S.K. NATHAN, Submissions to the International Centre for the Settlement of Investment Disputes in Breach of the Convention, *Journal of International Arbitration*, *supra*, note 122, at p. 29 ‘[t]he flexibility shown by ICSID and ICSID tribunals may have been spurred by the fact that few cases were referred to ICSID arbitrations for over a decade after its inception, and by the fear that ICSID could suffer the same fate as the Permanent Court of Arbitration which was being little used despite the extension of the use of its facilities by natural and juristic persons. There could also be genuine concerns that an institution such as ICSID, with the potential for regulating the conduct of States and foreign investors and developing new rules of international law relating to economic development, could be in jeopardy’.

²¹⁰ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0358.pdf>) (“**Generation Ukraine v. Ukraine**”), whereby the tribunal, noting the lack of a definition of investment in the ICSID Convention, limited its analysis to the definition of investment contained in the relevant BIT (i.e., Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 March 1994, Art. 1(a) (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2366>)), since according to the tribunal ‘[i]t is well settled that Contracting Parties may agree upon a more precise definition of “investment” in a separate legal instrument’ (para. 8).

²¹¹ *Tokios Tokéles v. Ukraine*, Decision on Jurisdiction and Dissent, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0863.pdf>), whereby the tribunal, in light of the lack of definition of investment under the ICSID Convention and of the importance that the drafters thereof gave to the parties’ autonomy, stated that the parties ‘enjoy broad discretion to choose the disputes that they will submit to ICSID’ (para.

concession agreement to develop and operate a local port terminal.²¹² In all these cases, in determining whether an investment was given, the ICSID tribunals scrutinized if the requirements of an investment under the relevant instrument were met, stating that such instrument alone set the boundaries of the investment tribunal's jurisdiction.

3.2.1 Criticism of the subjectivist approach

This approach can also be criticised on a number of grounds.

First of all, it *de facto* removes one jurisdictional requirement (i.e., the presence of an investment), merging it into the parties' consent. If the parties could determine the meaning of investment completely on their own, then the independent jurisdictional requirements *ratione materiae* under Art. 25(1) of the Convention would be meaningless and it would be absorbed by the consent.

In addition, it is not possible for the parties to broaden the concept of investment for the purposes of ICSID arbitration as much as they like.²¹³ As noted by Professor Schreuer,²¹⁴ the essential requirement of consent does not

19) and considered exclusively the definition of investment set out in the relevant BIT (i.e., Agreement Between the Government of Lithuania and the Government of Ukraine concerning the Protection and Promotion of Investment, Art. 1(1), not publicly available) (paras. 74-86).

²¹² *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998 (available at: http://www.italaw.com/sites/default/files/case-documents/ita0450_0.pdf). In this case, the tribunal based its decision on its subject matter jurisdiction exclusively on the wording of the BIT (i.e., Bilateral Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Foreign Investments, signed on 14 November 1991 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>)) without even mentioning the jurisdictional requirements set out under Art. 25(1) of the Convention (paras. 17-20).

²¹³ This position is supported by a number of authors. *See*, for instance, G. ABI-SAAB, *The Concept of Investment in the ICSID Convention*, in N.G. ZIADÉ (ed.), *Festschrift Ahmed Sadek El-Kosheri*, Kluwer Law International, 2015, pp. 239-248, at p. 243.

²¹⁴ C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 117.

imply unlimited freedom for the parties to determine what an investment is. In particular, it should be clear that ordinary commercial transactions should not be covered by the Centre's jurisdiction, as this can be inferred by the terms of the Additional Facility Rules. As already mentioned in Chapter I,²¹⁵ the Additional Facility Rules are designed to offer access to the Centre in situations where the Convention's jurisdictional requirements are not met, including when the underlying transaction is not an investment.²¹⁶ According to such Additional Facility Rules, in order to establish the jurisdiction thereunder the prior approval of the Secretary-General is required; such consent can be granted only if the Secretary-General is satisfied that the transaction at hand has features that distinguish it from an ordinary commercial transaction.²¹⁷ From this, it can be easily inferred that the existence of an investment is *per se* a condition to access ICSID jurisdiction that cannot be merely squeezed into the parties' consent. The Centre is not accessible for any transaction that the parties wish to submit to its scrutiny and, in particular, the Centre should never

²¹⁵ See, *supra*, note 37.

²¹⁶ Art. 2 of Additional Facility Rules provides that: '[t]he Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:

- (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;
- (b) *conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and*
- (c) fact-finding proceedings.

The administration of proceedings authorized by these Rules is hereinafter referred to as the Additional Facility' (emphasis added).

²¹⁷ Art. 4(3) of Additional Facility Rules provides that: '[i]n the case of an application based on Article 2(b), the Secretary-General shall give his approval only if he is satisfied (a) that the requirements of that provision are fulfilled, and (b) *that the underlying transaction has features which distinguish it from an ordinary commercial transaction*' (emphasis added).

exercise its jurisdiction with respect to merely commercial transactions, regardless of the fact that in any BIT such transactions are included on the list of protected investments.

Finally, this approach also seems to contrast with Arts. 32(1)²¹⁸ and 41(1)²¹⁹ of the Convention: a conciliation mission or an arbitral tribunal can consider on its own initiative whether the dispute before it falls within the Centre's jurisdiction; therefore, even if the parties agreed on the notion of the investment and a claim relating to a given transaction is to be submitted to the Centre's jurisdiction, the ICSID Convention still envisages the possibility for the tribunal to deny its jurisdiction if it deems that the transaction does not meet the minimum requirements of an investment. This implies that not

²¹⁸ Art. 32(1) of the Convention provides that: '[t]he Commission shall be the judge of its own competence.' Notably, this article, as well as Art. 41(1) of the Convention, refer to the concept of 'competence', while Art. 25(1) refers to the concept of 'jurisdiction'. As noted by G. ZEILER, Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings, in C. BINDER ET AL., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford Scholarship Online, September 2009, pp. 77-92, at p. 78-82, the Convention makes a peculiar use of the words 'jurisdiction' and 'competence' (the jurisdiction is referred to the Centre, while the competence to the Commission or Tribunal). In particular, 'the use of the term jurisdiction in Article 25 was controversial from the outset. There was a discussion as to the appropriateness of the word jurisdiction, given that the Centre only exercises administrative functions.' However, analysing the use of terms in the context of the Convention, it is clear that, if the prerequisites set out under Art. 25 are not met, the dispute will not be administered by the Centre (and 'this is what Article 25 ICSID Convention means when it stipulates the prerequisites under which the Centre has jurisdiction') and, consequently, 'the tribunal [will have] no competence as an ICSID tribunal' (p. 81). To put it slightly differently: '[i]n the Convention's terminology the word "jurisdiction" refers to the requirements set out in Art. 25, which are conditional for the power of a conciliation commission or arbitral tribunal. "Competence" refers to the narrower issues confronting a specific tribunal, such as its proper composition or *lis pendens*. [...] In practical terms, the distinction is of little consequence. Tribunals must be satisfied that both conditions are fulfilled. The two terms are frequently used interchangeably' (C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at pp. 531-532).

²¹⁹ Analogously, Art. 41(1) of the Convention provides that: '[t]he Tribunal shall be the judge of its own competence.'

everything that the parties have agreed to be an investment can be considered as such, at least for the Convention's purposes.²²⁰

3.3 The typical characteristics approach

Between the two extremities represented by the objectivist and subjectivist approach, a third intermediate approach has emerged,²²¹ according to which the criteria identified by the jurisprudence adhering to the objectivist approach to characterise an investment are not mandatory, but rather descriptive and

²²⁰ Moreover, the fact that the ICSID Secretary-General has the power to screen requests for arbitration for a 'manifest or obvious lack of jurisdiction' (Art. 36(3) of the Convention) should support the position that there are outer limits to the definition of investment. However, as noted by J. HO, 'The Meaning of 'Investment' in ICSID Arbitration', *Arbitration International*, Vol. 26, Issue 4, pp. 633-646, at p. 642: '[t]he decision of the ICSID Secretary-General to register a request of arbitration [...] is not dispositive of the existence of an 'investment' under Article 25(1) of the ICSID Convention, and, as evidenced in the arbitral awards, the existence of an 'investment' is usually contested and still needs to be adjudicated by a tribunal.' For an analysis of the Secretary-General's powers under Art. 36(3) of the Convention, and of the few cases when the Secretary-General refused to register a request of arbitration, *see* S. PUIG, C.W. BROWN, 'The Secretary-General's Power to Refuse to Register a Request for Arbitration Under the ICSID Convention', *ICSID Review*, Vol. 27, Issue 1, 2012 pp. 172-191.

²²¹ This third approach is included by certain authors within the ambit of the objectivist approach (*see*, for instance, C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, 'The ICSID Convention: A Commentary', *supra*, note 23, at p. 132, that refers to the 'typical characteristic approach' and the 'jurisdictional approach' within the scope of the outer-limits approach). Other authors, given the role that is granted to the parties' autonomy, consider this approach as part of the subjectivist approach (*see*, for example, B. STERN, 'Scope of Investor's Protection under the ICSID/BIT Mechanism: Recent Trends', *supra*, note 141, p. 40, which however admits that in certain cases: 'it appears that there is not always a clear-cut distinction between the liberal approach and the objective test'; K. YANNACA-SMALL, 'Definition of "Investment": An Open-ended Search for a Balanced Approach', *supra*, note 107, p. 251). In my opinion, due to the fact that in more recent times, this jurisprudential approach has significantly departed from the objectivist approach to get closer to a more subjectivist one, it represents a different category that is worth analyzing in an autonomous manner, also in light of the growing number of tribunals that apply it.

therefore the absence of any of them in a given case does not impair the existence of an investment. As such, the outlined criteria can only assist the arbitrators in deciding whether the transaction in question is an investment. This approach, therefore, on the one hand, recognises that there are outer limits to the concept of investment which cannot be overtaken by the will of the parties; but, on the other hand, accepts that such limits are broad and that the will of the parties in deciding if a transaction is an investment has to play a major role. Since, also pursuant to this approach, tribunals have to perform a double-barrelled test, in order to establish the existence of an investment, certain scholarly writings consider it as a variation of the objectivist approach.²²²

However, according to a recent deviation of this approach, the definition of investment contained in international agreements is to be considered the main (*rectius*, the only) factor that tribunals should take into consideration when deciding on the jurisdiction *ratione materiae*. This line of reasoning is based on the assumption that the objective outer boundaries imposed by Art. 25(1) are very broad and that an investment can substantially be anything except a mere sale and purchase. Therefore, even if this approach still refers to the concept of outside boundaries, it considers them so broad to substantially deprive them of much relevance, so that almost any transaction contemplated as an investment by the parties should pass the consistency test with Art. 25(1). By doing so, tribunals, despite formally recognising certain extreme limits, got closer to the subjectivist approach.

It is also worth analysing some of the most remarkable decisions pertaining to this approach to identify the growing role that the tribunals attached to the parties' will to the detriment of the application of objective criteria for the determination of the existence of an investment.

The first case where the typical characteristic approach was clarified is *CSOB v. Slovakia*.²²³ On that occasion, the respondent argued that the transaction underlying the claimant's case (i.e., a loan) did not involve a transfer of

²²² See, *supra*, note 221.

²²³ *CSOB v. Slovakia*, paras. 64-67.

resources into the Slovak Republic and, therefore, did not constitute an investment.²²⁴ The tribunal stated that the mere description of the transaction in question as an investment in the parties' agreement was insufficient to satisfy the jurisdictional requirement under Art. 25(1). In order to establish whether there was an investment under Art. 25(1) of the ICSID Convention, the tribunal recalled *Fedax v. Venezuela* in the part²²⁵ where it stated that an investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment.²²⁶ However, the tribunal also believed that the parties' consent constituted 'a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention'²²⁷ and that the elements suggested by the claimant as delineating the definition of an investment (i.e., 'the acquisition of property or assets through the expenditure of resources by one party in the territory of a foreign country which is expected to produce a benefit on both sides and to offer a return in the future, subject to uncertainties of the risk involved')²²⁸ 'are not a formal prerequisite for the finding that a transaction constitutes an investment as the concept is understood in the Convention.'²²⁹ In light of the above consideration, although loans were not expressly mentioned under the Czech Republic-Slovakia BIT²³⁰, the tribunal found that terms as broad as 'assets and monetary receivables or claims' clearly included loans within the ambit of protected investments.

²²⁴ CSOB v. Slovakia, para. 76.

²²⁵ *Fedax v. Venezuela*, para. 24.

²²⁶ *Supra*, note 223, para. 72.

²²⁷ CSOB v. Slovakia, para. 66.

²²⁸ CSOB v. Slovakia, para. 78.

²²⁹ CSOB v. Slovakia, para. 90.

²³⁰ Agreement Between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments, signed on 23 November 1992.

In *MCI v. Ecuador*,²³¹ where the transaction in question concerned intangible assets such as accounts receivable and an operating permit, the tribunal considered that ‘the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence.’²³² The tribunal then looked at Art. Ia) of the Ecuador-United States BIT,²³³ which gives a broad definition of investment, and decided that the rights and interests alleged by the claimants would fit into that definition. In the *Biwater v. Tanzania*²³⁴ award, the tribunal also ruled that the ‘*Salini* criteria [...] are not fixed or mandatory as a matter of law’²³⁵ and that ‘a more flexible approach to the meaning of “investment” is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case.’²³⁶ Notably, it also explicitly pointed out that the nature of the instrument enshrining the consent to ICSID jurisdiction is among the circumstances relevant when deciding how much weight should be given to the definition adopted by the parties.²³⁷ The tribunal added that the inflexible application of the *Salini* test ‘leads to a definition that may contradict individual agreements [...] as well as a developing consensus in parts of the world as to the meaning of “investment”.’²³⁸ Moreover, after a review of the most recent

²³¹ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/06, Award, 31 July 2007 (available at: <http://www.italaw.com/documents/MCIEcuador.pdf>) (“*MCI v. Ecuador*”).

²³² *MCI v. Ecuador*, para. 165.

²³³ Bilateral Investment Treaty between the Republic of Ecuador and the United States of America signed on 27 August 1993 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1065>).

²³⁴ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0095.pdf>) (“*Biwater v. Tanzania*”).

²³⁵ *Biwater v. Tanzania*, para. 312.

²³⁶ *Biwater v. Tanzania*, para. 316.

²³⁷ *Biwater v. Tanzania*, para. 316.

²³⁸ *Biwater v. Tanzania*, para. 314.

drafting practice in BITs, it stated that 'if very substantial numbers of BITs across the world express the definition of "investment" more broadly than the *Salini test*, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.'²³⁹ Even if some of the considerations of the tribunal may not be acceptable – for example that there is an international consensus on the concept of investment in light of the definitions included in the BITs (indeed, in section 2 of this Chapter, it has been highlighted how BITs are drafted in different manners depending mainly on the historical moment of their execution and on their purposes) – this award is still to be looked at positively, as it attempted to take a 'pragmatic' position, which does not disregard the Salini criteria, but which also tries to combine them with the definition of investment used by the parties in the BIT.

In 2009 the committee involved with the annulment of the MHS v. Malaysia Award on Jurisdiction²⁴⁰ pushed forward the findings of the previously mentioned cases and further broadened the outer limits of the term investment under the ICSID Convention.²⁴¹ In rebutting the approach adopted by the sole arbitrator in the MHS v. Malaysia Award on Jurisdiction, the tribunal built its reasoning on the idea that the parties to the ICSID Convention could have reached a definition of the term 'investment' during the negotiations, but they refrained from doing so; thus, according to the tribunal, the history of the Convention makes it clear that the consent of the parties to the dispute should

²³⁹ *Biwater v. Tanzania*, para. 314.

²⁴⁰ For more on the award, *see supra* note 159. In that case the sole arbitrator, noting the lack of one of the hallmarks of the Salini test, declined its jurisdiction, without verifying whether the definition of investment under the relevant BIT (i.e., Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments, signed on 21 May 1981 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1972>)) was met.

²⁴¹ *Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0497.pdf>) (“**MHS v. Malaysia Decision on Annulment**”).

be the primary factor to be taken into account when delimiting the arbitral tribunal's jurisdiction.²⁴² However, the tribunal also acknowledged that some 'outer limits' to the Centre's jurisdiction should exist and, through the analysis of the *travaux préparatoires* of the Convention, came to the conclusion that the outer limits are very ample and that exclusively sales 'and other transient commercial transactions' would fall outside the jurisdiction of ICSID.²⁴³ In light of the above, the tribunal decided any transaction which is not a mere sale can qualify as an investment²⁴⁴, including the marine search and salvage operation which the claimant carried out in Malaysia and which represented the contested investment in that case.

This trend was continued in the *Inmaris v. Ukraine* decision on jurisdiction.²⁴⁵ The dispute concerned several contracts to renovate and operate a ship owned by the Ukrainian Government for the purpose of a tourist venture and to train Ukrainian merchant marine sailors. On the issue of whether the transactions constituted an investment, the tribunal explicitly stated that the 'Salini' criteria are not to be considered as a 'compulsory, limiting definition of investment under the ICSID Convention'.²⁴⁶ On the contrary, also in this case, the tribunal put a great emphasis on the definition of investment provided by the parties in the relevant BIT, as through that definition they had agreed on the kinds of

²⁴² MHS v. Malaysia Decision on Annulment, para. 70.

²⁴³ MHS v. Malaysia Decision on Annulment, para. 69.

²⁴⁴ MHS v. Malaysia Decision on Annulment, para. 72. The same approach was followed by *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013 (available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf>), paras. 203-206. It is also worth mentioning that in this case the Tribunal rejected considering the 'contribution to the host State's development' as part of the typical features of an investment, finding that it would require it to conduct an inappropriate *ex post facto* analysis of the investment's benefits (paras. 207-209).

²⁴⁵ *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0427.pdf>) (**Inmaris v. Ukraine**)

²⁴⁶ *Inmaris v. Ukraine*, para. 129.

economic activity that were to be protected since they believed that they constituted ‘investments’ within the meaning of the ICSID Convention as well. Thus, ‘[t]hat judgment by States that are both Parties to the BIT and Contracting States to the Convention, should be given considerable weight and deference [and a] tribunal would have to have compelling reasons to disregard such a mutually agreed definition of investment.’²⁴⁷ The tribunal went on to maintain that the Salini test may be useful only in the case when the definition included in the BIT is so broad ‘that it may capture a transaction that would not normally be characterized as an investment under any reasonable definition.’²⁴⁸

In light of the above, according to this development of the typical characteristic approach, the consent provided through the BIT has primary importance in the determination of a protected investment since it would establish a *prima facie* rebuttable presumption that the transaction in question falls within the limits of the ICSID Convention.

3.3.1 Criticism of the typical characteristic approach

This approach seems more adequate than the two previous ones, as it allows new and unconventional operations to be included in the concept of investment,²⁴⁹ though taking into consideration the existence of outer limits to ICSID’s subject matter jurisdiction. As stated by one author:²⁵⁰ ‘one could describe a tiger as ‘orange with black stripes’; but if that description is taken as

²⁴⁷ Inmaris v. Ukraine, para. 130.

²⁴⁸ Inmaris v. Ukraine, para. 131.

²⁴⁹ As stated by P. VARGIU, Beyond Hallmarks and Formal Requirements: a “Jurisprudence Constante” on the Notion of Investment in the ICSID Convention, *Journal of World Investment & Trade*, Vol. 10, Issue 5, 2009, p. 753-768, at p. 763: ‘[...] the “typical characteristics” approach appears more consistent with the *rationale* behind the exclusion of a definition of investment from Article 25 ICSID, which was to make the provision in question adaptable to the evolution of the international investment scenario.’

²⁵⁰ Oscar Garibaldi quoted by J. HARB, Definition Of Investments Protected By International Treaties: An On-Going Hot Debate, MEALEY’S International Arbitration Report, Vol. 25, Issue 8, August 2011, pp. 1-19, at p. 13.

a definition, it would exclude the most sought-after tiger of all: the Bengal tiger.’ The holistic approach allows these sorts of issues to be overcome.

However, the approach is not exempted from criticism. First, it is not clear why the hallmarks of the Salini test are the only ones to be taken into account when deciding whether a transaction is actually an investment. Even though the application of these criteria in a more flexible manner can be welcomed since it produces more reasonable results, from a methodological perspective such approach is rather ‘weak’.

Furthermore, the line of reasoning within this school of thought that suggests that the consent provided through the BIT should be the primary factor to be taken into account may be troubling. Indeed, as seen above, recently BITs have tended to include a very broad definition of investment and it is difficult to imagine that the States had, by signing the ICSID Convention, intended to open themselves up to ICSID arbitration on disputes effectively concerning every kind of asset.²⁵¹

Also in *Biwater v. Tanzania*²⁵² and *MHS v. Malaysia Decision on Annulment*²⁵³ tribunals raised the possibility that there may be international consensus on an expanded definition of investment, due to the fact that a substantial number of BITs expresses the definition of investment in broader terms than the Salini test. However, the mere reproduction of similar definitions in various international treaties should not be sufficient to establish any international agreement on the meaning of such term. In addition, as illustrated in section 2 of this Chapter, BIT definitions of investment have been evolving in various ways; accordingly there is no consistent State practice which would support such an international agreement.

As a final remark, this approach has recently become very close to the subjectivist one. Originally it seemed to be more consistent with the thoughts of Professor Schreuer, who highlighted that the features he identified to

²⁵¹ See M. HWANG S.C., J. FONG LEE CHENG, Definition of “Investment” – A voice from the Eye of the Storm, *supra*, note 159, at p. 107.

²⁵² See, *supra*, note 239.

²⁵³ *MHS v. Malaysia Decision on Annulment*, para. 79, where the tribunal quoted the *Biwater v. Tanzania* award.

characterise an investment, which form the basis of the objectivist approach. But these features are not to be considered as always and mandatorily present,²⁵⁴ and in more recent times the approach substantially did not consider the outer limits of the term investment at all, just like the subjectivist approach, shrinking them to the fact that an investment cannot be a pure one-off sale.

4. Investment for the purposes of non-ICSID arbitration

As illustrated above, there are problems with the finding of a definition of investment for ICSID tribunals mainly derived from the jurisdictional requirement under Art. 25(1) of the Convention, which mentions, but does not define, the condition of an investment, and from the need to reconcile such a requirement with the definition of investment given by the parties in consent instruments.

However, when the dispute is not submitted to ICSID, but to another institution that applies different rules, such as the ICC or the SCC, or to *ad hoc* arbitration under the UNCITRAL Arbitration Rules, analogous problems should not exist. The rules applicable to those tribunals do not filter claims on the basis of their own notion of investment as a subject matter condition, and their jurisdiction is merely based on the consent of the parties: as long as the parties agreed to grant a certain meaning to the term investment, the tribunal for the purposes of its jurisdiction should only verify whether the transaction submitted to it is included within such definition. Substantially, it is possible for a particular asset to constitute an investment under an investment treaty, but

²⁵⁴ Professor Schreuer addresses this topic in the second edition of his commentary (C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, p. 133), where it is stated that: ‘The development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate. *The First Edition of this Commentary cannot serve as authority for this development.* To the extent that the “*Salini* test” is applied to determine the existence of an investment, its criteria should not be seen as distinct jurisdictional requirements each of which must be met separately. In fact, tribunals have pointed out repeatedly that the criteria that they applied were interrelated and should be looked at not in isolation but in conjunction’ (emphasis added).

not under Art. 25 of the ICSID Convention. While in ICSID arbitration, the definitional threshold must be met under both the investment treaty and the ICSID Convention, non-ICSID arbitration should only require the test under the applicable investment treaty.

Still, it should be noted that non-ICSID tribunals, especially in recent times, asked themselves whether the fact that the dispute is grounded as an ‘investment’ has any limiting effect on the jurisdiction of the arbitral tribunal or whether the parties to an investment treaty may extend the jurisdiction of the tribunal to cover any type of dispute, even those that arise out of mere commercial transactions. In other words, the problem that also non-ICSID tribunals face is whether the parties to an investment treaty can agree that any transaction, including a mere sale and purchase, is to be considered as an investment for the purposes of a treaty and that, therefore, a claim relevant thereto may be submitted to the jurisdiction of the non-ICSID investment tribunal, provided in the investor-State dispute settlement clause of the applicable treaty, as long as the contracting States have this in writing.

Historically, non-ICSID arbitrations have contented themselves with making their assessment by looking at the definition of the term in the relevant investment treaty, including wide asset-based definitions. However, in more recent times, certain non-ICSID tribunals have used some ‘objective’ criteria in the analysis of their jurisdiction, with an effort to go beyond the dichotomy between the concept of investment in ICSID and non-ICSID arbitration.

An example of the traditional approach can be given by *Petrobart v. Kyrgyz Republic*,²⁵⁵ an SCC arbitration arising out of the ECT. The case involved a contract between Petrobart Limited (“**Petrobart**”), a company incorporated in Gibraltar, and the joint stock company Kyrgyzgazmunaizat (“**KGM**”), a company owned by the Kyrgyz State, for the supply of gas condensate over a period of a year. As a result of the failure of KGM to pay to Petrobart the amounts due for the deliveries, Petrobart started an investment arbitration

²⁵⁵ *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 May 2005 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0628.pdf>) (“**Petrobart v. Kyrgyz Republic**”).

under the ECT.²⁵⁶ In this case the tribunal found an investment to exist under the ECT,²⁵⁷ despite the fact that the contract entered into between Petrobart and KMG ‘did not involve any transfer of money or property as capital in the business of the Kyrgyz Republic, but was a sale contract’.²⁵⁸ Indeed, the tribunal stressed that it had to verify only whether the transaction at issue qualified as an investment according to the ECT, since ‘it is obvious that, when there is a definition of a term in the treaty itself, that definition shall apply’.²⁵⁹ This approach is still the most largely used in non-ICSID arbitration. The evident consequence thereof is that access to investment arbitration varies depending on the investor’s choice between ICSID arbitration and other institutional or *ad hoc* arbitration. In the first case, it is more difficult for the claimant to bring an investment claim, due to the hurdles of ICSID’s jurisdiction, while, in other cases, depending on the treaty’s wording, it is easier.

²⁵⁶ For the sake of completeness, it is to be highlighted that, before the ECT arbitration, Petrobart initiated a UNCITRAL arbitration under the Law of the Kyrgyz Republic on Foreign Investment in the Kyrgyz Republic dated 24 September 1997, but the dispute was dismissed on the grounds that the underlying transaction did not constitute an investment according to that law, but, rather, it was only an international sale. *See* in this respect, V. HEISKANEN, Of Capital Import: the Definition of “Investment” in International Investment Law, in A.K. HOFFMANN (ed.), Protection of Foreign Investments through Modern Treaty Arbitration. Diversity and Harmonisation, Association Suisse de l’Arbitrage, 2010, pp. 51-73, at pp. 65-66.

²⁵⁷ Pursuant to Art. 1(6) of the ECT investment means ‘every kind of asset, owned or controlled directly or indirectly by an Investor,’ including, *inter alia*, ‘claims to money and claims to performance pursuant to a contract having an economic value and associated with an investment’ and ‘any right conferred by Law or contract or by virtue of any licenses and permits granted pursuant to Law to undertake any Economic Activity in the Energy Sector.’

²⁵⁸ Petrobart v. Kyrgyz Republic, p. 69.

²⁵⁹ Petrobart v. Kyrgyz Republic, p. 69. It is worth noting that the tribunal made reference to Fedax v. Venezuela and Salini v. Morocco to support the proposition that the term investment can have a wide meaning, but it nevertheless approached the issue differently because, in contrast to such awards, it relied solely on the broad definition of investment in the ECT and found that the right under the contract to payment for goods delivered is an asset and, accordingly, an investment protected by the ECT.

In addition, the said understanding leads to the conclusion that the term investment does not have an inherent meaning. In non-ICSID investment arbitration, anything can be an investment: it all depends on the contracting States' decisions.

Recent non-ICSID decisions have, however, contested this approach and considered the Salini test either tacitly or expressly.

The first case when this happened is apparently *Nreka v. Czech Republic*,²⁶⁰ a non-published case, whereby, on the basis of the information available, the tribunal checked whether the criteria frequently used by arbitrators to define 'investment' (including an extended duration, some form of risk, a certain regularity of profit and return, not being wholly insignificant in the amount, and entailing a contribution to the host State's economic development) were met, thus importing the Salini test in non-ICSID arbitration.²⁶¹

However, the most relevant decision on this point is the published award of *Romak v. Uzbekistan*.²⁶² The factual circumstances and the line of reasoning behind the decision will be better described in section 5.2 of this Chapter, as this is one of the Relevant Case; nevertheless, it should be noted that in this award the UNCITRAL tribunal, although it was not constituted under the

²⁶⁰ *Pren Nreka v. Czech Republic*, UNCITRAL, Partial Award, 5 February 2007 ("**Nreka v. Czech Republic**"). Since the award was not published, the information available on it is retrieved from a decision by the Paris Court of Appeal that on 25 September 2008 ruled on the application to set aside the award (*Czech Republic v. Pren Nreka*, Court of Appeal of Paris, *Decision*, 25 September 2008 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0569.pdf>)). The case is reported in K. YANNACA-SMALL, Definition of "Investment": An Open-ended Search for a Balanced Approach, *supra*, note 107, at p. 257. A comment on the case is also made by E. CABROL, *Pren Nreka v. Czech Republic and The Notion of Investment Under Bilateral Investment Treaties: Does "Investment" Really Mean "Every Kind of Asset"?*, in K.P. SAUVANT (ed.), *Yearbook on International Investment Law & Policy 2009-2010*, Oxford University Press, 2010, pp. 217-231.

²⁶¹ It is worth noting that the Paris Court of Appeal rejected the request to set aside the award, but, in establishing if an investment was made, simply relied on the wording of the applicable BIT.

²⁶² *See, infra*, note 320.

auspices of the Washington Convention, still applied the Salini test. The tribunal dismissed Romak's contention that the definition of investment in UNCITRAL proceedings is wider than in ICSID arbitration. The tribunal considered that the view implying that the substantive protection offered by the BIT would be narrowed or widened, depending on the choice between dispute resolution mechanisms offered in the treaty, would be 'absurd and unreasonable',²⁶³ and would lead to illogical results. According to the tribunal, therefore, the word investment should always have a core content and, thus, the subject matter jurisdictional requirements should be similar under both ICSID arbitration and other institutional or *ad hoc* arbitrations: it is not so much the term 'investment' in the ICSID Convention, as the term 'investment' *per se*, that should be considered as having an objective meaning in itself, whether it is mentioned in the ICSID Convention, a BIT, or a different instrument.²⁶⁴

The same approach was also followed by the subsequent Alps Finance v. Slovakia case,²⁶⁵ whereby the tribunal, citing several ICSID cases where the Salini test was applied,²⁶⁶ stated that the 'constant jurisprudential trend has led the most prominent doctrine to exclude in categorical terms that a mere one-off sale transaction may qualify as an investment. The tribunal cannot ignore

²⁶³ Romak v. Uzbekistan, para. 194.

²⁶⁴ For the sake of precision, according to the tribunal (Romak v. Uzbekistan, para. 205), 'contracting States are free to deem any kind of asset or economic transaction to constitute an investment as subject to treaty protection. Contracting States can even go as far as stipulating that a "pure" one-off sales contract constitutes an investment, even if such a transaction would not normally be covered by the ordinary meaning of the term "investment." However, in such cases, the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term "investment" an extraordinary and counterintuitive meaning' (emphasis added). The point that the tribunal left unresolved is how the contracting States should declare that they want to include such transactions in the concept of investment, if the plain meaning of the words used in the BIT is disregarded (as happened in this case).

²⁶⁵ *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0027.pdf>) ("Alps v. Slovakia").

²⁶⁶ Including Salini v. Morocco, Joy Mining v. Egypt, the L.E.S.I. Cases, etc.

the general consensus formed around the above doctrine.²⁶⁷ The tribunal, therefore, applying the ICSID's Salini test, declined its jurisdiction, considering the transaction at issue a mere one-off sale and not an investment.²⁶⁸

The above cases notwithstanding, it is important to highlight that, as already mentioned, *Romak v. Uzbekistan* cannot at the moment be considered as the leading case of a new jurisprudential line. As stated by the arbitrators in *Guaracachi v. Bolivia*:²⁶⁹ *Romak v. Uzbekistan* and *Alps Finance v. Slovakia* 'are very "fact-specific" cases that can partially explain their reasoning, which remains exceptional in the case law outside the ICSID system.'²⁷⁰ The tribunal continued stating that it was 'not appropriate to import "objective" definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention in the context of a non-ICSID arbitration'²⁷¹ and that, therefore, the only relevant definition was that included in the applicable investment treaty. In light of the above consideration, the tribunal accepted its jurisdiction on the basis of the wide asset-based definition of investment included in the applicable BIT.²⁷²

²⁶⁷ *Alps v. Slovakia*, para. 245.

²⁶⁸ The claim was borne out of an agreement between Alps Finance and Trade AG and a Slovakian company, in which the claimant purchased credits owed by a bankrupt debtor. Efforts to enforce the credits were blocked by a Slovakian regional court, in what the claimant argued was a wrongful decision. Alps Finance held the Slovakian government responsible for the alleged misbehaviour of its regional court.

²⁶⁹ *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014 (available at: <http://www.italaw.com/sites/default/files/case-documents/italaw3293.pdf>) ("**Guaracachi v. Bolivia**").

²⁷⁰ *Guaracachi v. Bolivia*, para. 364.

²⁷¹ *Guaracachi v. Bolivia*, para. 364.

²⁷² Art. 1 of the Agreement Between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investment entered into on 24 May 1988 provides that: "investment" means every kind of asset which is capable of producing returns and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such mortgages, liens or pledges;

Analogously, the tribunal in *Anatolie v. Kazakhstan*²⁷³ stated that ICSID jurisprudence cannot be applied when the Convention is not concerned, and therefore ‘the so-called Salini test, controversial and much discussed both by the Parties in this case and otherwise in ICSID and similar arbitrations, even if applied as a flexible guideline rather than as a strict jurisdictional requirement, cannot be used for the definition of investment under the ECT or, likewise, in the present case.’²⁷⁴

From the above, it can be deduced that, despite certain attempts to align the concept of investment in ICSID and non-ICSID arbitration, and to have a consistent definition of investment, no successful result has been achieved.²⁷⁵ This however does not necessarily need to be regarded in a negative manner.²⁷⁶ States entering into an investment treaty know exactly what the differences are between ICSID tribunals and all the other tribunals, also in terms of

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- (ii) shares in and stock and debentures of a company and any other form participation in a company;
 - (iii) claims to money or to any performance under contract having a financial value;
 - (iv) intellectual property rights and goodwill;
 - (v) any business concessions granted by the Contracting Parties in accordance with their respective laws, including concessions to search for, cultivate, extract or exploit natural resources.’

²⁷³ *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan*, SCC, Award, 19 December 2013 (available at: <http://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf>) (“**Anatolie v. Kazakhstan**”).

²⁷⁴ *Anatolie v. Kazakhstan*, para. 806.

²⁷⁵ For a comment on this point and possible suggestions to overcome this issue, see J.M. BODDICKER, *Whose Dictionary Controls?: Recent Challenges to the Term “Investment” in ICSID Arbitration*, *American University International Law Review*, Vol. 25, Issue 5, 2010, pp. 1031-1071.

²⁷⁶ In this respect, it should however be noted that several authors welcomed the *Romak v. Uzbekistan* award and its attempt to fill the gap between ICSID and non-ICSID jurisdictional requirements. See, among others, L. HALONEN, *Bridging the Gap in the Notion of ‘Investment’ between ICSID and UNCITRAL Arbitrations: Note on an Award Rendered under the Bilateral Investment Treaty between Switzerland and Uzbekistan*, *ASA Bulletin*, Vol. 29, Issue 2, 2011, pp. 312–326.

jurisdiction. If the contracting States decide in their treaty to allow investor-State arbitration before ICSID and/or other tribunals, they should be aware of the potential consequences. Also the fact that even a mere sale and purchase can be considered as an investment should not represent a problem, as long as the parties are not dealing with ICSID tribunals. Indeed, the basis of non-ICSID jurisdiction is entirely grounded on consent: the parties agree to submit to an arbitral tribunal certain transactions that they label as ‘investments’. The tribunal has only to verify whether the transaction that the claimant has brought to its attention is included in what the parties have agreed to be as such, and not to verify whether the Salini test’s criteria have been met. Of course, the broad asset-based definition of investment may entail that anything having an economic value is an investment and this may sound unreasonable. Still, if on the basis of the applicable provisions of the Vienna Convention it is believed that this was the intent of the contracting States, the tribunal cannot override their will and establish that investment must have an inherent meaning. It is highly likely that States will try to invoke ICSID’s objectivist jurisprudence in order to exclude the tribunal’s jurisdiction and avoid any discussions on the merits of the case, but this is trial strategy and it does not mean that the parties to the investment treaty did not have a clear common and agreed view on what was to be an investment thereunder.²⁷⁷

In light of the above, if States do not wish to bear the risk of losing their sovereign immunity²⁷⁸ for a claim concerning any asset having an economic value, they can either: (i) select ICSID tribunals as the exclusive forum in case

²⁷⁷ Still, certain authors have welcomed the approach purported by, *inter alia*, Nreka v. Czech Republic and Romak v. Uzbekistan. See, for instance, E. CABROL, Pren Nreka v. Czech Republic and The Notion of Investment Under Bilateral Investment Treaties: Does “Investment” Really Mean “Every Kind of Asset”?, *supra*, note 260, according to whom: ‘[...] the emergence of a notion of “investment” in investment arbitration and the search for satisfactory criteria should not be limited to the ICSID Convention, but should also play a role where tribunals examine their jurisdiction under a BIT. Applying similar criteria to investment under all investment treaties [...] would contribute to bring unity to a field that lacks cohesion’ (p. 231). With respect to Romak v. Uzbekistan, see, *infra*, note 357.

²⁷⁸ A State cannot claim sovereignty exemption from dispute resolution proceedings if it had committed to submit to the jurisdiction of that forum by, *inter alia*, international treaties.

of disputes arising from the investment treaty;²⁷⁹ and/or (ii) reduce the scope of the definition of investment in investment treaties.

As a final remark, the fact that ICSID's jurisdictional requirements are stricter is somewhat balanced by the upsides afforded by the Convention and, mainly, by the fact that national courts should not play any role in a dispute submitted to the Centre, except for the implementation of the arbitral award, which anyway is facilitated too.²⁸⁰

5. Commercial arbitral awards as investments: is it possible? An analysis of the Relevant Cases

From the analysis conducted above, a few preliminary conclusions may be drawn. First of all, for the purposes of non-ICSID arbitration, tribunals tend to give the predominant role to the definition of investment given by the parties in the international instrument whereby consent to the jurisdiction is granted. Only a minority of cases have adopted a different view, pursuant to which, in order to have a consistent approach with ICSID tribunals, also non-ICSID tribunals must take into account the 'intrinsic' meaning of the term investment and deny jurisdiction in case the transaction in question is not comprised in that meaning of investment, any different will of the parties notwithstanding.

This latter reconstruction in my view does not deserve to be followed, as the set of provisions of the Washington Convention does not apply to non-ICSID tribunals, which, therefore, are not bound to respect the limits set out under Art. 25(1) thereof.

In addition, such an approach would contribute to create uncertainty among States and investors on the requirements to access investor-State arbitration. Indeed, from the contracting States' perspective, States entering into investment treaties should know that they have two options: (i) to limit the possibility to bring investor-State claims under the relevant investment treaty to

²⁷⁹ However, notably, in this case it remains the risk of recourse by the tribunal to the subjectivist approach, as occurred in one of the Relevant Cases (ATA v. Jordan, *infra*, note 362).

²⁸⁰ See, *supra*, Chapter I, section 2.

ICSID's jurisdiction, whose access is more likely narrower (the subjectivist approach has been in more recent times substantially non-applied),²⁸¹ but that, at the same time, grants more certainty in terms of recognition and enforcement of the award; or (ii) to opt for the exclusive or concurring jurisdiction of non-ICSID tribunals, which implies that a wider range of claims can be in theory decided by the tribunal, mainly depending, in terms of the subject matter conditions, on the scope of the definition of investment provided under the applicable investment treaty, but which does not bring the advantages of having the proceeding administered by the Centre. States should be aware of these differences and take them into due consideration when drafting investment treaties. If, however, non-ICSID tribunals impose, as a matter of fact, the same jurisdictional *ratione materiae* conditions as those required by the Convention, through the application of the Salini test, States cannot rely on the above assumptions and will not be in a position to assess in advance the consequences in terms of access to justice in case of inclusion in the treaty of provisions, according to which disputes are to be settled through arbitration not governed by the Convention. One solution to overcome this issue may be to insert in the investment treaty a very precise and circumscribed definition of investment, for example detailing that certain features must exist or that certain assets or transactions shall, or shall not, as the case may be, qualify as an investment.²⁸²

Analogously, from the investor's perspective, in case the treaty gives the investor multiple choices of *fora*, the investor will know that its protection will be different, depending on the tribunal he/she/it selects: he should balance the pros and cons of each tribunal and decide accordingly, taking into account the

²⁸¹ Notwithstanding the fact that this consideration is largely accepted by commentators (*see* section 3.2 of this Chapter II), it should however be noted that, as better described below in this Chapter, one of the Relevant Cases (*ATA v. Jordan*, *infra*, note 362) applied the subjectivist approach, relying exclusively on the wording of the applicable BIT.

²⁸² In this respect, for example, States may decide to have ICSID and non-ICSID subject matter jurisdictional requirements substantially coincide under the treaty. *See*, for example, the 2012 U.S. Model BIT, whereby in the definition of investment the necessity of certain hallmarks (duration, risk and contribution) is expressly mentioned.

circumstances of the case. For instance, if it is clear that the underlying transaction is an investment, the investor may opt to bring his/her/its claim before an ICSID tribunal. On the contrary, he may prefer SCC or the other *fora* envisaged by the treaty, which more likely will consent to their jurisdiction, in case the underlying transaction falls within the definition of investment laid down in the treaty, but less likely under Art. 25(1) of the Convention. However, also in this case it must be noted that the rules that apply for each tribunal are different for a number of reasons. Deciding to bring an action before one or the other arbitral tribunal is a strategic decision, which should be made having taken into consideration all such differences, of which access to jurisdiction evidently represents just one element. In any event, in order to allow the investor to make a complete and reasoned assessment, there must be a good level of predictability as to the jurisdictional requirements applicable to each tribunal.

Moreover, I also believe that levelling the playing field on the jurisdiction *ratione materiae* between ICSID and non-ICSID tribunals does not make any sense if the rules that apply to the proceedings and to the recognition, enforcement, and annulment of awards are in any event different.

All this premised, it is worth analysing the Relevant Cases to see which approach has been adopted in order to establish if it has had an impact on the acceptance/denial of jurisdiction.

The analysis will follow a chronological order, as the tribunals seem to interplay with each other, taking into account previous awards to criticise them or to use them to support their decisions. Indeed, although investor-State decisions do not have precedential value *per se*, the sheer paucity of cross-over arbitration suggests that each award has (and will have) some influence on other arbitrations.

5.1 Saipem v. Bangladesh

The first known investment arbitration that decided upon a State's liability for interference with a commercial arbitration proceeding was *Saipem v. Bangladesh*.²⁸³

Facts

The underlying dispute arose out of a gas pipeline construction contract entered into on 14 February 1990 between Saipem S.p.A. ("**Saipem**"), an Italian oil and gas company, and a Bangladeshi State entity, named Bangladesh Oil, Gas and Mineral Corporation, also known as Petrobangla ("**Petrobangla**").²⁸⁴

The contract was governed by the laws of Bangladesh and contained a clause providing for the resolution of disputes arising therefrom by arbitration in Dhaka, Bangladesh, under the ICC rules.²⁸⁵

Ultimately the transaction envisaged under the contract went sour. During the execution phase, the project suffered significant delays, due, according to Saipem, to the rebellion of the local population against the project, and, therefore, the completion date was postponed.²⁸⁶ In addition, upon completion of the project and its takeover, Petrobangla refused to repay Saipem the outstanding retention amount, even if Saipem issued the corresponding warranty bond, as agreed under the contract. A dispute then arose between the parties over the compensation and additional costs for the delays and the

²⁸³ *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07 ("**Saipem v. Bangladesh**"), Decision on Jurisdiction And Recommendation On Provisional Measures, 21 March 2007 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0733.pdf>) ("**Saipem Decision on Jurisdiction**") and Award, 10 June 2009 ("**Saipem Award**") (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0734.pdf>).

²⁸⁴ Saipem Decision on Jurisdiction, para. 6; Saipem Award, para. 7.

²⁸⁵ Saipem Decision on Jurisdiction, para. 10; Saipem Award, para. 10.

²⁸⁶ Bangladesh, on the contrary, maintained that the problems with the population were caused by Saipem itself and that Saipem was already late before their occurrence.

return of the retention amount. Saipem referred the dispute to the ICC on 7 June 1993 and the ICC tribunal was constituted on 4 May 1994.²⁸⁷ During the arbitration proceeding, Petrobangla raised a number of procedural requests, which the ICC tribunal dismissed. Petrobangla also requested the ICC tribunal to order Saipem to provide information about its insurance policy and claims made under it, which Saipem had refused to provide, but the ICC tribunal issued an order pursuant to which Saipem's refusal to provide the requested information would be assessed when appropriate at a later stage.²⁸⁸ Following the ICC tribunal's decision on these matters, on 16 November 1997, Petrobangla sought revocation of the ICC tribunal's authority before the First Court of the Subordinate Judge of Dhaka. The basis of Petrobangla's claim was that the arbitrators had committed misconduct and had breached the party's procedural rights when rejecting its procedural requests. The day after, Petrobangla also applied to the High Court Division of the Supreme Court of Bangladesh to stay all further proceedings of the arbitration pending before the ICC tribunal and/or restrain Saipem and/or the tribunal from proceeding further with the arbitration. On 24 November 1997, the Supreme Court issued an injunction restraining Saipem from continuing with the arbitration, and subsequent decisions confirmed and maintained the stay of arbitration.²⁸⁹ In addition, on 5 April 2000, the First Court of the Subordinate Judge of Dhaka rendered a decision by means of which it revoked the authority of the ICC tribunal on the grounds that the arbitral tribunal misconducted the arbitration, improperly dismissing Petrobangla's procedural requests and disregarding Bangladeshi law. Using the words of the Bangladeshi court, there was a 'likelihood of miscarriage of justice.'²⁹⁰ Although Saipem could have challenged this decision, it decided not to do so, as in its view such an attempt would have been fruitless.

²⁸⁷ Saipem Decision on Jurisdiction, paras. 11-19; Saipem Award, paras. 11-25.

²⁸⁸ Saipem Decision on Jurisdiction, paras. 22-23; Saipem Award, paras. 27-33.

²⁸⁹ Saipem Decision on Jurisdiction, paras. 24-26; Saipem Award, paras. 34-39.

²⁹⁰ Saipem Decision on Jurisdiction, para. 29; Saipem Award, para. 40.

Notwithstanding the above decisions of the Bangladesh courts, on 30 April 2001, the ICC tribunal decided to resume proceedings ‘on the ground that the challenge or replacement of the arbitrators in an ICC arbitration falls within the exclusive jurisdiction of the ICC Court and not the courts of Bangladesh’ and that ‘the revocation of the authority of the ICC Arbitral Tribunal by the Bangladeshi courts was contrary to the general principles governing international arbitration’,²⁹¹ while Bangladeshi courts were continuing to issue injunctions to Saipem not to pursue the ICC arbitration. Despite the interference by the local courts, on 9 May 2003, the ICC award was rendered. It ruled that Petrobangla breached its contractual obligations and therefore it had to pay high sums of money as compensation to Saipem.²⁹²

On 19 July 2003, Petrobangla filed an action before the High Court Division of the Supreme Court to set aside the ICC award.²⁹³ Although denying the application, the Supreme Court ultimately ruled in favour of Petrobangla by stating that the ICC award was ‘a nullity in the eye of the law’,²⁹⁴ which could ‘neither be set aside nor [could] it be enforced.’²⁹⁵ This was because the ICC tribunal’s authority had been revoked and the arbitral tribunal had proceeded with the arbitration illegally and without jurisdiction.

Saipem did not appeal against that decision and therefore was not in a position to seek enforcement of the ICC award in Bangladesh, the only place where Petrobangla had any asset to attack.

The investment arbitration – The jurisdiction ratione materiae

Against this background, on 5 October 2004, Saipem filed a request for arbitration with ICSID under the Italy-Bangladesh BIT²⁹⁶, claiming that the

²⁹¹ Saipem Decision on Jurisdiction, para. 31; Saipem Award, para. 45.

²⁹² Saipem Decision on Jurisdiction, para. 34; Saipem Award, para. 48.

²⁹³ Saipem Decision on Jurisdiction, para. 35; Saipem Award, para. 49.

²⁹⁴ Saipem Decision on Jurisdiction, para. 36; Saipem Award, para. 50.

²⁹⁵ Saipem Decision on Jurisdiction, para. 36; Saipem Award, para. 50.

²⁹⁶ Agreement Between the Government of The Republic of Italy and the Government of The People's Republic of Bangladesh on the Promotion and Protection of Investments, signed on 20 March 1990 (available at:

undue intervention of the Bangladeshi courts in the ICC arbitration, which precluded the enforcement of the ICC award, constituted an expropriation.²⁹⁷

The first issue that the investment tribunal had to face concerned its jurisdiction, as Petrobangla contested, *inter alia*,²⁹⁸ the tribunal's subject matter jurisdiction. Though Bangladesh only claimed the lack of an investment under

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/268>) (**Italy-Bangladesh BIT**).

²⁹⁷ Saipem Decision on Jurisdiction, para. 42. As better explained in section 4.1 of this Chapter II, unlike more modern BITs, the Italy-Bangladesh BIT only provided compensation in the case of expropriation, while violations of fair and equitable treatment provisions were not envisaged and, therefore, a claim for denial of justice could not be raised thereunder.

²⁹⁸ Several jurisdictional aspects were investigated in the Decision on Jurisdiction, including: (i) the existence of a real treaty claim or rather a purely contract-based commercial arbitration dressed up as investment treaty claim; (ii) the attribution of the acts of Petrobangla and of the Bangladeshi courts to Bangladesh; and (iii) the application to the claim of the requirement of exhaustion of local remedies. As to the first aspect, the tribunal limited to rule that: '[i]n the Tribunal's view, the essence of Saipem's case is that the courts of Bangladesh acted in violation of the New York Convention and in an "illegal, arbitrary and idiosyncratic" manner amounting to a violation of the protection afforded to foreign investors under Article 5 of the BIT. Saipem does not request relief under the Contract; it does not raise contract claims over which the Tribunal would have no jurisdiction' (Saipem Decision on Jurisdiction, para. 141) (on this point, *see* R. TEITELBAUM, Case Report on *Saipem v. Bangladesh*, Arbitration International, Vol. 26, Issue 2, 2010, pp. 313-321, at p. 318 and following; E. SAVARESE, In margine al caso Saipem: tra allargamento della nozione di espropriazione e coordinamento "successivo" di giurisdizioni, *Diritto del commercio internazionale: pratica internazionale e diritto*, Vol. 21, No. 4, 2007, pp. 933-960). As to the issue of attribution, the tribunal in its preliminary analysis stated that: '[a]t this jurisdictional stage, there is no indication that either the courts of Bangladesh or Petrobangla could manifestly not qualify as state organs at least *de facto*' (Saipem Decision on Jurisdiction, para. 149). Finally, with respect to the exhaustion of local remedies, the tribunal highlighted that '[a]s a matter of principle, exhaustion of local remedies does not apply in expropriation law' (Saipem Decision on Jurisdiction, para. 151); it continued by stating that '[w]hether the requirement of exhaustion of local remedies may be applicable by analogy to an expropriation by the acts of a court and whether, in the affirmative, the available remedies were effective are questions to be addressed with the merits of the dispute' (Saipem Decision on Jurisdiction, para. 153).

Art. 1(1) of the BIT, the tribunal considered subject matter jurisdiction both under Art. 25(1) of the Convention and under the Italy-Bangladesh BIT.²⁹⁹

This implies that the tribunal did not adhere to the subjectivist approach and considered that, in addition to the content of the Italy-Bangladesh BIT, the Convention itself imposes outer limits to the concept of investment. On this basis, the tribunal started its enquiry.

With respect to Art. 25(1) of the Convention, despite the presence of Prof. Schreuer (one of the main supporters of the typical features approach) on the panel, the tribunal applied the standard four-prong Salini test in order to determine whether Saipem had made an investment, thus adhering to the objectivist approach.³⁰⁰

The application of this very strict test notwithstanding, the tribunal found that Saipem had made an investment for the purposes of the Convention. In its reasoning, the tribunal emphasized that it considered the ‘*entire operation*’,³⁰¹ which included the construction contract, the construction itself, the warranty, the retention money and the ‘*related ICC Award*’.³⁰² Considering the totality of these elements (and, in particular, the original transaction underlying the ICC award), it found that:

- (i) Saipem made a significant contribution in both technical and human resources, and this fact was not contentious between the parties;³⁰³
- (ii) the transaction had a sufficient duration, as it lasted in the aggregate (including the periods when the works were suspended) more than two years. In this, the tribunal did not follow the Bangladeshi positions pursuant to which only the periods during which the works were actually performed (i.e., less than a year) were relevant, as, according to the panel, ‘[t]he time of the project during which the works are interrupted or suspended entails

²⁹⁹ Saipem Decision on Jurisdiction, Sections 4 and 5.

³⁰⁰ Saipem Decision on Jurisdiction, para. 99.

³⁰¹ Saipem Decision on Jurisdiction, para. 110 (emphasis added).

³⁰² Saipem Decision on Jurisdiction, para. 110.

³⁰³ Saipem Decision on Jurisdiction, para. 101.

risks that may be even higher than those incurred while the works are being performed’;³⁰⁴

- (iii) Saipem incurred commercial risks, as is typical for long-term contracts, which is demonstrated by the undisputed stopping of the works and the necessity to renegotiate the completion date. Also in this case the tribunal disregarded the Bangladeshi line of argument according to which Saipem did not incur any commercial risk because it received an advanced payment; the tribunal in this respect also highlighted that the contractual mechanism providing for retention money created a risk for Saipem which indeed materialised;³⁰⁵ and
- (iv) the transaction contributed to the economic development of Bangladesh, as recognised by both parties.³⁰⁶

In this case the tribunal, in order to establish the subsistence of Art. 25’s jurisdiction, also analysed whether the dispute arose *directly* out of an investment.³⁰⁷ In this context the tribunal further elaborated the concept that the transaction shall be considered in its entirety and that the ICC award cannot be viewed in isolation. This is because the ‘rights arising out of the ICC Award arise only *indirectly* from the investment.’³⁰⁸ The tribunal suggested that an opposite finding would have implied that the award itself is an investment, which was a finding that the tribunal was ‘not prepared to accept.’³⁰⁹ However, having found that investment under the ICSID Convention includes all the elements of the operation (i.e., in this case, the construction contract, the construction, the construction itself, the warranty, the retention money and the ICC award), the tribunal was prepared to accept that the claimant’s dispute arose directly out of the global investment.³¹⁰

³⁰⁴ Saipem Decision on Jurisdiction, para. 102.

³⁰⁵ Saipem Decision on Jurisdiction, para. 109.

³⁰⁶ Saipem Decision on Jurisdiction, para. 101.

³⁰⁷ This is quite unusual, as normally the fact that the dispute arises *directly* out of an investment is uncontested.

³⁰⁸ Saipem Decision on Jurisdiction, para. 113.

³⁰⁹ Saipem Decision on Jurisdiction, para. 113.

³¹⁰ Saipem Decision on Jurisdiction, para. 114.

Having found the subsistence of the jurisdiction for the purposes of the Convention, the tribunal moved to the analyses of its jurisdiction under the Italy-Bangladesh BIT.³¹¹ The definition of investment contained therein was quite broad and comprised ‘any kind of property’, including any ‘credit for sums of money’.³¹² The tribunal accepted Saipem’s argument that the construction contract was an investment under Art. 1(1) of the Italy-Bangladesh BIT and that the ‘rights accruing from the ICC Award fall squarely within the notion of ‘credit for sums of money [...] connected with investments’ set out in Article 1(1)(c) of the BIT.’³¹³ Considering the ordinary meaning of the words ‘credit for sums of money’, the tribunal deemed that rights under an award ordering a party to pay an amount of money, such as the ICC award relevant to the dispute, were also covered by the definition. Nevertheless, the tribunal added that: ‘the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. *The ICC Award*

³¹¹ Saipem Decision on Jurisdiction, Section 5.

³¹² The definition of investment under the Italy-Bangladesh BIT is as follows: “The term “investment” shall be construed to mean *any kind of property* invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party in the territory of the other, in conformity with the laws and regulations of the latter.

Without limiting the generality of the foregoing, the term “investment” comprises:

- a) movable and immovable property and any other right “in rem” including, in so far as they may be used for investment purposes, real guarantees on others’ property;
- b) shares, debentures, equity holdings and any other negotiable instrument or document of credit, as well as Government and public securities in general;
- c) *credit for sums of money* or any right for pledges or services having an economic value connected with investments, as well as reinvested income as defined in paragraph 5 hereafter;
- d) copyright, commercial trademarks, patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill;
- e) any right of a financial nature accruing by law or by contract and any licence, concession or franchise issued in accordance with current provisions governing the exercise of business activities, including prospecting for cultivating, extracting and exploiting natural resources’ (emphasis added).

³¹³ Saipem Decision on Jurisdiction, para. 125.

*crystallized the parties' rights and obligations under the original contract.*³¹⁴ In light of this, the tribunal avoided determining whether the contract rights crystallized by the award constituted an investment by themselves.

Consideration

Before considering the relevance of this decision for the purpose of jurisdiction in cross-over arbitration, it is worth analysing the approach taken by the tribunal with respect to the concept of investment.

As already mentioned, the tribunal formally adhered to the most strict approach, i.e., the objectivist approach, pursuant to which a transaction to qualify as an investment must pass the double-barrelled test, first under the ICSID Convention, through the application of the Salini test, and then under the applicable BIT, by fitting the definition of investment provided therein. It is also worth noting that the tribunal applied the standard Salini test, which is composed of four elements, even though in recent years the trend is not to consider the contribution to the host State's development.³¹⁵ Despite this very rigid approach, the tribunal came to the conclusion that the jurisdiction *ratione materiae* was met. This was possible thanks to recourse to an artifice: the tribunal did not consider the rights arising out of the ICC award or the ICC award by themselves. Instead, the tribunal chose to consider the 'entire operation' performed by the claimant, consisting of the construction contract, the construction itself, the warranty, the retention money *and the related ICC award*, whereby the parties' rights and obligations under the original transaction were crystallised.

In this respect, it should be noted that it is consolidated in ICSID's jurisprudence that the entire transaction made by the investor is to be taken into consideration for the purposes of establishing the tribunal's subject matter jurisdiction.³¹⁶ However, this was the first time that the concept of entire

³¹⁴ Saipem Decision on Jurisdiction, para. 127 (emphasis added).

³¹⁵ See section 3.1.2 of this Chapter II.

³¹⁶ See, from the very beginning of ICSID practice, *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Decision of Jurisdiction, 12 May 1974, unpublished, reported in P. LALIVE, *The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal*

operation was broadened as much as to include an award, which ruled on the original investment. By acting in this way, the tribunal was able to assume a jurisdiction that otherwise it may have had to decline. Indeed, it is relatively easy to assess that the construction of a gas pipeline is an investment. Linking the ICC award and the rights arising therefrom to the construction activities and considering them as a whole permitted the tribunal to say that the overall transaction was an investment, and that therefore it also had the right to rule on the ICC award and on the behaviour of Bangladesh in this respect.

This case shows how the jurisdictional approach is absolutely subjective and ultimately can be the object of manipulation. The tribunal had no problems in using the strictest test as it considered a wider transaction, which, as a whole, met such a test. In addition, the approach's final subjectiveness results also from the analysis of the risk and duration elements. The tribunal opted for a solution, but it may have well taken the opposite decision, which in my view may have been grounded as well.

Having said that, this is to be considered as a seminal case,³¹⁷ which survives as an example of how an ordinary commercial dispute can evolve into one that triggers a host State's liability.³¹⁸ Acting as it did, the tribunal applied investment law (both the Convention and the Italy-Bangladesh BIT) to assume jurisdiction without the need to establish whether an ICC award constituted an investment.

Problems, in *British Yearbook of International Law*, Vol. 51 (1980), Oxford University Press, 1980, pp. 123-162, at p. 159.

³¹⁷ Of this opinion are L.A. MISTELIS, *Award as an Investment: The Value of an Arbitral Award of the Cost of Non-Enforcement*, in *ICSID Review*, Vol. 28, Issue 1, 2013, pp. 64-87, at p. 75; and L.G. RADICATI DI BROZOLO, *Remedies against State Interference with International Arbitration*, *supra*, note 63, at p. 6.

³¹⁸ R. TEITELBAUM, *Case Report on Saipem v. Bangladesh*, *Arbitration International*, *supra*, note 298, at p. 321. Many subsequent tribunals that dealt with the same issue have adopted an analogous approach (*see*, for instance, *Frontier v. Czech Republic* (*infra*, note 398); *White v. India* (*infra*, note 444)). For the sake of completeness, it is worth clarifying that the first time this line of reasoning was adopted was in *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita1076.pdf>) (“*Mondev v. US*”).

Still, as noted by one author, “[t]his functional equivalence [...] is more than sufficient to trigger investment protection and, if the factual circumstances are appropriate, provide significant additional support for arbitral awards.”³¹⁹

5.2 Romak v. Uzbekistan

The second case that dealt with cross-over arbitration was Romak v. Uzbekistan.³²⁰ This case was already briefly discussed in section 4 of this Chapter, as it was one of the first times in which a non-ICSID arbitral tribunal opened the door to the Salini test for the identification of an investment.³²¹

As better described below, the case did not go to the merits phase, as the tribunal dismissed the claim denying its jurisdiction *ratione materiae*, but it is still relevant for the issue concerning the definition of investment and for the investigation as to whether an arbitral award can qualify as a protected investment under a BIT.

Facts

The factual circumstances do not play a major role in this case, as the tribunal declined its jurisdiction over the case and did not analyse the merits of the claim. Therefore, the description will be limited to the salient elements necessary to understand the tribunal’s decision.

In the context of a more complicated transaction in July 1996, Romak S.A. (“**Romak**”), a Swiss company specialized in international trade in cereals, entered into a supply agreement with Uzdon Foreign Trade Company

³¹⁹ L.A. MISTELIS, Award as an Investment: The Value of an Arbitral Award of the Cost of Non-Enforcement, *supra*, note 317, at p. 75.

³²⁰ *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0716.pdf>) (“**Romak v. Uzbekistan**”).

³²¹ See section 4 of this Chapter II. It must be pointed out from now that this has been possible for the tribunal thanks to the existence of a provision of the applicable BIT allowing the investor to bring an investor-State claim either to an *ad hoc* UNCITRAL tribunal or to an ICSID one. If the relevant BIT does not contemplate the recourse to ICSID tribunal the reasoning of this case would probably not be applicable.

(“Uzdon”), an Uzbek company, pursuant to which Romak undertook to supply to Uzdon up to 50,000 of milling wheat before the end of the year. In return, Uzdon agreed to provide a letter of guarantee issued by the National Bank for Foreign Economic Affairs of Uzbekistan.³²² The supply agreement provided for arbitration under the Arbitration Rules of the GAFTA.³²³

Between July and November 1996, Romak delivered almost all the due wheat, but never obtained payment in return.³²⁴ In March 1997, Romak was informed that the promised letter of guarantee had never been issued by the National Bank for Foreign Economic Affairs of Uzbekistan, as any delivery of wheat in Uzbekistan was subject to certain import quotas. Given the fact that these quotas had not been allocated to Romak, the letter of guarantee could not be issued, and the supply agreement was invalid.³²⁵

After unsuccessful attempts to recover the amounts owed by Uzdon, Romak initiated a GAFTA arbitration against Uzdon under the supply agreement.³²⁶

On 22 August 1997, the GAFTA tribunal issued its award whereby it ruled in favour of Romak and ordered Uzdon to pay Romak damages.³²⁷ The award became definitive, and further to lack of voluntary compliance by Uzdon, Romak tried to enforce it in Uzbekistan and France, but without success.³²⁸

Indeed, in Uzbekistan, on 2 October 2000, the Commercial Court of the City of Tashkent declined enforcement, on the grounds that Romak had failed to submit a valid translation of the GAFTA award pursuant to Art. IV of the New York Convention, since it had submitted a Russian translation rather than one in the Uzbek language. On 24 November 2000, the Appellate Jurisdiction of the Commercial Court upheld the lower court's decision.³²⁹ Further to this decision, Romak dropped its enforcement action in France and on 20 March

³²² Romak v. Uzbekistan, paras. 34-36.

³²³ Grain and Feed Trade Association. Romak v. Uzbekistan, para. 37.

³²⁴ Romak v. Uzbekistan, paras. 41-42.

³²⁵ Romak v. Uzbekistan, para. 49.

³²⁶ Romak v. Uzbekistan, para. 52.

³²⁷ Romak v. Uzbekistan, paras. 56-61.

³²⁸ Romak v. Uzbekistan, paras. 64-70.

³²⁹ Romak v. Uzbekistan, para. 65.

2006 filed a claim against Uzbekistan under the auspices of the Permanent Court of Arbitration.³³⁰

Romak alleged that Uzbekistan, through the actions of, *inter alia*, Uzdon and its courts violated several provisions of the Swiss-Uzbek BIT,³³¹ including the most favoured nation clause, the umbrella clause and the fair and equitable treatment clause.

The investment arbitration – The jurisdiction ratione materiae

The interesting aspect of this case is how the tribunal came to decline its jurisdiction, through the application of the Salini test, even though the case was not subject to the Convention. As noted by one author,³³² the panel was perhaps inspired to narrow its view of the concept of investment and apply ICSID jurisprudence because, merely relying the literal meaning of the BIT's definition, any arbitral award would qualify for its protection and that would create a 'new instance of review of State court decisions concerning the enforcement of arbitral awards',³³³ for which the tribunal was not ready.

The starting point of the reasoning of the tribunal was the wording of the Swiss-Uzbek BIT that provided for a broad asset-based definition of investment supplemented with a non-exhaustive list of examples of what constituted an investment according to the signatories' will.³³⁴ In particular,

³³⁰ Romak v. Uzbekistan, para. 71.

³³¹ Agreement Between the Swiss Confederation and the Republic of Uzbekistan on the Promotion and Reciprocal Protection of Investments, signed on 16 April 1993 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2328>) (“**Swiss-Uzbek BIT**”).

³³² J.E. ALVAREZ, Crossing the “Public/Private” Divide: Saipem v. Bangladesh and Other Crossover Cases, in A.J. DEN BERG (ed.), International Arbitration: The Coming of a New Age?, ICCA Congress Series, Vol. 17, Kluwer Law International, pp. 400-430, at p. 416.

³³³ Romak v. Uzbekistan, para. 186.

³³⁴ Article 1(2) provides that: “The term “investment,” shall include every kind of assets and particularly:

- (a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
- (b) shares, parts or any other kinds of participation in companies;

within the list of investments, the Swiss-Uzbek BIT expressly mentioned any ‘claims to money’ and, according to Romak’s reconstruction, this reference was sufficient to establish the tribunal’s jurisdiction in this case. However, the tribunal did not follow Romak’s argument and rejected a literal interpretation of the definition of investment. It rather declared that it had to resort to the ‘ordinary meaning’ of the terms of the Swiss-Uzbek BIT in ‘their context and in the light of its object and purpose’,³³⁵ applying the ordinary rules of interpretation of treaties as set out by the Vienna Convention and, in particular, by Arts. 31 and 32 thereof.³³⁶

The tribunal therefore began its analysis by looking at the ordinary meaning of the term investment as well as of the term asset (which was used in the investment’s definition used in the Swiss-Uzbek BIT),³³⁷ referring in both cases to Black’s Law Dictionary.³³⁸ Then, the tribunal moved swiftly to the object and purpose and context of the Swiss-Uzbek BIT and discussed why a literal, mechanical reading of Art. 1(2) would have led to manifestly absurd or unreasonable results.

-
- (c) claims to money or to any performance having an economic value;
 - (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), technical processes, know-how and goodwill;
 - (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law’.

³³⁵ Romak v. Uzbekistan, para. 176.

³³⁶ Romak v. Uzbekistan, para. 172. With respect to Articles 31 and 32 of the Vienna Convention, *see, supra*, note 158.

³³⁷ Romak v. Uzbekistan, para. 177.

³³⁸ According to the 9th edition of the dictionary, as reported in Romak v. Uzbekistan (footnotes 152; 153), an investment is ‘[a]n expenditure to acquire property or assets to produce revenue; a capital outlay. 2. The asset acquired or the sum invested [...]’; while asset means ‘1. An item that is owned and has value. 2. (pl.) The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill. 3. (pl.) All the property of a person (esp. a bankrupt or deceased person) available for paying debts or for distribution.’

On the level of textual analysis, the tribunal deemed that a literal interpretation would have deprived the term investment of its inherent meaning, which was contrary to the logic of Art. 1(2). Indeed, according to the tribunal, the fact that the categories enumerated in that article were not exhaustive implied that there could have been other assets, which, despite not being expressly mentioned, may have been included in the concept of investment. For this reason the tribunal believed that there should have been ‘a benchmark against which to assess those non-listed assets’.³³⁹

The tribunal then looked at the ‘object and purpose’ and ‘context’ of the Swiss-Uzbek BIT, referring in particular to the ‘need to promote and protect foreign instruments with the aim to foster the economic prosperity of both States’, mentioned in the Preamble. Considering that on the same date the signatory States also concluded an agreement on Trade and Economic Cooperation, the tribunal came to the conclusion that the object and purpose of the Swiss-Uzbek BIT was not trade and, therefore, purely commercial sales transactions fell outside of its scope.³⁴⁰

The tribunal subsequently explained why a mechanical application of the categories listed in Art. 1(2) of the Swiss-Uzbek BIT would have also produced a ‘manifestly absurd or unreasonable result’, contrary to Art. 32(b) of the Vienna Convention.³⁴¹ According to the tribunal, such a reading would have eliminated any practical limitation of the concept of investment and led to the inclusion of any contract between a Swiss national and Uzbekistan within the scope of the protected investments, since any contract implies a claim to money. Besides, any rejection of enforcing an arbitral award could have amounted to a breach of the Swiss-Uzbek BIT’s provisions as any award or judgment would have qualified as an investment, making the tribunal into another ‘instance of review’ of court decisions concerning the enforcement of arbitral awards.³⁴²

³³⁹ Romak v. Uzbekistan, para. 180.

³⁴⁰ Romak v. Uzbekistan, para. 182.

³⁴¹ Romak v. Uzbekistan, para. 184. With respect to the Vienna Convention, *see, supra*, note 158

³⁴² Romak v. Uzbekistan, paras. 185-187.

Following this line of reasoning, the arbitrators considered that a lot of claims to money could constitute an investment, but not ‘*all* such assets necessarily so qualify.’³⁴³ In light of the above, the arbitrators concluded that the term investment must have an intrinsic meaning ‘independent of the categories enumerated in article 1(2) of the BIT’,³⁴⁴ which needed to be determined taking into due account the object and the purpose of the Swiss-Uzbek BIT. The point was for the tribunal to determine this meaning, since, as already seen, the Swiss-Uzbek BIT’s objective and purpose shed ‘little light on the meaning of the term “investments”’, which remained ‘ambiguous and obscure.’³⁴⁵

At this point, as stated by one author, a ‘providential escape was found in the arbitration clause itself’,³⁴⁶ which permitted the tribunal to apply ICSID’s precedents. Art. 9(3) of the Swiss-Uzbek BIT provided a dual option with respect to dispute resolution, allowing an investor to bring an investor-State claim either before an *ad hoc* UNCITRAL tribunal or before an ICSID one. Considering this alternative, the arbitral tribunal deemed that it had no choice than to rule that the definition of the term investment should not vary depending on the investor’s choice of the forum.³⁴⁷ It would have been ‘absurd’ and ‘unreasonable’³⁴⁸ to have two different notions of investment, depending on the choice of dispute resolution mechanism, as suggested by Romak. Indeed, according to the tribunal’s reconstruction, first of all, there was no basis to assume that BIT parties distinguished the use of the word ‘investment’ from the way it is used in the ICSID Convention. Second, it would not have made any sense that the contracting States contemplated a definition of investment that would effectively exclude recourse to ICSID and would

³⁴³ Romak v. Uzbekistan, para. 188.

³⁴⁴ Romak v. Uzbekistan, para. 188.

³⁴⁵ Romak v. Uzbekistan, para. 189.

³⁴⁶ J. BURDA, A New Step Towards a Single and Common Definition of an Investment? – Comments on the Romak versus Uzbekistan Decision, *The Journal of World Investment & Trade*, Vol. 11, Issue 6, 2010, pp. 1085-1101, at p. 1092.

³⁴⁷ Romak v. Uzbekistan, para. 193.

³⁴⁸ Romak v. Uzbekistan, para. 194.

therefore render without effect the BIT's provision granting the investor a choice between ICSID and UNCITRAL arbitration.³⁴⁹

Based on these premises, the tribunal felt free to consider ICSID jurisprudence, including *Salini v. Morocco*, *CSOB v. Slovakia* and *Joy Mining v. Egypt*, and to apply to its case. It is acknowledged in the award that ICSID's precedents are not consistent and, therefore, the tribunal distinguished between the 'conceptualist' approach, which envisages the application of the *Salini* test, and the 'pragmatic' approach, according to which the *Salini* test's hallmarks are mere typical features that may also not be present in a specific case.³⁵⁰ It did not enter into the debate as to whether the *Salini* criteria were mandatory or not, instead deciding to adopt a minimal approach, i.e., the *Salini-minus* test, where exclusively contribution, duration and risk are considered as the basic hallmarks of an investment.³⁵¹

It should be noted that the tribunal also briefly considered the subjectivist approach, arguing that the parties are free to include among the protected investments any kind of asset or economic transaction, including one-off sales contracts, which would not normally be covered by the ordinary meaning of the term investment. However, the tribunal continued stating that 'in such cases, the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term investment an extraordinary and counterintuitive meaning. As explained above, the wording of the BIT does not permit the Arbitral Tribunal to infer such an intent in the present case.'³⁵²

Before applying the *Salini* test to the circumstances of the case, the tribunal made some important considerations, which substantially aligned its reasoning with that of *Saipem Decision on Jurisdiction*. First of all, also in this case, the tribunal refused to rule in abstract whether an arbitral award in itself could be considered as an investment. It then continued arguing that a determination on

³⁴⁹ Romak v. Uzbekistan, para. 195.

³⁵⁰ Romak v. Uzbekistan, para. 196.

³⁵¹ Romak v. Uzbekistan, para. 207.

³⁵² Romak v. Uzbekistan, para. 205.

whether Romak held an investment under the BIT could not be made without taking into consideration the entire economic transaction that is subject to the arbitral proceeding. Indeed, the GAFTA award by itself ‘merely constitute[d] the embodiment of Romak’s contractual rights’ and, as such, was irrelevant for its analysis.³⁵³

In light of the above and resting its scrutiny on the supply contract, the arbitrators found that:

- (i) there was no evidence of contribution, since the supply of wheat with an expectation of immediate payment was not sufficient;³⁵⁴
- (ii) the duration of the operation, i.e. the 5 months during which wheat was delivered, did not reflect a commitment greater than an ordinary commercial transaction;³⁵⁵ and
- (iii) the risk of non-payment of the wheat supplied was a purely commercial risk and did not indicate an investment.³⁵⁶

In summary, the tribunal denied the existence of an investment as the transaction underlying the GAFTA award was a mere commercial transaction not meeting the inherent meaning of investment.

Considerations

The Romak v. Uzbekistan award has been welcomed by certain scholarly writings as it ‘takes a substantial stride towards bridging the gap between the jurisdictional requirements *ratione materiae* in ICSID and UNCITRAL arbitrations.’³⁵⁷

³⁵³ Romak v. Uzbekistan, para. 211.

³⁵⁴ Romak v. Uzbekistan, para. 222.

³⁵⁵ Romak v. Uzbekistan, para. 227.

³⁵⁶ Romak v. Uzbekistan, para. 232.

³⁵⁷ J. BURDA, A New Step Towards a Single and Common Definition of an Investment? – Comments on the Romak versus Uzbekistan Decision, *supra*, note 346, at p. 1100; L. HALONEN, Bridging the Gap in the Notion of ‘Investment’ between ICSID and UNCITRAL Arbitrations: Note on an Award Rendered under the Bilateral Investment Treaty between Switzerland and Uzbekistan (*Romak SA v Uzbekistan*), *supra*, note 276, at p. 312, also seems to support the results reached by the tribunal, but she nevertheless highlights how the ‘Tribunal’s reasoning for arriving at the conclusion that the definition of

As discussed above, the arbitrators, departing from a consolidated UNCITRAL jurisprudential trend that relied on the definition of investment included in the investment treaty to determine the tribunal's jurisdiction, considered that the word investment had an inherent meaning that must be considered. The problem for the arbitral panel was to identify that meaning. For that purpose it applied the Salini test, borrowing it from ICSID jurisprudence. The underlying reason was that if there is a concept of investment it must always be the same, regardless of the tribunal where a claim is brought, especially when the investment treaty allows the investor to choose to bring its claim before an ICSID or a non-ICSID arbitral tribunal. The tribunal stated that it could not accept that whether a claimant went to ICSID with its claims could have an impact on the definition of the term investment. According to the tribunal '[t]his would imply that the substantive protection offered by the BIT would be narrowed or widened [...] merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty'.³⁵⁸ However, this statement is not persuasive: the substantive protection does not change, as the substantive provisions are the same for UNCITRAL and ICSID arbitration. What is different, and is rightly different, is the access to the two instruments' jurisdiction, since the relevant jurisdictional requirements are not the same. Moreover, the tribunal seems to contradict itself when it expressly accepted that the parties are free to include – by means of an express and clear provision in that sense – any kind of asset among the protected investments, including one-off sales contracts, which would not normally be covered by the ordinary

“investment” is the same in the BIT and the ICSID Convention is problematic’ (at p. 322). It should also be noted that the approach of *Romak v. Uzbekistan*'s tribunal is similar to the one proposed by Z. DOUGLAS, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 164, whereby he stated that ‘the open-textured nature of the standard formulation in investment treaties [i.e., the wide asset based definition followed by a detailed but non-exhaustive enumeration of specific categories of assets] preserves the ordinary meaning of the term “investment” and therefore its consistency with the characteristics that must be attributed to the same term as employed in Article 25 of the ICSID Convention.’

³⁵⁸ *Romak v. Uzbekistan*, para. 194.

meaning of the term investment. In fact, if this were acceptable, the line of reasoning applied by the tribunal would evidently cease to work.

In any event, by ‘bridging the gap in the notion of investment’,³⁵⁹ the tribunal increased rather than reduced uncertainty in investment arbitration. After this award, if at least in non-ICSID arbitration an investor was sure that the only relevant matter for the subject matter jurisdiction was the definition included in the investment treaty, what non-ICSID tribunals will take into consideration has become more unpredictable.

In addition, as represented in section 3 of this Chapter, there is no common agreed definition of investment in ICSID jurisprudence. The *Romak v. Uzbekistan* tribunal applied the objectivist approach to verify whether there was an investment, without giving any clarification on the reasons behind its choice. In this respect, it must however be noted that the application of the typical features approach would have not led to a different outcome, as the underlying transaction was a mere sale of goods that had constantly been kept out of the concept of investment, also by the ICSID tribunal that adhered to the pragmatic approach.

There are two final remarks to be made. The first one concerns the possibility of qualifying the rights arising out of a commercial award as an investment, in light of this decision. In this respect, as noted by one author, ‘[d]espite its rejection of the claim on jurisdictional grounds, the arbitral tribunal seems to imply that it could have come to a different result had the underlying operation, which had been the subject of the previous commercial arbitration, been an investment.’³⁶⁰ Therefore, in that case the outcome of the decision would have probably been different.

The second one is that the reasoning of the tribunal, whether right or wrong, is strictly connected to the dual option to submit a claim, envisaged in the Swiss-

³⁵⁹ See, *supra*, note 357.

³⁶⁰ L.G. RADICATI DI BROZOLO, Remedies against State Interference with International Arbitration, *supra*, note 63, at p. 10. A similar point is raised by C. PRIEM, International Investment Treaty Arbitration as a Potential Check for Domestic Courts Refusing Enforcement of Foreign Arbitration Awards, *NYU Journal of Law & Business*, Vol. 10, 2013, pp. 189-221, at p. 202.

Uzbek BIT. If the provision does not make any reference to ICSID, I find it hard to see how non-ICSID tribunals can open the door to ICSID's jurisdictional requirements. This has not happened yet and, as noted, the approach chosen by the Romak v. Uzbekistan tribunal with respect to the interpretation of the term investment has not, in general, proliferated³⁶¹ — luckily, I venture to add.

5.3 ATA v. Jordan

ATA v. Jordan³⁶² is the third Relevant Case. The ICSID decision relating to the case was issued on 18 May 2010, three years after the Saipem Decision on Jurisdiction, which indeed was referred to in ATA v. Jordan, even if for a very limited purpose.

Facts

The case concerned whether: (i) the annulment of a commercial award and/or (ii) the extinguishment of the underlying arbitration agreement, by the Jordan courts, amounted to a breach of the applicable Jordan-Turkey BIT.³⁶³

The commercial dispute involved the collapse of a dike constructed by ATA Construction, Industrial and Trading Company (“**ATA**”), an entity incorporated in Turkey, for the Arab Potash Company (“**APC**”), a Jordanian entity at the time controlled by the State, at a site on the Dead Sea, pursuant to a contract entered into on 2 May 1998.³⁶⁴ When the dike collapsed in 2000, APC, on the basis of the arbitration clause contained in the aforementioned

³⁶¹ I.U. MUSURMANOV, *supra*, note 176, at p. 122. As an example of a non-ICSID tribunal which did not apply Romak's approach, see White v. India (*infra*, note 444).

³⁶² *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0043.pdf>) (“**ATA v. Jordan**”).

³⁶³ Agreement Between the Hashemite Kingdom of Jordan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investment, signed on 2 August 1993 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1769>) (“**Jordan-Turkey BIT**”).

³⁶⁴ ATA v. Jordan, paras. 31-32.

contract, commenced an arbitration proceeding against ATA, which brought a counterclaim. On 30 September 2003, the arbitral tribunal dismissed APC's claim and held in favour of ATA, exonerating it of any liability for the collapse and awarding compensation in relation to the counterclaim.³⁶⁵

Shortly thereafter, on 29 October 2003, APC applied to the Jordanian Court of Appeal to have the arbitral award annulled pursuant to the Jordanian arbitration law promulgated in 2001 (“**JAL**”), due to the alleged errors that the arbitral tribunal made in the application of Jordanian law. The relevant court issued its judgment on 24 January 2006 (incidentally, one day after the Jordan–Turkey BIT came into force), annulling the arbitral award on the basis that the tribunal erred in applying Jordanian law. In addition, the court extinguished the arbitration agreement between ATA and APC through the retroactive application of the JAL which entered into force after the commercial arbitration was set up and which mandated the extinguishment of the arbitral agreement in the event of a final decision on the part of the Jordanian courts, nullifying an arbitral award.³⁶⁶ The claimant later appealed to the Jordanian Court of Cassation, which upheld the Court of Appeal's judgment on 16 January 2007. Following this decision, APC commenced proceedings against ATA before the Jordanian Court of First Instance in relation to its original claims regarding the collapse of the dike.³⁶⁷

The investment arbitration – The jurisdiction ratione materiae (and ratione temporis)
Having no other remedy available against the decisions taken by the Jordanian courts, on 14 January 2008, ATA filed an ICSID arbitration against Jordan alleging violations of the Jordan–Turkey BIT, including unlawful expropriation and breach of the fair and equitable treatment clause, by way of serious and repeated denials of justice by the Jordanian courts. Jordan, the respondent, contested jurisdiction on the grounds that the Jordan–Turkey BIT did not

³⁶⁵ ATA v. Jordan, para. 33.

³⁶⁶ ATA v. Jordan, para. 35. This provision was set out in Art. 51 of the Jordanian Arbitration Law, which, according to the translation provided in the case, states that: '[t]he final decision nullifying the awards results in the extinguishment of the arbitration agreement'.

³⁶⁷ ATA v. Jordan, paras. 36-37.

apply as the dispute arose before its entry into force and that, in any event, there was no ‘investment existing’ at the time of the BIT’s entry into force or ‘made or acquired thereafter’³⁶⁸, as requested by the Jordan–Turkey BIT.

In May 2010, the ICSID tribunal issued its awards and, with respect to its jurisdiction, it considered two aspects: (i) the annulment of the commercial arbitral award; and (ii) the extinguishing of the arbitration agreement in the contract between ATA and APC.

With respect to the first aspect, the ICSID tribunal mainly focused on the issue of jurisdiction *ratione temporis*, rather than *ratione materiae*. It is not the purpose of this work to analyse jurisdiction *ratione temporis* in investor-State arbitration; however, in this case, an exception must be made as the time matter is strictly related to that of the existence of an investment.

First of all, it is worth noting that the Jordan–Turkey BIT, which entered into force on 23 January 2006, ‘shall apply to *investments existing at the time of entry into force* as well as to investments made or acquired thereafter’,³⁶⁹ while it does not contain any specific time limitation on temporal jurisdiction.³⁷⁰ Indeed, the dispute settlement clause of the Jordan–Turkey BIT³⁷¹ merely stated that: ‘[d]isputes between one of the parties and one investor of the other Party, *in connection with his investment*’ shall be settled amicably or, if not possible, through investor-State arbitration before a selection of *fora*, including ICSID tribunals.

On the basis of these provisions, the tribunal denied its jurisdiction *ratione temporis* with respect to the dispute over the annulment of the award. More precisely the tribunal found that such a dispute, which was ‘crystallized’³⁷² by means of the decision of the Jordan Court of Cassation in 2007, was ‘legally equivalent’³⁷³ to, and ‘really indistinguishable’³⁷⁴ from, the original dispute

³⁶⁸ ATA v. Jordan, para. 63.

³⁶⁹ Art. IX(1) of the Jordan–Turkey BIT (emphasis added).

³⁷⁰ For an explanation of the differences between the two types of clauses and some examples of investment treaties containing temporary limitations to the scope of protected investments, *see, supra*, note 143.

³⁷¹ Art. VII of the Jordan–Turkey BIT (emphasis added).

³⁷² ATA v. Jordan, para. 95.

³⁷³ ATA v. Jordan, para. 95.

initiated when the commercial arbitration proceeding was commenced on 6 September 2000. Therefore, since the original dispute arose more than five years before the entry into force of the Jordan–Turkey BIT – which, according to the reconstruction of the tribunal, does not apply retroactively with respect to disputes existing prior to its entry into force – the *ATA v. Jordan* panel established that all claims in connection with the annulment of the award, including claims of denial of justice, were *per se* inadmissible because of the lack of jurisdiction *ratione temporis*.³⁷⁵ In short, the tribunal did not consider whether there was an investment existing at the time of entry into force of the Turkey–Jordan BIT, as required by Art. IX thereof, but rather analysed whether the dispute between the parties arose after the entry into force of the Turkey–Jordan BIT. The debatable arbitrators’ argument in this respect was that: ‘[a]rticle IX(1) of the BIT expressly makes the BIT retroactive with respect to “investments existing at the time of entry into force [...]”.’ The provision does not make the BIT retroactive with respect to disputes existing prior to the entry into force of the BIT. Under the plain meaning of Article IX(1), the *Tribunal may only exercise jurisdiction ratione temporis over the Claimant’s claims if it finds that the dispute arose after the entry into force of the Treaty on 23 January 2006*.³⁷⁶ The tribunal, always in connection with the annulment of the arbitral award by the Jordanian Courts, considered the claim made by the ATA with respect to Jordan’s denial of justice separately.³⁷⁷ According to the claimant, such a claim was ‘subject to a different clock’,³⁷⁸ as there cannot be a denial of justice before the exhaustion of local remedies, i.e., before the issuance of the decision of the Jordan Court of Cassation in 2007. The panel also rejected this claim, stating that it was not possible to distinguish the denial of justice in the relevant dispute, which originated prior to the entry into force of the decision of the Jordan–Turkey BIT.³⁷⁹ In this context, the tribunal also considered, ‘assum[ing]

³⁷⁴ *ATA v. Jordan*, para. 103.

³⁷⁵ *ATA v. Jordan*, para. 103.

³⁷⁶ *ATA v. Jordan*, para. 98.

³⁷⁷ *ATA v. Jordan*, para. 105.

³⁷⁸ *ATA v. Jordan*, para. 105.

³⁷⁹ *ATA v. Jordan*, paras. 107-108.

arguendo that the alleged denial of justice represented a discrete claim’, whether ‘an international commercial arbitral award constitute[d] an investment that could be [...] expropriated by an otherwise lawful annulment by a national court’.³⁸⁰ Noting that Art. 25(1) of the ICSID Convention does not define the term investment, the tribunal looked to Art. I(2)(a) of the Jordan–Turkey BIT, which provides that a ‘claim to money’ is an investment, separate from the investment which gave rise to it.³⁸¹ The question for the tribunal remained whether ‘an arbitral award in itself qualifies as a claim to money or if the underlying investment must still exist in order for the claim to be asserted’.³⁸² The panel refrained from giving a reply to this question and limited itself to referring to the *Saipem v. Bangladesh* case, whereby the entire operation (consisting of the construction contract, the construction itself, the retention amount, the warranty and the award) was considered. The tribunal went on to state that ‘measured by the standards in *Saipem*, the Final Award [i.e., the commercial award] at issue in the present arbitration would be part of an “entire operation” that qualifies as an investment.’³⁸³ However, the tribunal still denied its jurisdiction on temporal grounds, alleging that, since the first legal confrontation over the ‘Final Award’ occurred before the entry into force of

³⁸⁰ ATA v. Jordan, para. 110.

³⁸¹ Art. 1.2(a) of the Jordan-Turkey BIT provided that: ‘the term “investment”, in conformity with the hosting Party’s laws and regulations, shall include every kind of asset in particular, but not exclusively:

- (i) shares, stocks or any other form of participation in companies
- (ii) returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment,
- (iii) movable and immovable property, as well as any other rights in rem such as mortgages, liens, pledges and any other similar rights,
- (iv) copyrights, industrial and intellectual property rights such as patents, licenses, industrial designs, technical processes as well as trademarks, goodwill, know-how and other similar rights,
- (v) business concessions conferred by law or by contract including concessions to search for, cultivate, extract or exploit natural resources on the territory of each Party as defined hereafter.’

³⁸² ATA v. Jordan, para. 112.

³⁸³ ATA v. Jordan, para. 115.

the Jordan-Turkey BIT, the dispute connected to the investment arose after its entry into force. Also this time the tribunal, on obscure grounds, rather than considering the existence of an investment at the time the Jordan-Turkey BIT entered into force, exclusively verified whether the dispute which resulted in the commercial award started before or after the BIT's coming into effect.

With respect to the second aspect (i.e., the extinguishment of the arbitration agreement), the tribunal considered whether there was an investment and, in case of a positive answer, whether the jurisdiction was barred *ratione temporis*.³⁸⁴

With regard to the first question, the tribunal first observed that the extinguishment of the arbitration agreement amounted to the extinguishment of the right to arbitration. The tribunal then noted, 'in [a] rather cursory manner',³⁸⁵ that the right to arbitration 'is a distinct "investment" within the meaning of the BIT because Article I(2)(a)(ii) defines an investment inter alia as "claims to [...] any other rights to legitimate performance having financial value related to an investment"' and that '[t]he right to arbitration could hardly be considered as something other than a "right [...] to legitimate performance having financial value related to an investment"'.³⁸⁶

With regard to the second question, the tribunal noted that the right to arbitrate ceased to exist upon the issuance of the decision of the Court of Cassation on 16 January 2007 (and not through the enactment of the JAL in 2001). Therefore, since the decision of the Court of Cassation occurred after the entry into force of the Jordan-Turkey BIT, the annulment of the arbitration clause fell within the competence of the tribunal because it was never in contention until the annulment.

Considerations

A few comments need to be made about this award. First of all, as illustrated, the tribunal denied its jurisdiction with respect to the decision concerning the

³⁸⁴ ATA v. Jordan, para. 116.

³⁸⁵ J.E. ALVAREZ, Crossing the "Public/Private" Divide: Saipem v. Bangladesh and Other Crossover Cases, *supra*, note 332, p. 414.

³⁸⁶ ATA v. Jordan, para. 117.

annulment of the award rendered by the Jordanian courts, due to the lack of *ratione temporis* jurisdiction. However, the line of reasoning used by the tribunal to come to such conclusion is based on an at least ‘arguable’ interpretation of the Jordan-Turkey BIT.

As a preliminary remark, it is worth noting that many investment treaties limit consent to arbitration to disputes arising after the treaty’s entry into force or, even more restrictively, to disputes based on factual circumstances arising after the treaty’s entry into force.³⁸⁷ However, this is not the case for the Jordan-Turkey BIT, which, as seen, contains no explicit temporal restrictions in the dispute settlement clause. The only temporal clause in the BIT is in Art. IX, which provides that the treaty ‘shall apply to investment existing at the time of entry into force as well as to investments or treaty acquired thereafter.’

Accordingly, the tribunal should have first analysed whether there was an investment for the purposes of the Jordan-Turkey BIT at the time of its entry into force and, in case an investment existed, accept its jurisdiction, both *ratione materiae* and *ratione temporis*, since the only temporal restriction related to ‘investments’ and not ‘disputes’ and, therefore, the Jordan-Turkey BIT covers any dispute as long as it is a dispute concerning investments existing at the time of entry into force.

On the contrary, the tribunal, in establishing its jurisdiction, focused on whether there was a dispute that arose after the entry into force of the Jordan-Turkey BIT.³⁸⁸ This approach was based, in my opinion, on a wrong

³⁸⁷ For an analysis of such treaties see S. BLANCHARD, State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration, Washington University Global Studies Law Review, Vol. 10, Issue 3, 2010, pp. 419-476, at p. 424 and following.

³⁸⁸ It was not the first case in which a tribunal made a similarly inaccurate use of precedents, disregarding the differences in the wordings of the relevant treaties. As noted by S. BLANCHARD, in State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration, *supra*, note 387, at pp. 451-452, in MCI v. Ecuador ‘[the] tribunal egregiously misapplied rules from prior decisions with complete disregard for differences in treaty language. Despite the absence of any temporal restriction in the BIT, the tribunal found not only that it did not have jurisdiction over pre-BIT *disputes*, but also that there was no jurisdiction relating to pre-BIT

interpretation of the treaty. The arbitrators, probably relying on the principle of non-retroactivity of treaties set out in Art. 28 of the Vienna Convention,³⁸⁹ believed that a specific provision was necessary in order to apply the jurisdictional clause of the Jordan-Turkey BIT retroactively to disputes arising before its entry into force. This approach however cannot be supported, since, as stated in various precedents, by using the word ‘disputes’ without any qualification in the jurisdictional clause of a BIT, the parties thereto intended to consent to jurisdiction over all disputes *existing* after the entry into force.³⁹⁰ The tribunal, in order to support this line of thought, referred instead to the *Lucchetti v. Peru* case,³⁹¹ completely disregarding the differences in the language of the respectively applicable treaties. Indeed, in the BIT applicable to that case, the consent to jurisdiction clause explicitly excluded jurisdiction over disputes that arose before the entry into force of the treaty³⁹² and, on this ground, the tribunal came to the conclusion that, since the relevant dispute

acts.’ With respect to the fact that tribunals should be careful in recalling precedents in case the wording of the BIT is (even slightly) different, see S.A. ALEXANDROV, On the Perceived Inconsistency in Investor-State Jurisprudence, in J.E. Alvarez ET AL. (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options*, Oxford Scholarship Online, 2011, pp. 61-70, at pp. 64-65.

³⁸⁹ Art. 28 of the Vienna Convention provides that: ‘[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.’

³⁹⁰ See, *inter alia*, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Interim Award, 1 December 2008 (“**Chevron Interim Award**”) (available at: <http://www.italaw.com/documents/Chevron-TexacovEcuadorInterimAward.pdf>), para. 267.

³⁹¹ *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005 (“**Lucchetti v. Peru**”) (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0275.pdf>).

³⁹² Art. 2 of the Convenio Entre El Gobierno de la Republica Del Peru y El Gobierno De La Republica De Chile Para la Promocion y Proteccion Reciproca de las Inversiones (available in Spanish at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/698>).

arose before the entry into force of the BIT, it had to deny its jurisdiction.³⁹³ Resting on that decision, the ATA v. Jordan tribunal established that since the dispute over the annulment of the award was indistinguishable from the original legal dispute between ATA and APC, it lacked jurisdiction *ratione temporis*, as the dispute arose in 2000, while the Jordan-Turkey BIT came into force in 2006.³⁹⁴

It goes without saying that if the tribunal had properly applied the BIT it may have come to a different solution as to its jurisdiction, admitting it on the basis of the fact that an investment existed when it entered into force. In fact, the tribunal, when considering the issue relating to the expropriation, seemed open to applying the line of reasoning used in the Saipem v. Bangladesh case.³⁹⁵ On the basis of that line of reasoning, the tribunal may have declared that it had jurisdiction *ratione temporis* over the claim as the investment existed at the time of the entry into force of the Jordan-Turkey BIT: indeed, the rights of the claimant under the award which crystallized the investment existed on 23 January 2006 when the Jordan-Turkey BIT came into force and, as already stated, such BIT applied to all investments existing at the time of its entry into force.³⁹⁶

³⁹³ It is also worth noting that, in any case, the approach adopted by the tribunal in *Lucchetti v. Peru* has been disregarded by subsequent tribunals that reached different outcomes on the same issue. *See*, for instance, *Jan de Nul v. Egypt*, para. 117. In this respect, *see* also J. DINGWALL, H. HAERI, *Jordan: ICSID Tribunal finds Jordan in Violation of its Investment Treaty Obligations*, *International Arbitration Law Review*, Vol. 13, Issue 4, 2010, pp. N-33-N-35, at p. N-34, that criticizes *ATA v. Jordan* because it follows *Lucchetti v. Peru*, rather than *Jan de Nul v. Egypt*. However, this consideration misses the point, as it does not consider that in *ATA v. Jordan* the wording of the Jordan-Turkey BIT does not bar on temporary grounds disputes arisen before its entrance into force.

³⁹⁴ Please however note that the *ATA v. Jordan* case may have relied on other cases adopting a different solution (*see, supra*, note 391).

³⁹⁵ However, it is not crystal clear whether the tribunal effectively adhered to the line of reasoning applied by the tribunal in the *Saipem Decision on Jurisdiction*.

³⁹⁶ In the *Chevron Interim Award*, the tribunal had to face an analogous issue in relation to a BIT, which contained the same provisions as the Jordan-Turkey BIT with respect to the definition of investment and the consent to jurisdiction. However, in that case the tribunal

A second element of interest of this decision is that, in the analysis of its subject matter jurisdiction with regard to the extinguishment of the arbitration agreement, the tribunal surprisingly adhered to the old-fashioned purely subjectivist approach: it merely considered the literal and plain meaning of the definition of the Jordan–Turkey BIT to determine whether there was an investment. And it is this approach that allowed the tribunal to determine that the right to arbitrate is an investment. The application of any other approach would probably have led to a different outcome. In any event, it must be noted that, by adopting a purely subjectivist approach, *ATA v. Jordan* sets out an interesting unprecedented declaration, according to which the right to arbitration is *per se* an investment. This represents the most extreme position so far taken by an arbitral tribunal in a cross-over case. However, in ICSID cases, this statement seems hardly replicable, unless the tribunal: (i) applies the subjectivist approach, which is quite obsolete and disused; and (ii) the definition of investment is broad enough to cover claims to money. To close, it must be noted that this tribunal, despite the criticism outlined above, reinforces the decision of the *Saipem v. Bangladesh* tribunal as to the liability of States that interfere with arbitral rights and lawfully obtained arbitral awards. Such liability would normally entitle an award creditor to initiate ICSID or other investment treaty arbitration.³⁹⁷

carried out a clear and extensively reasoned analysis, which should have been taken into consideration by the arbitrators in *ATA v. Jordan*.

³⁹⁷ This is also stated by L.A. MISTELIS, *Award as an Investment: The Value of an Arbitral Award of the Cost of Non-Enforcement*, *supra*, note 317, at p. 78. However, the author went on to specify that: '[i]t is also worth noting that both the *Saipem* and the *ATA* Tribunals consider an award 'as an aspect of the 'entire operation' for purposes of deciding whether there had been an investment for the purposes of the relevant treaty.' As already said in this section, I do not endorse this statement. The tribunal in this case referred to the *Saipem v. Bangladesh* concept of investment, but it did not use it to determine the existence of an investment.

5.4 Frontier v. Czech Republic

In 2010 another cross-over arbitral award was delivered,³⁹⁸ this time by a non-ICSID tribunal. It was the first time that, based on public available data, a non-ICSID tribunal ruled on the interference by national courts with the enforcement of an arbitral award after *Romak v. Ukraine*. However, in this case, the tribunal did not consider the *Romak v. Ukraine* precedent and instead, in deciding on its subject matter jurisdiction, relied exclusively on a literal interpretation of the applicable Canada-Czech Republic BIT.³⁹⁹

Facts

In August 2001, Frontier Petroleum Services Ltd. (“**Frontier**”), a Canadian company, made an investment in an aircraft production business in the Czech Republic, through a joint venture with a local partner, Moravan Aeroplanes, a.s. (“**MA**”), a company controlled by the State-owned entity Moravan s.a.. Under the joint venture agreement, Frontier agreed to finance the acquisition of the assets of LET a.s. (“**LET Assets**”), a State-owned aircraft manufacturing company, which were to be transferred to a joint venture project company (“**LZ**”), 49% owned by Frontier and 51% by MA.⁴⁰⁰

In August 2001, Frontier extended the loans and the LET Assets were duly purchased.⁴⁰¹ Further to the perfection of the acquisition, various fraudulent activities were conducted by MA with respect to the investment of Frontier in LZ, including the delivery to Frontier of fake share certificates and the amendment to LZ’s articles of association without the consent of Frontier.⁴⁰²

³⁹⁸ *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (available at: <http://www.italaw.com/cases/documents/517>) (“**Frontier v. Czech Republic**”).

³⁹⁹ Agreement Between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments, signed on 15 November 1990 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/60>) (“**Canada-Czech Republic BIT**”).

⁴⁰⁰ *Frontier v. Czech Republic*, para. 53.

⁴⁰¹ *Frontier v. Czech Republic*, paras. 54; 85.

⁴⁰² *Frontier v. Czech Republic*, para. 59.

In the meantime, in August 2002 Moravan s.a. was declared bankrupt and the LET Assets were included in the relevant bankruptcy estates.⁴⁰³ Further to the occurrence of these events, Frontier sought the assistance of various officials of the Czech government and initiated, *inter alia*, certain civil proceedings to protect its investment, also in light of the ongoing bankruptcy proceedings in respect of MA and LZ.⁴⁰⁴

Finally, on 23 July 2003, Frontier referred the dispute to arbitration in Stockholm under the auspices of the SCC pursuant to the dispute resolution clause of the joint venture agreement, alleging breaches of the joint venture agreement by MA and LZ, including: (i) failure to deliver 49% of LZ's shares to Frontier; and (ii) failure to reimburse the loan.⁴⁰⁵ On 30 December 2004, the Stockholm tribunal rendered its final award,⁴⁰⁶ ruling in Frontier's favour, but, before that, respectively in June and July 2004, the respondents in the arbitration were declared bankrupt in the Czech Republic.⁴⁰⁷

Frontier later sought recognition and enforcement of the Stockholm awards in the Czech Republic against the bankrupt respondents, but the Czech courts refused to enforce any of them. In particular, with respect to the final award, the municipal courts refused the enforcement, citing Article V(2)(b) (public policy) of the New York Convention, on the basis that such enforcement would be inconsistent with the Czech Republic's laws requiring equality of creditors in bankruptcy proceedings and the equitable and orderly distribution of assets.⁴⁰⁸

Frontier claimed that the Czech courts' wrongful refusal to enforce the awards amounted to a breach of the Canada-Czech Republic BIT, including fair and equitable treatment and full protection and security standards.

⁴⁰³ Frontier v. Czech Republic, para. 78.

⁴⁰⁴ Frontier v. Czech Republic, paras. 92-108.

⁴⁰⁵ Frontier v. Czech Republic, para. 107.

⁴⁰⁶ Notably, on 30 January 2004 the SCC issued an interim award, enjoining LZ and MA for improperly selling and disposing of the LET Assets acquired with the claimant's funds.

⁴⁰⁷ Frontier v. Czech Republic, para. 141.

⁴⁰⁸ Frontier v. Czech Republic, para. 172.

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On these grounds, by notice of arbitration dated 3 December 2007, Frontier commenced arbitration against the Czech Republic pursuant to the Canada-Czech Republic BIT, which provides for arbitration exclusively under the UNCITRAL Arbitration Rules.⁴⁰⁹

Also in this case the tribunal needed to first assess certain jurisdictional issues raised by the respondents, including the existence of an investment. Indeed, the tribunal's jurisdiction *ratione materiae* is limited to '[a]ny dispute [...] relating to the effects of a measure [...] on the management, use, enjoyment or disposal of an investment', where investment is defined according to the broad asset-based definition supplemented by a list of non-exhaustive examples of what an investment could consist of.⁴¹⁰

In liaising with this issue, the tribunal considered that the claimant made an original investment consisting of the payments made to MA, which '*were transformed into an entitlement to a first secured charge*'⁴¹¹ by means of the arbitral award of the Stockholm tribunal. The tribunal based its ruling on the definition of investment of the Canada-Czech Republic BIT and on the clarification set out in Art. 1(1) thereof which provides that '[a]ny change in the

⁴⁰⁹ Frontier v. Czech Republic, 178.

⁴¹⁰ More precisely, Art. 1(1) provides that: '[f]or the purpose of this Agreement:

(a) the term "investment" means any kind of asset held or invested either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:

(i) "movable and immovable property and any related property rights, such as mortgages, liens or pledges";

(ii) "shares, stock [...] or any other form of participation in a company, business enterprise or joint venture";

(iii) "claims to money, and claims to performance under contract having a financial value";

(iv) "intellectual property rights, including rights to [...] patents, trademarks as well as trade names, industrial designs, good will, trade secrets and know-how"; and

(v) "rights, conferred by law or under contract, to undertake economic and commercial activity".

Any change in the form of an investment does not affect its character as an investment.'

⁴¹¹ Frontier v. Czech Republic, para. 231 (emphasis added).

form of an investment does not affect its character of an investment.’ On these grounds, the tribunal accepted that by refusing to recognize and enforce the arbitration award, the respondent could be said to have affected the management, use, enjoyment or disposal by Frontier of ‘*what remained*’ of its original investment⁴¹² and therefore concluded that it had jurisdiction over the case.

Considerations

The part of the award concerning the subject matter jurisdiction is rather short: the tribunal liaised with it in a couple of pages, in which it expended more ink on the concept of measure than on that of investment.

However, despite being succinct, the decision on jurisdiction is dense in meaning. First of all, the tribunal implicitly took a position on the existence of outer limits to the concept of investment in non-ICSID tribunals. By non-consideration of the precedent *Romak v. Ukraine* and relying on the mere wording of the Canada-Czech Republic BIT, the tribunal refused to apply the ICSID jurisprudence to arbitration under the UNCITRAL Arbitration Rules. It stuck to the jurisprudence of non-ICSID tribunals and limited its analysis to the literal interpretation of the definition of investment set out in the applicable BIT.⁴¹³ It should however be noted that the *Romak v. Uzbekistan*’s lines of reasoning could have not been easily applied in this case, as the Canada-Czech Republic BIT did not provide for a dual option (ICSID and non-ICSID) jurisdiction and, as seen in section 5.2 of this Chapter, it was mainly the dual option jurisdiction clause provided in the Swiss-Uzbek BIT that allowed the *Romak v. Uzbekistan* tribunal to open the door to the Salini test.

Second, although the tribunal stuck to the literal interpretation of the definition of investment included in the Swiss-Uzbek BIT, it did not come to the conclusion that the arbitral award by itself is an investment. The tribunal, substantially in line with *Saipem v. Bangladesh*, preferred to state that the

⁴¹² *Frontier v. Czech Republic*, para. 231(emphasis added).

⁴¹³ It should be noted that the parties to the case did not raise the issue concerning the application of ICSID jurisprudence on outer limits, as happened in *Romak v. Uzbekistan*.

original transaction was an investment – which was easy to establish on the basis of the Canada-Czech Republic BIT – and that the arbitral award transformed such an investment into the claimant’s claim to money. The tribunal also clarified that, further to the transformation, there was no new investment, but the original investment remained with different features.

An explanation for this may be found in the fact that, differently from the Jordan-Turkey BIT applied in *ATA v. Jordan*, which included in the list of protected investments ‘[...] claims to money or any other rights to legitimate performance having financial value related to an investment’, the Canada-Czech Republic BIT referred to ‘claims to money, and claims to performance *under contract* having a financial value’, thus requiring that the claims to money arise out of a contract. A literal interpretation of this wording would have not let the tribunal say that the claims to money under the award represented an investment.

In any event, it must be noted that the Jordan-Turkey BIT contains a non-exhaustive list of investment and that, therefore, the tribunal may have well decided that an award was to be included within the meaning of investment thereunder, as it is included in the initial catch-all sentence which simply refers to ‘any kind of asset held or invested either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter’s laws [...]’.⁴¹⁴

Conclusively, the tribunal in *Frontier v. Czech Republic* applied the right principle, i.e. that ICSID’s jurisdictional requirements cannot apply to non-ICSID arbitration. However, this decision remains very fact-specific: only a BIT envisaging the possibility that an award can ‘transform’ itself without losing its nature can rely on this precedent.

⁴¹⁴ Jordan-Turkey BIT, art. I(A).

5.5 GEA v. Ukraine

In *GEA v. Ukraine*,⁴¹⁵ differently from *ATA v. Jordan*, the ICSID tribunal analysed in details the issue concerning its jurisdiction *ratione materiae*, expressly evaluating: (i) the approach to be followed in order to establish if there is an investment for the purposes of the ICSID Convention; and (ii) the possible qualification of an ICC award as an investment.

Even if the arbitration panel declined its jurisdiction, it still analysed the merits of the dispute finding that no breach of the BIT was made by the Ukrainian courts. This aspect will be better illustrated in Chapter IV below.

Facts

As to the facts, the commercial dispute arose out of a fuel conversion contract (“**Conversion Contract**” (as subsequently amended)) entered into in 1995 between a State-owned entity known as OJSC Oriana (“**Oriana**”) and GEA Group Aktiengesellschaft⁴¹⁶ (“**GEA**”).⁴¹⁷ Under the Conversion Contract, GEA undertook to supply naphtha fuel to Oriana, which, in turn, undertook to process it and return it to GEA in exchange for a tolling fee. Further to an incident in which a GEA’s inspector was shot in the kneecap, GEA alleged that material discrepancies were discovered between the quantity of raw materials shipped to Oriana and the quantity of finished products returned to GEA.⁴¹⁸

Further to such allegations, in 1998, the parties entered into a settlement agreement (“**Settlement Agreement**”) and a repayment agreement

⁴¹⁵ *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0356.pdf>) (“**GEA v. Ukraine**”).

⁴¹⁶ *GEA v. Ukraine*, paras. 44-45.

⁴¹⁷ For the ease of reference, hereinafter, reference will be generically made to GEA. However, for the sake of precision, it shall be highlighted that the Conversion Contract was originally entered into by Klöckner & Co Aktiengesellschaft, which, further to the acquisition by a subsidiary of GEA, changed its name into Solvadis International GmbH. Solvadis International GmbH then merged into Solvadis Chemag AG, which, on 28 June 2004, assigned all of its rights deriving from the business with Oriana to its controlling entity, MG Technologies AG, that in 2005 became GEA.

⁴¹⁸ *GEA v. Ukraine*, paras. 46-47.

(“**Repayment Agreement**”), whereby, *inter alia*, Oriana acknowledged its indebtedness to GEA and undertook to pay to GEA USD 27.6 million as compensation. Both agreements provided that any disputes arising therefrom would have been referred to arbitration under the ICC Rules in Vienna, Austria.⁴¹⁹

However, Oriana did not comply with its payment obligations towards GEA set out in the above-mentioned agreements in full and therefore GEA filed an ICC arbitration against Oriana.⁴²⁰ In 2002 the ICC tribunal rendered its award in favour of GEA setting out more than 30 million USD as primary compensation.⁴²¹

As Oriana did not voluntarily comply with the ICC award, in 2003 GEA sought recognition and enforcement of the ICC award in the Appellate Court of the Ivano-Frankivsk Region of Ukraine, but its application was rejected by the court, which found the repayment agreement to have been signed by unauthorized persons and thus invalid. GEA then filed a complaint with the Supreme Court of Ukraine, but also in this case without success. Alongside the enforcement proceedings, GEA attempted to claim under the ICC award in bankruptcy proceedings brought by a third party against Oriana. Here too, after a number of appeals, GEA was unsuccessful.⁴²²

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Having been frustrated in all of its attempts to obtain enforcement of the ICC award, on 24 October 2008 GEA filed an ICSID request for arbitration pursuant to Art. 13(2) of the Germany-Ukraine BIT⁴²³ for alleged

⁴¹⁹ GEA v. Ukraine, paras. 51-53.

⁴²⁰ GEA v. Ukraine, para. 57.

⁴²¹ GEA v. Ukraine, para. 62.

⁴²² GEA v. Ukraine, paras. 63-85.

⁴²³ Agreement Between the Federal Republic of Germany and Ukraine on the Promotion and Mutual Protection of Investments, signed on 15 February 1993 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1442>) (**Germany-Ukraine BIT**). The official language of the BIT is German. The English translations used in this work were retrieved from the GEA v. Ukraine award.

expropriation, and breaches of the following: full protection and security, fair and equitable treatment, arbitrary and discriminatory measures, national treatment and most favoured nation treatment obligations.

The ICSID tribunal was constituted in 2009 and rendered its final award in 2011. As normal, the first aspect that the arbitral tribunal considered was its jurisdiction over the case, including its subject matter jurisdiction, as the respondent, among other allegations,⁴²⁴ contested that GEA had never made an investment in Ukraine, while the latter deemed that the jurisdiction ought to be upheld as each of: (i) the Construction Contract, (ii) the Settlement Agreement and the Repayment Agreement, and (iii) the ICC award constituted an investment.

Before deepening into the analysis of each single instrument that according to GEA's reconstruction represented an investment, the tribunal acknowledged that ICSID tribunals have different views on the concept of investment, as, in some well-known cases, tribunals have articulated objective criteria for the definition of the term,⁴²⁵ while, in other (again well-known) cases, tribunals have adopted a more flexible approach.⁴²⁶ However, the arbitration panel, rather than opting for one of the two approaches, limited itself to state that 'this is a controversy that need not to be resolved', as either of the two approaches 'leads to the same conclusion with respect to each of the alleged "investments" in question.'⁴²⁷ Despite this statement, it should be noted that the tribunal, when making its evaluations on the alleged investments, applied

⁴²⁴ Ukraine also alleged that GEA did not have standing under the Convention and that the tribunal lacked *ratione temporis* jurisdiction.

⁴²⁵ GEA v. Ukraine, para. 139.

⁴²⁶ GEA v. Ukraine, para. 142.

⁴²⁷ GEA v. Ukraine, para. 143. As noted by J. FELLEBAUM, GEA v. Ukraine and the Battle of Treaty Interpretation Principles over the Salini Test, *Arbitration International*, Vol. 27, Issue 2, 2011, pp. 249-266, at p. 249: '[i]nstead of crafting an award that provides guidance on the critical question of interpretation [of Art. 25 of the Convention], the high calibre arbitral tribunal in the recent case of *Aktiengesellschaft v. Ukraine* ultimately sidestepped the controversy leading the distinguished arbitral tribunal away from what could have been a legally significant decision on this longstanding debate [i.e., the prevalence of the objectivist or of the typical features approach].'

the short-form Salini test (i.e., the Salini-less test), considering the elements of contribution, risk and duration.

The tribunal passed then to the analysis of the Conversion Contract.⁴²⁸ In line with its previous reconstruction on case law as to subject matter jurisdiction, the panel carried out the double-barred test, analysing whether the asset in discussion fitted the definition of the Germany-Ukraine BIT⁴²⁹ and the concept of investment under the Convention. With respect to the first aspect, the tribunal noted that the Conversion Contract squarely fell into the definition of investment of the Germany-Ukraine BIT, as, *inter alia*, ‘it confers “rights to the exercise of an economic activity”’.⁴³⁰ Turning to Art. 25 of the ICSID Convention, the tribunal had ‘no doubt that the Conversion Contract also meets this test.’⁴³¹ In particular, this contract satisfied all the elements of the objective definition of investment, as the claimant had provided a ‘*contribution* to Ukraine, during a certain *period of time*, while assuming the *risks* of the economic operation it was performing.’⁴³² In light of the above, the tribunal concluded

⁴²⁸ GEA v. Ukraine, para. 146.

⁴²⁹ The Germany-Ukraine BIT defines “investment” as follows: ‘For purposes of this agreement 1) the term “investments” means assets of any kind, in particular

a) movable and immovable property and other rights in rem such as mortgages and security interests;

b) equity interests and other stakes in companies;

c) claims to funds used to create material or immaterial values and claims to performances having such value;

d) intellectual property rights such as, in particular, copyrights, patents, utility models, industrial designs and models, trademarks, trade names, company and business secrets, technological processes, know-how and goodwill;

e) rights to the exercise of an economic activity including rights to the search for and the exploration, extraction and utilisation of natural resources on the basis of statutory provisions or granted under an agreement concluded in accordance with such statutory provisions.

Any change to the form in which assets are invested shall not affect their nature as investments.’

⁴³⁰ GEA v. Ukraine, para. 147.

⁴³¹ GEA v. Ukraine, para. 151.

⁴³² GEA v. Ukraine, para. 151.

that ‘with respect to the Conversion Contract [...] the Claimant made an “investment” in Ukraine, both within the meaning of Articles 1(1)(e) and 1(1)(a) of the BIT and (if needed) Article 25 of the ICSID Convention.’⁴³³

The tribunal then moved on to analyse the Settlement Agreement and the Repayment Agreement,⁴³⁴ in relation to which it found that they could not be considered, in and of themselves, as investments, either under the German-Ukraine BIT, or under the ICSID Convention, as these were ‘legal acts’ that could not be treated as identical to an actual investment in Ukraine. Specifically the tribunal concluded that the Settlement Agreement ‘merely established an inventory of undelivered goods and recorded the difference as a debt’, while the Repayment Agreement ‘merely established a means for the repayment’.⁴³⁵

The tribunal took a similar approach with respect to the last alleged investment, i.e., the ICC award. The tribunal first argued that the award is only a ‘legal instrument’,⁴³⁶ which provides for the disposition of rights and obligations arising out of the Settlement Agreement and the Repayment Agreement, which are not investments. Most importantly, the tribunal continued to state that ‘even if – *arguendo* – the Settlement Agreement and Repayment Agreement could somehow be characterized as “investments”, or the ICC Award could be characterized as directly arising out of the Conversion Contract [...], the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself.’⁴³⁷ To the tribunal, the ICC award was ‘analytically distinct’ from the underlying investment and involved ‘no contribution to, or relevant activity within, Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention.’⁴³⁸

⁴³³ GEA v. Ukraine, para. 153 (emphasis added).

⁴³⁴ GEA v. Ukraine, para. 154.

⁴³⁵ GEA v. Ukraine, para. 157.

⁴³⁶ GEA v. Ukraine, para. 161.

⁴³⁷ GEA v. Ukraine, para. 162.

⁴³⁸ GEA v. Ukraine, para. 162 (emphasis added).

Considerations

Of all the findings of the GEA v. Ukraine case on the existence of an investment, two are the most noteworthy here, namely: (i) the general approach adopted towards the concept of investment; and (ii) the tribunal's ruling on the ICC award.

As to the first aspect, the decision does not rely upon a hard distinction between the different approaches to the notion of investment for the purposes of the Convention, as in this specific case, according to the tribunal, any approach would have led to the same result. In fact, all of the elements identified as typical of (or essential to) an investment were matched by the Construction Contract, while none of them were met by the other alleged investments. However, it should be noted that the tribunal applied the Salini test in its reduced form, in other words considering only the hallmarks of contribution, duration and risk, as it believed that these were ‘the elements of the “objective definition” that are commonly applied under Article 25.’⁴³⁹ Maybe the tribunal would have reached a different conclusion had it applied the standard Salini test, which also requires a contribution to the host State’s development, or the Salini-plus test, which adds the elements of good faith and compliance with local laws. It should also be noted that the tribunal initially seemed to consider only the purely objectivist approach and the typical characteristics approach, by mentioning cases such as Phoenix v. Czech Republic and Biwater v. Tanzania. However, in the analysis of the Conversion Contract and of the award, the tribunal referred to Article 1(1) of the Germany-Ukraine BIT, *and (if needed)* Art. 25 of the ICSID Convention. By specifying ‘if needed’, the tribunal implicitly also considered the purely subjectivist approach, according to which only the BIT’s wording is relevant to establish the jurisdiction.⁴⁴⁰ This was probably due to the fact that the result of the analysis of the BIT’s wording with respect to each of the alleged

⁴³⁹ GEA v. Ukraine, para. 151.

⁴⁴⁰ This was also noted by J. FELLEBAUM, GEA v. Ukraine and the Battle of Treaty Interpretation Principles over the Salini Test, *supra*, note 427, at p. 262, who highlights how ‘[t]his raises the question whether a ‘double keyhole’ approach is necessary or appropriate and apparently contradicts the arbitral tribunal’s analysis above.’

investments was always confirmed by the application of the Salini test and vice-versa.

With respect to the second and most important aspect, it should be highlighted that the tribunal denied that the ICC award could represent an investment *per se* or a part thereof. For the tribunal, a commercial award is to be considered analytically different from the underlying transaction (i.e., in this case, the Convention Contract, the Settlement Agreement and the Repayment Agreement). Therefore, even if any of the operations on which the award ruled could qualify as an investment, the award would not be considered as part of that investment or as a toll by means of which the rights and obligations arising from the original investment are crystallized. In other words, for the tribunal an arbitral award does not represent the continuation or the transformation of an investment, not even in the case when the award concerns rights and obligations arising from an investment, as stated by most of the analysed precedent awards.

In my opinion this line of reasoning has to be welcomed.⁴⁴¹ As noted above, I find it difficult to accept that an investment also includes the subsequent award, which many tribunals have allowed.⁴⁴² While the award may arise out of a claim connected to the initial investment, it is logically and structurally different from it. The tribunal in this case clearly departed from *Saipem v. Bangladesh*, *Frontier v. Czech Republic* and *GEA v. Ukraine*, narrowing down the scope of ICSID's jurisdiction. In this respect, it is worth noting that the tribunal, in its arguments, explicitly mentioned the *Saipem v. Bangladesh* case. However, it limited itself to stating that in that case the tribunal 'made statements that are difficult to reconcile'⁴⁴³ and, therefore, it could not rely on it. By means of these words, *GEA v. Ukraine* seemed to say that, in order to

⁴⁴¹ By the way, other authors are more doubtful. *See* for instance S. FIETTA, J. UPCHER, *Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?*, *Arbitration International*, Vol. 29, Issue 2, 2013, pp. 187-221, at p. 203, that considers that 'the jurisdictional aspects of the GEA award [...] are open to debate'.

⁴⁴² *See, supra*, note 318.

⁴⁴³ *GEA v. Ukraine*, para. 163.

come to the conclusion that the award is part of the investment, the Saipem v. Bangladesh tribunal had to say everything and its opposite, as a logical argumentation could not lead to that result.

5.6 White v. India

White v. India⁴⁴⁴ represents the first time an award had been rendered against India in investment arbitration. The three arbitrators declared India to be in breach of its obligations towards the Australian investors, due to the conduct of its courts, which interfered with the enforcement of a commercial arbitral award. In addition, in jurisdiction, this case is relevant as the tribunal made some further contributions to the jurisprudence concerning the meaning of the term ‘investment’.

Facts

The origins of this decision can be traced back to 28 September 1989, when Coal India, a State-owned company, through its subsidiary Central Coalfields Ltd., entered into a contract with White Industries Australia Limited (“**White**”) for the supply of equipment with the primary objective of developing a coal mine at Piparwar, India (“**Contract**”). The Contract was governed by Indian law and contained an arbitration clause, pursuant to which all disputes were to be submitted to arbitration under the ICC Arbitration Rules. Under the Contract, White was to be paid approximately AUD 206.6 million in exchange for its services. In addition, the Contract provided that White was entitled to a bonus if production exceeded the target figure, but liable to a penalty if production was below the target figure.⁴⁴⁵

Disputes subsequently arose between Coal India and White as to whether White was entitled to the bonuses and/or whether Coal India was entitled to penalty payments. A number of other related technical disputes also arose,

⁴⁴⁴ *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>) (“**White v. India**”).

⁴⁴⁵ *White v. India*, paras. 3.2.13-3.2.21.

primarily concerning the quality of the washed and processed coal and the sampling process by which quality would be measured. More precisely, according to Coal India the quality of washed coal produced by the coal mine did not meet the contractual standard and for this reason it considered that a penalty was due under the Contract. Therefore, Coal India rejected White's demand for payment of a bonus and cashed a bank guarantee for AUD 2.77 million.⁴⁴⁶

In light of the above, on 28 June 1999, White filed a request of arbitration with ICC under the Contract.⁴⁴⁷ On 27 May 2002, the tribunal, in majority, rendered an award in favour of White, setting out that it was entitled to USD 4.08 million. However, the award issued by the tribunal was not the end but just the beginning of a long drawn litigation before the Indian courts.⁴⁴⁸

On 6 September 2002, Coal India applied to the High Court of Calcutta to have the award set aside. Shortly thereafter, on 11 September 2002, White applied for enforcement of the award in the Delhi High Court, not being aware of Coal India's application. Subsequently, in the first quarter of 2003, White's application to have Coal India's application rejected was dismissed by the Calcutta High Court. White appealed this decision of a single judge before the Division Bench of the Civil Appellate Division of the High Court at Calcutta at the end of 2003. This appeal was also dismissed, and against this White appealed to the Supreme Court of India in July 2004, following which the Delhi High Court stayed the enforcement proceedings.⁴⁴⁹ By 2010, the Supreme Court had not begun hearings on White's appeals.⁴⁵⁰

⁴⁴⁶ White v. India, para. 3.2.24.

⁴⁴⁷ White v. India, para. 3.2.29.

⁴⁴⁸ White v. India, para. 3.2.23.

⁴⁴⁹ White v. India, paras. 3.2.35-3.2.63.

⁴⁵⁰ For a detailed summary of the proceedings concerning the set-aside and the enforcement of the commercial award in India, see S. KACHWAHA, *The White Industries Australia Limited-India BIT Award: A Critical Assessment*, Arbitration International, Vol. 29, Issue 2, 2013, pp. 275-293, at pp. 277-281. The author highlights the reasons that, in his view, justify the delay (including interpretative questions on a new law on the setting aside and enforcement of the arbitral award) and how, in his opinion, White had not done everything it could to mitigate the delay of Indian courts.

Between the end of 2009 and the beginning of 2010, White wrote several letters to the Indian government claiming that the actions of Coal India and the Indian courts amounted to breaches of various provisions of the Australia-India BIT and asking the government to intervene and solve the matter, by coming to an amicable solution, as envisaged under the Australia-India BIT.⁴⁵¹ Since the government did not respond to White's letter in the six-month period envisaged under the Australia-India BIT, on 27 July 2010, White initiated the investment arbitration proceedings by way of filing a notice of arbitration.⁴⁵² In particular, White contested that India had expropriated its investment, failed to afford fair and equitable treatment by subjecting White to a denial of justice, frustrated its legitimate expectations, and failed to encourage and promote favourable conditions for investors from Australia. In addition, White contended that nine years for the enforcement of an international arbitral award in a country that is party to the New York Convention implied a breach of India's obligation to provide effective means of asserting claims and enforcing rights with respect to its investment.

The Investment Arbitration – The jurisdiction ratione materiae

Since, also in this case, the claimant's cause of action was based on non-enforcement of its ICC award, it was first necessary for the tribunal to establish whether the award constituted a protected investment under the Australia-India BIT. Were this not the case, White would have not been entitled to any protection, as they would not have met the subject matter jurisdiction of the tribunal.

⁴⁵¹ White v. India, para. 3.2.64. Art. 13(2) of the Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, signed on 26 February 1999 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/154>) (“**Australia-India BIT**”) provides that: ‘[i]f a dispute between the Contracting Parties cannot thus be settled within six months of one Contracting Party receiving a request in writing for such negotiations or consultations, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.’

⁴⁵² White v. India, para. 3.2.65.

In assessing its jurisdiction, the tribunal importantly agreed with White's reconstruction, according to which, since the tribunal was not established under the auspices of the ICSID Convention, there was no need to carry out the double-keyhole test. Rather, the tribunal should have simply relied on the definition of investment under the BIT.⁴⁵³ India, on the contrary, contested White's position, suggesting that the Salini test had to be fulfilled irrespective of whether the ICSID Convention applied, since the term investment had an inherent meaning, which the parties could not overtake.⁴⁵⁴ In this respect India contested that White's rights under the contract did not qualify as an investment under the Australia-India BIT, as they were merely rights *in personam*

⁴⁵³ According to Art. 1 (c) of the Australia-India BIT, ' "investment" means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and investment policies of that Contracting Party, and in particular, though not exclusively, includes:

(i) moveable and immovable property as well as other rights such as mortgages, liens, or pledges;

(ii) shares, stocks, bonds and debentures and any other form of participation in a company;

(iii) right to money or to any performance having a financial value, contractual or otherwise;

(iv) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to search for, extract and utilise oil and other minerals;

(v) activities associated with investments, such as the organization and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights'.

⁴⁵⁴ India based its position principally on the writing of Z. DOUGLAS, *The International Law of Investment Claims*, *supra*, note 357, whereby it is stated that there is a test to identify the existence of an investment, which is applicable in all investment treaty claims, regardless of whether they are brought under the ICSID Convention, the UNCITRAL or any other rules of arbitration. More precisely, the author – in his 'Rules' 22 and 23 – identified certain legal and economic characteristics that an investment must always have to qualify as such. The tribunal dismissed these allegations on the basis that the Australia-India BIT's definition of investment 'simply does not provide that the investment [...] must have Douglas' economic characteristics' (White v. India, para. 7.3.8).

without any proprietary foundation.⁴⁵⁵ In addition, according to India's reconstruction, White did not prove the existence of an investment under the Convention, as it lacked the elements of the Salini test. The tribunal, as mentioned above, dismissed India's position and analysed exclusively the definition of investment under the Australia-India BIT, which covered 'every kind of assets', including '(ii) right to money [...], contractual right or otherwise', looking at its plain and ordinary meaning, in light of its purpose and objective. Based on that wording and on the fact that the Australia-India BIT did not limit its terms to rights in rem or to those investments having certain economic features, it found that White's rights under the contract constituted a protected investment and upheld jurisdiction on that basis. The tribunal also took a position on the Salini test, arguing that it applies only to ICSID cases. It is however worth noting that the tribunal evidenced that, even if the Salini test had been applied, White would have nevertheless showed that an investment had been made.⁴⁵⁶

The tribunal also accepted the claimant's contention that its rights under the arbitral award, while not an investment *per se*, were part of its original investment.⁴⁵⁷ By doing that, the tribunal agreed with the *Saipem v. Bangladesh* Decision on Jurisdiction that commercial awards crystallise the parties' original contract rights and 'as such are subject to the protection as is afforded under the BIT.'⁴⁵⁸ In deciding on the matter, the tribunal also considered *GEA v. Ukraine*, which was cited by the respondent to support its argument that the award and the underlying investment are different and the former is not covered under the BIT. In this respect, the tribunal first noted that the position

⁴⁵⁵ India, always on the basis of Douglas' writings (*see, supra*, note 454), contested that White's rights under the Contract cannot be considered as investment because they do not satisfy the meaning of investment under the Australia-India BIT, as they are merely rights *in personam* without any proprietary foundation.

⁴⁵⁶ *White v. India*, paras. 7.4.9-7.4.10.

⁴⁵⁷ *White v. India*, paras. 7.6.2-7.6.3.

⁴⁵⁸ *White v. India*, para. 7.6.10.

of the tribunal was only an *obiter dictum*,⁴⁵⁹ and went on to state that ‘the conclusion expressed by the GEA tribunal represents an incorrect departure from the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning ‘investments’ made by ‘investors’ under BITs represent a continuation or transformation of the original investment.’⁴⁶⁰ Finally, the tribunal referred to a recent case where it was stated that: ‘[o]nce an investment is established, it continues to exist and be protected until its ultimate disposal has been completed.’⁴⁶¹

Considerations

This case reflects a notable return to the broad approach to the protection of rights arising out of commercial arbitration set out in *Saipem v. Bangladesh*. In fact, the UNCITRAL award confirms that commercial award rulings on rights arising from an investment benefit from the protection of the applicable investment treaties. It is worth noting that the tribunal, also in this case, did not state that an award represents an investment in and of itself. The tribunal first considered the contract and, once it found that it represented an investment, it found it easy to state that the commercial award was the continuation of the initial investment.⁴⁶²

This line of reasoning is in contrast with *GEA v. Ukraine* which took the opposite approach, denying that an arbitral award can be considered an

⁴⁵⁹ As noted by S. KACHWAHA, *The White Industries Australia Limited-India BIT Award: A Critical Assessment*, *supra*, note 450, pp. 275-293, at p. 283, it is not correct to qualify that paragraph as an *obiter dictum*; rather it is a judicial *dictum*, as it is not a passing remark, nor does it pertain to a collateral matter.

⁴⁶⁰ *White v. India*, para. 7.6.8 (emphasis added).

⁴⁶¹ *Chevron Interim Award*, para. 185, referring to *Mondev v. US*, para. 81. These cases did not involve domestic courts interfering with commercial arbitration. In any event, they established certain principles that are important for further development of jurisprudence on this topic (and in particular with respect to the application of the obligation to provide ‘effective means’ of enforcing rights, which will be better described in Chapter III).

⁴⁶² See I. KALNINA, *White Industries v. The Republic of India: A Tale of Treaty Shopping and Second Chances*, in *Transnational Dispute Management*, Vol. 9, Issue 4, 2012, pp. 1-8, at p. 4.

investment, and keeping it analytically separate from the underlying transaction (which may well be an investment). The *White v. India* tribunal expressly departed from that precedent, stating that it was contrary to the *developing jurisprudence on the treatment of arbitral awards*.

As already mentioned in my previous comments, I find it a little too far-reaching to say that a commercial award is the continuation of an investment made years ago, only because it ruled on that investment. However, this can be considered a pragmatic solution to ensure protection to an aggrieved award winner. Still, in non-ICSID cases, it would be easier to take a more straightforward approach: if from the wording of the BIT it is possible to qualify the award as an investment *per se*, the tribunal should follow that path and consider the award in and of itself rather than as the continuation/crystallisation of the original investment. Nevertheless, acting this way, if the BIT has a more restrictive language, there is a risk that the tribunal cannot give the award creditor access to jurisdiction. Considering the overall transaction makes it easier for the investment tribunal to uphold jurisdiction.

My final consideration goes to the fact that the tribunal distinguished the *Romak v. Uzbekistan* award. As already stated above, *White v. India*'s line of thought is to be considered more correct because in non-ICSID arbitration the only relevant parameter to establish one tribunal's jurisdiction should be the wording of the BIT. Adding supplementary requirements through arbitral practice may only create confusion for investors and States.⁴⁶³ It should also be noted that, even if the tribunal did not analyse this point and simply rejected *Romak v. Uzbekistan*'s position, in this case, different to the previous one, the applicable BIT did not provide for ICSID and non-ICSID alternative fora. Therefore, the application of *Romak v. Uzbekistan*'s lines of reasoning would probably not have been possible.⁴⁶⁴

⁴⁶³ For more on the topic, *see* sections 4 and 5 of this Chapter II.

⁴⁶⁴ For more on the topic, *see* section 4 of this Chapter II. As a general remark, it should be noted that all the Relevant Cases are very fact-specific and, therefore, their value as precedents could sometimes be limited. On this point, with respect to the *White v. India* case, *see* P. NACIMIENTO, S. LANGE, *White Industries Australia Limited v The Republic of India*, *ICSID Review*, Vol. 27, Issue 2, 2012, pp. 274-280, at p. 279.

6. Conclusions

From the analysis of the Relevant Cases, it is possible to draw some conclusions as to the access to investor-State justice for an aggrieved creditor whose award and/or arbitral agreement has/have been wrongfully set aside or non-enforced by the courts of the State hosting the original investment.

First of all, none of the Relevant Cases stands for the proposition that an arbitral award *per se* constitutes an investment for the purposes of a BIT or the ICSID Convention.

The case where the tribunal pushed itself more forward in this respect is *ATA v. Jordan*, whereby the arbitrators recognised that the arbitration agreement in itself represented an investment. However, this case does not seem a precedent on which an investor can easily rely on, mainly for a couple of reasons: (i) the ICSID tribunal did not consider the additional jurisdictional *ratione materiae* requirement set out in Art. 25(1) of the Convention and simply based its decision on the plain literal meaning of the definition of investment included in the applicable BIT, thus adhering to the nowadays neglected ‘subjectivist’ approach; and (ii) the Turkey-Jordan BIT’s definition of investment was drafted in a very broad manner, according to the asset-based formula, and included among the illustrative examples of what may constitute an investment ‘claims to money and any other right to legitimate performance having financial value related to an investment’, while many more modern BITs are drafted with less broad wordings.⁴⁶⁵

However, even if none of the tribunals expressly recognised the award as an investment *per se*, in four out of the six Relevant Cases the jurisdiction *ratione materiae* accepted letting the aggrieved investor access investor-State arbitration. In analysing the reasoning behind such decisions, I think that a distinction should be made between ICSID and non-ICSID Relevant Cases, as, *in principle*,⁴⁶⁶ the jurisdictional requirements are different.

⁴⁶⁵ For more on the topic, *see* section 2 of this Chapter II.

⁴⁶⁶ Indeed, in *ATA v. Jordan*, the tribunal, by means of the application of the subjectivist approach, substantially erased the subject matter gateway condition set out in Art. 25(1) of

In *Saipem v. Bangladesh*, which can be considered as the trailblazer of cross-over arbitration, the tribunal granted Saipem access to the ICSID's jurisdiction, considering the entire economic operation out of which the arbitral award resulted. The entire operation, according to the tribunal, started with the construction contract and ended at the award, which crystallized the rights and obligations arising from the original contract. In applying the Salini test to establish its jurisdiction, the tribunal basically referred exclusively to the features of the transaction underlying the commercial award (i.e., the construction activity) that resulted in it being an investment. The ICC award was, therefore, part of Saipem's investment. This decision suggests that access to ICSID jurisdiction can be obtained only and at the times when the transaction upon which the commercial award ruled is an investment for the purposes of the Convention and the applicable BIT.

It is worth noting that the tribunal in this case applied the Salini test to establish the existence of an investment, probably as it was rather sure of the outcome of the analysis and to exempt itself from any criticism that a more flexible approach may have brought. Notably, the tribunal applied the objectivist approach *de plano* without giving any explanation about the choice. In this situation, the statement made in the *MHS v. Malaysia Award on Jurisdiction*, according to which the differences between the objectivist and the holistic approach are more academic than real, seems to reflect the truth. This is because a tribunal will embrace the objectivist approach if, on the basis of the factual situation, it is possible to find the occurrence of all the hallmarks, while on the contrary, if the facts show that one or more of the hallmarks are missing, the tribunal will opt for the typical characteristics approach.⁴⁶⁷

the Convention; while *Romak v. Uzbekistan* applied to a non-ICSID case the Salini test to establish the existence of an investment.

⁴⁶⁷ As stated, *supra*, in note 159, I do not agree in principle with the mentioned *MHS v. Malaysia Award on Jurisdiction's* statements, since, as described in section 3.1 of this Chapter II, tribunals denied their jurisdiction further to the application of the Salini test. Still, it can be argued that in all cases when the existence of an investment is well proven, tribunals may prefer to apply the strictest test to avoid any criticisms.

Despite the tendency to associate the approach adopted in *Saipem v. Bangladesh* and the one in *ATA v. Jordan*, I do not see many similarities between these two cases. Indeed, in *ATA v. Jordan*, the tribunal recalled the *Saipem v. Bangladesh* case to verify whether it had jurisdiction over the annulment of the commercial award, but then it declined the jurisdiction on temporal grounds. On the other side, as already mentioned in this section, the panel accepted its jurisdiction with respect to the wrongful annulment of the arbitration agreement considering the arbitration agreement as a protected investment *per se*, through the application of the subjectivist approach.

Moving on to the analysis of the non-ICSID Relevant Cases, in which jurisdiction was accepted, the first case to mention is *Frontier v. Czech Republic*, where the tribunal substantially aligned with *Saipem v. Bangladesh*'s line of reasoning, considering not the award *per se*, but rather the overall operation carried out by the investor. However, differently from *Saipem v. Bangladesh*, the UNCITRAL tribunal did not have to consider the gateway conditions set out by the Convention and simply relied on the wording of the BIT, according to which '[a]ny change in the form of an investment does not affect its character as an investment'. On that basis, the panel ruled that *Frontier* made an investment by way of, *inter alia*, the loans granted to a JV company incorporated in the Czech Republic, which was transformed into an entitlement of a first security charge by means of the commercial arbitral award.

Also in *White v. India*, the most recent of the Relevant Cases, the tribunal considered, in line with *Saipem v. Bangladesh*, that the award was part of the overall transaction made by the investor and that, through it, the rights of the investor arising from the original investment had been crystallised. Interestingly, in this case, the tribunal identified a *developing jurisprudence*, pursuant to which awards made by tribunals arising from investments represent a continuation or a transformation of the original investment and therefore are capable of being protected under the applicable investment treaty.

In both the above-mentioned cases, the tribunal, in assessing its jurisdiction, exclusively considered the wording of the applicable BIT, without importing the jurisdictional threshold developed by ICSID tribunals, as on the contrary

Romak v. Uzbekistan did.⁴⁶⁸ Indeed, in Romak v. Uzbekistan, the tribunal denied its jurisdiction beyond the controversial application of the Salini test to the operation underlying the commercial award. Being an UNCITRAL case, the tribunal could have simply relied on the very broad wording of the BIT and accepted its jurisdiction taking into consideration either the award *per se* or the entire transaction. Bringing the Salini test into play has been perceived by commentators as a stratagem used by the arbitrators to deny their jurisdiction, as they were not ready to either review the host State's courts behaviour or judge over a mere commercial dispute. However, it must be noted that also in this case the tribunal followed the path traced by Saipem v. Bangladesh. Indeed, rather than considering the commercial award *per se*, the tribunal scrutinized the overall transaction performed by the claimant to assess its jurisdiction, as, in its opinion, the award was inextricably linked to the supply agreement from which the dispute arose, and it merely constituted the embodiment or crystallization of Romak's legal position thereunder. Since the underlying commercial transaction did not pass the Salini test, the tribunal denied its jurisdiction. Notably, the result of the analysis would have been different had the underlying transaction qualified as an investment on the basis of the Salini test.

In light of the above, it is possible to recognize a trend, pursuant to which tribunals are willing to accept their jurisdiction to review acts of the judicial body of a State that interfered with the recognition and enforcement of a commercial award or arbitration agreement. This is probably based more on a 'sense of justice', rather than on purely legal grounds, as none of the tribunals, including non-ICSID tribunals, whose gateway conditions are less narrow, dared to say that an award by itself represents an investment that can be protected under the Convention/applicable BITs. Rather, the tribunals worked on the concept of investment as to broaden its boundaries in order to include commercial awards and the rights arising therefrom in the overall transaction, which began with an investment. As noted by the tribunal in White v. India, it

⁴⁶⁸ Even if the tribunal stated that, if the Salini test was to be applied, the overall transaction would have passed it.

is possible to assist in ‘developing jurisprudence on the treatment of arbitral awards to the effect that *awards made by tribunals arising out of disputes concerning ‘investments’ [...] represent a continuation of transformation of the original investment*’.⁴⁶⁹

However, while this approach is probably necessary in the context of ICSID arbitration, whereby it is commonly agreed that there are outer limits to the concept of investment and an award would hardly fall within those limits *per se*, in my opinion it is not strictly necessary in non-ICSID arbitration. As already stated, in that context, the arbitrators should base their jurisdiction exclusively on the will of the contracting States, as reflected in the wording of the applicable investment treaty. Therefore, if the parties drafted the treaty in such a broad manner as to include awards in the concept of investment, the arbitrators should simply state that, pursuant to the language of the treaty and the relevant definition of investment, they have subject matter jurisdiction.

In this respect, it is however worth noting that, as described in more detail in section 2 of this Chapter, most recent investment treaties narrowed down the definition of investment in a number of ways and, as a consequence, it will become more and more difficult to consider the award as an investment *per se* even in non-ICSID arbitration. Taking into consideration the global transaction and include the award therein may be a solution to overcome this problem.

Nevertheless, it must be noted that not all tribunals accepted considering the award included in the transaction underlying the award itself. This was the case in *GEA v. Ukraine*, where the tribunal deemed the award analytically distinct from the underlying investment and, therefore, applied the Salini test first to the Conversion Contract, and found the existence of an investment, and then to the award, when it found that none of the hallmarks of the test were met.⁴⁷⁰

Notably, the tribunal took an express position with regard to the *Saipem v. Bangladesh* case, stating that it could not be considered as a precedent as it could be read in three different ways: as suggesting that the commercial arbitration was part of a cognizable investment, as suggesting that the award is

⁴⁶⁹ *White v. India*, para. 7.6.8.

⁴⁷⁰ For a more precise reconstruction of the tribunal’s lines of thought, *see* section 5.5 of this Chapter II.

not part of an investment, and as concluding that it is unnecessary to determine the precise status of the award. Probably, this position is due to the complex reconstruction made in *Saipem v. Bangladesh* as to whether the dispute before the tribunal arose directly out of an investment.⁴⁷¹ Personally, I do not agree with this statement: in *Saipem v. Bangladesh*, the tribunal considered the overall transaction and performed a consistent analysis under the Convention and the BIT, never coming to the conclusion that a commercial award is by and in itself an investment. More likely, the *GEA v. Ukraine* panel simply did not agree that the overall investment could be extended in such a way to include the award that logically and temporally came into existence at a moment when the underlying investment had ceased to continue. Both lines of reasoning are acceptable, though from a more rigorous logical perspective my preference is for the *GEA v. Ukraine* one. But this is, evidently, only my opinion, since as seen in this Chapter, *Saipem v. Bangladesh*'s line of reasoning seems to prevail in today's jurisprudence, probably also on the grounds that it is the only interpretation which allows the aggrieved award creditor to access the investor-State jurisdiction.

A last aspect concerning the access to investment arbitration deserves to be mentioned, as it may have an impact on the possibility for the prejudiced award creditors to seek justice before investor-State tribunals. This aspect regards the condition that the investment must be located in the territory of a contracting State (obviously different from the one in which the investor is a national). Many bilateral and multilateral investment treaties⁴⁷² expressly contain such a

⁴⁷¹ Also of this view is J.E. ALVAREZ, *Crossing the "Public/Private" Divide: Saipem v. Bangladesh and Other Crossover Cases*, *supra*, note 332, at p. 417, footnote 76.

⁴⁷² See, for instance, Art. 1101(1)(b) of the NAFTA which states that: '[t]his Chapter applies to measures adopted or maintained by a Party relating to: [...] (b) investments of investors of another Party *in the territory* of the Party existing at the date of entry into force of this Agreement as well as to investments made or acquired thereafter by such investors [...]' (emphasis added), or Art. 1 of the 2008 German Model BIT (*supra*, note 132). The territorial requirement may be included in the consent to jurisdiction clause, rather than in the definition of investment, as in the case of Art. 26(1) of the ECT, which provides that: '[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an *Investment of the latter in the Area of the former*, which concern an alleged breach

requirement in their definition of investment. These treaties explicitly limit their territorial application to investments made within the relevant State. According to certain authors,⁴⁷³ even if this condition is not explicitly mentioned, as in the cases of the ICSID Convention, it should still operate implicitly, as it is by itself included in the notion of an investment. Still, the majority of scholarly writings seem to be of the opposite view.⁴⁷⁴ In any event, the condition of territoriality, whether it is an explicit, or possibly implicit, restriction may be particularly relevant as its application entails the impossibility for the frustrated award creditor to bring a claim against the State whose courts wrongfully interfered with the enforcement of its award, unless such State coincides with the one where the original investment was made. The question was not addressed in the Relevant Cases, whereby jurisdiction was accepted probably because the decision dealt with the jurisdiction of the place where the debtor was domiciled and in which the investment had the closest link. However, investment treaty protection may not be available when it comes to the enforcement of the award in other countries.

An example may better explain this point: an investor that has made an investment in the territory of State 'X' initiates an arbitration proceeding against an enterprise national of State 'Y', and the seat of arbitration is agreed to be in State 'Z'. The investor wins the arbitration proceeding, but the courts of State 'Z' wrongfully annul the arbitral award, or the courts of a State 'K' abusively deny its enforcement on spurious public policy reasons. In these scenarios, the internationally wrongful act is committed by a State that is not the same as the State in which the investor made the most of its investment.

If the award is not considered by itself as an investment, but a crystallisation of the previous original operation, as prevailing precedents seem to suggest, there

of an obligation of the former under Part III shall, if possible, be settled amicably' (emphasis added).

⁴⁷³ See, *inter alia*, M. WAIBEL, Investment Arbitration: Jurisdiction and Admissibility, Legal Studies Research Paper Series, Paper No. 9/2014, University of Cambridge, 2014, at p. 38.

⁴⁷⁴ See for all C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, The ICSID Convention: A Commentary, *supra*, note 23, at p. 198, according to which: '[n]o such additional requirement should be read into the ICSID Convention.'

is the risk that the aggrieved award creditor cannot bring any direct claim against the State that denied enforcement to its award, if the territoriality condition applies. Indeed, in such a case the investment is constituted not by a single activity but by a number of activities that collectively make it. Thus, it needs to be determined at what point sufficient activity has taken place in the host country to meet the territoriality requirement. The existing case law does not come with a conclusive answer on this issue.⁴⁷⁵ However, on the basis of the few cases that considered the question,⁴⁷⁶ it seems that the operation in the entirety should be decisive, not whether a particular aspect of it is performed inside or outside the territory of the host State. In this line of reasoning, it seems plausible that if an arbitral award is rendered in a State different from the one where the underlying transaction was performed (State Z, using the terms of the example made above), and then the State (State Y) where such a transaction was on the whole made denies the enforcement, there should be no issues, since the territoriality requirement is respected. But, if on the contrary, it is the third State (State Z or State K) which, for any reason whatsoever, interferes with the enforcement of the arbitral agreement or with the award, the investor would not have much to claim, as the main part of the investment was not located in that State, but exclusively a very limited portion thereof. In such a case, the tribunal should deny its jurisdiction and the award creditor would not be granted with any protection.⁴⁷⁷

⁴⁷⁵ C. KNAHR, Investment ‘in the Territory of the Host State’, in C. BINDER ET AL., *International Investment Law for the 21st Century: Essays in Honour of Cristoph Schreuer*, Oxford Scholarship Online, September 2009, pp. 42-53.

⁴⁷⁶ *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0782.pdf>) (“**SGS v. Philippines**”), which referred to the *CSOB v. Slovakia* case.

⁴⁷⁷ See S. BALTHASAR, *White Industries v India: redefining the interface between commercial and investment arbitration?*, *International Journal of Arbitration, Mediation and Dispute Management*, Vol. 78, Issue 4, 2012, pp. 395-400, at p. 398; and G. KAUFMANN-KOHLER, *Commercial Arbitration Before International Courts and Tribunals: Reviewing Abusive Conduct of Domestic Court*, *Arbitration International*, Vol. 29, Issue 2, 2013, pp. 153-173, at p. 167.

CHAPTER III – CAUSES OF ACTION

1. Introduction

In light of the analysis conducted in Chapter II, it can be seen that investment tribunals may consider commercial awards as part of an investment. Therefore, an aggrieved investor whose award has been non-enforced or set aside on specious grounds⁴⁷⁸ may have access to investor-State arbitration to seek protection in case of misconduct of the courts of the State, subject to the occurrence of the conditions identified in Chapter II.⁴⁷⁹ The point is now to understand under which circumstances a State can be held liable for its national courts not having recognised and enforced or having set aside on arbitrary or parochial grounds⁴⁸⁰ a commercial arbitral award made by an arbitral tribunal set up on the basis of an investment agreement.

In this respect, it should be preliminarily noted that it is an established principle of international law that the acts of a State's courts are attributable⁴⁸¹ to that State for the purposes of engaging a State's responsibility.⁴⁸² It is not relevant whether the judiciary is independent of other governmental organs and there is no need for governmental or other intervention in order for the wrongful acts of the judiciary to be attributable to the State.⁴⁸³

⁴⁷⁸ The same issue concerns the non-recognition and/or set-aside of arbitration agreements.

⁴⁷⁹ See, Chapter II, *passim*, and, for a summary thereof, section 6 thereof.

⁴⁸⁰ Any time reference made to non-enforcement or arbitral awards shall also be deemed to be made to the issue of non-recognition of arbitration agreements.

⁴⁸¹ Attribution is a legal operation by which the conduct of a range of domestic law entities is treated as conduct of an international law entity, the State. This definition is provided by J. CRAWFORD, *Treaty and Contract in Investment Arbitration*, *Arbitration International*, Vol. 24, No. 3, 2008, pp. 351-374, at p. 356.

⁴⁸² For an analysis of the cases where this principle was established, see, *inter alia*, S. FIETTA, J. UPCHEER, *Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?*, *supra*, note 441, 2013, pp. 187-221, at p. 192.

⁴⁸³ S. FIETTA, J. UPCHEER, *Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?*, *supra*, note 441, at p. 192; and C.

This principle of customary international law⁴⁸⁴ is codified in Article 4(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts whereby it is stated 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.'⁴⁸⁵

Thus, a State may be judged by investment arbitral tribunals according to the international standards for the acts and omissions of its courts, since their transgressions of international law are attributable to the relevant States. With specific respect to international arbitration, the liability of the State for the undue disruption of arbitration proceedings caused by its national courts has been supported in recent times by Judge Schwebel, according to whom: '[...] when a domestic court, an organ of the State in the eyes of international law, blocks access to arbitration through issuance of an anti-suit injunction, that too constitutes a denial of justice for which the state of which the court is part (whether or not the judicial branch be independent) is internationally responsible'.⁴⁸⁶

LIEBSCHER, Monitoring of Domestic Courts in BIT Arbitration: a Brief Inventory of Some Issues, in C. BINDER ET AL. (eds.), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, pp. 105-128, at pp. 105-106.

⁴⁸⁴ S. SATTAR, *International Arbitration and Judicial Interference: Progressive Development of International Investment Law or a Threat to Its Legitimacy?*, *Asian International Arbitration Journal*, Vol. 9, Issue 2, 2013, pp. 63-77, at p. 64.

⁴⁸⁵ Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10) (available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

⁴⁸⁶ S. SCHWEBEL, *Anti-Suit Injunctions in International Arbitration: An Overview*, in E. GAILLARD (ed.), *Anti-Suit Injunctions In International Arbitrations*, Juris Publishing, 2005, pp. 12-13. This view is also supported by other doctrinal writings (*see*, among others, S. SATTAR, *International Arbitration and Judicial Interference: Progressive Development of International Investment Law or a Threat to Its Legitimacy?*, *supra*, note 484, at pp. 65-66 for an outline).

Indeed, as already noted in Chapter I,⁴⁸⁷ arbitration tribunals and national courts, despite being very different, are inseparable.⁴⁸⁸ However, a court's intervention should not take the form of an unjustified interference with the arbitration proceeding, which may occur when local courts do not exercise their powers legitimately and/or misuse their powers for ulterior motives. In case of such behaviours, the acts and/or omissions of the judiciary can entail an international liability of the relevant State.

Still, while it is firmly established that the acts of the judiciary can in principle engage the responsibility of the State, it is clear that public international law should not provide for a right of appeal against such decisions. In light of the above, international courts and tribunals have traditionally been reluctant to scrutinize the decisions of domestic courts and also in recent times have shown a certain level of deference towards municipal decisions.⁴⁸⁹

With respect to the sources of a State's liability for acts of the judiciary, being the municipal courts in charge of the administration of justice, their failure to respect international law has traditionally been considered within the ambit of denial of justice, which represents a fundamental part of customary international law on the treatment of aliens and is usually included in the

⁴⁸⁷ See Chapter I, section 3.

⁴⁸⁸ W.M. REISMAN, B. RICHARDSON, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, in A. JAN VAN DEN BERG (ed.), *Arbitration – The Next Fifty Years. 50th Anniversary Conference*, Geneva, 2011, ICCA Congress Series No. 16, 2012, pp. 17-65, at p. 18. Along the same lines see also N. BLACKABY, C. PARTASIDES, A. REDFERN, M. HUNTER, *Redfern and Hunter on International Arbitration* (5th Edition), Oxford University Press, 2009, at p. 439, where it states that: 'national courts could exist without arbitration, but arbitration could not exist without the courts'. As illustrated in Chapter I, section 3, the role of national courts is scaled down by supporters of the so-called delocalization theory. Anyway, also pursuant to this line of thought, national courts are involved in the recognition and enforcement of arbitral awards.

⁴⁸⁹ See, for instance, among the Relevant Cases, *Frontier v. Czech Republic* in section 7 of this Chapter III. Please also note that, in *Government of the Kaliningrad Region v. Republic of Lithuania* (*infra*, note 788), the tribunal declined its jurisdiction, stating that acting otherwise would have implied that the panel would have to act as an appellate body with respect to the domestic courts' decisions applying the New York Convention.

notion of fair and equitable treatment (“**FET**”). Broadly speaking, according to this doctrine a State is internationally responsible if it administers its system of justice to foreigners in an unfair, arbitrary and/or discriminatory manner.⁴⁹⁰

Importantly, however, denial of justice is not the only means by which the conduct of the domestic courts can entail the State’s responsibility at international level. In fact, in more recent times, ‘the claims that most naturally take the form of denial of justice are being diverted into the other main branches of investment law: expropriation, effective means and unfair treatment more generally.’⁴⁹¹ Each of these causes of action has different meanings and thresholds that will be more extensively analysed in the following sections of this Chapter.

Of course, the possibility to bring an investment treaty claim against the State’s courts that acted wrongfully and the choice of the claims to be raised rest upon the provisions of the applicable investment treaty and, in particular, the set of the protected entitlements subject to the relevant dispute settlement mechanism.⁴⁹²

In this Chapter, I will first introduce the causes of actions (i.e., the treaty standards) invoked in the Relevant Cases by the challenging investors. In this respect, by way of clarification, it should be noted that it is not the purpose of this work to discuss the content of the treaty standards exhaustively; I will rather outline the main principles that are necessary to understand the focal arguments of this work. I will then consider how the investment tribunals have dealt with them in the Relevant Cases. I will finally analyse if and how a

⁴⁹⁰ For more, *see* section 2 of this Chapter III.

⁴⁹¹ M.D. GOLDHABER, *The Rise of Arbitral Power Over Domestic Courts*, *Stanford Journal of Complex Litigation*, Vol. 1, Issue 2, 2012-2013, pp. 373-416, at p. 384. Indeed, according to the author, these are only deceptive transformations of denial of justice claims. His opinion is supported by other scholarly writings that will be better analysed in the following sections.

⁴⁹² As better explained in sections 10 and 11 of this Chapter III, not all investment treaties guarantee the same substantial protection to investments. Moreover, dispute settlement clauses may be narrow and limit the possibility to bring investment claims.

violation of the New York Convention can constitute an autonomous cause of action under investment treaty arbitration.

2. Denial of Justice

Despite the fact that in none of the Relevant Cases did the arbitral tribunal find the State in breach of the prohibition to deny justice and, more generally, that denials of justice have rarely proved to exist in investment arbitration, this cause of action deserves to be analysed first for a number of reasons.

Firstly, this is because traditionally the failure of a national legal system to provide due process to aliens was exclusively subsumed under the doctrine of denial of justice. This rule was established in international law well before its inclusion in investment treaties – where nowadays most of the times is encompassed within the FET standard –⁴⁹³ and can be considered as one of the oldest principles of customary international law.⁴⁹⁴

Second, according to certain authors,⁴⁹⁵ causes of actions, different from denial of justice, which concern mistreatment of aliens by local courts should be considered instrumental ‘transformations’ of denial of justice aimed at avoiding

⁴⁹³ See, for instance, the 2004 and 2012 US Model BITs, where in Art. 5(2) it is provided that: “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; [...]’; and the ASEAN Comprehensive Investment Agreement, signed on 26 February 2009 (available at: <http://agreement.asean.org/media/download/20140119035519.pdf>), which, in its Article 11(2), specifies that ‘[f]or greater certainty: (a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; [...]’. For a description of the main features of the FET standard, see section 5 of this Chapter III.

⁴⁹⁴ G. CARBONE, *The Interference of the Court of the Seat with International Arbitration*, *supra*, note 64, pp. 217-244, at p. 237.

⁴⁹⁵ Z. DOUGLAS, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, *International and Comparative Law Quarterly*, Vol. 63, Issue 4, October 2014, pp. 867-900, at p. 869; 893 and following; M.D. GOLDHABER, *The Rise of Arbitral Power Over Domestic Courts*, *supra*, note 491, at p. 384; P. NAIR, *State responsibility for non-enforcement of arbitral awards: revising Saipem two years on*, *Kluwer Arbitration Blog*, posted on 25 August 2011.

the difficulties in proving the existence of the conditions required for a denial of justice to exist.⁴⁹⁶ Indeed, for other causes of action the conditions for the responsibility of a State to be recognized are easier to meet.⁴⁹⁷ Moreover, it may happen that the applicable treaty does not allow investors to bring an investor-State claim grounded on the denial of justice,⁴⁹⁸ and consequently investors may be forced to sue a State for an action of its national courts on the basis of guarantees different from the prohibition to deny justice, regardless of the fact that the claim would have had better framed as one for denial of justice.

Finally, denial of justice also has a role to play in the Relevant Cases, regardless of the fact that, as mentioned, none of the involved tribunals found a violation thereof. For instance, in *GEA v. Ukraine* and *White v. India*, the claimants alleged that a violation of the FET standard by the relevant State had led to a denial of justice;⁴⁹⁹ and, in *Frontier v. Czech Republic*, the respondent contested that Frontier's claim had to be dismissed, as it should have been framed as a denial of justice, whose conditions were not met.⁵⁰⁰

All this premised, turning to the analysis of the standard, it should be noted that the international violation of denial of justice may be considered to exist, at its most general, when a State administers justice to aliens in a fundamentally unfair manner.⁵⁰¹ Denial of justice is indeed an element of the minimum standard of treatment of aliens, according to which, regardless of the treatment that a State affords to its nationals, foreigners are entitled to a minimum standard of justice.

⁴⁹⁶ See, *infra*, in this section.

⁴⁹⁷ As better explained later on in this section, a claim for denial of justice will be successful only if the misconduct of the State can be qualified as egregious and if all available local remedies have been exhausted.

⁴⁹⁸ This was for example the case for *Saipem v. Bangladesh*, where the investor was entitled to bring a claim exclusively for matters connected to an expropriation in breach of the Italy-Bangladesh BIT. See section 4 of this Chapter III. For more on the breadth of dispute resolution clauses in investment treaties, see section 10 of this Chapter III.

⁴⁹⁹ *GEA v. Ukraine*, para. 269.

⁵⁰⁰ *Frontier v. Czech Republic*, para. 487.

⁵⁰¹ J. PAULSSON, *Denial of Justice in International Law*, Cambridge University Press, 2005, at p. 4.

According to the majority of scholars, denials of justice occur exclusively in the event of procedural misbehaviours.⁵⁰² As stated by a leading scholar on the topic, '[d]enial of justice is always procedural.'⁵⁰³ Pursuant to the theory at work, international law should intervene exclusively when the decision of the judiciary is in violation of the fundamental requirements of an adjudicative procedure. A denial of justice can, therefore, arise only from procedural irregularities in judicial proceedings, such as refusal of access to justice, undue delays,⁵⁰⁴ lack of due process, failure to provide a fair hearing or the non-

⁵⁰² A. DIEHL, *The Core Standard of International Investment Protection*. FET, *International Arbitration Law Library*, Vol. 26, Kluwer Law International, 2012, at p. 463; F. MUTIS TÉLLEZ, *Does the Annulment of Arbitral Awards by National Courts Engage State Responsibility Under International Law?*, *CEPMLP Annual Review – CAR Vol. 16*, 2013, pp. 1-18, at pp. 6-7; A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 240; J. PAULSSON, *Denial of Justice in International Law*, *supra*, note 501, at p. 98. For a contrary opinion, *see* Z. DOUGLAS, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, *supra*, note 495, at p. 882; and D. WALLACE, JR., *Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattin v Mexico*, *Transnational Dispute Management*, Vol. 3, Issue 2, 2006, pp. 1-17. *See also* M. PAPARINSKIS, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, 2013, pp. 195-197 for an outline of the spectrum of doctrinal and jurisprudential positions with respect to the possible configurations of denial of justice.

⁵⁰³ J. PAULSSON, *Denial of Justice in International Law*, *supra*, note 501, at p. 98.

⁵⁰⁴ The topic of undue delays is particularly important in the context of this work, as was considered by the tribunal in *White v. India* (*see* section 9 of this Chapter III). Notably, in that case, the tribunal maintained that the delays did not amount to a denial of justice, but rather to a breach of the effective means clause set out in the applicable treaty. In this respect, it should be noted that, in the context of denial of justice, the bar to establish the occurrence of a denial of justice for delays is rather high and requires the delay to be 'studied, wrongful, continuous and unwarranted, equivalent to a refusal' or a delay that is '[i]n some respects...even more ruinous than an absolute refusal of access or wrongful rejection' (A.P. KARREMAN, K. DHARMANANDA SC, *Time to Reassess Remedies for Delays Breaching 'Effective Means'*, *ICSID Review*, Vol. 30, Issue 1, 2015, pp. 118-141, at p. 123).

execution of a judgment.⁵⁰⁵ Still, there may be extreme cases where denial of justice has been deemed to exist upon the occurrence of *gross* defects in substance of the decision.⁵⁰⁶ Also in this case eminent scholarly writings⁵⁰⁷ have deemed that a procedural denial of justice effectively occurred, as the substantive injustice evidenced only a procedural defect.⁵⁰⁸ In fact, the substance of the decision was so egregiously wrong that no honest or competent court could possibly have made it. If a judgment is grossly unjust it is because fair treatment was not accorded and the State has failed to provide a judicial system that meets international standards.⁵⁰⁹

⁵⁰⁵ A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 240.

⁵⁰⁶ *See* *Mondev v. US*, para. 127; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf>) (“*Loewen v. US*”), para. 133.

⁵⁰⁷ *See*, for all, J. PAULSSON, *Denial of Justice in International Law*, *supra*, note 501, at p. 82.

⁵⁰⁸ It should however be noted that part of the doctrine considers this as a case of *substantive denial of justice*. *See*, for instance, Z. DOUGLAS, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, *supra*, note 495, at p. 882, according to whom: ‘[t]he theory at work here is that denial of justice is limited to instances of procedural injustice but that substantive injustice can provide conclusive or strong evidence of procedural injustice. The problem with this theory is that it is nothing more than semantic camouflage for what amounts to a review of the substantive outcome produced by the domestic court. An international court cannot draw inferences from an injustice caused by substantive error unless it has determined that there has actually been a substantive error through an assessment of the applicable domestic law and that it is a particularly grave error. There is simply no difference in principle between the statements: ‘the domestic court got the point hopelessly wrong’ and ‘no competent domestic court could have decided the point in that way’. The latter statement is merely a reformulation of the first but perhaps with a different rhetorical sting.’ For more, *see, supra*, note 502.

⁵⁰⁹ Notably, according to J. PAULSSON, *Denial of Justice in International Law*, *supra*, note 501, at p. 60, a domestic court can commit substantive violations of international law that should not be catalogued as a denial of justice, but, rather, as a mere violation of the relevant obligation of the State.

In addition, for a denial of justice to occur, the factual situation must be egregious,⁵¹⁰ embodying a fundamental violation of the principle of fair process. Several investment arbitral tribunals have highlighted the high threshold of misconduct required to establish a denial of justice.⁵¹¹

The last, but very important, main element of denial of justice is represented by the fact that most likely a claim for denial of justice will not succeed unless the victim has exhausted municipal remedies.⁵¹² Notably, exhaustion of local remedies represents a general principle of customary international law and, broadly, a condition precedent to bringing a claim against a State.⁵¹³ According to this procedural rule, which developed in the context of diplomatic protection, a State cannot espouse a claim of one of its nationals against another State, unless the national has exhausted local remedies. In the context of investor-State arbitration this rule would require the investor to make any available appeal and obtain a final decision issued by the highest court of the host State before commencing a claim against a State. It has been noted that the main purpose of this rule is to give the State the opportunity to redress the alleged injury before having to defend an international claim.⁵¹⁴

⁵¹⁰ J. PAULSSON, Denial of Justice in International Law, *supra*, note 501, at p. 60.

⁵¹¹ See, *inter alia*, Loewen v. US, paras. 142-217; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0440.pdf>) para. 192 (“**Jan de Nul Award**”); and *Mondev v. US*, paras. 126-127.

⁵¹² Of course, it is possible that the concerned State specifically waives this requirement.

⁵¹³ See International Court of Justice, Decision, 21 March 1959, on the *Interhandel Case (Switzerland v. United States of America)* (available at: <http://www.icj-cij.org/docket/files/34/2297.pdf>), whereby the Court stated that: “[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law [...]”

⁵¹⁴ G.K. FOSTER, Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration, *Columbia Journal of Transnational Law*, Issue 49, 2011, pp. 201-267, at p. 211. The author also highlights how in the context of diplomatic protection this rule ‘may also benefit the State whose national has allegedly suffered injury by relieving it of the need to espouse claims that could be resolved by other means.’

However, some exceptions to this rule have been recognized. First, a remedy should not be pursued if it is ‘ineffective’ or ‘futile’, taking into account all the circumstances of the case.⁵¹⁵ Arbitral tribunals have applied this principle in different manners. In *Loewen v. US*, the tribunal adopted a very strict approach, requiring the claimant to prove that the exercising of local remedies was impossible or excessively difficult.⁵¹⁶ Other tribunals made reference to a reasonableness requirement, which was also backed by Prof. Paulsson.⁵¹⁷ For instance, in *Pantechniki v. Albania*,⁵¹⁸ the tribunal stated that ‘denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole. *That does not mean that remedies*

⁵¹⁵ The question of futile remedies that emerges in relation to denial of justice is analogous to the one that arises with respect to the extent of the obligation to exhaust local remedies before seeking diplomatic protection. In this respect *see* Art. 15 of the Draft Articles on Diplomatic Protection with Commentaries, Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (U.N. doc. A/61/10) (available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf).

According to this Article, called Exceptions to the local remedies rule, “[l]ocal remedies do not need to be exhausted where:

- (a) There are *no reasonably available local remedies* to provide effective redress, or *the local remedies provide no reasonable possibility of such redress*;
 - (b) There is *undue delay in the remedial process* which is attributable to the State alleged to be responsible;
 - (c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
 - (d) The injured person is *manifestly precluded* from pursuing local remedies;
- or
- (e) The State alleged to be *responsible has waived* the requirement that local remedies be exhausted’ (emphasis added).

⁵¹⁶ *Loewen v. US*, paras. 165-171.

⁵¹⁷ J. PAULSSON, Denial of Justice in International Law, *supra*, note 501, at p. 100.

⁵¹⁸ *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0618.pdf>) (“**Pantechniki v. Albania**”).

must be pursued beyond a point of reasonableness. It may not be necessary to initiate actions which exist on the books but are never in fact used. Oblique or indirect applications to parallel jurisdictions (an administrative appeal to remove a foot-dragging judge) may similarly be held unnecessary. Such determinations must perforce be made on a case-by-case basis.⁵¹⁹

In addition, the exhaustion of local remedies condition can be excluded by consent, such as in the case of an express waiver set out in an international agreement or treaty. For instance, the Convention treats the exhaustion of local remedies as an exception.⁵²⁰ Analogously, most of recent investment treaties tend to contain a waiver to that principle.⁵²¹

While the first exception has been deemed applicable to the cases of denial of justice – as stated by an eminent scholar, ‘[t]he victim of denial of justice is not required to pursue improbable remedies’⁵²² – tribunals’ awards and scholarly writings tend to consider that the second exception does not apply in the cases of denial of justice.⁵²³ Therefore, even if an investment treaty contains a general

⁵¹⁹ Pantechniki v. Albania, para. 96 (emphasis added). Along the same lines is Jan de Nul Award (para. 258).

⁵²⁰ See Art. 25 of the Convention, according to which: ‘[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration *to the exclusion of any other remedy*. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention’ (emphasis added).

⁵²¹ For instance Art. 10(5) of the Agreement Between the Republic of Austria and the United Arab Emirates for the Promotion and Protection of Investments, signed on 17 June 2001 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/224>), provides that ‘[i]f the investor chooses to file for arbitration, the host Contracting Party agrees not to request the exhaustion of local settlement procedures.’ For more on the topic, see W.S. DODGE, Investment Treaties between Developed States: The Dilemma of Dispute Resolution, in C.A. ROGERS, R.P. ALFORD, The Future of Investment Arbitration, Oxford University Press, 2009, pp. 165-181, at pp. 171-180; and C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, The ICSID Convention: A Commentary, *supra*, note 23, at pp. 405-406.

⁵²² J. PAULSSON, Denial of Justice in International Law, *supra*, note 501, at p. 113.

⁵²³ See Loewen v. US, paras. 162-163. As to the scholarly writings, see, for instance, G.K. FOSTER, Striking a Balance Between Investor Protections and National Sovereignty: The

waiver by means of which the contracting States have accepted that an investor can bring an investment claim without having first exhausted local remedies, such a waiver would apply with respect to any claim, except denial of justice. Indeed, in the context of denial of justice, the exhaustion of local remedies does not represent a mere procedural condition that can be waived, but rather a constituent element of the delict of denial of justice. The claim simply cannot be considered to exist until the self-correcting mechanisms of the local system have failed. In fact, such a delict comes into existence exclusively when there is a fundamental breakdown of the entire nation's judicial system, not when there is misbehaviour of a single court. More precisely, denial of justice occurs only when 'there is no reasonably available national mechanism to correct the challenged action.'⁵²⁴

3. Expropriation

As illustrated in section 2 of this Chapter III, the threshold to be met in order to find a denial of justice is very high. Therefore, the award winner frustrated by a wrongful set-aside or non-enforcement of its arbitral award may seek to pursue other causes of action to obtain reparation. In this context, one of the

Relevance of Local Remedies in Investment Treaty Arbitration, *supra*, note 514, at pp. 240-243; A. MOURRE, A. VAGENHEIM, Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem, in M.A. FERNANDEZ-BALLESTEROS, D. ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, Kluwer España; La Ley, 2010, pp. 993-1012, at p. 852; J. PAULSSON, Denial of Justice in International Law, *supra*, note 501, at p. 100; C. SCHREUER, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, *The Law and Practice of International Courts and Tribunals*, Vol. 4, Issue 1, 2005, pp. 1-17, at p. 14. However, it shall be noted that an *ad hoc* waiver by the State with specific reference to the application of exhaustion of local remedies in the context of denial of justice is considered acceptable. As a final remark please note that the requirement of exhaustion of local remedies in the ambit of denial of justice has been criticized by some commentators that deemed it inconsistent with the purpose of investor-State arbitration mechanism, where the investor is expressly dispensed from pursuing local remedies before suing a State. *See*, for instance, C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration: Substantive Principles*, *supra*, note 53, at p. 233.

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J. PAULSSON, Denial of Justice in International Law, *supra*, note 501, at p. 100.

treaty guarantees that have been enforced in cross-over cases is the protection from unlawful expropriation.

Before deepening into the analysis of what an expropriation is and when a State can be deemed responsible therefor, it should be noted that arbitral tribunals have long recognized that the conduct of the judicial organs of the State can amount to an expropriation of property.⁵²⁵ However, this finding is not unanimously agreed. As already mentioned,⁵²⁶ certain authors⁵²⁷ believe that the conduct of the judiciary can only entail the international liability of the State for denial of justice and this view has also been supported by arbitral tribunals.⁵²⁸

Since in the *Saipem v. Bangladesh* case, the ICSID tribunal found that the Bangladeshi municipal courts committed unlawful expropriation, this section will briefly give a few basic notions on the delict of expropriation, while considerations as to the relationship between denial of justice and judicial expropriation will be made in sub-section 4.2.1 of this Chapter in order to also take into account the position taken by the ICSID tribunal in the *Saipem v. Bangladesh* case.

Expropriation means, in its broadest sense, the right of the State to affect private property by varied means and for different reasons and objects.⁵²⁹

⁵²⁵ See *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0728.pdf>) (“**Rumeli v. Kazakhstan**”), para. 702. In this case, the investment tribunal deemed that the acts of the Kazakhstan courts were not so egregiously wrong as to constitute a denial of justice, but found that a decision of the Kazakh Supreme Court amounted to a creeping expropriation. See, also, *Sistem Mühendislik İn_aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2008 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita1074.pdf>), paras. 118-119.

⁵²⁶ See section 2 of this Chapter III.

⁵²⁷ See, *supra*, note 491.

⁵²⁸ See *Loewen v. US*, para. 141. In this case, the tribunal substantially considered the claim for expropriation absorbed by that of denial of justice.

⁵²⁹ S. JHA, *Expropriation: A Crisis in International Law*, Student Advocate, Vol. 13, 2001, at p. 123, quoting F.V. GARCÍA AMADOR, L.B. SOHN, R. BAXTER, *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, Oceana Publications, 1974, at p. 46. This definition seems particularly appropriate, as it is very generic and does not make any

Traditionally, expropriations have been carried out through actions of the State, which openly and deliberately seized property and/or compulsorily transferred titles thereto to itself or a State-mandated third party.⁵³⁰ This type of expropriation is commonly labelled as ‘direct expropriation’, as opposed to ‘indirect expropriation’, which does not affect titles to property, but results in the long-lasting total or near-total destruction of the economic value of the investment, or depriving the owner of the ability to manage, use or control their property in a meaningful way.⁵³¹

In recent times direct expropriations have become rare,⁵³² while indirect expropriations have gained in importance.⁵³³ There are several explanations for

reference to the taking of property (which characterizes direct expropriation) or to other specific manners by means of which expropriation can be pursued. However, it must be noted that, as remarked many Authors (*see, inter alia*, C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration: Substantive Principles*, *supra*, note 53, at pp. 266-267; A. RUZZA, *Expropriation and Nationalization*, Max Planck Encyclopedia of Public International Law (voice of), Oxford University Press, 2013, para. 10), a clear and agreed definition of investment has not developed, neither in national nor in international law. Other definitions of expropriation can be found in any of the scholarly writing mentioned in this section.

⁵³⁰ A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 324.

⁵³¹ For the sake of completeness, it is worth noting that it now accepted in doctrinal papers and case-law that indirect expropriations can occur as a result of a series of measures taken over time that, if considered as a whole, have an expropriatory effect (the so-called ‘creeping expropriation’). *See, inter alia*, C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration: Substantive Principles*, *supra*, note 53, at p. 268; A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 293 and following; C. SCHREUER, *The Concept of Expropriation under ECT and other Investment Protection Treaties*, in C. RIBEIRO (ed.), *Investment Arbitration and the Energy Charter Treaty*, Juris Publishing, 2006, pp. 108-147, at p. 122 ad following, where the relevant jurisprudence is also illustrated.

⁵³² C. SCHREUER, *The Concept of Expropriation under ECT and other Investment Protection Treaties*, *supra*, note 531, at p. 108.

⁵³³ R. DOLZER, C. SCHREUER, *Principles of International Investment Law*, *supra*, note 49, at p. 101; A.K. HOFFMANN, *Indirect Expropriation*, in A. REINISCH (ed.), *Standards of*

this shift. First, States are reluctant to damage their investment climates by taking the drastic step of openly taking property.⁵³⁴ Second, through indirect expropriations, States can achieve many of the benefits of an expropriation without taking titles or seizing control. Finally, the boundaries between legitimate regulation or exercise of judiciary powers and violation of foreign investors' rights for unlawful indirect expropriation are often difficult to determine.⁵³⁵ Indeed, all countries have the legitimate right to regulate investments in their territory, but the exact limit between legitimate regulation and illegal expropriation is not always clearly established. An analogous reasoning can be made with respect to the decisions of the national courts concerning foreign investments. On this basis, States have generally denied the existence of an indirect expropriation and not contemplated payment of any compensation to the expropriated foreign investor.⁵³⁶

Actually, the contours of indirect expropriations are not clearly identified. As Prof. Schreuer puts it, in the modern world of the law of expropriation, the question is not so much whether the requirements of a legal expropriation have been met, but whether an expropriation has occurred in the first place.⁵³⁷

Investment Protection, Oxford University Press, 2008, pp. 151-170, at p. 151; J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, at p. 297.

⁵³⁴ For an outline of the cases in which direct expropriations have exceptionally occurred in recent times, *see* A. REINISCH, Expropriation, in P. MUCHLINSKI, F. ORTINO, C. SCHREUER (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008, pp. 408-456, at p. 408.

⁵³⁵ *See* A. RUZZA, Expropriation and Nationalization, *supra*, note 529, para. 8. This distinction is considered as one of the '[...] more important and more challenging distinction for arbitral tribunals [...]'] by J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, at p. 297.

⁵³⁶ This is considered a typical feature of indirect expropriation by R. DOLZER, C. SCHREUER, *Principles of International Investment Law*, *supra*, note 49, at p. 102.

⁵³⁷ C. SCHREUER, *The Concept of Expropriation under ECT and other Investment Protection Treaties*, *supra*, note 531, at p. 110. This point has also been raised by other Authors. *See*, for instance, A.K. HOFFMANN, Indirect Expropriation, *supra*, note 533, at p. 152.

This is also due to the fact that international documents dealing with the protection of foreign investments contain a reference to indirect expropriations and/or to measures tantamount to expropriation, but they refrain from providing a circumscribed definition thereof or from explaining if there is a difference between direct/indirect expropriations and measures tantamount to expropriation.⁵³⁸ These provisions give little guidance to the parties or arbitral tribunals confronted by concrete cases.

⁵³⁸ This drafting approach has been remarked in a number of decisions. *See, inter alia*, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (“**LG&E v. Argentina**”) (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0460.pdf>) para. 185; *Tecmed v. Mexico* (*see, infra*, note 541), para. 113. As an example of treaties drafted in this manner, reference can be made to Art. 1110(1) of the NAFTA, which provides that: ‘[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.’

Analogously, Art. 13 of the ECT provides that: ‘(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation [...]’.

In these texts, ‘expropriation’ is explained by reference to the verbs ‘expropriate’ and ‘nationalize’, but no clarification is provided with regard to the meaning of these words. In addition, there is no indication of the differences between ‘direct expropriation’, ‘indirect expropriation’ and ‘measures tantamount to expropriation’. As noted by A. REINISCH, *Expropriation*, *supra*, note 534, at p. 422, in general investment treaties rarely try to define indirect expropriation; rather they acknowledge the possibility of indirect expropriation. Still, in recent times there has been an attempt to provide more details for the identification when State measures amount to indirect expropriation. Such an attempt may be seen as a “legislative” response to the growing field of investment dispute settlement involving an interesting mix of aiming at correcting judicial and arbitral findings and at the same time codifying judicial and arbitral trends’ (A. REINISCH, *Expropriation*, *supra*, note 534, at p. 424).

With specific reference to the category consisting in measures tantamount to expropriation,

In the absence of firm guidance, arbitral tribunals have identified a series of tests relevant to analysing when an indirect expropriation has occurred. However, the exact content of such tests, as well as the relevance thereof, is still debated, as arbitral tribunals have taken different approaches in such respect.⁵³⁹ Nevertheless, it is still worth analysing them, in order to have a better understanding of what an indirect expropriation is.

It is commonly agreed that, in order to have an indirect expropriation, the relevant measure must have a destructive and long-lasting effect on the

arbitral tribunals have taken two views on its content, in the lack of explanatory notes in the body of the treaty. One is that the category is somehow broader and more expansive than simple indirect expropriations (*see Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0900.pdf>) (“**Waste Management v. Mexico**”), paras. 995-996). On the other hand, the concept of ‘measures tantamount to expropriation’ has been considered as co-extensive with that of direct or indirect expropriation (*see Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0319.pdf>), para. 366). In any event, as noted by J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, at p. 300: ‘[i]n practice, the distinction between indirect expropriations and measures equivalent to expropriations does not appear to be a meaningful one. No case has yet identified a measure that was tantamount to an indirect expropriation but not itself an indirect expropriation.’

It is also worth noting that expropriation provisions in treaties, though often similar, sometimes contain distinctions in wording. According to C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration: Substantive Principles*, *supra*, note 53, at p. 268, these discrepancies have reinforced the difficulty in determining with precision the meaning of expropriation in international law.

Against this background, it is worth noting that certain investment treaties of the last generation have made an attempt to give a more detailed definition of direct and indirect expropriation. For examples thereof, *see* UNCTAD, *Expropriation*, UNCTAD Series on Issues in International Investment Agreements II, 2012, at pp. 9-10.

⁵³⁹ I substantially endorse the reconstruction made in A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 341, which is consistent with the one made by the UNCTAD (*supra*, note 538, at pp. 57-77).

economic value of the investment and its benefit to the investor.⁵⁴⁰ This analysis is complicated due to the fact that there is no exact numerical threshold of what represents a substantial deprivation. In any event, the deprivation in question must amount to a lasting removal of the availability of the owner to make use of the economic rights connected to the investment. More precisely, according to arbitral tribunals' practice, the State interference must lead to a substantial or radical deprivation of the owner's rights and shall not be merely ephemeral.⁵⁴¹ At the same time, it has been recognized that the

⁵⁴⁰ See, *inter alia*, K. YANNACA-SMALL, Indirect Expropriation and the Right to Regulate: How to Draw the Line, in K. YANNACA-SMALL (ed.), *Arbitration Under International Investment Agreements: A Guide to Key Issues*, Oxford University Press, 2010, pp. 445-477.

⁵⁴¹ One of the early decisions introducing the requirement of 'substantial deprivation' in order for an expropriation to be affirmed is *Pope v. Canada Interim Award* (*see, infra*, note 548), where the claimant asserted that the export control regime reduced its ability to export a product. The tribunal (para. 102) stated that: '[e]ven accepting (for the purpose of this analysis) the allegations of the Investor concerning diminished profits, the Tribunal concludes that the degree of interference with the Investment's operations due to the Export Control regime does not rise to an expropriation (creeping or otherwise) within the meaning of Article 1110. While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the *test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner. [...] under international law, expropriation requires a 'substantial deprivation'* (emphasis added). The concept is also expressed with detail in *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf>) ("**Tecmed v. Mexico**"), para. 115, whereby it is stated that: '[t]o establish whether the Resolution is a measure equivalent to an expropriation under the terms of section 5(1) of the Agreement, it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, *as if the rights related thereto* —such as the income or benefits related to the Landfill or to its exploitation— *had ceased to exist*. In other words, *if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss*. This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a *de facto* expropriation that deprives those assets and rights of any real substance.' Other relevant cases on this point

substantial deprivation can be of a partial nature⁵⁴² and temporary in time.⁵⁴³ Loss of control that prevents the investor from using or disposing of the investment is an alternative to the destruction of value: a valuable investment

are, *inter alia*, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf>); and *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0178.pdf>); and *Generation Ukraine v. Ukraine*.

⁵⁴² Some tribunals have accepted that an expropriation can regard also a mere portion of the original investment, provided that it consists in rights individually identifiable within the context of the wider investment, without looking at the control over the entire investment. *See*, for instance, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0531.pdf>), paras. 138; 144 (“**Middle East Cement v. Egypt**”).

⁵⁴³ Normally, in order to constitute an expropriation, the measure should be definitive and permanent (*see*, for instance, *Tecmed v. Mexico*, para. 116). However, this approach is not universal: also temporary measures have been considered expropriatory, depending on the circumstances of the case. Notably, since each decision is very fact-specific, it has not been possible for investment tribunals to set a formula for temporal duration of measures and, as a consequence, decisions on this topic are inconsistent. For instance, in *S.D. Myers v. Canada*, UNCITRAL, Partial Award, 13 November 2000 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf>), para. 283, although the tribunal agreed that generally an expropriation ‘[...] amounts to a lasting removal of the ability of an owner to make use of its economic rights, [...] *it may be that in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even it were partial or temporary*’ (emphasis added). Notably, in that case, the tribunal did not find that a temporary interference lasting for about 18 months amounted to an expropriation. On the contrary, in *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 20 December 2000 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0902.pdf>), para. 9, the tribunal found that the seizure of two hotels for about one year was not merely ‘ephemeral’, but sufficient to constitute an expropriation. Similarly, in *Middle East Cement v. Egypt*, para. 107, the tribunal considered the suspension of an export license for four months as not merely ‘ephemeral’.

would be useless if the owner cannot use, dispose of or enjoy it.⁵⁴⁴ It is debated whether, as maintained by the supporters of the so-called ‘sole effect doctrine’, an effective deprivation alone automatically constitutes an expropriation. More precisely, according to this approach, which is still adopted by the majority of arbitral tribunals,⁵⁴⁵ the effect of the government action is the only factor to be considered in the determination of the existence of an indirect expropriation. The motivations behind the measure are irrelevant. Despite the success that the sole effect doctrine has in jurisprudence, the trend in investment treaties is to explicitly state the contrary: most recent BITs clarify that the mere fact that measures have an adverse effect on the economic value of the investment does not necessarily mean that an indirect expropriation has occurred.⁵⁴⁶ Indeed,

⁵⁴⁴ See for instance, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf>), whereby the tribunal stated that: ‘[a] finding of indirect expropriation would require more than adverse effects. It would require that *the investor no longer be in control of its business operation*, or that the value of the business have been virtually annihilated’ (emphasis added).

⁵⁴⁵ The tribunal in the case *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Award, 16 December 2003, para. 4.3.1 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0570.pdf>), described this approach as follows: ‘[t]he Tribunal finds that ‘regulatory takings’ may under the circumstances amount to expropriation or the equivalent of an expropriation. *The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail*’ (emphasis added).

⁵⁴⁶ See, for instance, the Agreement For the Promotion and Protection of Investments Between the Republic of Colombia and the Republic of India, signed on 10 November 2009 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/796>), whose Art. 6(b) provides that: ‘[t]he determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering:

(i) the economic impact of the measure or series of measures; *however, the sole fact of a measure or series of measures having adverse effects on the economic value of an investment does not imply that an indirect expropriation has occurred; [...]*’ (emphasis added).

Analogously, the 2004 and 2012 US Model BITs, after stating in Art. 6(1) that: ‘[n]either Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization’, in a special Annex B

while the severity of the impact and the degree of interference play a central role in the determination of whether a measure is tantamount to an expropriation, they should not be considered as the decisive or exclusive elements. Following this trend, more recent case law seems to adopt a more flexible approach, also taking into account other elements.⁵⁴⁷

For example, some tribunals somehow considered the intention of the government to expropriate or the form of the measure. According to traditional case law the form of the measure is not determinative, and nor is the intent of the State: international law takes a functional, effect-based approach to the expropriation analysis, and so the formal status of a governmental measure does not shield this measure from scrutiny.⁵⁴⁸ Likewise, while in direct expropriation there must be a convergence of intent and result, in indirect expropriations there may not be a discernible intent to expropriate. Therefore, tribunals generally denied a primary relevance to the governments' intentions.⁵⁴⁹

entitled 'Expropriation' add that: '(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although *the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred*; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action' (emphasis added).

⁵⁴⁷ In *LG&E v. Argentina*, the tribunal held that (para. 194): '[t]he question remains as to whether one should only take into account the effects produced by the measure or if one should consider also the context within which a measure was adopted and the host State's purpose. It is this Tribunal's opinion that *there must be a balance in the analysis both of the causes and the effects of a measure in order that one may qualify a measure as being of an expropriatory nature*' (emphasis added).

⁵⁴⁸ For instance, in *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0674.pdf>) ("**Pope v. Canada Interim Award**"), para. 99, the tribunal did not accept Canada's defence that a non-discriminatory regulation cannot be expropriatory.

⁵⁴⁹ In *Tecmed v. Mexico*, the tribunal stated that: '[t]he government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation

Intent, however, is not wholly irrelevant: a tribunal is more likely to find an expropriation if there is a clear evidence of the intent to expropriate. Moreover, many recent treaties have explicitly introduced these criteria (i.e., the nature, purpose and character of the measure) in the assessment on whether a State's conduct represents an indirect expropriation.⁵⁵⁰ Such an explicit reference to those elements means that tribunals must pay close attention to them.

Also the investment-backed legitimate expectations of the investor have been considered somewhat relevant in assessing whether there has been an indirect expropriation. In investment arbitration, legitimate expectations have gained a particular prominence in the context of the FET standard.⁵⁵¹ However, this concept also has a role to play in the context of expropriation claims, as proven by the recent investment treaties, which mention legitimate expectations as a factor that must be considered when deciding a claim of indirect

measures is less important than its actual effects' (para. 116). Analogously, the tribunal in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0215.pdf>), para. 7.5.20 held that: '[t]here is extensive authority for the proposition that the state's intent, or its subjective motives are at most a secondary consideration. While intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state's intent, is the critical factor'. One of the rare cases in which a tribunal relied exclusively upon the intention of the government is *CCL v. Republic of Kazakhstan*, SCC Case 122/2001, Final Award, 1 January 2004 (available at: http://www.italaw.com/sites/default/files/case-documents/ita0289_1.pdf). There, the tribunal rejected an expropriation claim on the basis that the claimant had not shown that any motivation to expropriate laid behind any of the contested government's actions.

⁵⁵⁰ For instance the Canada-Romania BIT, provides in its Annex B named Clarification of indirect expropriation, the following explanation: '[...] (b) The determination of whether a measure or series of measures of a Contracting Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: [...]
(iii) *The character of the measure or series of measures, including their purpose and rationale; [...]*' (emphasis added).'

⁵⁵¹ See section 5 of this Chapter III.

expropriation.⁵⁵² Investment tribunals use divergent approaches concerning expectations for the purposes of expropriation claims. For some tribunals, expectations to be legitimate need not be based on specific and explicit representations or undertakings of the State, and implicit assurances may be sufficient.⁵⁵³ By contrast, the majority of tribunals⁵⁵⁴ require the State to make specific assurances to the investor, on which the latter relies. In any event, assessment of legitimate expectations is not to be considered as an exclusive test to be applied to an alleged expropriation. Although a State's commitments

⁵⁵² See, for instance Art. 4 of the Bilateral Agreement For the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of The People's Republic of China, signed on 22 November 2008 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/720>), whereby it is provided that: 'b) The determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering: [...]

ii) The scope of the measure or series of measures and *their interference on the reasonable and distinguishable expectations concerning the investment*; [...]' (emphasis added).

⁵⁵³ In *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, 12 January 2011 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0384.pdf>), para. 141, the tribunal stated that: '[o]rdinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made *explicitly or implicitly* by a State party' (emphasis added).

⁵⁵⁴ This is supported by Z. DOUGLAS, J. PAULSSON, *Indirect Expropriation in Investment Treaty Arbitrations*, in S.M. KROLL, N. HORN (eds.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*, Studies in Transnational Economic Law, Vol. 19, Kluwer Law International, 2004, pp. 145-258, at p. 156; and S. OLYNYK, *A Balanced Approach to Distinguishing Between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration*, *International Trade and Business Law Review*, Vol. 15, 2012, pp. 254-296, at pp. 289-291. Among the tribunals that adopted this approach, see *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>), where it is stated that: 'specific commitments [...] given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation' are required (Part IV, Chapter D, para. 7).

or representations with respect to an investment are an important aspect of the expropriation analysis, legitimate expectations based on these commitments or representations would not normally be, in and of themselves, acquired rights under a host State's laws. Where a State fails to honour its commitments or representations, but there is no substantial deprivation of the underlying acquired rights, the investor's claim should be framed as a denial of FET or breach of another minimum standard of treatment.⁵⁵⁵

Once it is established that an expropriation has been made, the tribunal shall then assess if the expropriation is to be considered lawful. Expropriation is not illegal *per se* under international law, as it represents an expression of the State's sovereignty. But, in order to be lawful, expropriation must respect certain conditions. The majority of investment treaties⁵⁵⁶ stipulate that for an expropriation to be lawful it must not be discriminatory against the investor, it must be for a public purpose in accordance with due process of law, and it must be accompanied by an appropriate compensation.⁵⁵⁷ It is largely agreed that these conditions have crystallized sufficiently to represent customary international law on expropriation and thus an expropriation that does not respect these conditions entails the international responsibility of the expropriating State.⁵⁵⁸

⁵⁵⁵ A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 351.

⁵⁵⁶ UNCTAD, *Expropriation*, *supra*, note 538, at p. 27

⁵⁵⁷ A. REINISCH, *Legality of Expropriations*, in A. REINISCH (ed.), *Standards of Investment Protection*, Oxford University Press, 2008, pp. 172-204, at p. 181.

⁵⁵⁸ *See, inter alia*, J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, at p. 320; and UNCTAD, *Expropriation*, *supra*, note 538, at p. 27. However, it is to be noted that A. REINISCH, *Legality of Expropriations*, *supra*, note 557, at p. 175-176, seems to state that only the first two requirements (i.e., the presence of a public purpose and the absence of discrimination) are generally accepted. In particular, the Author raises some doubts as to the possibility to see the requirement that an expropriation shall be calculated in accordance with due process as part of customary international law (at p. 192). Moreover, A. RUZZA, *Expropriation and Nationalization*, *supra*, note 529, para. 6, believes that the conditions for the lawful expropriation that acquired a customary status are: 'territorial

The requirement that an expropriation must be made for a public purpose means that it must be motivated by the pursuance of a legitimate welfare objective, as opposed to a purely private gain or an illicit end. A precise definition of the public purpose for which an expropriation may be lawfully made ‘has neither been agreed upon in international law nor even suggested.’⁵⁵⁹ However, this term has been broadly interpreted, given the acceptance of a State’s right to expropriate, and therefore States have been granted great discretion. Indeed, international tribunals have traditionally given strong deference to States as to whether an expropriation was motivated by a public interest and investors tend not to challenge expropriations on this ground.⁵⁶⁰ Nevertheless recent cases have proven that the test is not wholly irrelevant. For instance, in a case from 2006, a tribunal found that the taking was not legal because it was not possible to identify the public interest being served. Importantly the tribunal noted that: ‘[...] “*public interest*” requires some genuine interest of the public. If mere reference to “*public interest*” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the tribunal can imagine no situation where this requirement would not have been met.’⁵⁶¹ As to the timing, the public interest must exist when the expropriation was made, while it is not

limitation, implying the host State’s right to expropriate only property located within its territory, public interest, non-discrimination, and payment of compensation’.

⁵⁵⁹ A. REINISCH, *Legality of Expropriations*, *supra*, note 557, at p. 181.

⁵⁶⁰ *See*, with respect to ICSID tribunals, for instance, *Goetz and Others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability, 2 September 1998, para. 126, whereby the tribunal stated that: ‘[i]n the absence of an error of fact or law, of an abuse of power or of a clear misunderstanding of the issue, it is not the Tribunal’s role to substitute its own judgment for the discretion of the government of Burundi of what are ‘imperatives of public need [...] or of national interest’, quoted by A. REINISCH, *Legality of Expropriations*, *supra*, note 557, at p. 182.

⁵⁶¹ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0006.pdf>) (“**ADC v. Hungary**”), para. 432.

relevant if the expropriated property is subsequently used to satisfy an interest of the public.

Expropriation is unlawful if it is discriminatory. This principle is recognized by customary international law, as well as by most treaty provisions addressing the legality of expropriations.⁵⁶² Tribunals have found this requirement to be violated when a State has discriminated against foreign nationals on the basis of their nationality. However, if the discrimination may be the result of legitimate governmental policies and concerns only some foreigners, tribunals have taken a more nuanced approach. It should be noted that an expropriation that targets foreign investors is not discriminatory *per se*: it must be proved that the expropriation was based, linked to or taken for reason of the investor's nationality.

With respect to the due process principle, it should be noted that its exact content remains vague. Only a few of the most recent investment treaties provide a clarification of its meaning that may be of guidance to arbitral tribunals,⁵⁶³ while most of the time investment agreements remain inexplicit. Based on the very limited case law on the topic, it seems possible to argue that the due process principle requires that the expropriation complies with procedures set out in domestic law as well as with fundamental internationally recognized rules in this regard and that the affected investor has the right to have its case reviewed by an independent body.⁵⁶⁴ Therefore, if the

⁵⁶² A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 372; A. REINISCH, *Legality of Expropriations*, *supra*, note 557, at p. 186.

⁵⁶³ *See*, for instance, Art. 5(3) of the Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investments, signed on 1 October 2001 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/188>), whereby it is specified that: [d]ue process of law includes the right of an investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party *to prompt review of its case*, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Article *by a judicial authority or another competent and independent authority of the latter Contracting Party*' (emphasis added).

⁵⁶⁴ *See* A. REINISCH, *Legality of Expropriations*, *supra*, note 557, at p. 193; UNCTAD, *Expropriation*, *supra*, note 538, at p. 36. As to the relevant case law, *see*, for instance, the

expropriation lacks a legal basis or the investor has no recourse to domestic courts or administrative tribunals to challenge the measure, this means that the due process principle has been violated.

The last condition for an expropriation to be lawful is that it must be accompanied by compensation. In recent investment agreements there has been an increasing convergence regarding the features of the compensation to be considered as lawful.⁵⁶⁵ In particular, most investment treaties incorporate the standard of prompt, adequate and effective compensation,⁵⁶⁶ which is largely considered as representing the expression of customary international law.⁵⁶⁷ Compensation is considered prompt if it made without undue delay, adequate if it has a reasonable relationship with the market value of the investment concerned, and effective if paid in convertible or freely usable currency.⁵⁶⁸ Modern investment agreements usually spell out what constitutes an adequate compensation, making reference to the fair market value of the investment or to other parameters.⁵⁶⁹

recent ICSID case of ADC v. Hungary which briefly analysed the due process requirement provided for under the applicable BIT (which merely required the expropriation to be made, *inter alia*, in accordance with due process). More precisely, the ADC tribunal in para. 435 held that: '[s]ome basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow.'

⁵⁶⁵ See UNCTAD, Expropriation, *supra*, note 538, at p. 40.

⁵⁶⁶ This is known as the Hull standard, as it was first formulated in a diplomatic note of the US Secretary of State Cordell Hull to his Mexican counterparty.

⁵⁶⁷ A. REINISCH, Legality of Expropriations, *supra*, note 557, at p. 195. The Author however notes that the communist expropriations in Eastern Europe and large scale nationalizations have partially eroded the traditional consensus as to the fact that the Hull formula represents customary international law.

⁵⁶⁸ See UNCTAD, Expropriation, *supra*, note 538, at p. 40.

⁵⁶⁹ Reference is sometimes made to the genuine value (*see* the Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the

Finally, with respect to the assets that can be subject to expropriation, it is unanimously agreed⁵⁷⁰ that all rights and interests having an economic value are relevant, including immaterial and contractual rights.⁵⁷¹ This principle is reflected in the broad definition of the term investment, which is still prevailing in investment instruments.⁵⁷² It should however be noted that not every failure by a government to perform a contract implies an expropriation of the underlying contractual rights, even when the breach entails a loss of rights under the agreement. A mere violation of a contract by a State (attributable to the latter) does not automatically represent an expropriation. Scholarly writings, based on jurisprudence,⁵⁷³ have identified the determining factor in whether a State acted in its commercial role as a party to the contract or in its sovereign capacity.⁵⁷⁴ In any event, as noted by one author, ‘determining when a state is invoking its governmental powers with respect to a contract and when it is engaged in simple non-performance is not always easy, clear or self-evident.’⁵⁷⁵

Netherlands and the Sultanate of Oman, signed on 17 January 2009 (**The Netherlands-Oman BIT**) (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2068>) or to the real value (see Agreement Between the Republic of Turkey and the Republic of Slovenia On the Promotion and Protection of Investments, signed on 23 March 2004 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2274>)).

⁵⁷⁰ C. SCHREUER, *The Concept of Expropriation under ECT and other Investment Protection Treaties*, *supra*, note 531, at pp. 19-24, where case law is also illustrated.

⁵⁷¹ See, for instance, *Consortium RFFC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0226.pdf>) paras. 61-62, whereby it is stated that any right arising out of a contract which is considered as an investment is a right that can be expropriated.

⁵⁷² For more, see Chapter II, section 2.

⁵⁷³ For a recent case, which refers to a previous and well-established jurisprudence, see *Biwater v. Tanzania*, paras. 112-154.

⁵⁷⁴ R. DOLZER, C. SCHREUER, *Principles of International Investment Law*, *supra*, note 49, at pp. 126-129; C. SCHREUER, *The Concept of Expropriation under ECT and other Investment Protection Treaties*, *supra*, note 531, at p. 25.

⁵⁷⁵ J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, at p. 304.

4. Saipem v. Bangladesh

As already illustrated in Chapter II,⁵⁷⁶ in the Saipem v. Bangladesh case, the arbitral tribunal accepted its competence, considering, *inter alia*, that the dispute arose directly from an investment, as required by the Convention, as the ICC award crystallized the rights and obligations of the original investment.

It is now time to analyse the merits of this cause.

4.1. The merits phase

At the merits phase, Saipem claimed that, as a consequence of the unlawful interference of the domestic courts with the arbitration and the *de-facto* annulment of the ICC award rendered in its favour,⁵⁷⁷ it was deprived of the sums awarded by the award, and was therefore a victim of an illegal expropriation carried through the actions of Bangladesh's judiciary. Indeed, according to Saipem, the revocation of the panel's authority and the subsequent recognition of the ICC award issued by the latter as a nullity rendered useless a perfectly valid award and thus amounted to an indirect expropriation of its investment, and more precisely of: '(i) its right to arbitration of its disputes with Petrobangla; (ii) the right to payment of the amounts of the due under the Contract [i.e., the construction contract], as ascertained in the ICC Award; (iii) the rights arising under the ICC Award, including the right to obtain its recognition and enforcement in Bangladesh and abroad; and therefore (iv) the residual value of its investment in Bangladesh at the time of the ICC Award.'⁵⁷⁸

Hence, Saipem formulated a claim of indirect expropriation, rather than one of denial of justice or for violation of the FET standard, as would perhaps have been more appropriate.⁵⁷⁹ The point is that Saipem in this case did not have any

⁵⁷⁶ See Chapter II, section 5.1, also for a description of the facts of the cause.

⁵⁷⁷ The claimant alleged that the courts of Bangladesh acted illegally when they declared the ICC tribunal incompetent on specious grounds and the relevant award a nullity in the eye of the law. For more see Chapter II, section 5.1.

⁵⁷⁸ Saipem Award, para. 120.

⁵⁷⁹ Saipem itself confirmed that the claimed misconducts of the Bangladesh courts would have amounted also to a denial of justice and a violation of the fair and equitable treatment

choice: unlike most modern BITs, the Italy-Bangladesh BIT provided that investor-State disputes could exclusively regard ‘[...] compensation for expropriation, nationalization, requisition or similar measures [...]’.⁵⁸⁰ For the sake of completeness, it should be noted that the clause of the Italy-Bangladesh BIT regarding expropriation is one of the standard old-fashioned provisions, where a State is prohibited from performing any direct or indirect expropriation vis-à-vis the other contracting State’s nationals, except for public purpose or national interest, against an immediate, full and effective compensation, and on condition that the measures amounting to the expropriation are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.⁵⁸¹

standard provided by the BIT and customary international law, *see* Saipem Award, para. 121.

⁵⁸⁰ Art. 9(1) of the Italy-Bangladesh BIT.

⁵⁸¹ More precisely, Art. 5 of the Italy-Bangladesh BIT provides that:

- ‘(1) The Investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction.
- (2) Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.
- (3) The just compensation shall be equivalent to the real market value of the investment immediately prior to the moment in which the decision to nationalize or expropriate is announced or made public, and shall be calculated according to internationally acknowledged evaluation standards. Whenever there are difficulties in ascertaining the market value the compensation shall be calculated on the basis of a fair appraisal of the establishment's constitutive and distinctive elements as well as of the firms activities components and results. Compensation shall include interest calculated on a six-month LIBOR basis accruing from the date of nationalization or expropriation to the date of payment. In the event of failure to reach an agreement between the investor and the Contracting Party having liability, the amount of the compensation shall be calculated following the settlement of dispute procedure provided by Article 9

The preliminary analysis of the claim was made in the Saipem Decision on Jurisdiction, where the tribunal had to determine whether the facts alleged by Saipem were capable *prima facie* of constituting an expropriation. In this regard, the tribunal – also recalling the jurisprudence of the European Court of Human Rights –⁵⁸² noted in its succinct motivation that rights determined by an arbitral award could, in theory, be the subject matter of an expropriation. In addition, the tribunal accepted that an action of the judiciary could amount to an expropriation. In this respect, the tribunal noted that though ‘[...] more often expropriation results from an act of the executive power [...] there is no reason why a judicial act could not result in an expropriation.’⁵⁸³

However, the tribunal left open for the merit stage the issue regarding whether or not Petrobangla and the courts of Bangladesh effectively breached the expropriation clause of the Italy-Bangladesh BIT.

The issue was therefore explored in the Saipem Award, where the tribunal, in order to solve the case, addressed the following questions: (i) did the actions of the Bangladeshi courts meet the general conditions of an expropriation?;⁵⁸⁴ (ii) were such actions illegal?; (iii) was the principle of exhaustion of local remedies applicable to the case?; and (iv) did Saipem accept the risk of the Bangladeshi

of this Agreement. Once the compensation has been determined it shall be paid promptly and authorization for its repatriation in convertible currency issued. [...].’

⁵⁸² The leading case quoted in the Saipem Decision on Jurisdiction is *Stran v. Greece*. For more, see Chapter I, section 5.

⁵⁸³ Saipem Decision on Jurisdiction, paras. 131-132.

⁵⁸⁴ Notably, despite Saipem’s claims concerned also the conduct of Petrobangla, the arbitral tribunal dismissed such position stating that ‘[...] it is generally accepted that an act must be governmental in nature to constitute an expropriation. In other words, only acts of the government that cannot be performed by private parties can constitute an expropriation. In the present case, it is undisputable that Petrobangla did not act in a governmental capacity in connection with the ICC proceedings. Therefore, Petrobangla’s actions in the course of the ICC proceedings, whether justified or not, cannot amount to an expropriation’ (Saipem Award, para. 131).

courts' wrongful interference by choosing Dhaka as the seat of the arbitration.⁵⁸⁵

With respect to the first question, according to the tribunal the actions of the Bangladeshi courts represented measures having similar effects to a direct expropriation (i.e., an indirect expropriation), as they substantially deprived Saipem of its residual rights of the original investment. Using the words of the panel, this conclusion was '[...] plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is "a nullity"'. Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.⁵⁸⁶ The tribunal overtly ruled on this point on the basis of the sole effect doctrine,⁵⁸⁷ which, as previously illustrated,⁵⁸⁸ exclusively considers the impact of the measure on the investment. In this respect, two important considerations shall be made.

First, the application of the sole effect doctrine implies that an expropriation to exist must have a substantial and irreversible character. However, in this case, the award rendered by the tribunal could have been recognized and enforced in countries different from Bangladesh according to the New York Convention.⁵⁸⁹ The tribunal acknowledged this aspect, but it decided to adopt a practical approach, ruling that, since Petrobangla had no assets outside Bangladesh, '[...] the perspective that the ICC Award could possibly be enforced under the New

⁵⁸⁵ Saipem Decision on Jurisdiction, para. 117. The tribunal considered also the issue regarding attribution of the disputed actions to Bangladesh. This point will not be analysed here, as the tribunal simply relied on the well-settled principle pursuant to which a State is responsible also for the acts of its judiciary, regardless of its independence from the executive (*see* section 1 of this Chapter III).

⁵⁸⁶ Saipem Award, para. 129

⁵⁸⁷ Saipem Award, para. 131.

⁵⁸⁸ *See* section 3 of this Chapter III.

⁵⁸⁹ Saipem could have also sold its award to another entity, which had the possibility to set-off debts vis-à-vis Petrobangla, for instance. Anyway, this is one of the controversial aspects of this award, which will be better analysed in para. 4.2 of this Chapter III.

York Convention outside Bangladesh despite having been declared “a nullity” by the Bangladeshi courts has no realistic basis.⁵⁹⁰

The second consideration is strictly connected to the second question posed by the tribunal (i.e., whether the Bangladeshi courts’ actions were illegal). Notably, the ICSID tribunal underscored that, in line with the parties’ allegations, the courts’ actions could amount to an indirect expropriation exclusively to the extent the judicial decision was found to be illegal.⁵⁹¹ Therefore, the tribunal supplemented the sole effect doctrine through the consideration of an additional element, represented by the illegality of the actions of the judiciary. The tribunal justified its position in light of the very peculiar kind of interference in the case at hand. Indeed, if the illegality item was not taken into consideration ‘[...] any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.’⁵⁹² According to Saipem, the courts’ actions were illegal since the jurisdiction over the revocation of the ICC tribunal’s authority rested with the appointed panel pursuant to the rules governing the arbitration.⁵⁹³ The arbitral tribunal rejected this claim, stating that the ICC Rules, while binding on the parties, are not binding on national courts and national arbitration laws can provide a solution that is different from that of the ICC Rules. Saipem also alleged that the action of the national courts were illegal on the grounds that, according to the Bangladeshi Arbitration Act, the

⁵⁹⁰ Saipem Award, para. 130.

⁵⁹¹ This concept shall not be confused with the lawfulness of an expropriation, which was illustrated in section 3 of this Chapter III. Indeed, in relation to the latter aspect, the tribunal limited to state that: ‘Bangladesh did not claim that the intervention of the local courts was driven by public purposes or national interest, and it is common ground that no compensation was paid. Hence, the question that the Tribunal must answer is whether the disputed actions constitute an expropriation within the meaning of Article 5 of the BIT. This presupposes that “property” has been “taken” by the State’ (Saipem Award, para. 126).

⁵⁹² Saipem Award, para. 133.

⁵⁹³ Saipem Award, paras. 137-144. From this position, it clearly results that Saipem adhered to the theory of delocalisation of international arbitration. On the contrary, the tribunal endorsed the territorialism theory. For more on this, *see* section 4.2.4 of this Chapter III.

intervention of the courts was permitted only once the contractually agreed method had been exhausted, while in the case at issue the national courts' intervention occurred in the course of the arbitral proceeding. The ICSID tribunal, however, refused to engage in its own independent interpretation of the local arbitration law and relied on the contrary position of Bangladesh that was supported by a legal opinion on local law (while Saipem did not have any legal opinion to support its position).⁵⁹⁴

Notwithstanding the rejection of both the allegations made by Saipem, the tribunal still concluded that the local court decisions were illegal in relation to two aspects.⁵⁹⁵ On the one hand, it found that the national courts committed an abuse of right, exercising their supervisory powers for a purpose that was different from the one for which the right was created.⁵⁹⁶ Further to a careful review of the procedural orders, which the ICC arbitrators had rendered in the course of the arbitration between Petrobangla and Saipem, the ICSID tribunal did not find any misconduct and miscarriage of justice by the ICC tribunal. The ICSID tribunal concluded that, in the absence of any basis for inferring a likelihood of miscarriage of justice in the ICC tribunal's conduct, the Bangladeshi courts, when revoking the ICC tribunal's authority, issued a grossly unfair judicial ruling. This position was strengthened by the fact that the decision of the Bangladeshi court concerning the revocation of the ICC tribunal was not sufficiently reasoned, as it simply took for granted

⁵⁹⁴ Notably, according to L.G. RADICATI DI BROZOLO, L. MALINTOPPI, *Unlawful Interference with International Arbitration by National Courts of the Seat in the Aftermath of Saipem v. Bangladesh*, in M.A. FERNANDEZ-BALLESTEROS, D. ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, Kluwer España; La Ley, 2010, pp. 993-1012, at p. 1004, '[t]his position seems to contrast with the now generally accepted view that arbitral tribunals (presumably including ICSID tribunals) have the power, and arguably the duty, to ascertain the content of the applicable rules on their own, without necessarily relying on the positions of the parties [...]'].

⁵⁹⁵ The tribunal dismisses also the first item on the 'merits' of the courts' decision to revoke the authority of the arbitrators (i.e., the one relating to the conspiracy and collusion between Petrobangla and the national courts), due to the lack of sufficient evidence in this respect (*see* Saipem Award paras. 146-148).

⁵⁹⁶ Saipem Award, para. 160.

Petrobangla's false allegations. Another important consideration to support the illegality of the local courts' decisions was identified in the fact that the ICC arbitrators were never consulted by the Bangladeshi courts during the process leading to the revocation decision.

In light of the above, the tribunal came to the conclusion that the Bangladeshi courts '[...] abused their supervisory jurisdiction over the arbitration process.'⁵⁹⁷ Indeed, according to the panel, '[i]t is true that the revocation of an arbitrator's authority can legitimately be ordered in case of misconduct. It is further true that in making such an order national courts have substantial discretion. However, *they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct and the risks it carries for the fair resolution of the dispute.* Taken together, the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to the facts indeed constituted an abuse of right.'⁵⁹⁸

On the other hand, the tribunal found a violation of the New York Convention, to which Bangladesh was bound. More precisely, Article II(1) thereof imposes an obligation on the contracting States to recognize valid written arbitration agreements and, in the tribunal's view, '[a] decision to revoke the arbitrators' authority can amount to a violation of Article II of the New York Convention whenever it de facto «prevents or immobilizes the arbitration that seeks to implement that [arbitration] agreement» thus completely frustrating if not the wording, at least the spirit of the Convention.'⁵⁹⁹ In this respect too, the ICSID tribunal yielded to a pragmatic approach.⁶⁰⁰ Indeed, the ICC arbitration could in theory have been pursued with a new arbitral tribunal. However, '[g]iven the abusive way in which the courts of Bangladesh exercised their supervisory jurisdiction [...] over the first ICC tribunal, the tribunal finds this perspective unrealistic. There is every likelihood that Saipem would have been exposed to similar risks with a new

⁵⁹⁷ Saipem Award, para. 159.

⁵⁹⁸ Saipem Award, para. 167.

⁵⁹⁹ Saipem Award, para. 167.

⁶⁰⁰ E. SAVARESE, *The Arbitral Practice of the International Centre for Settlement of Investment Disputes (ICSID) in 2009*, *supra*, note 194, at p. 369.

arbitral tribunal.⁶⁰¹ Finally, the ICSID tribunal found the unappealed decision holding the ICC award inexistent to be flawed under international law, and that it given ‘the “coup de grâce” [...] to the arbitral process, thus removing any doubt that might have remained [about the effect of the courts' intervention].’⁶⁰²

Having decided that the Bangladeshi courts illegally expropriated the residual part of Saipem’s investment, the tribunal had to establish whether the requirement of exhaustion of local remedies was also to be applied to a claim of judicial expropriation or if it was limited to the specific circumstances of denial of justice.⁶⁰³ This analysis needed to be made as Saipem decided not to appeal the decision declaring the ICC award non-existent and thus did not exert all available remedies. Broadly, the tribunal concurred with Saipem that the claim was one of expropriation and not denial of justice, and that exhaustion of local remedies ‘does not constitute a substantial requirement of a finding of expropriation by a court.’⁶⁰⁴ However, the tribunal refrained from explaining why the local remedies' rule should not apply in all cases of investor-State arbitrations concerning conducts of the judiciary. It also emphasized that the requirement of exhaustion of local remedies is met every time the investor has exerted all *reasonable* remedies, even though the ultimate appeal formally remains available to such an investor. The tribunal therefore went on to conclude that Saipem could ‘[...] be held to have exerted reasonable local remedies, having spent considerable time and money seeking to obtain redress without success although the allegation of misconduct was clearly ill-founded. Requiring it to do more and file appeals would amount to holding it to «improbable» remedies. This is even more true knowing that Saipem's case was precisely that the local courts should never have become involved in the dispute, since the parties had entrusted the ICC Court of Arbitration with the power to revoke the arbitrators' authority.’⁶⁰⁵

⁶⁰¹ Saipem Award, para. 169.

⁶⁰² Saipem Award, para. 173.

⁶⁰³ See section 2 of this Chapter III.

⁶⁰⁴ Saipem Award, para. 181.

⁶⁰⁵ Saipem Award, para. 183.

Finally, with respect to the last question, the ICSID tribunal utterly rejected Bangladesh's defence that, by agreeing to Dhaka as the seat of the arbitration, the foreign contractor 'had accepted the risk of interference by the local courts.'⁶⁰⁶ Indeed: '[t]here is no question that, under most legal systems including the Bangladeshi one, by choosing the seat of the arbitration the parties submit to the jurisdiction of the courts at the seat, which jurisdiction can be exercised in aid and in control of the arbitration process. That submission obviously implies that the courts exercise their jurisdiction to the ends for which it is created and do not abuse their powers. In the present case it has been established above page that the courts' intervention was abusive [...]. Hence the choice of Dhaka as the seat of the arbitration cannot change the conclusions drawn earlier by the tribunal.'⁶⁰⁷

In light of the above considerations, the tribunal found that the conduct of the Bangladeshi judiciary under discussion constituted an illegal expropriation and the expropriated rights were Saipem's residual contractual rights under the investment as crystallized by the ICC award.⁶⁰⁸

⁶⁰⁶ Saipem Award, para. 185.

⁶⁰⁷ Saipem Award, para. 187.

⁶⁰⁸ As to the amount of the compensation, the Tribunal held (paras. 201-207) that the sums awarded by the ICC award was the best evaluation of the compensation due by Bangladesh to Saipem according to customary principles of international law and, in particular, the principle set forth by the Permanent Court of Justice in the Chorzow Factory case (*Chorzof Factory case (Merits), Germany v. Poland*, Judgment of the PCIJ, 13 September 1928 (available at: http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf)) regarding compensation of damages for breach of international obligations. In particular, in the Chorzow Factory case (at p. 47), the Permanent Court of Justice established that: '[t]he essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it [...]'].

4.2. Considerations

The Saipem Awards has incited interest and comments from many authors. Some of them looked at the award from a positive angle, for instance welcoming the fact that eventually the abusive interference of a State with international arbitration was considered an international wrong.⁶⁰⁹ Others highlighted its flaws, for instance stating that the ICSID tribunal acted as an international court of appeal against the decisions taken by the Bangladeshi courts⁶¹⁰ and that the tribunal did not sufficiently explain certain positions it maintained with respect, for example, to the requirements for a judiciary expropriation to occur or the application in the case at work of the exhaustion of local remedies.⁶¹¹

Certainly, this award needs to be analytically examined, also to establish if, and to what extent, other arbitral tribunals can follow the path traced by it.

⁶⁰⁹ J.D. CAYRE, Introductory Note to the International Centre for Settlement of Investment Disputes: Saipem S.p.A. v. The People's Republic Of Bangladesh, *International Legal Materials*, Vol. 48, Issue 5, 2009, pp. 996-998, at p. 998; and L.G. RADICATI DI BROZOLO, L. MALINTOPPI, Unlawful Interference with International Arbitration by National Courts of the Seat in the Aftermath of Saipem v. Bangladesh, *supra*, note 594, at pp. 1110-1111.

⁶¹⁰ *See*, for instance, P.J. MARTINEZ-FRAGA, H.J. SAMRA, The Role of Precedent in Defining Res Judicata in Investor-State Arbitration, *Northwestern Journal of International Law*, Vol. 32, 2012, pp. 419-450, at p. 440, whereby it is stated that the Saipem Award has the effect of 'transforming and deforming international tribunals into second-instance appellate venues sitting in judgment of the manner in which municipal courts process applications for the recognition and enforcement of foreign judgments.' *See*, also, P. NAIR, State responsibility for non-enforcement of arbitral awards: revising Saipem two years on, *supra*, note 495; and W.M. REISMAN, H. IRAVANI, The Changing Relation of National Courts and International Commercial Arbitration, *supra*, note 64, Vol. 21, Issues 1-4, 2010, pp. 5-46, at p. 40.

⁶¹¹ With respect to the issue of judicial expropriation, *see, inter alia*, E. SAVARESE, The Arbitral Practice of the International Centre for Settlement of Investment Disputes (ICSID) in 2009, *supra*, note 194, at p. 370 (for more *see* sections 4.2.1 and 4.2.2 of this Chapter). For the application of the exhaustion of local remedies, *see*, for instance, A. MOURRE, A. VAGENHEIM, Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem, *supra*, note 523, at pp. 864-866 (for more *see* sections 4.2.3 of this Chapter).

4.2.1. Judiciary expropriation or disguised denial of justice?

One of the most problematic passages of the Saipem Award regards the qualification of the international wrong perpetrated by the national courts as a delict different from denial of justice. In fact, as illustrated in section 4.1 of this Chapter, in the case at issue, the tribunal accepted Saipem's reconstruction that the illegal setting aside of an international commercial award could amount to an indirect expropriation.⁶¹²

This position aroused criticisms of certain authors,⁶¹³ according to whom any claim based on national courts' conducts may exclusively regard denial of justice, irrespective of any possible attempt to recast it, for example, as an expropriation.⁶¹⁴ Pursuant to this line of thought, a denial of justice occurs all the times the harm suffered by the investor is directly caused by miscarriage of justice. International arbitration should have a deferential approach vis-à-vis the decisions taken by the national courts⁶¹⁵ and this is why claims for denial of justice can exclusively be hosted if certain specific circumstances are met: there

⁶¹² Notably an analogous issue had arisen in the past with respect to regulatory expropriation/breach of the FET standard. As noted by O.T. JOHNSON, D.Z. PINSKY, Representing Claimant: Pre-Arbitration Considerations, in C. GIORGETTI (ed.), *Litigating International Investment Disputes. A Practitioner's Guide*, Brill Nijhoff, 2014, pp. 19-40, at pp. 30-31, 'it has become common for claims of indirect expropriation and denial of fair and equitable treatment to appear in the same case, based on the same acts of the respondent state. This should not be surprising when one considers that both claims are, in essence, claims that the state has misused its regulatory authority.'

⁶¹³ A. MOURRE, A. VAGENHEIM, *Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem*, *supra*, note 523, at pp. 865-866; and Z. DOUGLAS, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, *supra*, note 495, at pp. 893-896.

⁶¹⁴ Notably, the same considerations made in this paragraph apply to *ATA v. Jordan* and *White v. India*, where the tribunals considered the national courts liable for treaty breaches different from denial of justice.

⁶¹⁵ *See, inter alia*, D. WALLACE, JR., *Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattin v Mexico*, *supra*, note 502, at p. 7, according to whom 'there must be a presumption of deference to the foreign court whose performance is being judged'.

must be a procedural error, the error has to be egregious and all local remedies available to correct the error need to have been tested. On the contrary, the option to bring investor-State claims for an action of local courts under a different treaty guarantee would entail a circumvention of such constraints. Of course, such circumvention may represent an advantage for the individual investor; however it could also ‘compromise significantly the integrity, credibility and sustainability of investment treaty law’.⁶¹⁶ Indeed, if it is possible to put different labels on the same conduct, an investor could simply chose to follow the simpler path in order to avoid, for instance, the application of the rule of exhaustion of local remedies or to access investor-State arbitration when the consent to jurisdiction clause included in the applicable treaty does not allow claims for denial of justice. This was exactly what happened in the *Saipem v. Bangladesh* case, where the Italy-Bangladesh BIT allowed investment treaty claims only on the grounds of expropriation.⁶¹⁷

Broadly, I do not concur with this reconstruction. If it is accepted that the actions of the municipal courts can entail a State liability, why should such liability be limited to the cases of denial of justice? As long as the constitutive elements of a different cause of action are met by a conduct of the judiciary, such conduct should entail a liability of the State.⁶¹⁸ Notably, arbitral awards have recognized that the delict of denial of justice can be also committed by

⁶¹⁶ M. SATTOROVA, Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct?, *International and Comparative Law Quarterly*, Vol. 61, Issue 1, January 2012, pp. 223-246, at p. 244.

⁶¹⁷ E. ALVAREZ, Crossing the “Public/Private” Divide: *Saipem v. Bangladesh* and Other Crossover Cases, *supra*, note 332, at p. 410 addressed the issue demanding if the way that an investor-claimant categorizes its claim should matter to the result.

⁶¹⁸ In the same vein seems to be M. PAPANISKIS, The International Minimum Standard and Fair and Equitable Treatment, *supra*, note 502, pp. 207-208; and J. PAULSSON, Denial of Justice in International Law, *supra*, note 501, at p. 72. However, it shall be noted that Papaniskis argues that ‘the delineation of denial of justice from other international wrong is still challenging’ and strongly criticizes the *Saipem* Award, as the tribunal did not clearly distinguish denial of justice from judicial expropriation.

administrative bodies;⁶¹⁹ therefore, denial of justice should no longer be considered as a delict exclusively pertaining to the conduct of the judiciary and, as such, the only one to be tested every time the local courts' conducts are under scrutiny. With specific reference to this case, judicial expropriation has been correctly treated as a different cause of action from denial of justice.⁶²⁰ As noted by one author, 'not every [judicial] expropriation is a denial of justice and not every denial of justice is an expropriation.'⁶²¹ For instance, in a case of denial of justice it is not required that an investor is deprived of its investment, and in order for a judicial expropriation to occur there is no need that an entire legal system fails to accord a fair process.

Of course, an arbitral tribunal dealing with this issue should be very careful and should verify the existence of the constitutive elements of an expropriation in a rigorous manner. Otherwise, claims for expropriation can be simply 'deployed to fill the gaps in investment protection, even when such gaps have been expressly agreed by contracting state parties in the relevant treaty instrument.'⁶²²

4.2.2. Are the constitutive elements of expropriation present in the Saipem v. Bangladesh case?

⁶¹⁹ See, *Generation Ukraine v. Ukraine*. However, it shall be noted that this position has been subject matter of criticisms (see, for instance, C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration: Substantive Principles*, *supra*, note 53, at p. 233).

⁶²⁰ As noted in sections 3 of this Chapter III, tribunals have not taken a univocal orientation on this aspect. Some of them (issued after the Saipem Award) have recognised judiciary expropriation as a different cause of action from denial of justice (see, *supra*, note 525), while a different tribunal has considered the claim of expropriation as overlapping with the one of denial of justice (see, *supra*, note 528).

⁶²¹ M. SATTOROVA, *Judicial expropriation or denial of justice? A note on Saipem v Bangladesh*, *International Arbitration Law Review*, Vol. 2, Issue 35, 2010, pp. 35-41, at p. 38.

⁶²² M. SATTOROVA, *Investment Treaty Breach as Internationally Proscribed Conduct: Shifting Scope, Evolving Objectives, Recalibrated Remedies?*, *Trade Law and Development*, Vol. 4, Issue 2, 2012, pp. 315-352, at p. 338.

As illustrated in section 4.1 of this Chapter, despite the criticism, the tribunal in the *Saipem v. Bangladesh* case established that the misconduct of municipal courts can entail the liability of the State for an unlawful expropriation.

It is now worth analysing how the ICSID tribunal came to this conclusion. In fact, as will be better described below, the tribunal took an innovative approach also in this respect, introducing an additional element allegedly necessary to establish the existence of a judiciary expropriation, which was not taken into consideration by precedent case law.

The criteria overtly adopted in order to verify the existence of the judiciary expropriation was the well-established ‘sole effect’ doctrine, pursuant to which the only relevant element to be considered is the impact of the measure on the investment, which must be totally and permanently deprived of its value.⁶²³

According to the tribunal, in the case at hand, the Bangladeshi courts’ conduct substantially deprived Saipem of its property (i.e., ‘the residual contractual rights under the investment as crystallized by the ICC Award’)⁶²⁴ and such deprivation was irreversible, since Petrobangla did not have any asset outside of Bangladesh and, therefore, the possibility to enforce the ICC award elsewhere on the basis of the New York Convention had no realistic basis.⁶²⁵

This point of the decision has been subject to criticism on different grounds. According to Prof. Alvarez, ‘[b]ased on the facts presented, there was arguably no substantial deprivation of the underlying “investment” rights in that case but only a deprivation of part of those rights as contained in the arbitral award.’⁶²⁶ The Professor held that, since the rights arising from the ICC award were only a part of the original investment, the Bangladeshi municipal courts with their decisions have not taken Saipem’s investment, but only the award,

⁶²³ For more, *see* section 3 of this Chapter III.

⁶²⁴ Saipem Award, para. 128.

⁶²⁵ Saipem Award, para. 130.

⁶²⁶ E. ALVAREZ, *Crossing the “Public/Private” Divide: Saipem v. Bangladesh and Other Crossover Cases*, *supra*, note 332, at p. 425.

that is ‘monies owed to them for delays in payment and not the full contract that the ICC award supposedly “crystallizes”’.⁶²⁷

In relation to this comment, however, it could be argued that the Bangladeshi courts through their actions took the entirety of what remained of the investment, or, in other words, what of the investment still existed at the time when the measures were taken. As already stated,⁶²⁸ I find it difficult to accept the concept of investment enshrined in this award; however, if it is accepted, it is evident that the municipal court expropriated all that the investment was at that given moment.

Other authors have criticized that the taking was not permanent. This is because the denial of recognition and enforcement of the ICC award by the Bangladeshi court does not have an *erga omnes* effect and the recognition and enforcement thereof could have been sought elsewhere. According to this line of thought, it is true that, as the ICSID tribunal recognized, Petrobangla did not have assets outside the boundaries of Bangladesh;⁶²⁹ however, Saipem could have waited until Petrobangla acquired assets elsewhere in the world, or tried to sell the award to a third party having debts to settle against Petrobangla.⁶³⁰ On these grounds the finding of an expropriation in any

⁶²⁷ E. ALVAREZ, Crossing the “Public/Private” Divide: Saipem v. Bangladesh and Other Crossover Cases, *supra*, note 332, at p. 425. The same position is also supported by M. SATTOROVA, Judicial expropriation or denial of justice? A note on Saipem v Bangladesh, *supra*, note 621, at p. 40.

⁶²⁸ See Chapter II, sections 5.1 and 6.

⁶²⁹ This element induced the arbitrators to believe that the enforcement the ICC award elsewhere was unrealistic (Saipem Award, para. 130).

⁶³⁰ See, *inter alia*, B. DEMIRKOL, Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration, ICSID Review, Vol. 30, Issue 1, 2015, pp. 56-77, at p. 70; and L. GUGLYA, International Review of Decisions Concerning Recognition and Enforcement of Foreign Arbitral Award: A Threat to the Sovereignty of the States or an Overestimated Hazard (so far)? (*with Emphasis on the Developments within the International Investment Arbitration Setting*), in A.J. BĚLOHLÁVEK, N. ROZEHNALOVÁ (eds.), Czech Yearbook of International Law, Vol. 2 (2011), Juris Publishing, 2011, pp. 93-121, at p. 114.,

situation when the recognition and enforcement scheme is at stake shall be considered improbable.⁶³¹

Yet, these scholarly writings do not seem to take into account that in the case at issue, the rulings of the Bangladeshi courts are more similar to a setting-aside than to a mere non-enforcement of a commercial award. Indeed, the Bangladeshi Supreme Court refused to set aside the ICC award, simply because it considered it as non-existent. Therefore, Saipem in order to enforce its award should have found a State that accorded recognition and enforcement to an award substantially set aside by the courts of the seat, which, as illustrated in section 4 of Chapter I, may be rather complicated, if not impossible.⁶³² In any case, assuming that a State may accept the recognition of such an award, it may still be argued that requiring the aggrieved award creditor to wait for Petrobangla to purchase assets outside of Bangladesh may be too onerous, as realistically it would never happen.⁶³³

The tribunal however did not simply rely on the sole effect doctrine. Indeed, it stated that due to the *peculiar circumstances of the case* it had to consider whether the conduct of the courts was also illegal. For the panel, a different approach would have entailed that any setting aside of an award could imply a claim for

⁶³¹ L. GUGLYA, International Review of Decisions Concerning Recognition and Enforcement of Foreign Arbitral Award: A Threat to the Sovereignty of the States or an Overestimated Hazard (so far)? (*with Emphasis on the Developments within the International Investment Arbitration Setting*), *supra*, note 630, at p. 114.

⁶³² Analogously, it should have found a debtor of Petrobangla interested in purchasing an ICC award, issued by a panel not recognized in the State where Petrobangla is incorporated and declared ‘a nullity in the eye of the law’.

⁶³³ In addition, according to L. GUGLYA, International Review of Decisions Concerning Recognition and Enforcement of Foreign Arbitral Award: A Threat to the Sovereignty of the States or an Overestimated Hazard (so far)? (*with Emphasis on the Developments within the International Investment Arbitration Setting*), *supra*, note 630, at p. 114, in addition, requiring the investor to enforce the award elsewhere ‘[...] could indeed be subject to criticism, foremost because the scheme described above is vulnerable at the point of *de facto* obligating the investor to initiate alternative recognition and enforcement proceedings, in case of failing the initial attempt to get the award enforced in order to “exhaust the [internationally] available remedies”. This way the enforcement forum shopping seems to be encouraged, which is hardly one of the aims pursued by the New York Convention.’

expropriation, even when the setting aside was well grounded and legitimate. On this basis, the ICSID tribunal found the Bangladeshi courts' actions illegal as they committed an abuse of right and violated the *spirit* of the New York Convention.⁶³⁴

This is another controversial passage of the Saipem Award. In particular, some authors did not welcome the introduction of the legality requirement. For some of them the panel did not sufficiently clarify the special circumstances justifying the additional element: was it due to the fact that the case at issue was a judicial expropriation or rather that the municipal courts interfered with an arbitration proceeding?⁶³⁵ Others highlighted how the tribunal simply added an unnecessary element,⁶³⁶ while others wondered about the legal basis for that ruling.

In this respect, the most appropriate explanation is linked to the nature of the instrument at hand: a commercial award. National courts have legitimate grounds on which they can set aside, or deny recognition and enforcement to, a commercial award. Thus, the annulment of an award might be analogized to a regulatory taking. Scholarly writings, based on numerous and conflicting investment treaty awards, have tried to identify the difference between a legitimate regulatory action, which is an expression of the power of a State and does not give rise to a claim of compensation, and indirect expropriation through a legislative act.⁶³⁷ The result is a wide list of factors to be taken into consideration in addition to the effect of the measure, such as a lack of

⁶³⁴ Saipem Award, para. 167.

⁶³⁵ M. SATTOROVA, Judicial expropriation or denial of justice? A note on Saipem v Bangladesh, *supra*, note 621, at pp. 38-39.

⁶³⁶ B. DEMIRKOL, Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration, *supra*, note 630, at p. 70.

⁶³⁷ See, *inter alia*, A. NEWCOMBE, The Boundaries of Regulatory Expropriation in International Law, ICSID Review, Vol. 20, Issue 1, 2005, pp. 1-57; C. SCHREUER, The Concept of Expropriation under ECT and other Investment Protection Treaties, *supra*, note 531, at p. 110; and J.W. SALACUSE, The Law of Investment Treaties, *supra*, note 9, at p. 313; UNCTAD, Expropriation, *supra*, note 538, at pp. 97-100.

proportionality,⁶³⁸ a lack of public purpose and due process, the existence of discrimination,⁶³⁹ and a failure to meet the legitimate expectations of the investor.⁶⁴⁰ The situation in the case at hand is similar: the tribunal had to distinguish between a correct setting aside of a commercial award and a wrong judiciary taking. In fact, when a court engages in normal judicial activities, the mere fact that an investor suffers a deprivation is not sufficient to ground an expropriation claim. Judiciary expropriation needs something more to exist. The tribunal, relying on what both parties to the claim had agreed on, identified this additional requirement on the illegality of the decision, and, more precisely, on the abuse of right and in the violation of the New York Convention.⁶⁴¹ Yet, both the correctness of the references to the abuse of right and the breach of the New York Convention can also be debated. As noted by one author, the tribunal, in its cursory explanation, did not analyse why there should be a binding rule of international law that would make a State responsible for committing an abuse of right.⁶⁴² In this respect, if it is correct that the ICSID tribunal did not explain the concept, it should be noted that abuse of right has

⁶³⁸ See, J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, at p. 313; and UNCTAD, *Expropriation*, *supra*, note 538, at pp. 97-100.

⁶³⁹ See, UNCTAD, *Expropriation*, *supra*, note 538, at pp. 95-97.

⁶⁴⁰ D.B. KING, R. MOLOO, *Enforcement after the Arbitration: From National Courts to Public International Law Fora*, *supra*, note 84, pp. 393-458, at p. 416.

⁶⁴¹ Of this opinion, D.B. KING, R. MOLOO, *Enforcement after the Arbitration: From National Courts to Public International Law Fora*, *supra*, note 84, at pp. 416-417; A. NEWCOMBE, *When is Court Interference in Arbitration Proceeding Expropriatory?*, in *Kluwer Arbitration Blog*, posted on 7 July 2009 (available at: <http://kluwerarbitrationblog.com/2009/07/07/when-is-court-interference-in-arbitration-proceedings-expropriatory/>). This explanation is also supported by the fact that in its most recent issue on expropriation, UNCTAD (*Expropriation*, *supra*, note 538, at pp. 101-102) has included among the elements to be considered in order to distinguish between a right regulatory activity and a regulatory taking the abuse of power, relying on the Saipem Award.

⁶⁴² P. NAIR, *State responsibility for non-enforcement of arbitral awards: revising Saipem two years on*, *supra*, note 495.

been considered as a fundamental part of the good faith principle,⁶⁴³ which is enshrined in Art. 26 of the Vienna Convention pursuant to which: '[e]very treaty in force is binding upon the parties and shall be performed by them *in good faith*.' The theory of abuse of right has been considered as a mere application of this principle to the exercise of rights.⁶⁴⁴ Based on the decisions of the international courts and tribunals and the practice of a number of States, it has been deemed⁶⁴⁵ that the principle of abuse of rights constitutes a general principle of law under Art. 38(i)(c) of the Statute of the ICJ.⁶⁴⁶

The Appellate Body of the WTO has formulated the principle as follows: '[the good faith] principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by States. One application

⁶⁴³ B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, 2006 (reprinted; original version: 1953), at p. 121 and following; and G. KAUFMANN-KOHLER, *Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts*, *supra*, note 477, at p. 170. For more on abuse of right see T.J. GRIERSON-WEILER, I.A. LAIRD, *Standards of Treatment*, in P. MUCHLINSKI, F. ORTINO AND C. SCHREUER, *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008, pp. 260-302, at pp. 284-287.

⁶⁴⁴ B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, *supra*, note 643, at p. 121.

⁶⁴⁵ G. KAUFMANN-KOHLER, *Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts*, *supra*, note 477, at p. 169. For more on the concept of abuse of right and its value as a general principle of international law see A. KISS, *Abuse of Right*, *Max Planck Encyclopedia of Public International Law* (voice of), Oxford University Press, 2006.

⁶⁴⁶ Art. 38(1) of the Statute of the International Court of Justice – which is annexed to the Charter of the United Nations and of which it forms an integral part – provides that: '[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. *the general principles of law recognized by civilized nations*;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

of this general principle is widely known as the doctrine of *abus de droit*, which prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.⁶⁴⁷

The concept of abuse of right is also well established in investment arbitration, where several awards have considered it at the jurisdictional phase in the context of access to the ICSID jurisdiction.⁶⁴⁸ In case the law allows a State a wide discretion in the exercise of a right, such as in the case of decisions of the judiciary, especially those concerning national law, the principle of abuse of right implies that such discretion is to be exercised in a 'reasonable, honest and sincere manner in conformity with the spirit, purpose as well as the letter, of the law.'⁶⁴⁹

In light of the above, it can be argued that the criticism under analysis is not so well grounded and that the Saipem v. Bangladesh tribunal assessed the legality of the decisions taken by the municipal courts on the basis of a crucial principle of international law that allows international tribunals to investigate if the judiciary has properly exercised its discretionary powers.

On the contrary, the contours of second element of illegality seem more blurred. In fact, the tribunal did not find a specific violation of the New York Convention, probably because the case under work did not concern the recognition of an arbitration agreement or the recognition/enforcement of commercial arbitral award, which are the subject matters of the convention. Still, the tribunal held that a revocation of the arbitral tribunal's authority

⁶⁴⁷ United States - Import Prohibition of Certain Shrimp and Shrimp Products - AB-1998-4 - Report of the Appellate Body, WTO Doc. WT/DS58/AB/R, para. 158.

⁶⁴⁸ See J. CHAISSE, The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration, *Hastings Business Review*, Vol. 11, Issue 2, 2015, pp. 225-305, p. 254.

⁶⁴⁹ B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, *supra*, note 643, at p. 135.

violated the ‘spirit’ of the New York Convention. Although it is correct that, according to the Vienna Convention, a treaty should be interpreted consistent with its *object and purpose*, holding that State responsibility could be engaged on the ‘more nebulous ground of violating its “*spirit*” would again probably be considered by many to be a step too far.’⁶⁵⁰

Moreover, the fact that the tribunal found a breach of the Italy-Bangladesh BIT due to the misapplication of the New York Convention raised criticism among scholars, which found this contrary to the ‘architecture’ of international arbitration.⁶⁵¹ Indeed, although the tribunal in the Saipem Decision on Jurisdiction stressed that it would have not acted as a supranational appellate body overlooking the decisions of the Bangladeshi courts,⁶⁵² according to certain authors it effectively acted as such.⁶⁵³ In fact, if it is true that the arbitrators have not reviewed the correctness of the courts’ decisions with respect to the application of national law, they still reviewed domestic opinions for compliance with international law and the proper discharge of the national courts’ responsibilities under the New York Convention, which does not envisage a system of review of the national courts’ decisions on its application. As noted by one of the supporters of the architecture of international arbitration, the Saipem Award ‘is far-reaching in its implications. It adapts the mechanisms of international investment law, as expressed in bilateral investment treaties, to serve as the criterion for a review of the lawfulness of the performance by national courts of their responsibilities under the New

⁶⁵⁰ P. NAIR, State responsibility for non-enforcement of arbitral awards: revising Saipem two years on, *supra*, note 495.

⁶⁵¹ See Chapter I, section 4, and section 10 of this Chapter III.

⁶⁵² Saipem Decision on Jurisdiction, paras. 181-184.

⁶⁵³ G. CARBONE, The Interference of the Court of the Seat with International Arbitration, *supra*, note 64, at pp. 241-242; P. NAIR, State responsibility for non-enforcement of arbitral awards: revising Saipem two years on, *supra*, note 495; W.M. REISMAN, B. RICHARDSON, Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration, *supra*, note 488, at pp. 55-56; and A. STEPHENSON, L. CARROLL, J. DEBOOS, Interference by a Local Court and Failure to Enforce: Actionable Under a Bilateral Investment Treaty?, in C. BROWN, K. MILES (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, 2011, pp. 429-444, at pp. 439-440.

York Convention.⁶⁵⁴ Moreover, it has been argued that the ICSID tribunal acted as a supranational appellate body as the remedy that Saipem sought through the ICSID proceeding was the enforcement of an award issued by an ICC tribunal whose authority had been revoked by the courts of the State where the arbitral process was held.⁶⁵⁵ This topic will be addressed in more details in the comments to *Frontier v. Czech Republic*, where the tribunal explained its understanding of the role of international investment arbitration with respect to national courts applying the New York Convention.⁶⁵⁶

4.2.3. Exhaustion of local remedies

Another important issue that the tribunal faced, but unfortunately did not treat in detail, concerns the application of the exhaustion of the local remedies' principle to the case at work. The tribunal limited to state that exhaustion of local remedies is an essential element of denial of justice, but it *tended to consider* that '[...] exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court.'⁶⁵⁷ The tribunal however went on to state that: '[b]e this as it may, the tribunal does not need to make a determination on this issue since it considers that, if the requirement applied, Saipem would be deemed to have satisfied it under the circumstances.'⁶⁵⁸ In fact, the tribunal believed that Saipem did not have to pursue unreasonable remedies and that, after all that Saipem had done, '[r]equiring it to do more and file appeals would amount to holding it to "improbable" remedies.'⁶⁵⁹

⁶⁵⁴ W.M. REISMAN, B. RICHARDSON, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, *supra*, note 488, at p. 56. Notably, it seems that the panel in the *ATA v. Jordan* case, which was composed also by Prof. Reisman, did the same in order to assess if the annulment of an arbitration clause was in breach of the Jordan-Turkey BIT. For more *see* para. 6 of this Chapter.

⁶⁵⁵ W.M. REISMAN, B. RICHARDSON, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, *supra*, note 488, at p. 55.

⁶⁵⁶ *See* section 7.2.1 of this Chapter.

⁶⁵⁷ Saipem Award, para. 181.

⁶⁵⁸ Saipem Award, para. 182.

⁶⁵⁹ Saipem Award, para. 183.

From the above, despite its vagueness, it is possible to draw two conclusions on the reasoning of the tribunal. First, the panel is aligned with the *Loewen v. US* case and the majority of scholarly writings⁶⁶⁰ according to which exhaustion of local remedies represents a substantive element of denial of justice and any waiver to such a rule does not apply to claims for denial of justice.⁶⁶¹

Second, the tribunal relied on a flexible approach in discerning the situation where the attempt to resort to local remedies is futile, through the application of a standard of ‘reasonable’ actions, which is one lower than the one required in *Loewen v. US*.⁶⁶²

Having said that, the tribunal did not take a firm position on the most critical aspect: in case of judicial expropriation, or more generally when the courts’ actions are under scrutiny for a breach of international law, does the exhaustion of local remedies find application? A reply to this question needs to be given in order to assess the requirements that must be met by investors that intend to file a claim for judicial expropriation.

As a preliminary remark, if a claim for judiciary expropriation is considered inadmissible, since any international wrong by national courts can only represent a denial of justice, the problem does not come into existence. Indeed, *ça va sans dire* that, in such a case, the exhaustion of local remedies finds application.⁶⁶³

If, on the contrary, the conduct of the local courts may amount to a different international delict (such as a judicial expropriation), the question is well posed. In this regard, it is worth noting that certain commentators⁶⁶⁴ believe that the exhaustion of local remedies should apply to any international wrong

⁶⁶⁰ See section 3 of this Chapter III.

⁶⁶¹ See section 3 of this Chapter III.

⁶⁶² See section 3 of this Chapter III.

⁶⁶³ See section 2 of this Chapter III.

⁶⁶⁴ G. CARBONE, *The Interference of the Court of the Seat with International Arbitration*, *supra*, note 64, at pp. 241-242; G.K. FOSTER, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, *supra*, note 514, at p. 244; and pp. 248-249; and M. SATTOROVA, *Judicial*

committed in the process of administering justice.⁶⁶⁵ Indeed, according to this line of thought, since in all cases there is some form of judicial misconduct, the considerations made in the case of denial of justice, regarding the special nature of the judicial system, should be applied in case of any judicial wrong.⁶⁶⁶

This solution is not persuasive. Limiting the analysis to the case of judiciary expropriation, it is noted that, if such a delict is to be considered different from denial of justice, then the constitutive elements thereof must be different. More precisely, the basis for a claim of denial of justice is that the entire legal system failed to provide justice; thus, all available judicial remedies must be tested in order to find a denial of justice, and the exhaustion of local remedies represents a constituent element thereof. In other words, the delict of denial of justice is committed exclusively when the adjudicative process reaches its final conclusion. On the contrary, an expropriation may take place through the activity of exclusively a lower court, provided that through that court's conduct the foreign investor is substantially and permanently deprived of its investment. The reinstatement of requirement of exhaustion of local remedies, in this case, would frustrate one of the advantages of investor-State arbitration, on which the contracting States of the ICSID Convention and/or other investment treaties have agreed, granting the waiver to the procedural condition of exhaustion of local remedies.⁶⁶⁷ Further, if investors are required to exhaust judicial appeals of judicial decisions, should the same rationale not apply to administrative and regulatory decisions, which are invariably subject to review by some State judicial authority?⁶⁶⁸ Indeed, it is well established that investors

expropriation or denial of justice? A note on *Saipem v Bangladesh*, *supra*, note 621, at pp. 38-39.

⁶⁶⁵ M. SATTOROVA, *Judicial expropriation or denial of justice? A note on Saipem v Bangladesh*, *supra*, note 621, p. 40.

⁶⁶⁶ M. SATTOROVA, *Judicial expropriation or denial of justice? A note on Saipem v Bangladesh*, *supra*, note 621, at pp. 38-39.

⁶⁶⁷ Of this opinion: A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 502, at pp. 243-244.

⁶⁶⁸ The same question was posed in A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 243.

are not required to exhaust administrative appeal to bring an investor-State claim: the waiver contained in investment treaties has the exact purpose of preventing an aggrieved investor from carrying this burden.

To sum up, the delict of expropriation is consummated when any body through an act or an omission deprives substantially and definitively a foreign investor of its investment. This rule should vary only because the organ that committed the delict is the judiciary. Notably, the fact that the deprivation suffered by the investor through the court's conduct has to be permanent in order for a State to be guilty of expropriation does not mean that the relevant decision shall be definitive and unchallengeable. It is indeed sufficient that the court's decision is enforceable to entail that the investor is not only temporarily deprived (as in the *Saipem v. Bangladesh* case). A different solution would once again imply the re-introduction of the procedural requirement of exhaustion of local remedies.⁶⁶⁹

4.2.4. Role of the seat of arbitration

What is described above are the main issues faced, and position taken, by the ICSID tribunal in the *Saipem* Award regarding the topic of judicial expropriation *versus* denial of justice.

Yet, there is also another interesting aspects of the decision that should be briefly analysed, which concerns the theory adopted by the tribunal on the role of the seat of arbitration. As mentioned in Chapter I,⁶⁷⁰ the two main theories in this respect are territorialism and delocalization. Considering the former, arbitrators derive their powers from the law of the place where they perform their duties and the award 'made' at the place of arbitration. From the latter, on the contrary, international arbitral tribunals are seen as detached from the controls imposed by the seat of arbitration. Notably, the territorial approach is also characterized by the courts' deference to the decision to set aside the

⁶⁶⁹ Of a different opinion is B. DEMIRKOL, *Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration*, *supra*, note 630, at p. 70.

⁶⁷⁰ *See* Chapter I, section 4.

award by the courts of the State of the seat of the arbitration. An opposite attitude is pursued by the delocalized approach, according to which the enforcing court is free to ignore the setting aside disposed by the court of the seat of the arbitration.

In the Saipem Award, the ICSID tribunal implicitly reaffirmed the seat theory of international arbitration law, stating that the parties are bound by the national law governing the arbitration, which supersedes any rule agreed by the parties to the contrary. The tribunal clearly supported the notion that international arbitration is based on the legal system of the State of the seat, and that the local courts have the right to supervise arbitrations taking place in their territory, according to the local national rules.⁶⁷¹

According to some scholars, 'by following this course the tribunal displayed considerable wisdom, were it only because in this way its decision remains uncontroversial. What is perhaps more important in practical terms is that, by recognizing that international arbitration is rooted in the legal system of the State of the seat, the tribunal could sanction the illegality of that State's behaviour. This would arguably have been more difficult had the tribunal accepted the premise that the arbitration had no connection with the State.'⁶⁷²

However, one cannot help note that supporters of the territorial approach tend to consider that the courts of the seat of the arbitration should have the final say with respect to decisions concerning the validity of the issued arbitral award, which therefore should not be reviewed by any other national/international court/tribunal, including investment tribunals. Therefore, if the courts of Bangladesh considered that the award was a nullity, a strict adherence to the territorial approach would have implied that such an award had no legal significance and no tribunal should have ruled on its

⁶⁷¹ Saipem Award, paras. 137-144. Yet, the tribunal seemed to leave the door partially open also to the denationalization of commercial arbitration, when, it affirmed that the ICC award could in theory have been enforced abroad (had assets been available) despite the award was substantially set aside by the courts of the State where the arbitration seated.

⁶⁷² L.G. RADICATI DI BROZOLO, L. MALINTOPPI, Unlawful Interference with International Arbitration by National Courts of the Seat in the Aftermath of Saipem v. Bangladesh, *supra*, note 594, at pp. 1008-1009.

enforcement. On the contrary, in the Saipem Award the ICSID tribunal reviewed the Bangladeshi courts' decision, and while it is true that on the one hand it confirmed that the courts of the seat may legitimately revoke the arbitrators' authority in case of misconduct and that in the exercise of their powers they have substantial discretion, it also maintained that such discretion should be exercised in accordance with the principle of good faith and, in particular, without abusing of their rights.⁶⁷³

5. The FET and MFN standards

In some of the Relevant Cases,⁶⁷⁴ the claimants have contested, *inter alia*, that the municipal courts breached the FET standard set out in the applicable BIT. It is therefore worth briefly illustrating this standard, in order to have a better understanding of such cases.

The FET standard is one of the centrepieces of most claims by investors against host States. This is principally due to its vague and potentially elastic nature, which implies that it is a flexible tool that can be adapted to the circumstances of each case. In fact, 'fair and equitable treatment' does not refer to a well-defined juridical concept. Historically, it was not a term of art in public international law. In addition, almost no investment treaty provides for a definition of what is to be considered fair and equitable and there are significant variations in the drafting of the FET clauses in investment treaties, which must be taken into account in the determination of the relevant scope of protection. Finally, although arbitral tribunals have interpreted and applied this standard in a large number of cases, such applications are so tied to the facts of the specific case as to sometimes limit the utility of the relevant arbitral decisions.⁶⁷⁵ Therefore the exact content of this term remains elusive.

⁶⁷³ See also section 4.2.2 of this Chapter III.

⁶⁷⁴ Reference is made to: ATA v. Jordan (*see* section 6 of this Chapter III); Frontier v. Czech Republic (*see* section 7 of this Chapter III); GEA v. Ukraine (*see* section 7 of this Chapter III); and White v. India (*see* section 9 of this Chapter III).

⁶⁷⁵ However, as better explained below in this section, from the application of the FET standard by arbitral tribunals, scholars have retrieved some of the constitutive elements thereof.

As mentioned, the meaning of the standard largely depends on the wording used in the applicable BIT: the text of FET provisions in investment treaties varies considerably, contributing to the lack of certainty surrounding the FET standard. More precisely, investment treaties employ the following main formulations and approaches to the FET standard:⁶⁷⁶

- unqualified obligation to provide fair and equitable treatment;⁶⁷⁷
- FET obligation linked to international law without reference to a minimum standard of treatment of aliens;⁶⁷⁸
- FET obligation linked to the notion of minimum standard of treatment of aliens in accordance with customary international law;⁶⁷⁹

⁶⁷⁶ This classification among the FET clauses - that is supported by UNCTAD, Fair and Equitable Treatment, UNCTAD Series on International Investment Agreements II, 2012.- is not the only possible classification. For a different classification, *see, inter alia*, M. KINNEAR, The Continuing Development of the Fair and Equitable Treatment Standard, in A. K. BJORKLUND ET AL. (eds.), Investment Treaty Law, Current Issues III, The British Institute of International and Comparative Law, 2009, pp. 209-239, at p. 213.

⁶⁷⁷ For instance, the Acuerdo Para la Prohacion y la Proteccion Reciproca de Inversiones Entre il Reino De Espana y la Republica Argentina, signed on 3 October 1991 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/119>), in its Art. 4(1), provides that each Party shall accord in its territory fair and equitable treatment to investments made by investors of another Party.

⁶⁷⁸ For instance, (i) the Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 1991 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>) (“**US-Argentina BIT**”), in its Art. II(2)(a), provides that: ‘[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law’; and (ii) the Agreement Between the Government of The Republic of Croatia and the Government of the Sultanate of Oman on the Promotion and Reciprocal Protection of Investments, signed on 5 April 2004 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/880>), in its Article 3(2), provides that: ‘[i]nvestments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment in accordance with international law and provisions of this Agreement’.

- FET obligation with an additional substantive content (such as, prohibition of denial of justice, prohibition of unreasonable/discriminatory measures, irrelevance of breach of other treaty obligations) and without reference at all to international law.⁶⁸⁰

In the cases when the FET standard is not textually linked to the minimum standard of treatment of aliens or to international law, the FET has been interpreted by many tribunals⁶⁸¹ as an autonomous or self-standing standard.

⁶⁷⁹ For instance, Art. 1105 of the NAFTA, which is titled ‘Minimum Standard of Treatment’, provides that: ‘[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security’. In relation to this provision, further to decisions that declared the standard additive to the minimum standard of treatment (*see especially, Pope and Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0678.pdf>)), the NAFTA Free Trade Commission, composed of representatives of the three NAFTA countries, issued in 2001 the binding Notes of Interpretation of Certain Chapter 11 Provisions, which rejected any notion that NAFTA Article 1105 contained any elements that were ‘additive’ to the international minimum standard (the note is available at: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp). The language of the note has influenced the drafting of many subsequent investment treaties by NAFTA and non-NAFTA countries (*see, inter alia*, the U.S. Model Bilateral Agreement (2007) and the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, signed on 27 February 2009).

⁶⁸⁰ With respect to the link between the FET standard and the prohibition to deny justice, *see, supra*, note 493.

⁶⁸¹ *See*, among others, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 May 2006, (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>), para. 309 (“**Saluka v. Czech Republic**”); *Biwater v. Tanzania*, para. 591. This approach is also supported by scholarly writings. According to C. SCHREUER, *Fair and Equitable Treatment in Arbitral Practice*, *Journal of World Investment & Trade*, Vol. 6, Issue 3, 2005, pp. 357–386, at p. 365: ‘[i]n the absence of indications to the contrary, the better view is to give to it an autonomous meaning’. *See also*, F. MUTIS TÉLLEZ, *Conditions and Criteria For The Protection of Legitimate Expectations Under International Investment Law*, *ICSID Review*, Vol. 27, Issue 2, 2012, pp. 432-442, at p. 432; and M. KINNEAR, *The Continuing Development of the Fair and Equitable Treatment Standard*, *supra*, note 676, at pp. 223-224. For a dissenting opinion, *see*

Instead of deriving the content of the standard from its original source (i.e., the minimum standard of treatment of aliens), tribunals focused on the interpretation of the clause in the context of the relevant treaty. By acting this way, the scope of the standard has been expanded and its content has been determined on a case-by-case basis, becoming a topic in continuous development.

On the contrary, when the FET standard is linked to the minimum standard of treatment of aliens – whose goal is to preclude conducts against foreigners that fall below a certain threshold considered unacceptable in international law⁶⁸² – the scope of the FET has been somewhat limited. The reference to the minimum standard of treatment by the treaty drafters is clearly aimed at preventing over-expansive interpretations of the FET standard, with an attempt to control the discretion of the tribunals when assessing its content.⁶⁸³ The issue with this approach is however that there is no general consensus as to what constitutes the minimum standard of treatment of aliens under customary international law. As a consequence, certain tribunals have aligned the FET standard and the minimum treatment, substantially widening the scope of the protection granted by the minimum standard, and possibly

G. MAYEDA, *Playing Fair: the Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, *Journal of World Trade*, Vol. 42, Issue 2, 2007, pp. 273–291, according to which the FET standard should be always interpreted in line with the minimum standard set out in international law.

⁶⁸² See *Glamis Gold, Ltd v. United States of America*, UNCITRAL, Award, 8 June 2009 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf>) paras. 615–616.

⁶⁸³ In this respect, it is worth referring to the definition of the minimum standard given in the concurring opinion by American Commissioner, in the context of the influential case *L. F. H. Neer and Pauline Neer v. United Mexican States*, Award, 15 October 1926, *Reports of International Arbitral Awards*, Vol. IV, United Nations, 2006, pp. 60–66, at p. 65, whereby the General Claims Commission stated that ‘the treatment of an alien, in order to constitute an international delinquency, should amount to an *outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*’ (emphasis added). Despite almost 90 years old this passage is largely still deemed to reflect the high threshold for violating the international minimum standard.

overruling the presumable will of the parties at the time of the signing of the treaty.⁶⁸⁴

As a final remark, it is worth noting that also when the FET standard provision includes additional substantive content, its scope and purpose remain somewhat vague, despite that such elements may help to interpret the will of the State parties at the time of the negotiation.

Anyway, despite this background, on the basis of the interpretation granted by arbitral tribunals in their awards, scholarly writings have identified the basic content of the FET standard, which may find application in any event, regardless of the specific formulation of the treaty clause.

First, the FET standard is a non-contingent, objective standard, whose content is not determined by reference to treatment of other individuals and/or investments, like the most favoured nation or national treatment standards. The FET standard has its own normative content, though the exact meaning needs to be established on the basis of the specific circumstances of the case.

Second, the FET and its constituting elements are an expression of the principle of good faith.⁶⁸⁵ This however does not imply that bad faith or injury are necessary conditions for a violation of the FET standard.⁶⁸⁶ Their presence

⁶⁸⁴ See *Merrill & Ring Forestry L. P. v. The Government of Canada*, UNCITRAL, ICSID Administered case, Award, 31 March 2010 (available at: <http://www.italaw.com/documents/MerrillAward.pdf>). Notably this approach seems to contradict the 2001 NAFTA's Notes of Interpretation of Certain Chapter 11 Provisions (*see, supra*, note 679), whose aim was to draw a clear distinction between the minimum standard of treatment of aliens under customary law and an unqualified obligation to grant fair and equitable treatment. Also due to the lack of clear arguments, this award contributed to create confusion as to the exact level of protection of investor under NAFTA's FET clause.

⁶⁸⁵ See, *inter alia*, *Tecmed v. Mexico*, para. 153. For more on the principle of good faith, *see* section 4.2.2 of this Chapter III.

⁶⁸⁶ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (available at: <http://www.italaw.com/cases/288>) (“**CMS v. Argentina**”), para. 280, whereby it is stated that the standard is ‘unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.’ Also *see* *Loewen v. US*, at para. 132, according to which: ‘[n]either State practice,

is, in any event, sufficient for establishing a breach of the FET: a State's conduct, which is aimed at harming a foreign investor, cannot be considered fair and equitable.

Third, the determination of whether there has been a violation of the FET standard is highly fact- and context-dependent. As several tribunals put it, 'the judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case' and the 'standard is to some extent a flexible one which must be adapted to the circumstances of each case.'⁶⁸⁷ Regrettably, relying on the fact that the application of the FET is highly fact-specific, some awards have simply summarised the facts of the case and reached the conclusion that there had been a violation of the FET, without providing any specific legal analysis. Alternatively, some tribunals considered the FET as an abstract standard and then concluded that there has been a violation thereof after a review of the facts without specifying which elements of the standard have been breached.⁶⁸⁸

In addition to these general features, tribunals have also identified a number of recurrent elements, which may represent the normative content of the FET standard, according to the specific circumstances of each case. These elements can be summarized in three categories: (i) due process, which comprises denial of justice; (ii) transparency and stability, which includes the respect of the investor's legitimate expectations; and (iii) lack of arbitrariness and discrimination.⁶⁸⁹

the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice.'

⁶⁸⁷ See, among others, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 109, citing *Mondev v. US*, para. 118; and *Waste Management v. Mexico*, para. 99.

⁶⁸⁸ These trends are retraced in A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 278, where other scholarly writings are also quoted.

⁶⁸⁹ With possible minor differences, these are unanimously considered as the constituting elements of the FET standard. See, for instance, M. MOLINUEVO, *Protecting Investment In Services: Investor-State Arbitration versus WTO Dispute Settlement*, *Global Trade Law*

With regard to the first element, a number of investment treaties spell out that the content of the FET includes the obligation not to deny justice.⁶⁹⁰ Notably, even when denial of justice is not specifically mentioned, arbitral decisions have accepted that the FET treaty rule makes a reference to the customary law of denial of justice.⁶⁹¹ Having illustrated the meaning of the concept of ‘denial of justice’ in section 2 of this Chapter, in this section the focus will be on the other elements of the FET standard. What is worth noting is that a breach of due process, which entails a violation of the FET standard, may also not amount to a denial of justice. In a number of cases, tribunals have held that a lack of fair procedure or a grave procedural shortcoming was an important element of the FET.⁶⁹²

The concept of the FET is strictly related to that of transparency and the establishment of a stable and predictable regulatory environment. Transparency is considered an important element of good governance, generally, and it is especially important to investors. To make effective investment decisions, investors need to know the applicable legal rules, which therefore must be communicated or anyway made available to the concerned persons. Analogously, a government acting fairly shall inform investors of changes to the applicable rules so that they may plan and manage operations accordingly. Thus, governments are obliged to be transparent about the rules in force. In light of the above, it may be argued that even where an investment treaty does

Series, Vol. 38, Kluwer Law International, 2011; J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, at p. 229 and following; K. YANNACA-SMALL, *Fair and Equitable Treatment Standard*, in K. YANNACA-SMALL (ed.), *Arbitration Under International Investment Agreements: A Guide to Key Issues*, Oxford University Press, 2010, pp. 445-477.

⁶⁹⁰ *See, supra*, note 493.

⁶⁹¹ *See* *Rumeli v. Kazakhstan*, para. 651; *Jan de Nul Award*, paras. 254-261; *Pantechniki v. Albania*, para. 93.

⁶⁹² *See*, for instance, *Waste Management v. Mexico*, para. 98; and *Petrobart v. Kyrgyz Republic*, para. 344. For an outline of the criticism of those scholars that believe that any misconduct of the judiciary can exclusively amount to a denial of justice and any attempt of qualification as violation of a different treaty standard is solely aimed at lowering the bar, please refer to section 4.2.1 of this Chapter III., which can apply here *mutatis mutandis*.

not specifically provide for transparency, the FET clause implicitly requires the host government to act transparently.

Governmental transparency clearly affects an investor's legitimate expectations. An investor's legitimate expectations are based on the host State's legal framework and on any undertakings or representations made by it. Therefore, the principle of protecting investment-backed expectations is often combined with the principle of transparency. Thus, it may happen that a violation of the FET clause occurs through a simultaneous failure to act transparently and to protect the investor's legitimate expectations. Protection of the investors' legitimate expectations has been 'repeatedly identified by tribunals and scholars as one of the major components of the standard'.⁶⁹³ Investment tribunals however have interpreted the concept of legitimate expectations in different ways, and therefore what is to be considered as such is not univocally determined yet. Expectations of the investor can qualify as legitimate if they are objectively and subjectively reasonable. This means that first of all, from an objective standpoint, it must be verified whether the expectation is one of a diligent and prudent investor, having taken into account all circumstances surrounding the investment, including the political, socio-economic, cultural and historical conditions prevailing in the host State. Expectations can be considered subjectively legitimate if they do not conflict with the knowledge that the investor had on the law and the representations made by the host State. The concept of legitimate expectations is linked to the fact that investments by their very nature are long-term transactions and, as such, they are subject to the risk that conditions thereof may change negatively affecting the investment during its term.

As a general principle, it can be stated that expectations can be considered legitimate if they rely on the stability, predictability and consistency of the host State's legal and business framework existing at the time when the investment

⁶⁹³ UNCTAD, Series on International Investment Agreements II, Fair and Equitable Treatment, *supra*, note 676, at p. 9. Of the same opinion, *inter alia*, F. MUTIS TÉLLEZ, Conditions and Criteria For The Protection of Legitimate Expectations Under International Investment Law, *supra*, note 681, at p. 432.

was made and at each later moment when a decisive step concerning the investment was made (such as expansions, developments and reorganizations). However, this cannot imply that a State cannot legitimately change its legal and business framework: protection of legitimate expectations cannot be pushed to entail a 'freeze' of the host State's regulatory system so it stays the same as at the time when the investment (or major decision concerning the investment) was made. It is debated whether in order to violate the FET clause, the legitimate expectations should be grounded on a specific or unambiguous representation made by the host State inducing the investor to make the investment. The prevailing case law seems oriented to require specific formal assurances or guarantees from the State,⁶⁹⁴ while no legitimate expectations may arise exclusively from existing background and regulation if no promises have been made by the host State. This approach is also supported by some commentators, who have argued that the doctrine of legitimate expectations can be engaged exclusively when a State has made a specific representation.⁶⁹⁵

⁶⁹⁴ See *CMS v. Argentina*, para. 277; and *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0619.pdf>), para. 331. For a contrary opinion see *Saluka v. Czech Republic*, where, at para. 329, it was held that legitimate expectations 'need not to be based on an explicit assurance from the Czech Government', given that the investor could reasonably expect that the Government would act in a consistent and even-handed way.

⁶⁹⁵ See, among others, S. FIETTA, *Expropriation and the "Fair and Equitable" Standard. The Developing Role of Investors' "Expectations" in International Investment Arbitration*, *Journal of International Arbitration*, Vol. 25, Issue 3, 2006, pp. 375-399, at p. 397. On the contrary, M. KINNEAR, *The Continuing Development of the Fair and Equitable Treatment Standard*, *supra*, note 676, at p. 228 states that: '[t]he weight of authority suggests that an undertaking or promise need not be directed specifically to the investor and that reliance on publicly announced representations or well-known market conditions is a sufficient foundation for investor's expectations'; and F. MUTIS TÉLLEZ, *Conditions and Criteria For The Protection of Legitimate Expectations Under International Investment Law*, *supra*, note 681, at p. 441 who believes that a State can violate the investor's legitimate expectations also 'altering the legal order upon which the investor relied and/or repudiating or interfering with investor's licence or contract right'.

Turning to the analysis of the third element, it should be noted that a number of investment tribunals have highlighted that prohibition of arbitrariness and discrimination is part of the FET standard. A conduct may be considered as arbitrary if ‘it is founded on prejudice and preference rather than on facts’.⁶⁹⁶ Therefore, a measure that inflicts damage on the investor without having any underlying purpose or a rational explanation is to be considered as arbitrary. The problem is to determine whether governmental conduct in a specific situation within the context of a complex and long-term relationship is actually discriminatory or arbitrary. Inevitably, the State will try to justify its conduct as rational and necessary to protect the public interest, while the investors whose interests have been injured will claim to be treated in a capricious or discriminatory matter. Tribunals have found that in order to establish whether conduct is to be deemed as arbitrary, the factual situation of the State must be taken into consideration. For instance, in the *Enron v. Argentina*⁶⁹⁷ and *LG&A v. Argentina* cases,⁶⁹⁸ the fact that the State was facing a financial crisis was taken into account in order to exclude that Argentina acted in an arbitrary or discriminatory manner.⁶⁹⁹

Despite the fact that the FET standard is included in almost all modern investment treaties, there are still cases where the applicable treaty does not contain such a provision and the investor had to make recourse to the most favoured nation (“**MFN**”) clause, in order to ‘import’ the standard from another treaty.⁷⁰⁰ For the sake of clarity, the MFN standard can operate also

⁶⁹⁶ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Award, 3 September 2001, para. 221 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf>); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (available at: <http://www.italaw.com/documents/PlamaBulgariaAward.pdf>), para. 184.

⁶⁹⁷ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf>), para. 254

⁶⁹⁸ *LG&E v. Argentina*, para. 161 and following.

⁶⁹⁹ Notably, in the two mentioned cases, Argentina has been found guilty for breach of the FET, even if its conduct was not arbitrary.

⁷⁰⁰ See, among the Relevant Cases, *ATA v. Jordan* (section 6 of this Chapter III).

with respect to any guarantee. For instance, in *White v. India*, the claimant rested in it in order to import an effective means clause into the basic treaty.⁷⁰¹

Preliminarily, it must be noted that MFN is a treaty-based obligation and not a principle of international law applicable to any State as a general legal obligation. In order for MFN to apply, a specific provision in the relevant treaty, which may also specify the content and the limits thereof, should exist.

Second, it is a ‘comparative’ or ‘relative’ standard, as it does not impose an obligation to provide foreign investors with a given quality or level of treatment. The required treatment is determined by reference to the treatment accorded to other investments in similar circumstances. Its aim is to prevent discrimination, by ensuring that foreign investors do not receive treatment that is less favourable than the one granted to investors of other countries. Therefore, in order to find a breach of the MFN clause, the difference in treatment must be grounded on the nationality of the foreign investor.

It shall however be noted that certain limitations operate with respect to the application of the MFN clause. First of all, the scope of the MFN is governed by the so called *ejusdem generis* principle,⁷⁰² pursuant to which the standard can apply only to situations belonging to the same subject matter or the same categories of subjects to which the clause relates. Therefore, the third party treaty must, in principle, regulate the same subject matter as the basic treaty, since, as is well known, investment treaties can have different subject matters (investment promotion, investment protection, investment liberalization or a combination thereof). No other rights can be claimed under an MFN clause

⁷⁰¹ See section 9 of this Chapter III.

⁷⁰² This principle was first brought to the light by International Court of Justice in the *The Ambatielos Claim* (Greece, United Kingdom of Great Britain and Northern Ireland), Award, 6 March 1956, Reports of International Arbitral Awards, Vol. XII, pp. 83-153, at p. 107, and is now consistently affirmed by practice and jurisprudence. In the context of investment claims, the principle has been highlighted in the case *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on the Objections of Jurisdiction, 25 January 2000 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf>) (“**Maffezini v. Spain**”), para. 56 and following, and not challenged by the other subsequent cases on dealing with MFN clauses.

than those falling within the limits of the subject matter of the clause. Notably, even where the treaty does not specify that the MFN standard applies only to 'like circumstances' or in 'like situations', the *ejusdem generis* principle should be considered applicable, as an inherent principle underlying any MFN clause. In addition, the MFN clause's scope of application depends on the specific wording set out in the treaty. Indeed, it is normally the treaty itself that identifies the substantive coverage of the MFN clause, specifying the covered beneficiaries (investors and/or investments)⁷⁰³, the covered phases of the investment (the post-establishment phase⁷⁰⁴ or both the pre- and post-

⁷⁰³ Most investment treaties contain MFN clauses that refer to both investors and investments (*see* UNCTAD, Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II, 2010, at p. 45); however, this is not always the case as certain treaties refer only to investments. *See*, for instance, Art. 4 of the Agreement Between Australia And Uruguay on the Promotion and Protection of Investments, signed on 3 September 2001 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/167>), pursuant to which: '[e]ach Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country, provided that a Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from [...]'].

⁷⁰⁴ *See*, for instance, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments, signed on 12 May 2006 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2009>), which provides for an 'admission clause' in the basic treaty explicitly subjecting the entry of investments to the domestic legal framework, while the MFN clause does not refer to any establishment-related activity. More precisely, Art. 2, named Admission of Investments, states that: '1. Each Contracting Party shall admit investments in accordance with its laws and regulations', while Art. 4, named National Treatment and Most-Favoured-Nation Provision, provides that: '1. Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords, in like circumstances, to investments or returns of its own investors or to investments or returns of investors of any third State. 2. Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, to

establishment phases⁷⁰⁵) and any applicable exception (in relation, for instance, to certain sectors⁷⁰⁶ or rights granted on the basis of specific instruments⁷⁰⁷).⁷⁰⁸

treatment less favourable than that which it accords, in like circumstances, to its own investors or to investors of any third State.’

⁷⁰⁵ See, for instance, Art. 10.4 of the Free Trade Agreement between Central America, the Dominican Republic and the United States of America (CAFTA), signed on 5 August 2004 (available at: http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp), pursuant to which: ‘1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory*. 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments*’.

⁷⁰⁶ This sort of exceptions are typical in MFN which regards the pre-establishment phase. See for instance the Canada Model BIT of 2004, pursuant to which:

‘1. Articles 3, 4, 6 and 7 shall not apply to:

(a) any existing non-conforming measure that is maintained by

(i) a Party at the national level, as set out in its Schedule to Annex I, or

(ii) a sub-national government;

(b-c) [...]

2. Articles 3, 4, 6 and 7 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its schedule to Annex II.

3. Article 4 shall not apply to treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in its schedule to Annex III.

4. In respect of intellectual property rights, a Party may derogate from Articles 3 and 4 in a manner that is consistent with the WTO Agreement.

5. The provisions of Articles 3, 4 and 6 of this Agreement shall not apply to:

(a) procurement by a Party or state enterprise;

(b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance;

6. [...]

7. The provisions of Article 4 of this Agreement shall not apply to financial services.’

⁷⁰⁷ This is a typical post-establishment exception. See, for instance, Art. 4 of the Agreement between the Czech Republic and the Republic of Paraguay for the Promotion and Reciprocal Protection of Investments, signed on 21 October 1998 (available at:

Moreover, the clause may include specific qualifications or representations, which shall guide and provide clarifications to the interpreters.⁷⁰⁹

Notably, the general scope of the clause is still debated. In particular, much attention has been drawn to the debate of whether the MFN may entail the importing in the concerned treaty of: (i) substantive protections from other investment treaties; and (ii) provisions relating to procedural matters.

With respect to the first issue, tribunals seem to have accepted that protection provisions that are absent in the basic treaty can be imported from other treaties.⁷¹⁰ On the contrary, it seems that the absence of a provision in a third

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/973>), which provides that: ‘3. The treatment of the most favoured nation, shall not be applied to the privileges which one Contracting Party grants to the investor of a third State in pursuance of its participation to a *free trade zone, customs union, similar international agreements to such unions or institutions, common market, monetary unions or other forms of regional agreements to which each Contracting Party is a party or may become a party.* 4. The treatment granted by this Article does not refer to the advantages that one of the Contracting Parties grants to the investor of a third State as a result of an agreement to avoid the double taxation or other agreements relating to taxation matters’ (emphasis added).

⁷⁰⁸ For more on this topic, see A.R. ZIEGLER, *Most-Favoured-Nation (MFN) Treatment*, in A. REINISCH (ed.), *Standards of Investment Protection*, Oxford University Press, 2008, pp. 59-86, at pp. 75-83; and UNCTAD, *Most-Favoured-Nation Treatment*, *supra*, note 703, at pp. 38-53.

⁷⁰⁹ See for instance, Art. 3(3) (National Treatment and Most-favoured-nation Provisions) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of El Salvador for the Promotion and Reciprocal Protection of Investments, signed on 14 October 1999 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1138>), pursuant to which: ‘[f]or the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 [investor-State disputes] of this Agreement.’ As illustrated hereinbelow, this clarification is particularly important, as precedent arbitral awards have not taken a unanimous approach with respect to the possibility to include dispute settlement provisions within the ambit of the MFN clause.

⁷¹⁰ See, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0544.pdf>) (“**MTD v. Chile**”), paras. 100-104; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of*

treaty cannot be the basis for the removal of such a clause in the basic treaty through the application of the MFN.⁷¹¹

With respect to the second issue,⁷¹² tribunals have adopted different approaches.⁷¹³ According to one line of thought, supported by many subsequent awards, dispute resolution clauses in principle should not be treated differently from other clauses, but there are certain ‘core matters’ that have been subject to specific negotiations that cannot be implanted into other instruments.⁷¹⁴ More precisely, an investor cannot be permitted to rely upon the MFN clause to override public policy considerations that the contracting States have envisaged as fundamental conditions for their acceptance of the treaty, such as: (i) the condition represented by the exhaustion of local remedies; (ii) the fork in the road provision; (iii) the choice of a particular arbitration system (such as the ICSID); and (iv) the agreement to arbitrate

Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009 (available at: <http://www.italaw.com/cases/documents/133>) (“**Bayindir v. Pakistan**”), paras. 153-160. This approach was endorsed also in *White v. India* (see section 9 of this Chapter III).

⁷¹¹ See *CMS v. Argentina*, para. 377.

⁷¹² For the purposes of this work, it shall be noted that the only Relevant Case where this issue was raised is *Frontier v. Czech Republic*, where Frontier claimed that, if the tribunal deemed that it had no jurisdiction on the basis of the Canada-Czech Republic BIT, the MFN should have applied (*Frontier v. Czech Republic*, para. 247). However, the tribunal did not deal with this issue as it accepted its jurisdiction on the basis of the Canada-Czech Republic BIT (see Chapter II, section 5.4).

⁷¹³ See A.R. ZIEGLER, *Most-Favoured-Nation (MFN) Treatment*, *supra*, note 708, at p. 58. According to A.C. SMUTNY, L.A. STEVEN, *The MFN Clause: What are its Limits?*, in K. YANNACA-SMALL (ed.), *Arbitration Under International Investment Agreements: A Guide to Key Issues*, Oxford University Press, 2010, pp. 351-381, at p. 381, the divergent results are simply due to the fact that ‘each individual tribunal reached its decisions upon a careful analysis of the available evidence relevant to the intent of the contracting Parties in each case. In this sense we might expect divergent results because the evidence of intent in some cases will favour the extension of MFN benefits to dispute settlement, whereas in other cases it will favour the opposite result.’ Of an analogous opinion seems to be M. VALENTI, *The Most Favoured Nation Clause in BITs as a Basis for Jurisdiction in Foreign Investor—Host State Arbitration*, *Arbitration International*, Vol. 24, Issue 3, 2008, pp. 447-465.

⁷¹⁴ See *Maffezini v. Spain*; *Tecmed v. Mexico*, para. 69.

under a highly institutionalized system of arbitration.⁷¹⁵ Other ‘core matters’ identified by investment tribunals include clauses concerning the temporal scope of a treaty⁷¹⁶ and the subject matter jurisdiction of a treaty.⁷¹⁷ However, there are also ICSID awards, where the tribunal came to the conclusion that

⁷¹⁵ See *Maffezini v. Spain*, paras. 62-63. In this case the tribunal considered that the first resort to domestic courts for a period of 18 months before establishing the investor-State dispute did not reflect a fundamental question of public policy which would have limited the scope of the MFN clause. According to A. REINISCH, *Maffezini v. Spain*, Max Planck Encyclopedia of Public International Law (voice of), Oxford University Press, 2007, the *Maffezini v. Spain* approach was endorsed or used in a number of cases, including, *inter alia*, *MTD v. Chile* and *Tecmed v. Mexico* (for additional reference to case-law see also A.R. ZIEGLER, Most-Favoured-Nation (MFN) Treatment, *supra*, note 708, at p. 85).

⁷¹⁶ See *Tecmed v. Mexico*, para. 69, whereby it is stated that: ‘matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. *Their application cannot therefore be impaired by the principle contained in the most favoured nation clause*’ (emphasis added). See also *MCI v. Ecuador*, paras. 118-128.

⁷¹⁷ See *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0798.pdf>), para. 41, whereby it is stated that: ‘[e]ach treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of "investment" itself.’ In its reasoning, the panel analysed a basic legal notion: in order to resort to the MFN treatment clause, the basic treaty has to be validly invoked. Therefore, first comes the application of the treaty itself, through the scope and definition clauses, and only after, the MFN clause can be invoked.

the relevant MFN provision did not cover the dispute settlement at all.⁷¹⁸ Finally, it is worth noting an isolated case, whereby the panel deemed that the MFN clause could incorporate the host State's broader consent to arbitrate under third-State treaties into the basic treaty and serve as a basis of jurisdiction.⁷¹⁹ Against this background, more and more States seem to prefer to clearly express their will to include in,⁷²⁰ or exclude from,⁷²¹ the relevant MFN clause procedural provisions, especially dispute settlement, by stating the exception or the clarification in an appropriate way in the text of the treaty.

6. ATA v. Jordan

In the second Relevant Case in chronological order, which is *Romak v. Uzbekistan*, the tribunal did not analyse the merits, as it denied its

⁷¹⁸ See, for instance, *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, para. 102 and following (available at: <http://www.italaw.com/cases/954>); and *Plama Consortium Ltd v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (available at: <http://www.italaw.com/cases/documents/858>).

⁷¹⁹ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, October 2007 (available at: <http://www.italaw.com/cases/documents/924>). S.W. SCHILL, Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration: Arbitral Jurisprudence at a Crossroads, *The Journal of World Investment & Trade*, Vol. 10, Issue 210, 2009, pp. 189-225, endorsed this approach. Also Z. DOUGLAS, *The International Law of Investment Claims*, *supra*, note 357, is along this line of reasoning. In his Rule 43, it is stated that: '[a] most-favoured-nation (MFN) clause in the basic investment treaty does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty.'

⁷²⁰ See, *supra*, note 709.

⁷²¹ See, for instance, the Agreement between the Republic of Colombia and the Swiss Confederation for the Promotion and Reciprocal Protection of Investments, signed on 17 May 2006 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/803>), whose Art. 4(2) provides that: '[f]or greater certainty, it is further understood that the most favourable nation treatment [...] does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements concluded by the Party concerned.'

jurisdiction⁷²² and did not take any position on whether the assertions of the claimant were grounded.

On the contrary, in *ATA v. Jordan*, the tribunal accepted its jurisdiction with respect to the set aside of the arbitration agreement included in the construction contract entered into between ATA and APC.⁷²³ It is worth recalling that, conversely, the tribunal rejected its jurisdiction with respect to the set aside of the commercial arbitral award itself.⁷²⁴

6.1. The merits phase

Prior to analysing the positions held by the panel at the merits phase, it should be noted that, though the arbitral tribunal declined its jurisdiction with respect to the annulment of the commercial arbitral award, in an *obiter dictum*, it maintained that, even if there had been jurisdiction, such annulment would have not represented a denial of justice, as the actions of the municipal courts ‘could hardly be said to have constituted abusive misconduct, bad faith or denial of justice’,⁷²⁵ thus endorsing the reconstruction pursuant to which for denial of justice to occur it must be egregious.⁷²⁶

With respect to the setting aside of the arbitration agreement, the decision of the tribunal is rather peculiar, as it did not address in the specific any of the claims made by ATA, but considered the misconduct of the Jordan judiciary contrary to the ‘letter and the spirit’⁷²⁷ of the Turkey-Jordan BIT because its decision was based on the retroactive application of the JAL. More precisely, the national courts of the Kingdom of Jordan retroactively applied the JAL, which mandated the extinguishment of an arbitration agreement in the event of a final decision on the part of the Jordanian courts nullifying an arbitral award

⁷²² See Chapter II, section 5.2.

⁷²³ See Chapter II, section 5.3.

⁷²⁴ See Chapter II, v section 5.3.

⁷²⁵ See *ATA v. Jordan*, section 126

⁷²⁶ See section 2 of this Chapter III.

⁷²⁷ See *ATA v. Jordan*, para. 125.

based on that arbitration agreement,⁷²⁸ and thus declared the arbitration agreement between ATA and APC null.

Stepping back to the alleged violations of the Turkey-Jordan BIT, ATA claimed that, when the Jordanian court extinguished the arbitration agreement, it unlawfully expropriated ATA's investment, violated the MFN clause and, broadly, took an unfair and inequitable decision, contrary to the Turkey-Jordan BIT.⁷²⁹ According to ATA, the fact that such an extinguishment resulted from the application of the JAL did not preclude the wrongfulness of the measure as a matter of international law. More precisely, the claimant asserted that: '[t]he mere existence of legislation does not constitute a violation of a State's international obligations owed to a foreign investor. If a State passes legislation entitling its judiciary or executive to expropriate property, the State does not violate its international obligation not to expropriate an individual investor's property until the judiciary or executive actually effects an unlawful taking of that investor's property.'⁷³⁰ Notably, Jordan rebutted this position, affirming that the: 'Claimant has failed to prove that the final sentence of Article 51 of the Jordanian Arbitration Law violates the Turkey-Jordan BIT, either on its face or as applied in this case, and the provision does not run afoul of applicable international norms. For example, the provision and its operation in this case are consistent with Article II(3) of the New York Convention, and [the] Claimant has not shown otherwise.'⁷³¹

As mentioned, the tribunal upheld ATA's position. More precisely, it referred to the Preamble of the Turkey-Jordan BIT, according to which 'the fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and a maximum effective utilization of economic

⁷²⁸ This provision was set out in Art. 51 of the Jordanian Arbitration Law.

⁷²⁹ *See* ATA v. Jordan, para. 128. ATA made a number of claims also in relation to the setting aside of the arbitral awards, but the panel did not consider them as it blocked the relevant judgment at the jurisdictional phase. Therefore such aspects will not be considered hereinafter.

⁷³⁰ *See* ATA v. Jordan, para. 82.

⁷³¹ *See* ATA v. Jordan, para. 93.

resources.⁷³² In light of this provision of the Preamble, the tribunal considered that the extinguishment of ATA's right to arbitration by Jordan violated both the letter and the spirit of the BIT. Interestingly, the tribunal in a footnote also noted that: '[...] by virtue of Article II(2) of the Treaty (i.e., the MFN clause), the Respondent has assumed the obligation to accord to the Claimant's investment fair and equitable treatment (see the UK-Jordan BIT) and treatment no less favourable than that required by international law (see the Spain-Jordan BIT).'⁷³³ However, it did not take any explicit position on the application of the MFN clause and violation of the FET clause possibly imported in the Turkey-Jordan BIT from third-party treaties.

The tribunal also maintained that:

- the retroactive effect of the JAL, which extinguished a valid right to arbitration, deprived the claimant of a valuable asset in violation of the treaty's investment protections;⁷³⁴ and
- the annulment of the arbitration agreement also violated the duty of Jordan, arising from Art. II of the New York Convention, to recognize valid arbitration agreements: this would have probably required the Jordanian courts to refuse to apply retroactively the provision of the JAL. In an *obiter dictum* the tribunal also added that '[i]t is arguable [...] that the extinguishment rule might be deemed to be prospectively compatible with Article II insofar as parties electing Jordan as the venue for an arbitration or electing Jordanian law as the law of the arbitration had notice of the rule and accepted it. But this argument cannot work retroactively. Retroactivity is the problem here.'⁷³⁵

6.2. Remarks

On the merits, this award is very short and not detailed. It is not therefore possible to understand in depth the line of reasoning followed by the panel.

⁷³² See ATA v. Jordan, para. 125.

⁷³³ See ATA v. Jordan, note 16.

⁷³⁴ See ATA v. Jordan, para. 126.

⁷³⁵ See ATA v. Jordan, para. 128.

On the basis of its cursory explanation, it seems that the panel deemed that through the retroactive application of the Jordanian Arbitration Law – which was not in place at the time the investment of ATA in Jordan was made – and the ensuing annulment of a valid arbitral award, Jordan violated the New York Convention and the Jordan-Turkey BIT.

However, many passages of the tribunal’s reasoning remain obscure. More precisely it is not clear: (i) which standard(s) of protection of foreign investment included in the Jordan-Turkey BIT the tribunal considered breached; and (ii) how the violation of the New York Convention amounted to a violation of the Jordan-Turkey BIT or in any event entailed the international liability of the State vis-à-vis the investor.

With respect to the first topic, it must preliminarily be noted, as illustrated in section 6.1 of this Chapter, that from the summary of ATA’s allegations made by the tribunal of the award, it seems that ATA itself failed to clearly frame its claim in relation to the extinguishment of the arbitration agreement.⁷³⁶ Indeed, ATA claimed a violation of the MFN clause, but the award does not specify which provisions of which treaty should have been imported in the basic treaty as a consequence of the application of the MFN clause. In addition, it also asserted a breach of the expropriation clause of the Turkey-Jordan BIT and the existence of conduct that was imprecisely considered ‘unfair and inequitable contrary to the BIT’.⁷³⁷ The tribunal in its decision seems to have somewhat endorsed this third and latter claim of ATA (i.e., that the national court adopted an unfair and inequitable decision) because no express reference to the MFN clause or to the expropriation clause is made in the tribunal’s decision on the merits, even though implicit or explicit references to the MFN clause and to the prohibition to expropriate are present here and there.

More precisely, in relation to the expropriation claim, the tribunal itself stated that, through the retroactive application of the Jordan arbitration law, which

⁷³⁶ This flaw was also noted by Jordan (*see* ATA v. Jordan, para. 93). However, the claims concerning the setting aside of the arbitral awards (which was dismissed on temporal grounds, see Chapter II, section 5.3) were extensively explained and motivated by ATA.

⁷³⁷ ATA v. Jordan, para. 81.

extinguished a valid arbitration right, the national courts deprived the investor of a valuable asset ‘in violation of the Treaty’s investment protection.’⁷³⁸ However, the tribunal did not expressly mention the Jordan-Turkey BIT’s provision on expropriation. The reason the tribunal did not expressly rely on the relevant clause of the Turkey-Jordan BIT is not clear. Indeed, it is recognized that immaterial rights, such as contractual rights, can be expropriated.⁷³⁹ Moreover, once it is accepted that (i) an arbitration agreement constitutes by itself an investment⁷⁴⁰ and (ii) an indirect expropriation can take place through the loss of control over the investment, in the case at issue the substantive elements for an expropriation seem to be met.

In relation to the MFN clause, one may still consider that the tribunal took it into consideration as it is mentioned in a footnote of the award.⁷⁴¹ The above premised, the point is now to understand on which grounds the tribunal found the Jordan State liable for annulling the arbitration agreement. In this respect, some authors deemed that the tribunal did not take into consideration any particular guarantee and, relying on the Preamble, which highlights the importance to ensure a fair and equitable treatment to foreign investors, it considered that the Turkey-Jordan BIT was breached by the actions of the Jordanian courts, without identifying exactly which clause thereof.⁷⁴² This reconstruction adheres to the wording of the award, but does not really provide an explanation of the panel’s thoughts. Moreover, such an approach would be quite an inappropriate position, as it is a well-known principle that a paragraph

⁷³⁸ ATA v. Jordan, para. 126.

⁷³⁹ See section 3 of this Chapter III.

⁷⁴⁰ This statement was made by the tribunal itself (ATA v. Jordan, para. 117). See Chapter II, section 5.3.

⁷⁴¹ Reference is made to footnote 16 of the award (*see, supra*, note 733). For more on this point, *see infra* in this section.

⁷⁴² M.D. GOLDHABER, *The Rise of Arbitral Power Over Domestic Courts*, *supra*, note 491, at p. 392.

of the Preamble does not create rights or obligations, but can only be used to interpret a clause of the treaty.⁷⁴³

According to other scholarly writings,⁷⁴⁴ the tribunal concluded that there was a violation of the FET standard. In this respect it should however be noted that the Jordan-Turkey BIT did not contain a FET provision and that, as illustrated, the tribunal did not expressly rely on the MFN clause to apply the FET standard included in other treaties stipulated by Jordan. As noted above, a reference to the FET clause of other treaties is exclusively made in a footnote, with no specific explanation.⁷⁴⁵ Therefore, it is not clear whether the tribunal effectively based its decision on them. If the tribunal deemed that a violation of the FET standard set out in other treaties was existent, it should have explained its reasoning with more details, as, for instance, was done in the context of the *Bayindir v. Pakistan* case, which presented various features analogous to those of *ATA v. Jordan*. Also in *Bayindir v. Pakistan*, the tribunal had to establish whether a FET clause could be imported in the base treaty through the application of the MFN clause set out therein. Notably, the applicable BIT⁷⁴⁶ was very similar to the Jordan-Turkey BIT with specific respect to the provisions relevant in this context as: (i) it contained a reference to the FET in its Preamble; (ii) it provided for a MFN clause having an analogous wording; and (iii) the exceptions to the application of the MFN standard were the same as those included in the Jordan-Turkey BIT (i.e., obligations assumed in certain

⁷⁴³ A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties, Standards of Treatment*, *supra*, note 10, at p. 124. Relevance to the Preamble in the interpretation of a treaty is given by Art. 31(1) of the Vienna Convention pursuant to which: '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

⁷⁴⁴ J. DINGWALL, H. HAERI, *Jordan: ICSID Tribunal finds Jordan in Violation of its Investment Treaty Obligations*, *supra*, note 393, at pp. N34-35; D.B. KING, R. MOLOO, *Enforcement after the Arbitration: From National Courts to Public International Law Fora*, *supra*, note 84, at pp. 421.

⁷⁴⁵ Footnote 16. *See, supra*, notes 733 and 741.

⁷⁴⁶ Agreement Between the Republic of Turkey and the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments, signed on 16 March 1995 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2135>).

specific investment instruments and with respect to tax matters). In that case, the tribunal ruled that: '[i]n the Tribunal's view, such language [i.e., the wording of the Preamble] is of little assistance as it does not establish any operative obligation. It is true that the reference to FET in the preamble together with the absence of a FET clause in the Treaty might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty. The Tribunal is, however, not persuaded that this suggestion rules out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty. *The fact that the States parties to the Treaty clearly contemplated the importance of the FET rather suggests the contrary. Indeed, even though it does not establish an operative obligation, the preamble is relevant for the interpretation of the MFN clause in its context and in the light of the Treaty's object and purpose pursuant to Article 31(1) of the VCLT.*'⁷⁴⁷ The panel went on to state that the ordinary meaning of the MFN clause, together with the relevant limitations, showed that the parties to the treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors from third countries. For the tribunal, this reading was supported by the Preamble's insistence on the FET.⁷⁴⁸ Once it had been established that the MFN could entail the importation of the FET standard from other treaties, the tribunal analysed which FET clauses of other treaties entered into by Pakistan with third States, if any, may have been relevant, and if so their content, so it could understand if an effective breach of the basic treaty had occurred.

Unfortunately, the tribunal in the *ATA v. Jordan* award did not articulate its reasoning in such a precise way, which renders the interpretation of the award particularly complex.

One could also argue that the tribunal considered the FET standard part of customary international law⁷⁴⁹ and therefore applicable despite the lack of a

⁷⁴⁷ Bayidir v. Pakistan, para. 155 (emphasis added).

⁷⁴⁸ Bayidir v. Pakistan, para. 157.

⁷⁴⁹ A. DIEHL, *The Core Standard of International Investment Protection*, *supra*, note 502, at p. 541. Also certain investment tribunals have embraced the proposition that the FET standard reflects a rule of customary international law (*see*, for instance, *Mondev v. US*, paras. 110-117; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in

specific FET clause in the Jordan-Turkey BIT,⁷⁵⁰ but no specific indication of this is given in the award. In any event, assuming that the tribunal effectively deemed that the Jordanian courts breached the FET standard, it has been highlighted how the tribunal ‘did not articulate the elements it viewed as necessary to justify [that] violation.’⁷⁵¹

Finally, according to one author,⁷⁵² the tribunal substantially considered that Jordan, through its courts, violated the prohibition of abuse of rights.⁷⁵³ More precisely, the national courts retroactively applied an unusual national law, which entered into force after the conclusion of the arbitration agreement.

Notably, all the above reconstructions are somewhat grounded, even if none of the results are particularly persuasive. The fault however does not lie in the scholarly interpretations, but on the award, as it does not allow the interpreter to properly understand the line of reasoning followed by the tribunal.

With respect to the second obscure aspect of the merits of this award, it is noted that the tribunal did not explain how the wrongful application of the New York Convention assumed relevance in the context of the claim. More

Respect of Damages, 31 May 2002, pp. 52-66 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0686.pdf>). Please, however, note that the inclusion of the FET standard within customary international law is debated. For instance, H. HAERI, A Tale of Two Standards: ‘Fair and Equitable Treatment’ and the Minimum Standard in International Law, *Arbitration International*, Vol. 27, Issue 1, 2011, pp. 27-43, at pp. 43-44 is of the contrary opinion.

⁷⁵⁰ It has been argued that when the clause relating to the dispute settlement and consent to jurisdiction is very broad (as the one included in the Jordan-Turkey BIT), the aggrieved investor could bring an investor-State claim also for violations of international norms which have an impact on the investment, without being limited to the violations of substantive standards set out in the applicable investment treaty. For more on this *see* section 10 of this Chapter.

⁷⁵¹ D.B. KING, R. MOLOO, Enforcement after the Arbitration: From National Courts to Public International Law Fora, *supra*, note 84, at pp. 421.

⁷⁵² G. KAUFMANN-KOHLER, Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts, *supra*, note 477, at p. 172.

⁷⁵³ Of a different opinion, S. FIETTA, J. UPCHEER, Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?, *supra*, note 441, at p. 192.

precisely, the tribunal clearly explained that the national courts, in applying the new provisions of JAL, breached Art. II of New York Convention, which requires the recognition of written agreements under which the parties undertake to submit to arbitration. However, the missing passage is how this violation is relevant in the context of an investment treaty claim. More precisely, the question is whether the tribunal considered that through the breach of the New York Convention, the investor also breached the Turkey-Jordan BIT (and, had this been the case, which provisions thereof had been breached) or whether it considered that international law generally had been violated.⁷⁵⁴

Notably, the tribunal, when deciding on the relief, stated exclusively that the reparation was due since the extinguishment of the right to arbitration was ‘unlawful’,⁷⁵⁵ once again without making reference to any provision of the Turkey-Jordan BIT.

To conclude, in light of the above considerations, one may argue that also in this case the tribunal adopted an approach which can be considered more solomonic than juridical:⁷⁵⁶ it noted that the retroactive application of a law which did not exist at the time the parties stipulated the construction contract and entails the annulment of the arbitration agreement frustrated the legitimate reliance of the Parties on the arbitration agreement included in the contract and violated the New York Convention. Indeed, at the time of execution of the contract the parties *agreed and expected* to preclude the submission to national courts of potential disputes under the contract. The peculiarity in this case is that the ICSID tribunal could have resorted to a number of effective legal solutions to reach the same result, but apparently opted not to.

⁷⁵⁴ Indeed, ‘it is widely accepted that frustration of the arbitral proceeding by the state is in itself a violation of international law’ (S. SATTAR, *National Courts and International Arbitration: A Double-edged Sword?*, *supra*, note 64, at p. 68).

⁷⁵⁵ *ATA v. Jordan*, para. 129.

⁷⁵⁶ E. ALVAREZ, *Crossing the “Public/Private” Divide: Saipem v. Bangladesh and Other Crossover Cases*, *supra*, note 332, at p. 426, commented the *Saipem v. Bangladesh* case as follows: ‘*Saipem* award might be seen as Solomonic or just result grounded in inelegant (if not erroneous) international investment law’.

Moreover, the remarks concerning the fact that ICSID tribunal in *Saipem v. Bangladesh* adapted the mechanisms of investment law expressed in BITs for a review of the lawful application of the New York Convention also seems applicable in this case.⁷⁵⁷

As a final remark, it is worth noting that the fact that the tribunal did not clearly express its point of view renders this award a difficult precedent to rely on for future cases. In any event, it continued the trend pursuant to which frustrated winners of commercial awards have an opportunity to bring their claims before investment tribunals alleging violations of investment treaties.

7. *Frontier v. Czech Republic*

The case at issue is to be considered relevant for the level of details that the tribunal went into to support its positions and also for certain peculiar positions that the tribunal took, such as the one about the role of investment arbitration with respect to domestic courts' decisions concerning the application of the New York Convention.

Prior to beginning with the analysis of the merits of the award, a couple of preliminary remarks need to be made. First, *Frontier* alleged that several behaviours of the Czech courts and Czech officials entailed violations of provisions of the BIT. However, only one of these claims will be considered herein as all the others do not deal with the interference of the national courts with the enforcement of arbitral awards, and therefore fall outside the scope of this work.⁷⁵⁸ Second, although *Frontier* argued that the non-enforcement of the

⁷⁵⁷ See, *supra*, para. 4.2.2 Notably the Author that made this critic vis-à-vis *Saipem* was also a component of the *ATA v. Jordan* panel.

⁷⁵⁸ The other claims that are not described herein and that have been integrally dismissed by the panel regarded: (i) a violation of the FET standard for the alleged delays of the Regional Court in Brno in the proceeding concerning *Frontier's* request of declaration of invalidity of two resolutions adopted at LZ's general meeting held on 13 September 2002; (ii) violation of the FET and full protection and security standards because of a meeting between national judges and the bankruptcy trustee before the issuance of courts' decision; (iii) violation of the good faith principle as well as the FET and full protection and security standards for the failure of Czech officials to assist the claimant.

award amounted to a violation of: (i) the effective means standard,⁷⁵⁹ (ii) the FET standard,⁷⁶⁰ (iii) the obligation to provide favourable conditions for the investment,⁷⁶¹ and (iv) the full protection and security standard,⁷⁶² the arbitral panel substantially disregarded all causes of actions, and focused on the violation of the FET standard exclusively. Therefore, in this section 7 only this cause of action will be considered.

7.1. The merits phase

Frontier's claim under analysis focused on the refusal by the Czech courts to recognize and enforce all of the orders contained in the interim award and in the final award issued by the SCC, respectively on 30 January 2004 and 30 December 2004.⁷⁶³

In this respect, it is useful to briefly recall the content of the parts of the interim and final awards that according to Frontier's reconstruction the Czech courts had wrongfully not enforced, as it had an impact on the decision of the investment tribunal. Both the interim and the final awards upheld Frontier's claims. More precisely, in the interim award, LZ and MA were enjoined from, *inter alia*, improperly selling and disposing of the LET Assets acquired with the claimant's funds until the issuance of the final award. The final award provided, *inter alia*, that Frontier was entitled to a first secured charge against the LET Assets and all of the property of MA for an amount of 204,170,000 Czech crowns plus interest and ordered the trustee in the bankruptcy of MA and the

⁷⁵⁹ Frontier v. Czech Republic, para. 469.

⁷⁶⁰ Frontier v. Czech Republic, para. 470.

⁷⁶¹ Frontier v. Czech Republic, para. 470.

⁷⁶² Frontier v. Czech Republic, para. 470.

⁷⁶³ Indeed, some of the orders of the interim award and of the final award have been enforced. More precisely, with respect to the interim award, the Regional Court accepted to appoint a receiver of MA. In relation to the final award, *see, infra*, note 764. For more on the facts, *see* Chapter II, section 5.4.

trustee in the bankruptcy of LZ, respectively, to immediately grant to Frontier first secured charges in accordance with the content of the final award.⁷⁶⁴

Turning to the analysis of the positions of the investment tribunal with respect to the lack of recognition and enforcement of the interim award, the tribunal noted that the municipal courts did not act in an improper manner. More precisely, the tribunal highlighted that in the letters that Frontier wrote on 27 February 2004 to the District Courts in Uherské Hradiště, enclosing, *inter alia*, the interim award, the claimant merely *suggested* to terminate or interrupt all executions of judgements against MA and LZ and it requested to be updated in this respect, without specifying on which grounds it had such a right. In addition, the tribunal noted that Frontier's requests to the Regional Courts to enjoin all parties from any disposition of the assets of MA and open proceedings with respect to the nullity of any sale contract or other acts of MA and LZ were not clearly connected to the terms of the interim award. Finally, the relief sought with respect to the interim award by Frontier also regarded third parties, while the interim award addressed only MA and LZ. In light of the above, the tribunal was 'unable to conclude that the alleged inactions of the

⁷⁶⁴ Notably, the final award contained several additional orders in favour of Frontier. More precisely: (i) Frontier was entitled to an accounting of the LET Assets held at that time or, otherwise, sold, pledged or otherwise disposed from 15 August 2001; (ii) Frontier was entitled to 49% of the shares of LZ, against the consideration of USD 100, to be paid by way of set off against amounts otherwise owed to Frontier by MA and LZ; (iii) MA and LZ were ordered to pay to Frontier certain interests, the damages for lost of business opportunities, the arbitration costs and to repay Frontier the share of advanced payments to cover the fees and the costs of arbitration (Frontier v. Czech Republic, paras. 141; 523). In relation to the order referred to under (i) above, the investment tribunal found refusal to enforce it justifiable as it noted that such refusal 'was based on more technical grounds, such as the impossibility of the trustee to trace the assets of a third party (*i.e.* LET), and the lack of concordance between the wording of the Claimant's request and the Final Award' (Frontier v. Czech Republic, para. 523). With respect to the order referred to under (ii) above, the share certificates were duly delivered to Frontier (Frontier v. Czech Republic, para. 142). With respect to the orders referred to under (iii), the investment tribunal maintained that 'these claims were ultimately upheld.' In light of the above, the investment tribunal focused only on the lack of enforcement of the order concerning the granting of a first security over the Let Assets.

Regional Court and the District Court [...] constituted a failure to properly give effect to the Interim Award.⁷⁶⁵

The investment tribunal then moved on to the claims connected to non-enforcement of the final award, which, as illustrated in section 5.4 of Chapter II, was based on the public policy exception set out in Art. V(2)(b) of the New York Convention. More precisely, substantially all the Czech judicial authorities called to decide upon the recognition and enforcement of the part of the final arbitral award regarding the granting of a secured charge over the LET Assets and the assets of MA stated that such an act would have been contrary to: (i) the national bankruptcy law, as it purported to accord to the Claimant an exceptional status after the bankruptcy had been declared; and (ii) the Czech public policy principle of equality of rights of bankruptcy creditors.⁷⁶⁶ Therefore, they all refused the enforcement under Art. V(2)(a) of the New York Convention. According to the claimant, the Czech courts acted in bad faith and based their decisions on applicable municipal law, while under Art. 27 of the Vienna Convention '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'⁷⁶⁷

Prior to the analysis of the merits of this claim, the investment tribunal had to face a preliminary issue raised by the Czech Republic, according to which the claimant's claim was inadmissible 'because the tribunal must [...] make a ruling on the correctness of the Czech courts' reliance upon the public policy exception in Article V(2)(a) of the *New York Convention*. This would mean that the Tribunal would be acting as a court of appeal in respect of a decision of the Czech courts or as an international court with supervisory jurisdiction over contracting states' obligations under the New York Convention.'⁷⁶⁸ This was, according to the respondent, contrary to the wording and the spirit of the New York Convention, where the final word on the issue of public policy as a bar to recognition and enforcement was given to the national competent

⁷⁶⁵ Frontier v. Czech Republic, para. 524.

⁷⁶⁶ Frontier v. Czech Republic, paras. 502-475.

⁷⁶⁷ Frontier v. Czech Republic, paras. 474.

⁷⁶⁸ Frontier v. Czech Republic, para. 485

authorities.⁷⁶⁹ In addressing this point, the tribunal made an important assertion with respect to the role that investment tribunals have in the review of the activities of the local courts. The tribunal highlighted that its ‘role under this claim is to determine whether the refusal of the Czech courts to recognise and enforce the Final Award in full violates Article III(1) of the BIT [i.e., the FET standard clause].’⁷⁷⁰ Therefore, it recognised its power to review the decisions of national courts applying the New York Convention, in order to assess if through such decisions the State had breached a provision of the applicable investment treaty. As already mentioned, the tribunal limited its analysis to a breach of the FET clause, while it apparently disregarded all other claims raised by Frontier (e.g., violation of the effective means clause and the full protection and security clause).

In order to assess if a violation of the FET clause had occurred,⁷⁷¹ the tribunal deemed that its analysis should focus on whether the Czech courts’ refusal to enforce amounted to an abuse of rights contrary to the international principle of good faith, meaning in particular that the interpretation given by the Czech courts to the public policy exception in Art. V(2)(b) of the New York Convention was made in an arbitrary or discriminatory manner or was otherwise fundamentally unfair.⁷⁷²

In this respect, the tribunal first held that it is widely accepted that the concept of public policy for the purposes of the New York Convention also refers to international public policy. Still, it found that the New York Convention leaves some room for national conceptions of the public policy exception. In light of the above, the tribunal deemed it unnecessary to ‘determine whether the findings of the Czech courts meet the applicable standard of international public policy, or to determine the precise contents of that standard. States enjoy a certain margin of appreciation in determining what their own

⁷⁶⁹ Frontier v. Czech Republic, para. 485

⁷⁷⁰ Frontier v. Czech Republic, para. 525.

⁷⁷¹ As already mentioned in section 7 of this Chapter III, the tribunal limited its analysis to a breach of the FET clause, while it apparently disregarded all other claims raised by Frontier (e.g., violation of the effective means clause and of the full protection and security clause).

⁷⁷² Frontier v. Czech Republic, para. 525.

conception of international public policy is.⁷⁷³ The tribunal went on to state that it was sufficient to assess whether the interpretation given to the public policy exception by the municipal courts was plausible, i.e., made in good faith and reasonably tenable.⁷⁷⁴ After having found that the equality of creditors in bankruptcy proceedings is considered as a public policy principle sufficient to refuse enforcement of arbitral awards in several jurisdictions, it came to the conclusion that the ‘interpretation of the international public policy [...] adopted by the Czech courts is reasonably tenable.’⁷⁷⁵ Therefore there was no indication that the national courts acted arbitrarily, discriminatorily or in bad faith and, as a consequence, in violation of the FET standard.⁷⁷⁶ On this ground, Frontier’s claim was dismissed.

7.2. Remarks

Differently from *ATA v. Jordan*, in the case at issue, the panel took certain clear positions, clarifying the role of investment arbitration in reviewing national courts’ conduct and the conditions under which a decision of national

⁷⁷³ Frontier v. Czech Republic, para. 527.

⁷⁷⁴ Frontier v. Czech Republic, para. 527. In this respect it must be noted that the tribunal, in the course of its analysis of the content of the ‘full protection and security standard’, stated that: ‘[i]n this Tribunal’s view, where the acts of the host state’s judiciary are at stake, “full protection and security” means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor. On the other hand, not every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, *such as an international tribunal, is “wrong” would not automatically lead to state responsibility as long as the courts have acted in good faith and have reached decisions that are reasonably tenable.* In particular, the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated’ (para. 127, emphasis added). Therefore, despite the fact that in the decision, the tribunal referred only to the FET standard, one may argue that it considered also the full protection and security standard and that in future cross over cases, aggrieved investors can bring claims also for violations of that standard.

⁷⁷⁵ Frontier v. Czech Republic, para. 529.

⁷⁷⁶ Frontier v. Czech Republic, para. 529.

courts can entail a breach of the FET clause of an investment treaty. These aspects will be considered in detail in the following two sub-sections.

7.2.1. The role of investment tribunals

The first remarkable statement of this award is the one concerning the role to be attributed to investment tribunals in the review of decisions of domestic courts concerning the enforcement of commercial arbitral awards. As already noted in this Chapter, international tribunals have always had a deferential approach vis-à-vis the decisions taken by national courts.⁷⁷⁷ In addition, they have unanimously asserted that they cannot, and will not, act as an international court of appeal against the decisions assumed by national courts concerning the application of the New York Convention or the setting aside of commercial arbitral awards.⁷⁷⁸ The reason underlying this position is that traditionally it was not considered possible for investment tribunals to review the national courts' decisions on the topic, in light of the so-called 'architecture'⁷⁷⁹ of international

⁷⁷⁷ See sections 1 and 2 of this Chapter III.

⁷⁷⁸ For instance, in the *Saipem v. Bangladesh* Decision on Jurisdiction, paras. 155; 158, the tribunal expressly stated that: '[t]o avoid any ambiguity, the Tribunal stresses that Saipem's claim does not deal with the courts' regular exercise of their power to rule over annulment or setting aside proceedings of an award wrongful interference [...]. *By accepting jurisdiction, this Tribunal does not institute itself as control body over the ICC Arbitration, nor as enforcement court, nor as supranational appellate body for local court decisions. This Tribunal is a treaty judge. It is called upon to rule exclusively on treaty breaches, whatever the context in which such treaty breaches arise*' (emphasis added). In *Romak v. Uzbekistan*, the denial of jurisdiction was based on the grounds that the mechanical application of the broad definition of investment included in the Switzerland-Uzbekistan BIT: 'would create, *de facto*, a new instance of review of State court decisions concerning the enforcement of arbitral awards. [...] The refusal or failure of the host State's courts to enforce such an award would therefore arguably provide sufficient grounds for a *de novo* review – under a different international instrument and on grounds different from those that would normally apply – of the State courts' decision not to enforce an award' (para. 186).

⁷⁷⁹ The term architecture is coined by W.M. Reisman (*see, inter alia*, W.M. REISMAN, H. IRAVANI, *The Changing Relation of National Courts and International Commercial Arbitration*, *supra*, note 64; W.M. REISMAN, B. RICHARDSON, *Tribunals and Courts: An*

commercial arbitration. As already illustrated in sub-section 4.2.2 of this Chapter,⁷⁸⁰ according to this doctrine, commercial arbitration awards should be considered as the final decision on the contended matter, with the courts of the seat of the arbitration being competent to annul the award and courts of the place of enforcement being competent to rule upon the recognition and enforcement of the award in that particular State.⁷⁸¹ This architecture does not envisage any form of recourse against the final decision on the annulment or on the enforcement of the awards. In particular, with respect to the enforcement of arbitral commercial awards, the New York Convention – which does not provide for any dispute resolution clause – seems to prevent any further review of the decision taken by national courts involved in the application of the Convention itself. In this respect, it has been noted that: ‘[...] the drafters of the New York Convention (some more than 50 years ago) were most likely not intending to see the international investment arbitration forum considering the compliance of the states with the provisions thereof.’⁷⁸² In relation to the annulment of arbitral awards, the power to rule on the topic, according to the school of thought that adheres to the territorialist theory, is granted exclusively to the courts of the place where the arbitration is held: they are given the ultimate say as to the validity of the award and their decision in this respect should have effects *erga omnes*.

As illustrated, in relation to the topic connected to the enforcement of the arbitral award, the tribunal in the *Frontier v. Czech Republic* award seems to

Interpretation of the Architecture of International Commercial Arbitration, *supra*, note 488).

⁷⁸⁰ See also Chapter I, section 4.

⁷⁸¹ There are, of course, other conceptions of the architecture of international commercial arbitration. However, they are not reflective of the generally accepted conceptions of international law (see G. KAUFMANN-KOHLER, *Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts*, *supra*, note 477, at p. 154)

⁷⁸² L. GUGLYA, *International Review of Decisions Concerning Recognition and Enforcement of Foreign Arbitral Award: A Threat to the Sovereignty of the States or an Overestimated Hazard (so far)? (with Emphasis on the Developments within the International Investment Arbitration Setting)*, *supra*, note 630, at p. 109.

challenge the above-mentioned architecture, expressly recognising that investment tribunals are entitled to review how the New York Convention was applied by national courts.⁷⁸³ However, the tribunal itself somewhat limited this power: the review of the decisions of national courts in this respect could be made exclusively to the extent necessary to establish if a violation of the standards set out in the applicable investment treaty occurred. Therefore, if the non-enforcement of an arbitral award due to a bad faith application of the New York Convention also amounts to a violation of a standard of the applicable BIT (e.g., FET, full protection and security, denial of justice, etc.), the investment tribunal is entitled to judge the conduct of the national courts. Consequently, investment tribunals are not called to rule on the application of the New York Convention and/or national law, but rather on allegations of treaty violations by a State, even if it is undeniable that in order to do that they have to review the content of the decision rendered by the national courts.⁷⁸⁴

This framing of investment tribunals' activities supports the theory that they are not acting as a mere body of appeal, but are exclusively exercising their jurisdiction, assessing whether a treaty breach has occurred.

The tribunal's position is endorsed by one author, according to whom: '[t]here is no reason why [an investment arbitral tribunal] should not entertain a claim simply because the circumstances under which the alleged breach occurred involve the application of another treaty (i.e., the New York Convention).'⁷⁸⁵

This author maintains that investment tribunals do not act as an appellate body in relation to the enforcement of commercial arbitral awards; rather, they assess

⁷⁸³ In *Saipem v. Bangladesh* the issue was different, as it concerned how the national courts decided on the revocation of the powers of an ICC award and on the substantial annulment of the award it rendered. Also in that case, the tribunal found a violation of the New York Convention, which had a role to play in establishing the liability of Bangladesh for expropriation.

⁷⁸⁴ Notably, according to S. FIETTA, J. UPCHEER, *Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?*, *supra*, note 441, at pp. 215-216, the investment tribunal did not act as a simple forum of appeal, since it considered only certain egregious misconducts of national courts.

⁷⁸⁵ G. KAUFMANN-KOHLER, *Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts*, *supra*, note 477, at p. 164.

whether a violation of the BIT took place. Pursuant to this author, if the jurisdictional requirements under the applicable investment treaty are met,⁷⁸⁶ the tribunal should exercise its jurisdiction, regardless of the fact that in order to do that it also has to consider other international instruments, such as the New York Convention. This statement is probably the key to understanding the entire theme: the cornerstone of the Relevant Cases is represented by the inclusion of commercial arbitral awards and arbitration agreements within the concept of protected investment under the applicable investment treaty. Once this is accepted, it goes without saying that, in order to establish if a violation of the applicable BIT took place, the investment tribunal shall assess how the New York Convention was applied.⁷⁸⁷

The above notwithstanding, it is noted that this position has been rebutted in a quite recent case, where the tribunal denied its jurisdiction with respect to a claim concerning the enforcement of a commercial arbitral award that, pursuant to the claimant, should have been denied.⁷⁸⁸ In that case, the decision was apparently based on the reasoning that, by accepting the jurisdiction, the tribunal would have assumed the role of an appellate body empowered to scrutinize the correctness of domestic decisions regarding the application of the New York Convention.⁷⁸⁹ According to the tribunal, in fact, the New York

⁷⁸⁶ As illustrated in Chapter II, this is in my opinion the cornerstone of this issue. Once it is accepted that the subject matter jurisdiction is correctly established, it is true that the investment tribunal shall apply the treaty and possibly review the national courts' application of the New York Convention.

⁷⁸⁷ See Romak v. Uzbekistan, *supra*, note 778.

⁷⁸⁸ *Government of the Kaliningrad Region v. Republic of Lithuania*, ICC Arbitration, Final Award, 28 January 2009 (unpublished). The case under work is somehow the opposite of the Relevant Cases: in fact, the commercial award was recognized and enforced in Lithuania and the claimant asserted that Lithuania should have denied such enforcement. It shall also be noted that this case does not regard an investor-State arbitration, but a claim made by a State vis-à-vis the other State party to the BIT.

⁷⁸⁹ Despite the award is not published, the reasoning of the arbitral tribunal and certain excerpts of the award can be retrieved from the decision of Paris Court of Appeal rejecting the application for annulment of the ICC award (*Government of the Kaliningrad Region v.*

Convention provided exclusive jurisdiction in favour of national courts of the place of enforcement, with the exclusion of the jurisdiction of any other tribunal or court on these issues. Remarkably, the French court involved in the judgment concerning the setting aside of the investment award⁷⁹⁰ established that the BIT could not be interpreted as giving rise to a State's liability for complying with its obligations under the New York Convention.

Along the same lines are those scholarly writings that have criticised the tribunal's position in *Frontier v. Czech Republic* as well as the other Relevant Cases where the claimant's position was upheld,⁷⁹¹ on the grounds that the international arbitral award acted as a court of appeal against the decision of the national courts regarding the annulment or the enforcement of commercial arbitral awards.⁷⁹²

The risk envisaged by scholarly writings in this case is that investment arbitration might displace the national courts of the place where the arbitration was held as the final decision-maker with respect to the validity of an international commercial award. Once again, in such a case the architecture of investment arbitration would be demolished.⁷⁹³

Republic of Lithuania, Paris Court of Appeal, Decision of 18 November 2010, available at: http://www.italaw.com/sites/default/files/case-documents/ita0443_0.pdf.

⁷⁹⁰ Being an award issued by a non-ICSID tribunal, broadly the courts of the place of the arbitration are competent with respect to its set aside. For more on the topic, *see* Chapter I, section 4.

⁷⁹¹ In fact, analogous to the issue analysed by the *Frontier v. Czech Republic*'s tribunal in the passage under analysis herein is the problem relating to the possibility to invoke a BIT in order to initiate investment arbitration against the States whose courts annulled an arbitration agreement or an arbitral award on the grounds that the State's judiciaries violated some of the guarantees included in such BIT, as it happened in the *Saipem v. Bangladesh* and *ATA v. Jordan* cases.

⁷⁹² *See* sections 4.2.3 and 6.2 of this Chapter III.

⁷⁹³ W.M. REISMAN, B. RICHARDSON, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, *supra*, note 488.

In this regard, it shall however be recalled that, in recent times, some authors⁷⁹⁴ have started to challenge the foundations of the architecture of international arbitration itself. Relying, *inter alia*, on the literal wording of Art. V of the New York Convention, they have argued that no rule prescribes that the State of the place of the arbitration shall have the final say with respect to the annulment of an international commercial award. In light of the above, investment arbitration is entitled to review the decisions of national courts deciding on the set-aside. As a final remark with respect to the paragraph of the *Frontier v. Czech Republic* award analysed herein, notably it seems to deny that a mere violation of the application of the New York Convention can *per se* entail the international liability of the State vis-à-vis the aggrieved investor and that there must always be a breach of the applicable BIT. This aspect will be analysed in more detail in section 10 of this Chapter.

7.3. Violation of the FET Standard

Another important finding of this case is that the tribunal, as a matter of principle, seemed to accept that the court's non-enforcement of a commercial arbitral award could amount to a breach of the FET standard, without the need for the court's conduct to reach the threshold of a denial of justice. The comments made in section 4.2.1 of this Chapter apply *mutatis mutandis* to this case. In addition, scholarly writings have highlighted how in *Frontier v. Czech Republic*, the investment tribunal established that a breach of the FET could occur in case of an implausible interpretation of Art. V(2)(b) of the New York Convention. This statement raised criticism as, while it is recognised that the implausible interpretation of a national norm does not imply the international

⁷⁹⁴ See, *inter alia*, J. PAULSSON, *Interference by National Courts*, in L.W. NEWMAN, R.D. HILL (eds.), *The Leading Arbitrators' Guide to International Arbitration* (2nd Edition), JurisNet, 2008, pp. 33-62; L.G. RADICATI DI BROZOLO, *The Control System of Arbitral Awards: A Pro-Arbitration Critique of Michael Reisman's "Architecture of International Commercial Arbitration"*, in A. JAN VAN DEN BERG (ed.), *Arbitration – The Next Fifty Years. 50th Anniversary Conference*, Geneva, 2011, ICCA Congress Series No. 16, 2012, pp. 74-101.

responsibility of the court,⁷⁹⁵ it seems that, pursuant to the tribunal's line of thought, an opposite principle applies with respect to implausible interpretations of international norms. According to one author, since there is no valid distinction between an implausible interpretation of national and international norms, the 'focus of the enquiry at international level cannot be whether the domestic court arrived at a 'plausible interpretation' of an international norm; instead the focus must be whether the court denied the national's substantive rights (whether their source is international or national law) in a manner that was violative of that national's procedural rights as protected by international law.'⁷⁹⁶

According to this author, therefore, any claim concerning misconduct of national courts must be framed as a denial of justice. Any different approach would entail that the national courts act as a court of appeal with respect to the national court's decisions upon the enforcement of the New York Convention.⁷⁹⁷ It should be noted that this line of reasoning is based on the principle that a denial of justice can also be substantial. However, this position is still somewhat unclear. If denial of justice can also be substantial, the investment arbitration would in any event review the merits of the decision taken by the national tribunal concerning the application of the New York Convention. Of course, the threshold for a violation of the BIT would be higher,⁷⁹⁸ but the methodology applied by the tribunal would be the same. On the contrary, if denial of justice is to be considered only procedural, there would be an effective difference. The investment tribunal would not be entitled to review the merits of the decisions, but only if the principles of due process were respected. Notably, the majority of scholarly writings considering that denial of justice is only procedural still tend to state that a delict also takes place

⁷⁹⁵ Waste Management v. Mexico, para. 129; Jan de Nul Award, para. 209; Iberdrola v. Guatemala (*see, infra*, note 566), paras. 491; 502; 507.

⁷⁹⁶ Z. DOUGLAS, International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, *supra*, note 495, at pp. 898.

⁷⁹⁷ For more on this topic *see* section 7.2.1 of this Chapter III.

⁷⁹⁸ *See* section 2 of this Chapter III.

in the event of manifest substantial errors that show a procedural injustice.⁷⁹⁹ Hence, also in this case there would be room for reviewing the merits of the decision.

8. Effective means of asserting claims

Historically the ‘effective means’ standard was not commonly included in investment treaties⁸⁰⁰ and until recent times few investors brought claims alleging that the rights protected by this standard were violated. The first publicly available award that addressed the issue is *Petrobart v. Kyrgyz Republic*, dated 2005. It is largely as a consequence of this situation that there has not been substantial scholarly analysis on the content of the standard and today ‘providing an authoritative definition of effective means presents an immediate challenge’.⁸⁰¹ A very broad definition of the standard that is in line with the few jurisprudential findings on it is as follows: the right of foreign investors to the means required to assert claims against and enforce the rights of a host State before the courts of that host State.

In 2012, the effective means standard was considered by the *White v. India* tribunal, which found a violation thereof due to the undue delays of the Indian municipal courts to decide upon the setting aside of a commercial award issued in favour of White.

Since this ICSID award, the recourse to the effective means standard has become more frequent. As mentioned, before *White v. India*, the standard was

⁷⁹⁹ For more on this topic, *see* section 2 of this Chapter III.

⁸⁰⁰ A.P. KARREMAN, K. DHARMANANDA SC, Time to Reassess Remedies for Delays Breaching ‘Effective Means’, *supra*, note 504, at p. 124, where reference is made to a study published in 2012, according to which, out of a sample of 412 BITs, only 68 contained an effective means standard, representing approximately 16.5% of the surveyed BITs. According to the *Chevron Partial Award (infra, note 809)*: ‘BIT provisions such as this one are relatively rare. They appear only in U.S. BITs, the ECT, and a handful of other BITs.’

⁸⁰¹ M. ALLEN, Effective Means and the Perils of Standard-Setting, *SPIL International Law Journal*, Issue 1, 2014, pp. 86-108, at p. 91. A very broad definition (maybe tautological) provided by the same Author could be as follows: the right of foreign investors to the means required to assert claims against and enforce rights a host State before the courts of that host State (*ibid.*).

only marginally applied by investment tribunals. On the basis of publicly available sources, after *Petrobart v. Kyrgyz Republic* and before *White v. India* only three investment tribunals addressed the topic.

In order to have a better understanding of the standard, it is worth briefly analysing the principal findings of each of the tribunals that dealt with it.

Starting with the analysis of the first case, in *Petrobart v. Kyrgyz Republic*, the tribunal agreed with the claimant's allegations that the obtainment by the State's executive of a stay of a judgement issued in the claimant's favour against a State-owned entity through ex-parte interactions with the judiciary amounted to a breach of the effective means clause included in the ECT.⁸⁰² However, the tribunal did not provide substantive analysis of the requirements for establishing such a breach.⁸⁰³

The second investment arbitration dispute concerning a violation of an effective means clause is *AMTO v. Ukraine*⁸⁰⁴ from 2008. In this case, the tribunal agreed that an inadequacy in a statute forming part of the host State's legislation could be considered tantamount to a breach of the effective means standard, to the extent that such shortcoming had the effect of denying an investor the ability to assert a claim in the courts of the host State. In its reasoning, the tribunal individuated the main features of the standard. More precisely, in its view, effective means was a '*systematic, comparative, progressive and practical standard*. It is *systematic* in that the State must provide an effective framework or system for the enforcement of rights, but *does not offer guarantees in individual cases*. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12). It is *comparative* in that compliance with international standards indicates that *imperfections in the law might result from the complexities of the subject matter rather than the inadequacies of the legislation*. It is *progressive* in the sense that *legislation ages and needs to be modernized and adapted from time to time, and results might not be immediate [...]* it is a *practical*

⁸⁰² *Petrobart v. Kyrgyz Republic*, para. 28-29.

⁸⁰³ *Petrobart v. Kyrgyz Republic*, para. 26.

⁸⁰⁴ *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0030.pdf>) ("*AMTO v. Ukraine*").

standard in that *some areas of law*, or the application of legislation in certain circumstances, *raise particular difficulties which should not be ignored in assessing effectiveness*.⁸⁰⁵ On these grounds, the panel did not consider Ukraine's law under issue in breach of the standard.

The third arbitration tribunal to consider an effective means clause was *Duke v. Ecuador*,⁸⁰⁶ where the panel in its brief analysis of the clause considered it an implementation of the more general guarantee against denial of justice.⁸⁰⁷ More precisely, the tribunal found that the effective means standard concerns systemic or institutional means of protecting investments, such as access to the courts. According to the tribunal, the effective functioning of the institutional mechanism, rather than the mere existence thereof, is the crucial aspect for determining a breach of the effective means standard.⁸⁰⁸

The three awards mentioned above are limited in their contribution to the identification of a standard autonomous from denial of justice. In *Duke v. Ecuador*, the panel even seems to deny this possibility, considering it as a provision exclusively aimed at implementing the prohibition to deny justice.

A significant step forward in the identification of an autonomous effective means standard was made by the *Chevron Partial Award*.⁸⁰⁹ As to the facts of the case, making a very long story short, in 1991 *Texaco Petroleum Corp.* ("**Texaco**"), a company subsequently acquired by *Chevron Corporation* ("**Chevron**"), initiated before Ecuadorian courts the first of seven claims against Ecuador for breach of an oil exploitation contract entered into in the early 1970s. Since in 2006 many of these cases were still pending, Ecuador filed

⁸⁰⁵ *AMTO v. Ukraine*, para. 88 (emphasis added).

⁸⁰⁶ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0256.pdf>) ("**Duke v. Ecuador**").

⁸⁰⁷ *Duke v. Ecuador*, para. 391.

⁸⁰⁸ *Duke v. Ecuador*, para. 392.

⁸⁰⁹ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Partial Award on the Merits, 30 March 2010 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0151.pdf>) ("**Chevron Partial Award**").

an investor-State claim for breaches of the US-Ecuador BIT under the auspices of UNCITRAL Arbitration Rules. Specifically, Chevron argued that the egregious delays amounted to a denial of justice under customary international law and/or a breach of the FET clause, the effective means clause as well as of provisions relating to the non-arbitrary protection of investments included in the US-Ecuador BIT.

In the Chevron Partial Award, the tribunal focused on the analysis of the effective means clause. It recognised that such a rule significantly overlaps with the prohibition of denial of justice under customary international law and to some extent implements and forms part of the more general guarantee against denial of justice. However, it contradictorily went on to say that effective means represents *lex specialis*: an independent treaty obligation and not a mere reinstatement of the principle of denial of justice. Indeed, while denial of justice requires a serious shortcoming on the part of the national courts, ‘a distinct and potentially less-demanding test is applicable’⁸¹⁰ under the effective means clause. Thus, actions that would not amount to a denial of justice could still qualify as a violation of the effective means clause.

The tribunal then identified the features of this standard. First, a State must set up a legal system and laws that work properly and, *inter alia*, allows investors' claims to be adjudicated without ‘indefinite or undue delay’,⁸¹¹ defined as the ability to ‘enforce legitimate rights within a reasonable amount of time.’⁸¹² In order to assess the reasonableness of the delay the tribunal suggested looking at the same factors that inform the determination of denial of justice under customary international law, i.e., ‘the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case, and the behaviour of the courts themselves.’⁸¹³ Then, the tribunal noted that for a breach of the effective means standard to exist, there is no need for the claimant to prove the interference of the host State in judicial proceedings.

⁸¹⁰ Chevron Partial Award, para. 244.

⁸¹¹ Chevron Partial Award, para. 250.

⁸¹² Chevron Partial Award, para. 250.

⁸¹³ Chevron Partial Award, para. 250.

Finally, the tribunal also considered that investors have a role to play in domestic litigation. More precisely, the tribunal found that, even if the exhaustion of local remedies' rule does not apply, a claimant must adequately utilize the means available to it to assert claim and enforce rights.⁸¹⁴

The Chevron Partial Award is full of meaning in a number of respects. First and foremost, the effective means standard was conceived as an independent standard through this sentence, which definitively distinguished it (with some caveats) from the concept of denial of justice. Additionally, the findings of the Chevron Partial Award have been largely applied in the *White v. India* case.

Notwithstanding the above, it should be noted that the tribunal's findings can be considered quite controversial. Ecuador itself contested them: after the tribunal's decision, Ecuador transmitted a diplomatic note to the United States, whereby it, *inter alia*, maintained that its obligations under the effective means clause were not greater than those under denial of justice under customary international law. The United States refused to reply to Ecuador's request and therefore the issue still remains outstanding.⁸¹⁵

⁸¹⁴ More precisely, the tribunal found that 'a qualified' requirement of exhaustion of local remedies applies under the "effective means" standard, which means that 'the Tribunal must consider whether a given claimant has done its part by properly using the means placed at its disposal.' Chevron Partial Award, paras. 323-324.

⁸¹⁵ On June 28, 2011, the Republic of Ecuador instituted arbitral proceedings concerning the interpretation and application of Article II(7) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, signed on 27 August 1993 (available at: <http://www.state.gov/documents/organization/43558.pdf>) ("US-Ecuador BIT"), pursuant to Article VII of the US-Ecuador BIT. The Permanent Court of Arbitration acted as Registry in this arbitration (all relevant public documentation is available at: http://archive.pca-cpa.org/showpage7d72.html?pag_id=1455). The decision of the tribunal is not public. However, reports indicate that the tribunal dismissed the claim affirming that there was no dispute between the two States because the silence of the United States did not amount to an actual opposition to Ecuador's view, nor could the United States be forced to give an interpretation (J. Hepburn, L. Eric Peterson, US-Ecuador Inter-state Investment Treaty Award Released to Parties; Tribunal Members Part Ways on Key Issues, *Investment Arbitration Reporter* (subs. req.), 30 October 2011 (available at: www.iareporter.com/articles/20121030_1J)).

It is against this background that in 2012 the *White v. India* award was issued.

9. **White v. India**

White v. India is the last of the Relevant Cases that will be analysed in this Chapter and it is also the last award rendered in the context of cross-over arbitration, though subsequent claims concerning the interference by national courts in the enforcement of commercial arbitral awards have been filed.⁸¹⁶

It should also be noted that, before *White v. India*, the tribunal in *GEA v. Ukraine* – despite its rejection of GEA’s allegations at the jurisdictional phase, on the grounds of the lack of an investment –⁸¹⁷ ‘out of an abundance of caution’ addressed ‘the merits of all the claimant’s claim.’⁸¹⁸ Therefore, the tribunal considered whether Ukraine, by refusing enforcement of the commercial arbitral award, committed an unlawful expropriation and/or violated the FET clause, denying justice to GEA under the Germany-Ukraine BIT.⁸¹⁹

In relation to the expropriation claim,⁸²⁰ the tribunal made reference to the *Saipem v. Bangladesh* case, where, according to the *GEA v. Ukraine* panel, the ‘non-enforcement of the ICC Award amounted to an expropriation due to the

⁸¹⁶ For more on the topic, *see* section 11 of this Chapter.

⁸¹⁷ *See* Chapter II, section 5.5.

⁸¹⁸ *GEA v. Ukraine*, para. 205.

⁸¹⁹ For the sake of completeness, it shall be noted that for the purposes of this work, GEA’s allegations concerning conducts of Ukraine different from the non-enforcement of the arbitral award have not been considered. Additionally, the tribunal dismissed GEA’s claim concerning the breach of the Art. 2(3) of the Germany-Ukraine BIT prohibiting arbitrary and discriminatory measures ‘for the same reasons as the Claimant’s claims in respect of the fair and equitable treatment were rejected’ (para. 331), having found that the protection against arbitrariness or discrimination is related to that the FET.

⁸²⁰ Art. 4(2) of the German-Ukraine BIT provided that: ‘investments by nationals or companies of either Contracting State may not, within the territory of the other Contracting State, be expropriated, nationalized or subjected to such other measures the effect of which would be tantamount to expropriation or nationalization except for the public interest and against compensation [...]’ (translation provided in *GEA v. Ukraine*, para. 207).

particularly egregious nature of the acts of the Bangladeshi courts.⁸²¹ Applying the *Saipem v. Bangladesh* standard to the case, the tribunal found that ‘even assuming that the ICC Award could somehow qualify as an “investment” [...] the tribunal has been presented with no evidence that the actions taken by the Ukrainian courts were “egregious” in any way; that they amounted to anything other than the application of Ukrainian law; or that they were somehow deliberately taken to thwart GEA’s ability to recover on the ICC Award.’⁸²² Further, with respect to the breach of the FET clause,⁸²³ the tribunal came to an analogous conclusion. More precisely, in order to make its assessment, it applied the test identified in *Mondev v. US*,⁸²⁴ and, on the basis of the circumstances of the case, it held that there was nothing clearly improper and discreditable about the decisions taken by the Ukrainian courts in relation to the enforcement of the commercial arbitral award.⁸²⁵ Therefore the tribunal,

⁸²¹ GEA v. Ukraine, para. 234.

⁸²² GEA v. Ukraine, para. 236.

⁸²³ Art. 2(1) of the German-Ukraine BIT provided that: ‘[e]ither Contracting State shall, if possible, promote within its territory investments by nationals or companies of the other Contracting State and shall permit such investments in accordance with its legislation. It shall in any case grant investments fair and equitable treatment’ (translation provided in *GEA v. Ukraine*, para. 268).

⁸²⁴ In particular, the tribunal in para. 312 quoted para. 348 of the *Mondev v. US* award, whereby it is stated that: ‘[t]he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.’

⁸²⁵ GEA v. Ukraine, para. 319.

had it had jurisdiction, would have dismissed GEA's claims at the merits phase in any case.

To sum up, it is possible to conclude that the panel in *GEA v. Ukraine* adopted an approach of reasonable deference to the domestic courts on issues regulated by domestic laws and, since there was not convincing evidence of misconduct by the municipal courts in the application of such laws to the fact of the case, it considered that Ukraine did not breach the Germany-Ukraine BIT.

9.1. The merits phase

Turning back to *White v. India*, the tribunal, as anticipated, found a breach of the effective means standard through the actions of the municipal courts. It is however noted that White alleged the existence of other breaches of the BIT. The tribunal considered all the alleged breaches in detail and this is worth analysing in the context of this work, as it adds content to the standards already analysed in the previous sections of this Chapter.

More precisely, the first claim considered by the tribunal concerned the violation of Art. 3(1) of the Australia-India BIT, according to which the contracting States shall encourage and promote favourable conditions for investors to make investments in its territory. According to White, this provision gave rise to, *inter alia*, the following obligations on India (all of which were allegedly breached): to create a suitable governance framework for supervising the actions of State-owned corporations (such as Coal India); to ensure that India's arbitration laws were administered in line with the New York Convention; and to take steps to reduce the backlog of cases in its courts. White's allegations were rejected by the tribunal, which found that the provision of Art. 3(1) regarded the pre-establishment phase and was too generic to give rise to the substantial claims identified by White.

The second claim put forward by White concerned the breach of the FET standard. More specifically, White contested that India frustrated its legitimate expectations that: (i) India would have applied the New York Convention in accordance with international standards; and (ii) India would have afforded justice to White by allowing it to enforce the award in a timely manner. In addition White claimed that India committed a denial of justice. In relation to

the first aspect (i.e., violation of White's legitimate expectations), the tribunal preliminarily assessed whether, at the time of its investment, White had expectations that could be considered as legitimate regarding the conduct of the Indian courts with respect to the enforcement and setting aside of arbitral awards. As to the setting aside, the panel pointed out that, at the time of White's investment, White should have known that awards made outside of India were also subject to being set aside if the arbitration agreement was governed by Indian law.

For the sake of completeness, it is worth recalling that this approach was based on the provisions of the Indian Arbitration Act of 1940, which allowed Indian courts to have jurisdiction on applications to set aside a foreign award if the law governing the contract and the law governing the agreement to arbitrate were the laws of India. However, the Arbitration Act of 1940 was subsequently replaced by a new Arbitration Act of 1996, which distinguished between national and foreign arbitration on the basis of the place where the arbitration was made. While the new Arbitration Act of 1996 contains a provision regarding the setting aside of national (i.e., Indian) awards, it does not regulate the setting aside of foreign awards. Hence, after 1996, some Indian courts started taking a view that foreign awards could not be set aside by Indian courts.⁸²⁶ It is in this context that Coal India's request to set aside the award won by White was made. In light of the above, the tribunal concluded that White could not legitimately have expected that India would have applied the New York Convention in an appropriate manner, in particular not setting aside awards rendered outside of India.

With respect to the expectations regarding a timely enforcement of the arbitral award, the tribunal noted that White should have known that the domestic court structure in India was overburdened and, in the absence of any specific assurance from India that any award could be enforced in a particular time

⁸²⁶ For more on the context, see S. KACHWAHA, *The White Industries Australia Limited – India BIT Award: A Critical Assessment*, *supra*, note 450, pp. 275-293, at pp. 277-278.

frame, White could not have legitimately expected the timely enforcement of the arbitral award.⁸²⁷

At this point, the tribunal turned to White's allegations about Indian courts denying justice to White. Substantially, White alleged that the courts failed to provide justice by allowing the enforcement process and the setting aside proceedings to last for more than nine years with no realistic end in sight. In this respect the tribunal recognised that denial of justice is a very demanding standard and that various elements are relevant to assess whether a judicial delay amounts to a denial of justice, such as the complexity of the proceedings, the need for swiftness, the behaviour of the litigants involved, the significance of the interests at stake and the behaviour of the courts themselves.⁸²⁸ The tribunal then analysed each of these factors in turn against the factual background of the case and concluded that, while the overall duration of the proceedings was 'certainly unsatisfactory in terms of efficient administration of justice', the delay had not 'reached the stage of constituting a denial of justice'.⁸²⁹

The last claim considered by the tribunal regarded the breach of the clause of the Australia-India BIT prohibiting expropriation.⁸³⁰ Remarkably, this analysis was made even though the panel had already found India liable under the

⁸²⁷ Notably, the tribunal considered also whether White could have legitimate expectations regarding India as a place to invest and transparency of court proceedings. The tribunal found no evidence of legitimate expectations also in these respects.

⁸²⁸ White v. India, para. 10.4.10.

⁸²⁹ White v. India, para. 10.4.22.

⁸³⁰ Art. 7(1) of the Australia-India BIT provided that: '[n]either Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the investments of investors of the other Contracting Party except for a public purpose, on a non-discriminatory basis, in accordance with its laws and against fair and equitable compensation.' Notably, White claimed that India violated also Art. 9 of the BIT, which provides that: 'each Contracting Party shall permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred without unreasonable delay and on a non-discriminatory basis [...]'. However, this claim was dismissed as the tribunal found that the acts of Coal India could not be attributed to India.

effective means clause. India alleged that the award rendered in its favour (which crystallized the rights and obligations arising from the original investment) was unlawfully expropriated. The tribunal correctly found that, since the Indian courts had yet to dispose of the set aside and the enforcement of the arbitral award, the awards was not ‘taken’. It continued: ‘[a]ll that has happened is that the determination of its validity has not yet occurred. This does not sound in expropriation.’⁸³¹ From this it is possible to infer that a delay cannot amount to an expropriatory taking.

The last cause of action to analyse represents the cornerstone of this award: the violation of the effective means clause. This part of the award is particularly relevant because, on the one hand, the panel effectively found a breach of this standard perpetrated by the Indian courts and, on the other hand, the tribunal also briefly described the features thereof, contributing to the development of effective means as an autonomous guarantee distinguishable from the principle of denial of justice.

It should be noted that the violation of the standard was found to exist even though the Australia-India BIT did not contain an effective means provision. However, the treaty provided for a MFN clause,⁸³² which according to India allowed the incorporation in the Australia-India BIT of the effective means' clause set out under the India-Kuwait BIT,⁸³³ according to which: ‘[e]ach Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. *Each Contracting State shall, in accordance with its applicable laws and regulations, provide effective means of asserting claims and enforcing rights with respect to investments [...]*’⁸³⁴ India, on the

⁸³¹ White v. India, para. 12.3.6.

⁸³² Art. 4(2) of the Australia-India BIT provides that: ‘[a] Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments or investors of any third country.’

⁸³³ Agreement Between the Republic of India and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, signed on 27 November 2001 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1569>) (“**India-Kuwait BIT**”).

⁸³⁴ Art. 4(5) of the India-Kuwait BIT (emphasis added).

contrary, claimed, *inter alia*, that if such a provision was to be introduced in the Australia-India BIT, it would ‘fundamentally subvert the carefully negotiated balance of the BIT.’⁸³⁵ The panel upheld White’s position and considered that White was correctly availing itself of the right to rely on more favourable substantive provisions included in the third-party treaty,⁸³⁶ which, in the tribunal’s view, was ‘exactly the result which the parties intended by the incorporation in the BIT of a MFN clause.’⁸³⁷

Having accepted the application of the effective means clause in the case at issue, the tribunal went on to analyse the standard. In doing this, it relied upon the Chevron Partial Award, which was the first decision that considered the effective means as an autonomous standard and provided a comprehensive analysis thereof.⁸³⁸ In its following analysis, the tribunal scrutinized the court proceedings in India in much more detail than it had with respect to the denial of justice and, contrary to previous decisions,⁸³⁹ it considered the enforcement proceeding and the set-aside proceeding separately.

With respect to the enforcement proceeding before the High Court in New Delhi, the delays did not represent a breach of the standard. Specifically, the panel differentiated between three-and-a-half years of normal proceedings and the following six years during which the proceedings were stayed. The three-and-a-half years before the stay was ordered were ‘not exceptional’, either in India or elsewhere, and the delays were caused by both parties asking for adjournments on several occasions.⁸⁴⁰ The delay after the stay was considered ascribable to White’s conduct, as it did not appeal the stay decision. According to White’s allegations, it did not appeal as it would have been fruitless considering the delays suffered in the context of the appeal before the Supreme

⁸³⁵ White v. India, para. 11.2.1.

⁸³⁶ White v. India, para. 11.2.3.

⁸³⁷ White v. India, para. 11.2.4.

⁸³⁸ For a summary of its content, *see* section 9 of this Chapter III.

⁸³⁹ AMTO v. Ukraine, para. 76, whereby the tribunal maintained that: ‘the experience of an investor in domestic courts may involve a series of decisions, and these decisions should be considered in their entirety.’

⁸⁴⁰ White v. India, para. 11.4.8.

Court regarding the set-aside proceedings. The tribunal, however, was not convinced: the delay of an appeal decision in one set of proceedings does not necessarily imply that an appeal in a different set of proceedings would be futile.⁸⁴¹

On the contrary, the delay in the set-aside proceedings was considered by the panel undue and in violation of India's obligation of providing White with effective means of asserting claims and enforcing rights.⁸⁴² The tribunal did not find any excuse for Indian courts' delay amounting to nine years in the aggregate. Moreover, it noted that White did everything it could to expedite those proceedings.⁸⁴³

9.2. Remarks

This award has contributed to the development of cross-over arbitration. After an award (*GEA v. Ukraine*) where the tribunal declined its jurisdiction and denied that, in any event, there would have been a treaty breach, *White v. India* re-opens the gates of investment arbitration to a frustrated award winner. It should however be noted that the tribunal took a very cautious approach to the wide number of claims presented,⁸⁴⁴ recognizing exclusively the breach of the effective means' clause in relation to the set-aside proceeding pending before the national courts. Moreover, it contributed to the development of a new standard: after this claim, other investors sought the enforcement of the effective means clause into a BIT, incorporating it by way of the MFN clause.⁸⁴⁵

⁸⁴¹ *White v. India*, para. 11.4.12-13.

⁸⁴² *White v. India*, para. 11.4.19.

⁸⁴³ *White v. India*, para. 11.4.18.

⁸⁴⁴ E. ALVAREZ, *Crossing the "Public/Private" Divide: Saipem v. Bangladesh and Other Crossover Cases*, *supra*, note 332, at p. 420.

⁸⁴⁵ *See, generally, Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 (documentation available at: <http://www.italaw.com/cases/1687>).

9.2.1. Effective means: the rise of a new standard?

Undoubtedly, the keystone of the award is represented by the recognition of a breach of the effective means standard, to be considered as an autonomous guarantee, whose existence is not subject to the high thresholds required for a denial of justice. In fact, the tribunal, following the path traced by the Chevron Partial Award, clarified that the provisions of investment treaties affording investors access to effective means of asserting claims and enforcing rights are not mere positive reinstatements of the customary international law requirement not to deny justice, but represent an autonomous standard, with its own content.

In this sense, the *White v. India* tribunal found that undue delays of the municipal judiciary can breach the effective means guarantee which represents a special (*lex specialis*) cause of action, intended by the treaty drafters as a less demanding standard than denial of justice under customary international law.

More precisely, the *White v. India* award⁸⁴⁶ provided a list of the key features of the standard, summarizing the findings of Chevron Partial Award, as follows:

- a) the effective means guarantee requires that the host State establishes a proper system of laws and institutions that work effectively;
- b) the interference of the host State in judicial proceedings is not a condition to find a breach of the standard;
- c) indefinite or undue delay may amount to a breach of the effective means standard. Whether or not a delay in dealing with an investor's claim breaches the effective means clause will depend on the circumstances of the case, which include (as in the context of denial of justice) the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case and the behaviour of the courts themselves;
- d) court congestion and backlogs may be taken into account, but they do not represent a complete defence. On the contrary, the host State's courts regular and extensive delays may show a systemic problem with the court

⁸⁴⁶ *White v. India*, para. 11.3.2

system, which would also constitute a breach of the effective means standard;

- e) the effective means is an objective international standard;
- f) the exhaustion of local remedies is not a substantive element of the standard. However, the means available to the investor to assert claims and enforce rights must have been effectively used.

There is nothing wrong in the fact that the *White v. India* tribunal relied on the findings of another investment tribunal. Indeed, though precedents are not binding in the context of investment arbitration, many tribunals have highlighted how they need to be taken into account, also with a view to harmonizing the outcomes of different proceedings that deal with the same matters.⁸⁴⁷

However, it has been highlighted⁸⁴⁸ that the *Chevron Partial Award* may not be the most appropriate precedent to follow. As noted in section 8 of this Chapter, in this award the tribunal departed from the precedent that considered the effective means within the ambit of the international standard of denial of justice. This different outcome was also due to the particular interpretation of the specific provisions included in the applicable BIT. More precisely, the tribunal in *Chevron v. Ecuador* noted that the effective means clause was situated near the FET clause. Yet, whereas the latter required that ‘in no case [shall] be accorded treatment less than that required by international law’, the effective means clause did not have such accompanying explanation. From this different drafting the tribunal inferred that the effective means

⁸⁴⁷ See, for instance, *Saipem Award*, para. 90, where it is stated that: ‘[t]he Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.’

⁸⁴⁸ S. KACHWAHA, *The White Industries Australia Limited – India BIT Award: A Critical Assessment*, *supra*, note 450, at p. 288 and following.

standard had a lower bar for violation than that required under international law.⁸⁴⁹ However, the FET and effective means provisions in the Kuwait-India BIT relevant for the *White v. India* case⁸⁵⁰ are very different from those included in the US-Ecuador BIT, applied in the Chevron Partial Award. More precisely, Art. 5(1) of the Kuwait-India BIT provides that '[e]ach Contracting State shall at all time ensure investments and associated activities, made in its territory by investors of the other Contracting State, fair and equitable treatment', with no reference to customary international law. Moreover, Art. 4(5) of the Kuwait-India BIT provides that '[e]ach Contracting State shall *in accordance with its applicable laws and regulations* provide effective means of asserting claims and enforcing rights with respect to investments the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.'⁸⁵¹

Such differences in drafting were not explicitly addressed by the *White v. India* tribunal. However, one may argue that the different wordings may have an impact on the interpretation of the effective means clause and the mere incorporation of the outcome of the reasoning made in the Chevron Partial Award by the *White v. India* tribunal could be shallow.

Moreover, it has been noted⁸⁵² that the exact content of the effective means standard, as identified by the Chevron Partial Award and in *White v. India*, remains somewhat unclear. More precisely, effective means appears to be a

⁸⁴⁹ Chevron Partial Award, para. 121. For a critical analysis to the interpretative method adopted in the Chevron Partial Award, see J. WIRTH, 'Effective Means' Means? The Legacy of Chevron v. Ecuador, *Columbia Journal of Transnational Law*, Vol. 52, No. 1, 2013, pp. 326-367. Indeed, the interpretation given to the FET clause by the tribunal is not undisputed. See *supra* para. 5.

⁸⁵⁰ As explained in section 9.1 of this Chapter III, the *White v. India* tribunal applied the effective means provision of the Kuwait-India BIT by operation of the MFN clause included in the Australia-India BIT.

⁸⁵¹ Emphasis added.

⁸⁵² M. SANAN, The *White Industries* award – Shades of Grey, *The Journal of World Investment & Trade*, Vol. 13, 2012, pp. 661-685, at p. 682.

denial of a justice-less standard, as its features are identified through a comparison with the standard of denial of justice, whose difficult requirements do not need to be met. This however makes the boundaries of the new autonomous standard relatively blurred and subject to the discretion of the panel involved in the relevant case. Indeed, some authors have wondered how the two standards effectively differ from each other and how the *White v. India* tribunal distinguished denial of justice from effective means, considering it a less demanding standard.⁸⁵³ In fact, the tribunal rejected the denial of justice claim, but considered the same conduct sufficient to meet a violation of the effective means standard; in addition, it failed to explain how these two international standards diverge from each other in terms of the undueness of the same delay. Moreover, with respect to the circumstances to be considered in order to exclude a violation of the standards at issue, the tribunal took into consideration the situation of India – a developing country with 1.2 billion people and a seriously overstretched judiciary – in the exclusion of the existence of a denial of justice, yet these same circumstances were not taken into account in the assessment of the breach of the effective means guarantee, regardless of the fact that, in the list of the elements of the effective means standard retrieved from the *Chevron Partial Award*, the panel expressly stated that: ‘as with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake and in the case and the behaviour of the courts themselves.’⁸⁵⁴

Arguably, tribunals may work on the difference between obligation of conduct (which is the effective means clause) and obligations of result (which is the prohibition to deny justice) to trace the distinguishing features of the two standards.⁸⁵⁵ As a consequence of such a distinction, the results reached by the

⁸⁵³ P. NACIMIENTO, S. LANGE, *White Industries Australia Limited v The Republic of India*, *ICSID Review*, Vol. 27, Issue 2, 2012, pp. 274-280; and M. SANAN, *The White Industries award – Shades of Grey*, *supra*, note 852, at p. 682 and following.

⁸⁵⁴ *White v. India*, para. 11.3.1(i).

⁸⁵⁵ For more on the distinction in the context of public international law, see C.P. ECONOMIDES, *Content of the Obligation: Obligations of Means and Obligations of Result*,

analysed case could not be confirmed, but at least the effective means clause would eventually find a specific meaning.

As a final remark, it is noted that also with respect to the breach of the effective means clause, the arbitrators imposed a relatively high burden of proof on the claimant. In fact, the tribunal found that a delay in the enforcement of a commercial arbitral award lasting more than nine years did not amount to a violation of the effective means standard, since part of the delay was attributable to the backlog of cases before the Indian courts, the availability of counsels and White's decision not to appeal the decision of the Delhi court before the Supreme court.

9.2.2. The other standards considered

A few considerations can be made about the analysis made by the tribunal in relation to other standards that, according to White, had been violated through the non-enforcement/set-aside of the ICC award.

With respect to the denial of justice claim, preliminarily, it must be noted that, even if the tribunal did not explicitly address the matter, it made it clear that it did not consider this standard to be exclusive when dealing with the conduct of domestic courts. Indeed, the panel also considered the other claims submitted by White and, more precisely, in relation to the violation of the FET clause, it analysed if there was a violation of White's legitimate expectations.

As to the content of the standard, the tribunal affirmed that the test for establishing a denial of justice remains high. In addition to the exhaustion of local remedies, it required, in line with *Mondev v. US* and *Chevron v. Ecuador*, evidence of “a particularly serious shortcoming” or “egregious conduct that

in J. CRAWFORD, A. PELLET, S. OLLESON (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 372-381. The distinction between obligations of conduct (or means) and obligations of result derives from the domestic laws of civil law countries, while it is largely unknown in the common law systems. Obligations of means are those by which the debtor promises to use all possible means to perform its obligation; by contrast, through an obligation of results the obligor commits itself to reach the agreed result. The obligation of result is evidently more flexible than obligations of result, which by definition is more rigid.

‘shocks, or at least surprise a sense of judicial propriety.’”⁸⁵⁶ The same approach was adopted by other tribunals, including the tribunal in *GEA v. Ukraine*, and confirms that it is very difficult for an aggrieved investor to prove the existence of a denial of justice, and that the recourse to other treaty guarantees may represent the easiest solution, also in light of the fact that tribunals seem keen to verify the national courts’ behaviours under different standards. An investment tribunal following this approach is by itself reasonable: municipal courts can engage a liability of the State they belong to for any violation of applicable international provisions, including any clause of an investment treaty.

Of course, the tribunal must carefully analyse the existence of the constitutive elements of each standard in order to establish if the courts committed any breach thereof, and must maintain a deferential approach vis-à-vis the national courts, in light of the peculiar functions of this State’s organ. For instance, in a claim for judicial expropriation, the tribunal must examine if there has been a substantial and permanent deprivation of an investment. With specific regard to the violation of the effective means standard, however, it seems that the relevant constitutive elements are not that clear and a tribunal may find it applicable at all times that a denial of justice claim cannot be upheld, but the panel believes that the behaviour of the national courts is somewhat regrettable. However, if on the one hand it seems doubtful that the treaty drafters had any specific intent to provide an easy substitute for denial of justice, on the other hand, the fact that such a provision is present must mean something. In this respect, one could argue that at the time the treaty was drafted the denial of justice standard was not clearly framed and, therefore, for the avoidance of doubt, the drafters opted to include the effective means clause, which merely represented a specification of the denial of justice principle and that therefore was part of it. Here, reference should be made to the position taken in this respect by the *Chevron v. US* tribunal, which noted that ‘the latter intent [i.e., the implementation of part of the denial of justice guarantee] could have been easily expressed through the inclusion of explicit

⁸⁵⁶ *White v. India*, para. 10.4.23.

language to that effect or by using language corresponding to the prevailing standard for denial of justice at the time of drafting.⁸⁵⁷

With respect to the violation of the investor's legitimate expectation, it is only worth noting that the tribunal rejected the claimant's allegation that FET requires the States not to affect the basic expectations of the foreign investor when making its investment. On the contrary, the tribunal's decision implied that legitimate expectation might rest only on more specific and less ambiguous undertakings.⁸⁵⁸

As to the expropriation, although the tribunal did not find it to have occurred because of the lack of actual set-aside of the award, it still endorsed the reasoning of *Saipem v. Bangladesh*, considering that an arbitral award could *per se* be subject to a judiciary expropriation. It could be argued that had the Indian courts, at the end of this judicial odyssey, set aside the arbitral award and White had commenced the ICSID arbitration after that decision, the investment tribunal would have found the existence of expropriation.

9.2.3. The approach vis-à-vis the application of the New York Convention

It should be noted that, at the merits stage, the tribunal did not address the issue of whether India was acting in accordance with the New York Convention, either by delaying the enforcement of the commercial award or by allowing setting aside proceedings in India, even if the award was rendered abroad. It did not analyse those aspects and limited its assessment to whether the delays were unduly long under the India-Australia BIT. Also, when it considered White's legitimate expectation, it rejected taking into account

⁸⁵⁷ Chevron Partial Award, para. 242.

⁸⁵⁸ Notably, as described in section 9 of this Chapter III, the tribunal deemed that, even considering the claimant's expectations relevant, White knew that the enforcement of commercial awards was not timely made in India and that local courts tended to find their jurisdiction with respect to set-aside proceedings to the extent that the arbitral award was governed by Indian laws. With respect to the features that expectations must have to be considered legitimate, please refer to section 5 of this Chapter III.

India's obligations under the New York Convention and only deemed relevant the actual situation in Indian courts at the time the investment was made.

In this way, the tribunal avoided the criticism of those who believe that in cross-over cases investment tribunals act as courts of appeal, entitled to assess the correct application by national courts of the New York Convention.⁸⁵⁹

However, once the breach of the BIT was established, the tribunal, in order to assess the compensation due to White, asked itself if 'the Award [was] enforceable under the laws of India.'⁸⁶⁰ In this context the investment tribunal wore the shoes of the national courts involved in the enforcement proceeding and, through the application of the New York Convention, and the analysis of White's and Coal India's expectations, established that: '[h]aving determined that none of the grounds advanced by Coal India for resisting the enforcement of the Award support such an outcome, the tribunal concludes that the Award is enforceable under the laws of India.'⁸⁶¹ The tribunal, therefore, carried out

⁸⁵⁹ Notably, this criticism is not endorsed by those who believe that there is no real architecture of international commercial arbitration and that investment tribunals should assess the responsibility of a State in light of its obligations under international law. According to this line of thought (*see* section 7.2.1 of this Chapter III), the New York Convention contains specific obligations and exceptions. In particular, Art. V(e) establishes that only the courts of the seat of arbitration are competent to set aside foreign arbitral awards. This consideration arguably renders the decision of Indian Courts to suspend the enforcement proceeding unlawful. Indian courts had to enforce the arbitral award, since in any event it could have not been set aside by the courts of the seat. And the investment tribunal should have recognised this. On the contrary, in assessing whether a denial of justice occurred, the tribunal 'excused' the conduct of the municipal courts on the ground that there was a debate in India on whether Indian courts could properly entertain an application to set aside an arbitral award not made in India (*White v. India*, para. 10.4.11). However, it is a principle of international law that the laws of the country cannot excuse the commission of an international wrong by a State. This position seems supported by one of the arbitrators that in a footnote explained that: '[f]or Arbitrator Brower, the 1996 Act cannot justify the actions of the Indian judiciary since, as explained by Professor Van den Berg, the New York Convention supersedes domestic law concerning the enforcement of foreign arbitral awards' (*White v. India*, footnote 69).

⁸⁶⁰ *White v. India*, para. 14.1.1.

⁸⁶¹ *White v. India*, para. 14.2.66.

the task that Indian courts should have done, acting as a court of appeal at a later stage. Based on this finding the tribunal awarded White the entire value of the commercial award.⁸⁶²

10. An investment tribunal's jurisdiction for violations of the New York Convention

On the basis of the Relevant Cases analysed in this Chapter, it seems that a breach of the New York Convention is not sufficient to establish a responsibility of the State vis-à-vis the aggrieved investor. Something more is required: such violation shall also amount to a breach of the investment treaty, where the consent to arbitration is granted.

As noted, the excerpt of the *Frontier v. Czech Republic* award analysed in subsection 7.2.1 of this Chapter seems to support this proposition. This is also in line with the general principle that no delictual responsibility towards foreign nationals can arise from the breach of an obligation that a State has assumed vis-à-vis another State. Foreign nationals do not have a general right to reparation for damages caused when States do not comply with their international obligations towards other States. In the context of the New York Convention, this implies that a national court's decision that is inconsistent with an international provision prescribed by that convention may entail the international responsibility of the State in question vis-à-vis the other contracting States.

In light of the above, the investment tribunals in the Relevant Cases have considered that for the municipal courts' decisions to amount to delictual responsibility in international law vis-à-vis a foreign investor, something more

⁸⁶² *White v. India*, para. 14.3.6. This remedy has been strongly contested, as the courts of India were still in time to rule on the enforcement of the award. Substantially, the tribunal awarded to White the same compensation that would have been awarded in case of denial of justice. This, once again, contributed to blur the lines between the two standard. Moreover, if in case of denial of justice, such a compensation would be justifiable (also in light of the exhaustion of local remedies), in case of delay, probably other remedies (e.g., damages for the delay), would have been more suitable.

is required, namely, a violation of a provision of the treaty where the State in question has given its consent to investor-State arbitration.

However, it could be argued⁸⁶³ that upon the occurrence of certain conditions, investment tribunals may also have jurisdiction with respect to pure breaches of the New York Convention.

More precisely, these conditions regard: (i) the breadth of the consent to investor-State arbitration granted by the State in the applicable treaty; and (ii) the law applicable to the treaty itself. Obviously, the pre-requisite also in this case is that the subject matter jurisdiction is established and, therefore, the commercial award/arbitration agreement at issue is considered as an investment (or part thereof) under the ICSID Convention and/or the applicable investment treaty, as the case may be.

With respect to the first condition, it should be recalled that, as already illustrated,⁸⁶⁴ the consent to investor-State arbitration arises, first, from the State expressing its willingness to submit certain disputes to arbitration, mostly in the form of a standing offer by the State, and then from the acceptance by the investor of such an offer, which can also be expressed through the commencement of an arbitration.

⁸⁶³ See B. DEMIRKOL, Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration, *supra*, note 630. *Contra* G. KAUFMANN-KOHLER, Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts, *supra*, note 477, at p. 170; F. ROSENFELD, The Systemic Integration of International Investment Treaties and the New York Convention, posted on 5 December 2012 on the Transnational Notes (available at: <http://blogs.law.nyu.edu/transnational/2012/12/the-systemic-integration-of-international-investment-treaties-and-the-new-york-convention/>). With respect to the last two writings, it should be noted that Prof. Kaufmann-Kohler is mainly engaged in defending the outcome of the Relevant Cases and, therefore, she does not even seem to consider that a State-investor dispute may concern *per se* a breach of the New York Convention, while the second Author limits to say that: '[e]ven if ICSID tribunals have jurisdiction, they are not entitled to award damages based on a mere finding that the New York Convention has been violated'.

⁸⁶⁴ See, *supra*, Chapter I, section 2 and Chapter II, section 2.

The State's offer to arbitrate in investment treaties may take several forms. However, after a review of treaty practice, scholarly writings⁸⁶⁵ have recognised four core typologies of provisions regarding the States' consent. The first group allows 'all' or 'any' investment disputes to be submitted to arbitration.⁸⁶⁶ The second group restricts consent to arbitration to disputes arising out of or related to: (i) an investment authorization; (ii) an investment contract; or (iii) the allegation of a violation of any right conferred, created or recognized by the respective treaty in relation to an investment.⁸⁶⁷ The third group limits the

⁸⁶⁵ See, *inter alia*, R. DOLZER, C. SCHREUER, *Principles of International Investment Law*, *supra*, note 49, at p. 102; Z. DOUGLAS, *The International Law of Investment Claims*, *supra*, note 357, pp. 234-235; C. SCHREUER, *Jurisdiction and Applicable Law in Investment Treaty Obligations*, *McGill Journal of Dispute Resolution*, Vol. 1, Issue 1, 2014, pp. 1-24, at pp. 6-11; C. SCHREUER, *Consent to Arbitration*, in P. MUCHLINSKI, F. ORTINO AND C. SCHREUER, *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008, pp. 837-843; C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: A Commentary*, *supra*, note 23, at p. 526 and following; UNCTAD, *Investor-State Dispute Settlement, Series on Issues in International Investment Agreements II*, 2014, at pp. 38-41. This reconstruction is endorsed by case law. See, for instance, *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5. Award, 17 August 2012 (unofficial translation in English available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1173.pdf>) ("**Iberdrola v. Guatemala**"), para. 304.

⁸⁶⁶ See, for instance, Art. 139 of the Free Trade Agreement between the Government of the People's Republic of China, and the Government of the Republic of Peru, signed on 28 April 2009 (available at: http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_10_en.pdf), which enables the investment arbitral tribunal to hear '[a]ny dispute between an investor of one of the Party and the other Party in connection with an investment in the territory of the other Party' (emphasis added). This approach is very common, despite the fact that there may be some differences in detail among different treaties.

⁸⁶⁷ See, for instance, Article VII of the US-Argentina BIT, which offers consent for investment disputes which are defined as follows: 'a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.'

jurisdiction to violations of the substantive provisions of the treaty itself.⁸⁶⁸ The fourth and last group confines the relevant tribunal's jurisdiction to disputes about expropriation or the *quantum* to be paid in the event of an illegal expropriation.⁸⁶⁹ The most commonly used models⁸⁷⁰ are the first and third one, that will hereinafter be referred to as the 'broad' and 'narrow' consent, respectively.

In case the investment treaty contains any consent to jurisdiction clauses different from the broad one, it goes without saying that it is not possible for the aggrieved award creditor to bring a claim for a violation of a norm different from those expressly mentioned in the consent clause. With specific reference to the narrow clause, in the recent case *Iberdrola v. Guatemala*, the ICSID tribunal ruled that it had no jurisdiction to review any kind of dispute related to an investment, but only those connected to a matter covered by the treaty.⁸⁷¹

⁸⁶⁸ See, for instance, Art. 9 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of El Salvador and the Kingdom of the Netherlands, signed on 12 November 1999 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1133>), which regards: '[t]he disputes which arise *within the scope of this agreement* between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party [...]' (emphasis added).

⁸⁶⁹ See, for instance, the Italy-Bangladesh BIT applicable in the *Saipem v. Bangladesh* case (see, *supra*, note 580).

⁸⁷⁰ Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration, *supra*, note 630, at p. 57.

⁸⁷¹ *Iberdrola v. Guatemala*, paras. 301; 356. The relevant consent to jurisdiction clause was included in Art. 8 of the Acuerdo entre el Reino de España y la República de Guatemala para la promoción y la protección recíproca de inversiones, signed on 9 December 2002 (available at: http://www.boe.es/diario_boe/txt.php?id=BOE-A-2004-11256), according to which: '1. Any dispute relating to investments that arises between one of the Contracting Parties and an investor of the other Contracting Party, *concerning matters governed by this Agreement* shall be notified in writing, including detailed information, by the investor to the Contracting Party receiving the investment. As far as possible, the parties to the dispute, shall endeavour to settle these differences by mutual agreement' (non-official translation from the original Spanish wording; emphasis added). In the case, the tribunal dismissed the claim as it exclusively related to the law of Guatemala and the mere mention

Therefore, if a dispute concerning an international commercial arbitration award originates from the conduct of the courts of a State party to a treaty providing for a narrow consent clause, the investment tribunal would not have jurisdiction to decide whether the State has violated international norms, different from those included in the investment treaty, such as the New York Convention. In light of the above, a State's conduct violating the New York Convention may be assessed by the relevant investment panel only to the extent it also amounts to a denial of justice or, according to certain scholars and case law,⁸⁷² an unlawful expropriation, a breach of the FET clause or other treaty standard expressly set out in the applicable treaty.

On the contrary, in the event of a treaty containing a broad consent to arbitration, it could be deemed that the relevant investment tribunal has jurisdiction to assess a State's liability for a breach of the New York Convention. Indeed, to the extent that a connection with the investment is established, the broad consent may be considered to grant jurisdiction with respect to any claim, and not only to disputes that are connected to the violation of a treaty's standards. In this regard, it should be noted that the coverage of broad consent clauses has been considered by investment tribunals in the ambit of the analysis of the possibility for investment tribunals to rule upon contractual claims and that scholarly writings have elaborated two opposite schools of thought based on, *inter alia*, such decisions.

According to the restrictive interpretation,⁸⁷³ the fact that the consent is included in the investment treaty necessarily implies that the consent is in

of the treaty by the claimant and the qualification of the actions of Guatemala according to the standards of the applicable treaty is not sufficient to convert the dispute into one on issues covered by the treaty.

⁸⁷² See, for instance, *Saipem v. Bangladesh*.

⁸⁷³ See, *inter alia*, E. DE BRADANDERE, *Investment Treaty Arbitration as Public International Law*, Cambridge University Press, 2014, at pp. 26 and pp. 42-49; E. GAILLARD, *Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses*, *New York Law Journal*, Col. 234, Issue 68, 2005, pp. 1-3; C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration: Substantive Principles*, *supra*, note 53, at p. 100-101; J.W. SALACUSE, *The Law of Investment Treaties*, *supra*, note 9, at p. 381; and J.O. VOSS, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*,

principle limited to the invocation by the foreign investor of the specific rights attributed to it in that treaty. More precisely, this line of thought deems that: '[i]t would be relatively odd to accept that an investment treaty, which contains substantive protection standards for the treatment of foreign investors, would provide jurisdiction over investment disputes in cases where the tribunal would not even be called upon to rule on the violation of the substantive provisions of that treaty.'⁸⁷⁴ This reasoning is supported by arbitral decisions that denied that a broad consent clause entitled the investor to bring contract claims without the simultaneous occurrence of any treaty breach.⁸⁷⁵ There is also an opposite view,⁸⁷⁶ according to which broad consent clauses do not restrict a tribunal's jurisdiction to claims arising from alleged violations of

Studies on the Law of Treaties 4, Martinus Nijhoff Publishers, 2011, at pp. 73-81. Please note that the doctrine and the case-laws relating to the scope of consent to investor-State arbitration mentioned in this paragraph investigated whether the consent included claims for breaches of investment contracts. The Author's considerations have been used in the context of this work to analyse the different question concerning the possibility to encompass within such consent also claims for breaches of the New York Convention.

⁸⁷⁴ E. DE BRADANDERE, *Investment Treaty Arbitration as Public International Law*, *supra*, note 873, at p. 45. In the same vein, E. GAILLARD, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – The SGS Cases Considered*, in T. WEILER (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May, 2005, pp. 325-346.

⁸⁷⁵ *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf>), para. 161.

⁸⁷⁶ *See, inter alia*, A.K. BJORKLUND, *Applicable Law in International Investment Disputes*, in C. GIORGETTI (ed.), *Litigating International Investment Disputes. A Practitioner's Guide*, Brill Nijhoff, 2014, pp. 261-286, at pp. 265 and following; C. SCHREUER, *Jurisdiction and Applicable Law in Investment Treaty Obligations*, *supra*, note 865, at p. 8; C. SCHREUER, *Consent to Arbitration*, *supra*, note 865, pp. 837-843; C. SCHREUER, *Investment Treaty Arbitration and Jurisdiction over Contract Claims- the Vivendi I Case Considered*, in T. WEILER (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May, 2005, pp. 281-323; and A.M. STEINGRUBER, *Consent in International Arbitration*, *supra*, note 150, at p. 256.

the BIT's substantive standards. As noted by one author, '[b]y their own terms, these consent clauses encompass disputes that go beyond the interpretation and application of the BIT itself and would include dispute[s] that arise from a contract and other rules of law in connection with the investment.'⁸⁷⁷ Authors supporting this line of thought based their reasoning on two main arguments. The first one regards the fact that if a State wanted to limit its offer regarding investor-State disputes, it could have done so. Indeed, as noted above, certain States have adopted consent clauses whereby the scope of their offer to arbitrate is reduced to BIT claims or even to certain guarantees included therein. If the BIT does not contain any such limitation, it means that contracting States accepted that an investor may bring claims relating to investment contracts or based on other rules of law.⁸⁷⁸ The second argument invoked in this context comes from the comparison between the broad consent clause to arbitrate with private investors with the narrowly formulated inter-state dispute clause, which, indeed, is mostly limited to disputes related to the interpretation or application of the relevant investment treaty. This line of thought has been supported by case law. In particular, the *ad hoc Committee* which had to decide on the request for the annulment of the Vivendi v. Argentina award⁸⁷⁹ ruled that: '[r]ead literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT.'⁸⁸⁰ In light of the above, the tribunal concluded that contractual claims are included within the scope of its jurisdiction.

⁸⁷⁷ C. SCHREUER, Jurisdiction and Applicable Law in Investment Treaty Obligations, *supra*, note 865, at p. 8.

⁸⁷⁸ Interestingly, the supporters of the opposite view believe that should the parties have intended to include contract claims they would have inserted a specific language, as envisaged, for instance, in Art. 24 of the 2012 US Model BIT.

⁸⁷⁹ *See, supra*, note 549.

⁸⁸⁰ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (available at: <http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf>), para. 55. Art. 8 of the applicable treaty (Accord entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur l'encouragement et la protection

Adhering to this latter school of thought implies that disputes concerning violations of other conventions and treaties that have an impact on the investment made by the investor in accordance with the applicable BIT may be included in the scope of application of the broad consent clause. Therefore, if it is accepted that a commercial arbitral award (or an arbitration agreement) is included in the concept of protected investment, the New York Convention is a multilateral treaty that has an impact on the investment, since it regards its recognition and enforcement.

However, the consent clause is not sufficient to establish the jurisdiction of the investment tribunal. The second element to be taken into account regards the rules on applicable law included in treaties. Indeed, if the consent clause is wide, but the clause on applicable law is limited to the provisions of the investment treaty, it would not be possible for the tribunal to rule on breaches of the New York Convention. In this respect a couple of considerations need to be made.

First, most of investment treaties setting out a broad consent do not contain provisions concerning the law to be applied by investment tribunals.⁸⁸¹ In such a case the rules set out in the ICSID Convention or in the rules applicable to the proceeding on the governing law shall apply.

In this respect, Art. 42(1) of the ICSID Convention provides that: '[t]he tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.' In this respect the Report of the Executive Directors explains that the reference to international law should be understood in the sense given in Art. 38(1) of the Statute of the ICJ, which provides for the application of:

réciproques des investissements (ensemble une déclaration), signed on 3 July 1991 (available at: <http://www.italaw.com/sites/default/files/laws/italaw6009.pdf>) offered consent for '[t]out différend relatif aux investissements, au sens du présent Accord.' Along the same lines, *see, inter alia*, SGS v. Philippines).

⁸⁸¹ C. SCHREUER, Jurisdiction and Applicable Law in Investment Treaty Obligations, *supra*, note 865, at p. 14.

- (i) international conventions, general or particular, establishing rules expressly recognized by the relevant State;
- (ii) international custom;
- (iii) general principles of law recognized by civilized nations; and
- (iv) judicial decisions and the teaching of the most highly qualified publicists of the various nations.⁸⁸²

Therefore, it has been deemed that this provision covers, *inter alia*, the law of the host State, the substantive rules of the treaty where the consent to jurisdiction is granted and other relevant treaties and general customary international law.⁸⁸³

In case of non-ICSID arbitration, the rules applicable to the proceeding usually identify the set of provisions applicable, giving a prominent role to the choice made by the parties. In the absence of a choice it is usually envisaged that the tribunal can apply the rules that it deems appropriate.⁸⁸⁴

On the contrary, in case the laws are indicated in the investment treaty, the relevant content is not uniform. Limiting the analysis to the treaties relevant in this sub-section (i.e., those providing for a broad consent clause), some of them notably make reference to the investment treaty and the principles of international law.⁸⁸⁵ Others are more elaborate, referring to the treaty, the law

⁸⁸² The position included in the Report of the Executive Directors seems endorsed by case law. For more, see D. DI PIETRO, *Applicable Law Under Article 42 of the ICSID Convention – The case of Amco v. Indonesia*, in T. WEILER (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May, 2005, pp. 223-279, at p. 255-258.

⁸⁸³ C. SCHREUER, *Jurisdiction and Applicable Law in Investment Treaty Obligations*, *supra*, note 865, at p. 12.

⁸⁸⁴ See, for instance, the UNCITRAL Arbitration Rules, which provide that in the absence of agreement between the parties, the tribunal shall apply the law ‘which it determines to be appropriate’ (Article 35(1) of the UNCITRAL 2010 Rules; Article 33(1) of the UNCITRAL Rules adopted in 1976). The same provision is found in the ICC Rules (Art. 17).

⁸⁸⁵ See, for instance, the 2003 Italy Model BIT according to which: ‘[w]hen delivering its decision, the Arbitration Tribunal shall apply the provisions contained in this Agreement,

of the State party to the dispute, and the rules and principles of international law.⁸⁸⁶ Finally, there are some clauses on applicable law, which are broader and expressly refer to the treaty where the consent is granted, other treaties in force between the contracting parties, the law of the State party to the dispute, and the rules and principles of international law.⁸⁸⁷

As clearly emerges, it is not always possible to find a correspondence between the rules on applicable law and the rules on jurisdiction. When the clause relating to the applicable law is particularly broad and makes reference to the treaties in force between the contracting States, it seems possible to state that the investment tribunal has jurisdiction to assess whether the host State has complied with the New York Convention.

In other cases, the crucial point is to understand if the New York Convention may be deemed to be included in the reference to the applicable principles or rules of international law. According to a wider interpretation, the inclusion of international law could imply the applicability of any rule of international law that is invoked and that is significant to the claim put forward, including

as well as the principles of international law recognized by the two Contracting Parties' (Art. X(4)).

⁸⁸⁶ See, for instance, Art. 8(3) of Agreement Between the People's Republic of China and Bosnia and Herzegovina on the Promotion and Protection of Investments, signed on 26 June 2002 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/465>), which provides that: '[t]he arbitration award shall be based on:

- the provisions of this Agreement;
- the laws of the Contracting Party in whose territory the investment has been made including the rules relative to conflict of laws; and
- the rules and universally accepted principles of international law.'

⁸⁸⁷ See, for instance, Art. 10(5) of the Tratado entre la Republica Federal de Alemania y la Republica Argentina sobre Promoción y Protección Reciproca de Inversiones, signed on 9 April 1991 (available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/92>), according to which: 'El Tribunal arbitral decidirá sobre la base del presente Tratado y, en so caso, sobre la base de otros tratados vigentes entre las Partes, del derecho interno de la Parte Contratante - en cuyo territorio se realizó la inversión, incluyendo sus normas de derecho internacional privado, y de los principios generales del derecho internacional.'

multilateral treaties governing a variety of aspects of international law,⁸⁸⁸ such as the New York Convention. Under a narrower interpretation, the applicable rules would be those that have a direct bearing on investment law.⁸⁸⁹ Perhaps, if a commercial award is considered included within the scope of protected investment, the New York Convention may be deemed included within the scope of applicable rules of international law also pursuant to this interpretation.

In light of the above, it seems possible to argue that if a treaty contains a broad consent clause coupled with a clause on the applicable law referring to the rules of international law, the investment tribunal could also assess the State's liability vis-à-vis an investor with respect to the wrongful application of the New York Convention, provided that the commercial award under discussion can be qualified as an investment. The same conclusion should be reached with regard to breaches of customary international law.

Notably, it has been possible to make the considerations above in light of certain specific features of the New York Convention.⁸⁹⁰ Indeed, the New York Convention itself does not establish an exclusive jurisdiction that impairs other dispute settlement mechanisms. Otherwise, the exclusive dispute settlement clause set out in the Convention would prevail over the one included in the treaty.⁸⁹¹

⁸⁸⁸ C. SCHREUER, Jurisdiction and Applicable Law in Investment Treaty Obligations, *supra*, note 865, at p. 17. Please however note that this reasoning may not be applicable when the treaty exclusively refers to the principles of international law recognized by the contracting States, which is a more stringent concept.

⁸⁸⁹ C. SCHREUER, Jurisdiction and Applicable Law in Investment Treaty Obligations, *supra*, note 865, at p. 17.

⁸⁹⁰ These considerations have been retrieved from the reflections made by scholarly writings with respect to contract claims under investment treaties. *See* J. CRAWFORD, Treaty and Contract in Investment Arbitration, *supra*, note 481; B. DEMIRKOL, Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration, *supra*, note 630, at pp. 59-60.

⁸⁹¹ This would have been the case, for instance, of Art. 23(1) of the WTO Dispute Settlement Understanding (i.e., the Understanding on rules and procedures governing the settlement of disputes, attached as Annex 2 to the WTO Agreement), which establishes exclusive

Additionally, the New York Convention grants rights to the benefit of individuals, i.e., the parties to an arbitration agreement and the award winners. Indeed, 'if an international convention regulates exclusively inter-State issues which concern the individual interests of the contracting States, their collective interests, or the interests of the international community as a whole, and the obligations are strictly owed to other contracting States, [an] individual's interests would not be infringed directly by the breach.'⁸⁹²

In this respect, it should be pointed out that, as mentioned above, individuals are not party to treaties and therefore do not derive any legal obligations under the treaties. However, under general international law, it is generally accepted that international treaties concluded between two or more States can grant certain rights to individuals and corporations. Therefore, the obligations contracted in treaties are inter-state obligations, but States can also grant treaty rights to foreign persons that become beneficiaries of these rights, even if they do not become contracting parties thereof.⁸⁹³ In light of this, if an international convention regulates individual legal relationships or provides individual rights, such as the New York Convention, its violation might directly infringe an individual's legal interests and the aggrieved investor would be entitled to bring an investor-State claim connected to such violation.

It is undeniable that applying the reasoning discussed in this sub-section to cross-over cases would make an investor's position much easier. Releasing the

jurisdiction over disputes arising from the violation of obligations stipulated under relevant trade agreements.

⁸⁹² B. DEMIRKOL, Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration, *supra*, note 630, at p. 60.

⁸⁹³ On the topic *see, inter alia*, E. DE BRADANDERE, Investment Treaty Arbitration as Public International Law, *supra*, note 873, at p. 55 and following; B. DEMIRKOL, Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration, *supra*, note 630, at p. 60; C. MCLACHLAN, L. SHORE, M. WEINIGER, International Investment Arbitration: Substantive Principles, *supra*, note 53, at pp. 61-65; and J.J. VAN HAERSOLTE-VAN HOF, A.K. HOFFMANN, The Relationship between International Tribunals and Domestic Courts, in P. MUCHLINSKI, F. ORTINO, C. SCHREUER (eds.), The Oxford Handbook of International Investment Law, Oxford University Press, 2008, pp. 963-1006, at pp. 985-990.

dispute from the finding of a violation of the investment treaty where the consent clause is contained, the investor would not have to prove that a denial of justice had occurred, nor that the national courts involved had acted in bad faith, committed an abuse of right, etc. In addition, all discussions concerning whether national courts' conduct may entail exclusively a denial of justice or also a violation of a different BIT standard would become irrelevant. The mere wrongful application of the New York Convention by national courts would grant the investor the right to make a claim vis-à-vis the relevant State on that ground. Perhaps investment tribunals may also be keen to accept such a cause of action considering that they have shown interest in expanding their jurisdiction as much as possible.⁸⁹⁴ This however may have an additional negative impact on the entire system of investment arbitration. States may be worried of this over-expansive interpretation of the arbitral tribunals' jurisdiction and deny their consent to investment arbitration with private investors in future BITs.

Moreover, in this scenario, the entire architecture of international arbitration would collapse: investment tribunals would be entitled to act as a court of appeal against the decisions of national courts concerning the enforcement of the New York Convention, which seems to be against the letter and the spirit thereof.⁸⁹⁵

11. Conclusions

From the analysis conducted in this Chapter it emerges that, in three out of the four Relevant Cases in which jurisdiction was accepted, the tribunal considered that a provision of the applicable BIT was breached by the host State through an action of the municipal courts, which refused to enforce, or set aside or

⁸⁹⁴ This is evident, for instance, from all the Relevant Cases where jurisdiction has been deemed to exist: the boundaries of the concept of investment have been broadened probably beyond the contracting States' will at the time the investment treaty was concluded, which entailed that in newer BITs the definition of the term investment is very detailed and circumscribed.

⁸⁹⁵ G. KAUFMANN-KOHLER, *Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts*, *supra*, note 477, at p. 170

delayed enforcement of, an arbitral award or an arbitration agreement. While it may be too early to acknowledge the existence of an effective trend, these awards have contributed to the development of a theory pursuant to which the abusive interference of a State with international arbitration constitutes an international wrong. The existence of this theory is also witnessed by the fact that at the time of writing, at least three more investor-State claims have been brought before investment tribunals for issues connected to, *inter alia*, the non-enforcement of commercial awards.⁸⁹⁶ Of course, the decisions at issue are very

⁸⁹⁶ Those cases are:

- (i) *Enel Green Power S.p.A. v. Republic of El Salvador* (ICSID Case No. ARB/13/18): the documents relating to this claim are not published. However, based on reports (<http://0-www.iareporter.com.catalogue.ulrls.lon.ac.uk/articles/parties-in-enel-v-el-salvador-arbitration-agree-on-a-former-senior-counsel-at-icsid-to-serve-as-chair-in-pending-arbitration/>), the claimant launched arbitration under a 1999 Salvadoran statute that offers a pathway to arbitration, alleging that El Salvador has failed to abide by the terms of a 2011 arbitral award issued in a dispute between the claimant and a state-owned Salvadoran energy company. The case ended with an award embodying the parties' settlement agreement, pursuant to ICSID Arbitration Rule 43(2) on 14 September 2015 (*see*: <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/13/18>);
- (ii) *KBR, Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1). The claim arose out of the Mexican courts' annulment of an ICC arbitration award issued in favour of the claimant's subsidiary. KBR's claims included, indirect expropriation, denial of justice, breach of the FET clause and of the national treatment standard, set out in the NAFTA. Despite the award is not published at the date of this work, according to reports (*see*: <http://0-www.iareporter.com.catalogue.ulrls.lon.ac.uk/articles/mexico-secures-dismissal-of-nafta-claim-brought-by-kellogg-brown-and-root-kbr-in-dispute-arising-out-of-unpaid-icc-arbitration-award/>) arbitrators have dismissed KBR's claims; and
- (iii) *Marvo Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25). None of the documents concerning the claim are publicly available. However, according to reports (*see*: <http://www.iareporter.com/articles/romania-loses-another-intra-eu-bit-case-this-time-under-a-treaty-that-was-mutually-terminated-but-whose-sunset-clause-provided-arbitral-footing/>) one of the claims raised by the claimants focused on the Romanian court system's handling of a commercial arbitration award issued in their favour. In particular the claim regarded a breach

fact-specific, yet ‘they are all inspired on the assumption that states are under some form of obligation to respect arbitration, the violation of which may entail international responsibility.’⁸⁹⁷

On the basis of the analysis conducted in this Chapter, it is possible to draw conclusions as to: (i) the causes of actions that may be invoked by an aggrieved award winner with respect to national courts' misconduct; and (ii) the role to be played by investment tribunals in the review of national courts' behaviour.

11.1. Investment treaties' causes of action

With respect to the first aspect, as illustrated, the sources of obligations are wide-ranging, including the prohibition to expropriation, the violation of an effective means clause, and the violation of FET. Interestingly, none of the awards analysed herein have recognised the occurrence of a denial of justice by the national courts; instead, the tribunals accepted the claimants' reconstructions as to the occurrence of breaches of different guarantees by the national courts. This approach has aroused the criticism of certain scholars⁸⁹⁸ that believe that the panels' intent was to accord justice to investors in cases where the conditions for a denial of justice would have not been met. Indeed, as illustrated in section 2 of this Chapter, claims for denial of justice can exclusively be hosted if certain specific conditions are met: there must be a procedural error, the error has to be egregious, and all local remedies available to correct the error shall have been exhausted. According to these authors, in light of the deference that has to be paid towards the domestic judiciary and respect for judicial finality, the only claim that can be brought vis-à-vis a State

of the ‘effective means’ clause found in Article 2.5 of the Italy-Romania BIT (now terminated). Despite the ICSID award was issued in favour of the two brothers, the claim concerning the breach of the effective means clause was unsuccessful.

Additional claims may have been lodged which will become public available in the future.

⁸⁹⁷ L.G. RADICATI DI BROZOLO, *Enhancing the Effectiveness of Arbitration in Asia – Towards Less State Interference*, *Transnational Dispute Management*, Vol. 8, Issue 5, December 2011, pp. 1-16, at p. 14.

⁸⁹⁸ *See, infra*, note 613.

concerning the conduct of the national courts is denial of justice.⁸⁹⁹ As illustrated, case-law⁹⁰⁰ seems however oriented on a different route, through the recognition of violations of the FET standard, not for a breach of denial of justice, but for a breach of the relatively new treatment standard providing investors with effective means to assert claims and enforce rights. This has resulted in an increase in cases of actionable judicial wrongs. This jurisprudential approach is to be welcomed, since if it is recognised that wrongful interference of the courts can entail the State's responsibility, why should such liability be limited to cases of denial of justice? As long as the constitutive elements of a different cause of action are met by the conduct of the judiciary, such conduct should entail a liability of the State.

Moving on to the analysis of guarantees considered by the Relevant Cases, in the Saipem Award, the tribunal recognized that the national courts committed a judicial expropriation, by means of the revocation of the powers of the arbitral panel and the labelling of the award issued by such panel as a nullity. In this case, judicial expropriation was correctly treated as a different cause of action from denial of justice.⁹⁰¹ In order to come to its conclusion, the tribunal took an innovative approach, applying the sole effect doctrine, but introducing an additional element allegedly necessary. More precisely, after having established that the Bangladeshi courts' conduct substantially deprived Saipem of the residual contractual rights under the investment as crystallized by the ICC Award⁹⁰² and that such deprivation was irreversible,⁹⁰³ the tribunal stated that due to the *peculiar circumstances of the case* it had to consider whether the conduct of the courts was also *illegal*. For the panel, a different approach would have entailed that any setting aside of an award could have implied a claim for

⁸⁹⁹ Other commentators believe that, regardless of the cause of action, whenever a claim is made against the State local remedies remain relevant, regardless of how the claim is characterised. *See, infra*, note 664.

⁹⁰⁰ *Government of the Kaliningrad Region v. Republic of Lithuania, supra*, note 788.

⁹⁰¹ For the relationship between denial of justice and judicial expropriation after the Saipem Award, *see, supra*, note 620.

⁹⁰² Saipem Award, para. 128.

⁹⁰³ Saipem Award, para. 130.

expropriation, even when the setting aside was legitimate. In this respect, the ICSID tribunal found the Bangladeshi courts' actions illegal as they committed an abuse of right and violated the spirit of the New York Convention.⁹⁰⁴

The *ATA v. Jordan* case and the *Frontier v. Czech Republic* case dealt with the FET standard. Despite the fact that the panel's reasoning in the *ATA v. Jordan* case was very succinct and that the tribunal in the *Frontier v. Czech Republic* case came to the conclusion that no breach of the FET had occurred, these cases are still relevant as they found that a State may be in principle responsible for the municipal courts' breach of the FET for a reason different from denial of justice. Interestingly, in the *Frontier v. Czech Republic* case, the tribunal stated that it had to assess whether the Czech courts' refusal to enforce the award amounted to an abuse of rights contrary to the international principle of good faith.⁹⁰⁵

In *White v. India*, the tribunal recognised that the delays in proceeding concerning the set-aside of an arbitral award entailed a breach of the effective means' clause. *White v. India* is the fifth case in which an arbitral panel dealt with such a guarantee and the second one in which effective means was expressly considered as autonomous standard, detached from denial of justice. The tribunal's approach was however very rigid. It did not consider that a six-year delay in the enforcement proceeding could fall within a breach of the standard, due to the specific circumstances of the case. Notably, the tribunal in this case endorsed the *Saipem Award's* decision, implicitly asserting that, had the Indian courts set aside the arbitral award, a claim for judicial expropriation could have been lodged.

In light of the above, it can be stated that an award creditor frustrated in its rights due to the non-recognition or set-aside of an arbitral award or the non-recognition of an arbitration agreement may bring an investment treaty claim alleging the occurrence of:

- (i) a denial of justice: this is the traditional cause of action in case of judicial wrongs. However, the bar to find a violation thereof remains high and, as

⁹⁰⁴ Saipem Award, para. 167.

⁹⁰⁵ *Frontier v. Czech Republic*, para. 525.

almost all tribunals dealing with it in the Relevant Cases noted, its finding requires egregious misconduct;

- (ii) a judicial expropriation: this cause of action had already been considered by investment tribunals. In the context of the *Saipem v. Bangladesh* case, the panel recognised that an arbitral award can be expropriated and suggested that, in addition to the sole effect doctrine, tribunals must also consider whether the expropriation was illegal under an international law perspective;
- (iii) a violation of the FET standard, for a reason different from denial of justice, such as for breach of legitimate expectations or abuse of right;
- (iv) a violation of the ‘effective means’ standard. In relation to this latter guarantee, it must be noted that its contours are somewhat vague, as it is a recent standard that probably needs to be further elaborated by case law. On the basis of the current background, it can be argued that undue delays not amounting to a denial of justice can imply a violation of this standard;
- (v) a violation of the full protection and security standard. In the *Frontier v. Czech Republic* case, the tribunal found such a standard implies an obligation on the State to make a functioning system of courts and legal remedies available to the investor. However, it went on to say that the State responsibility arises only if the courts have acted in bad faith and have reached decisions that are not reasonably tenable.

As already noted, all the studied awards are very fact-specific. How future investment tribunals will act remains highly unpredictable also in light of the non-binding nature of precedents. Moreover these few decisions do not tell us what other types of judicial interferences can be considered relevant or whether other BIT standards may prove useful in challenging undue judicial interferences.⁹⁰⁶ As noted by one author: ‘[m]any unresolved issues obviously

⁹⁰⁶ See in particular, E. ALVAREZ, *Crossing the “Public/Private” Divide: Saipem v. Bangladesh and Other Crossover Cases*, *supra*, note 332, who at p. 411, wondered: ‘does a national court’s issuance of an injunction to prevent arbitration ever constitute a violation of a BIT, for example? Does a local court action decision to vacate an arbitral award on permissible grounds under local law or the New York Convention nonetheless be re-examined and if found to be erroneous as a matter of law by an investor-state arbitral tribunal be the basis

loom now that this Pandora's Box has been opened. Whether those issues are resolved through wildly inconsistent rulings or serious efforts to produce jurisprudence constant will exacerbate or lessen fears concerning the internal fragmentation of international investment law.⁹⁰⁷

11.2. The role of investment tribunals

The second relevant aspect concerns the role played by investment tribunals in the Relevant Cases analysed in this Chapter. Indeed, as illustrated, commentators criticised that investment tribunals acted as a sort of supranational court of appeal against the decisions of municipal courts, through the verification of how the New York Convention was applied or on which grounds an arbitration agreement/award was set aside. In fact, while it is true that the arbitrators did not review the correctness of the courts' decisions with respect to the application of national law, they still reviewed domestic opinions for compliance with international law and the proper discharge of the national courts' responsibilities under the New York Convention, which does not expressly provide for any review of the national courts' decisions upon its application.

Moreover, the end result sought by the claimants in the Relevant Cases was the enforcement of a commercial award, which for a number of reasons was denied by municipal courts. The traditional approach of investment tribunals was to assert that they could not, and would not, act as an international court of appeal against the decisions assumed by national courts concerning the application of the New York Convention or the setting aside of commercial

of a BIT claim (as for violation of FET) – or should a BIT claim in such contexts be limited to certain egregious actions by a local court that can have no justification under the rule of law? Does it matter for this purpose whether the local court action was taken by the court in which the arbitration occurred or by another jurisdiction in which enforcement of a commercial arbitral award is sought? Does it matter whether the local court's action will make it impossible to enforce the arbitral award anywhere, as where no attachable assets exist elsewhere or because the local courts' action effectively voids the award?

⁹⁰⁷ E. ALVAREZ, Crossing the “Public/Private” Divide: Saipem v. Bangladesh and Other Crossover Cases, *supra*, note 332, at p. 411.

arbitral awards,⁹⁰⁸ as this would have represented a violation of the so-called ‘architecture’ of international commercial arbitration. As already illustrated in this Chapter and in Chapter I, according to this doctrine, commercial arbitration awards should be considered as the final decision on the contended matter, with the courts of the seat of the arbitration being competent to annul the award and the courts of the place of enforcement being competent to rule upon the recognition and enforcement of the award in that particular State.⁹⁰⁹ This architecture does not envisage any form of recourse against the final decision on the annulment or on the enforcement of the awards.

In this respect, it should be noted that this investment tribunal’s ‘mantra’ was somewhat unlocked by the *Frontier v. Czech Republic* tribunal, which stated that its role was to determine whether the refusal of the Czech courts to recognize and enforce the Final Award in full violated the FET standard clause.⁹¹⁰ Therefore, it expressly recognized its power to review the decisions of

⁹⁰⁸ For instance, in the *Saipem v. Bangladesh Award*, paras. 155; 158, the tribunal expressly stated that: ‘[t]o avoid any ambiguity, the Tribunal stresses that Saipem’s claim does not deal with the courts’ regular exercise of their power to rule over annulment or setting aside proceedings of an award wrongful interference [...]. *By accepting jurisdiction, this Tribunal does not institute itself as control body over the ICC Arbitration, nor as enforcement court, nor as supranational appellate body for local court decisions. This Tribunal is a treaty judge. It is called upon to rule exclusively on treaty breaches, whatever the context in which such treaty breaches arise*’ (emphasis added). In *Romak v. Uzbekistan*, the denial of jurisdiction was based on the grounds that the mechanical application of the broad definition of investment included in the Switzerland-Uzbekistan BIT: ‘would create, *de facto*, a new instance of review of State court decisions concerning the enforcement of arbitral awards. [...] The refusal or failure of the host State’s courts to enforce such an award would therefore arguably provide sufficient grounds for a *de novo* review – under a different international instrument and on grounds different from those that would normally apply – of the State courts’ decision not to enforce an award’ (para. 186).

⁹⁰⁹ There are, of course, other conceptions of the architecture of international commercial arbitration. However, they are not reflective of the generally accepted conceptions of international law (see, G. KAUFMANN-KOHLER, *Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts*, *supra*, note 477, at p. 154).

⁹¹⁰ *Frontier v. Czech Republic*, para. 525.

national courts applying the New York Convention, in order to assess if through such decisions the State may have breached a provision of the applicable investment treaty. However, the Frontier tribunal itself somewhat limited this power: the review of the decisions of national courts in this respect could be made exclusively to the extent necessary to establish if a violation of the standards set out in the applicable investment treaty had occurred. Therefore, only if the non-enforcement of an arbitral award due to a bad-faith application of the New York Convention also amounts to a violation of the applicable investment treaty guarantees is the investment tribunal entitled to judge the conduct of the national courts.

This framing of investment tribunals' activities supports the theory that they are not acting as a mere body of appeal, but are exclusively exercising their jurisdiction, assessing whether a treaty breach has occurred. Moreover, this approach seems to be the logical consequence of the recognition of arbitration agreements and/or arbitral commercial awards as part of an investment. As correctly noted, '[t]here is no reason why [an investment arbitral tribunal] should not entertain a claim simply because the circumstances under which the alleged breach occurred involve the application of another treaty (i.e., the New York Convention).'⁹¹¹ Consequently, however, not all the failures to respect the New York Convention may be included within the framework of investment treaties' protection. In fact, many clear violations of the New York Convention will remain without remedy due to the absence of any relevant investment providing the jurisdictional hook on which to hang a claim.

This is probably the correct angle to analyse the topic: the cornerstone of the Relevant Cases is represented by the inclusion of commercial arbitral awards within the concept of protected investment under the applicable investment treaty. Once this is accepted, it goes without saying that, in order to establish if a violation of the applicable BIT took place, the investment tribunal shall assess, *inter alia*, how the New York Convention was applied.⁹¹²

⁹¹¹ G. KAUFMANN-KOHLER, Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts, *supra*, note 477, at p. 164.

⁹¹² See Romak v. Uzbekistan, *supra*, note 778.

Along the same lines are those scholarly writings that have criticised a tribunal's position in the Relevant Cases where a claimant's position was upheld, on the grounds that the international arbitral award acted as a court of appeal against the decision of the national courts regarding the annulment or the enforcement of commercial arbitral awards.⁹¹³ The risk envisaged by scholarly writings in this case is that investment arbitration might replace the national courts of the place where the arbitration was held as the final decision-maker with respect to the validity of an international commercial award or arbitration agreements. Once again, in such a case the architecture of investment arbitration would be demolished.⁹¹⁴

In this regard, it should however be recalled that some authors⁹¹⁵ have recently started to challenge the foundations of the architecture of international arbitration itself. Relying, *inter alia*, on the literal wording of Art. V of the New York Convention, they have argued that no rule prescribes that the State of the place of the arbitration shall have the final say with respect to the annulment of an international commercial award.⁹¹⁶ In light of the above, investment arbitration is entitled to review the decisions of national courts deciding on a set-aside.

11.3. Jurisdiction over breaches of the New York Convention

A brief final remark connected to both the topics discussed in this section 11 concerns the possibility of bringing an investor-State claim for a mere violation of the application of the New York Convention. The Frontier statement referred to, *inter alia*, in section 11.2 of this Chapter seems to deny this possibility. However, it could be argued that if the consent to jurisdiction is

⁹¹³ See sections 4.2.3 and 6.2 of this Chapter III.

⁹¹⁴ W.M. REISMAN, B. RICHARDSON, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, *supra*, note 488.

⁹¹⁵ See, *inter alia*, J. PAULSSON, *Interference by National Courts*, *supra*, note 794; and L.G. RADICATI DI BROZOLO, *The Control System of Arbitral Awards: A Pro-Arbitration Critique of Michael Reisman's "Architecture of International Commercial Arbitration"*, *supra*, note 794.

⁹¹⁶ For more, see, *supra*, Chapter I, section 4.

sufficiently wide – making reference, for example, to any claims concerning an investment – and the provisions of law included in the applicable investment treaty do not make reference only to the BIT and the national law, then the tribunal could be allowed to establish a responsibility of the State for the misapplication of the New York Convention by its national courts.⁹¹⁷ This approach would, however, imply the final dismantling of the architecture of international arbitration, with the recognition of investment tribunals as the final reviewer of national courts' application of the New York Convention. Moreover, it could imply a negative reaction from the States that would probably restrict their consent to jurisdiction in future investment treaties. Indeed, the partial cession of sovereignty inherent in all international treaties is less accepted when national courts are involved, in light of the 'sanctity' of judicial independence that puts the judiciary at the core of sovereign pride and identity. Therefore, if the recognition of the power of investment treaty tribunals to review the national courts' behaviour in light of the applicable investment treaty provisions may be acceptable, the application of other parameters may be considered a too strong conditioning on the State.

⁹¹⁷ It shall be however noted that the most prominent doctrine seems to be of a different view. See G. KAUFMANN-KOHLER, Commercial Arbitration Before International Courts and Tribunals Reviewing Abusive Conduct of Domestic Courts, *supra*, note 477, at p. 170; F. ROSENFELD, The Systemic Integration of International Investment Treaties and the New York Convention, *supra*, note 863.

CHAPTER IV – CONCLUSIONS

1. Investment arbitration as a tool for reviewing national courts' conduct dealing with commercial arbitration

The core issue of each of the Relevant Cases is the extent to which a State can be held liable on the international plane for interference by its national courts with arbitration proceedings and, in particular, with the enforcement process of an arbitral award.

This is slippery ground and the finding of a State's liability in the Relevant Cases has aroused the interest of the international community and given rise to divergent positions among scholarly writings.

The sensitivity of the topic is mainly due to the fact that the conduct under review in the Relevant Cases were performed by national courts and the consistent position at the international level is that there should be a presumption of deference towards the decisions of domestic courts. This, of course, does not mean that the activities of municipal courts cannot be assessed by international courts and tribunals, as it is a well-established principle that the conduct of the judiciary are capable of creating a State's liability, likewise all other State organs. However, it is largely believed that the judiciary should have a relatively broad margin of operation and that its conduct must be particularly serious to amount to an international wrong. One should only consider that many authors maintain that the only cause of action available against national courts is denial of justice, which requires a serious procedural error and the exhaustion of local remedies.⁹¹⁸ All other substantive claims would only represent an attempt to lower the bar for finding a liability of national courts on the international plane.

With specific reference to the activity of domestic courts concerning the recognition and enforcement of international arbitral awards, the margin of operation of domestic courts is also recognised, to a certain extent, by the New York Convention. Indeed, the scope of the New York Convention is limited to

⁹¹⁸ See, *supra*, Chapter III, sections 2 and 4.2.1.

the recognition and enforcement of international arbitral awards and arbitration agreements, while it does not regulate all other areas where the national courts and international arbitration may meet. It is a well-established principle that international arbitration needs the support of national courts. As arbitration is a private manner of dispute settlement not incardinated in a specific legal system, the intervention of the courts of the seat of the arbitration may be necessary in a number of circumstances: for the appointment of arbitrators, in case of a lack of collaboration of one of the parties, for obtaining the cooperation of third parties which are not bound by the arbitration agreement, or for applying for the annulment of arbitral awards. In all these cases, the courts of the seat will be responsible for taking the relevant decisions and, of course, such decisions will be made according to the domestic rules, which all differ from each other. In this respect, the main instrument that attempts to achieve a minimum level of harmonisation among the various jurisdictions is the Uncitral Model Law. Firstly, however, the Uncitral Model Law is not binding and each State can freely decide to adapt its national laws to it, and, secondly, it is silent on many matters. Therefore, the laws of the State of the seat, as well as their application by the national judiciary, still remain relevant. Of course, the parties are free to determine the seat of the arbitration, and should be aware of the risks of a specific country when they decide to arbitrate at a particular place. Therefore, one may argue that the parties only have themselves to blame in case of assistance by the courts of the seat that turns into interference, because they could have expected that when they chose to refer to arbitration in that country. However, one must consider that in some cases, certain parties, such as governmental entities, would accept to go to arbitration only in the State where their legal seat is placed or where the transaction that the parties will perform will be located. In addition, in the context of the negotiations of an investment agreement, and of the mutual concessions necessary to reach a contractual arrangement, it is very possible that one party is forced to accept a forum that is less than optimal for it. Moreover, despite its success (it currently counts more than 150 signatories), the New York Convention has not been able to achieve a harmonised international regime concerning the recognition and enforcement of arbitral

awards. This is due to the fact that many of the concepts that are crucial for its application are not spelled out in detail and, therefore, remain subject to different interpretation and applications. Hence, the role for national law has been left relatively open in the structure of the New York Convention and, not surprisingly, this has contributed to the failure in reaching a truly international standard for international commercial arbitration. To cite the most evident situation: the New York Convention lists the limited cases where recognition and enforcement of arbitral award can be refused by a State.⁹¹⁹ However, on the one hand, the New York Convention leaves each contracting State free to accept or refuse enforcement in any of such cases. Thus, there may be situations where enforcement is granted to an award annulled by the courts of the seat. On the other hand, if enforcement is refused, it is difficult to draw a distinction between cases where national courts effectively interfered with the arbitral proceeding and cases where national courts legitimately exercised their rights to intervene in the arbitration proceeding and to have a divergent opinion from that of the arbitrators.

The Relevant Cases are framed in this context. In all of them an award holder frustrated in its attempt to have an arbitral award or an arbitration agreement enforced, brought an investment treaty claim alleging that provisions of a BIT had been violated by the national courts that denied the enforcement.

At first, this may sound a bit strange: what is the nexus between the denial of recognition and enforcement of an award and the violation of a BIT? Shouldn't the (possibly) wrongful lack of recognition merely represent a violation of the New York Convention or a denial of justice by national courts? How does investment law deal with this issue?

⁹¹⁹ Those cases, provided by Art. V of the New York Convention, are: awards made without jurisdiction; a party being affected by some relevant incapacity; a failure to comply with the rules of natural justice; the composition of the tribunal being contrary to the arbitration agreement or the law of the seat; the award having been set aside by the courts of the seat; the subject matter of the dispute not being capable of resolution by arbitration in the country where enforcement is sought or enforcement of the award being otherwise contrary to the public policy of that country.

The replies to these questions are relatively simple. One must consider that in case of non-enforcement of an international award in breach of the New York Convention the award winner does not have an effective method to seek justice. This is mainly due to the fact that the New York Convention does not envisage an international appellate body that has the power to review the decisions of national courts regarding the application of the New York Convention. Therefore, the frustrated award winner should seek redress before the courts of the same State, which, especially in case of collusion with the award loser, would be unlikely to reverse the decision of the court of the lower instance. The other available remedy under traditional public international law would be diplomatic protection, which, for the reasons illustrated in Chapter I, is a far from perfect remedy.⁹²⁰

Against this background, international lawyers have tried to be creative in finding a venue where the award holder may have an effective relief in case of wrongful interference by national courts. Besides human rights courts,⁹²¹ the location was found in investment treaty arbitration, which over the past 30 years has gained momentum. Every year dozens of cases are submitted to the Centre, and, presumably, an analogous number of investment cases are dealt with by other institutions, such as the ICC and the SCC.⁹²² This may be also explicable by the fact that investment tribunals have been relatively keen on finding the State hosting the investment liable under the invoked instruments.⁹²³

⁹²⁰ For more, *see* Chapter I, sections 2 and 5.

⁹²¹ For more, *see* Chapter I, section 5, where the downsides of this remedy are highlighted, especially if compared to the recourse to investment arbitration.

⁹²² While the Centre makes available the main details of the cases filed before it, the same is not done by other institutions, where the protection of confidentiality of the party is prevailing.

⁹²³ In 2012 investment arbitration was strongly criticised as a system of ‘pro-investor interpretation of the treaties’ by P. EBERHARDT, C. OLIVET, T. AMOS, N. BUXTON in *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, November 2012, Corporate Europe Observatory (CEO), p. 11 (available at: <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>). Of the same opinion is, also, G. VAN HARTEN, *Pro-Investor or Pro-*

Of course, to access investment treaty arbitration, certain jurisdictional requirements must be met and an investment treaty breach must have been committed.

In particular, one of the basic jurisdictional requirements is represented by the presence of an investment. If the claim does not concern an investment made by an investor in the territory of the other contracting State, then access to an investment treaty tribunal shall be denied. This means that the award must qualify as an investment for the award winner to achieve access to investment tribunals empowered to review actions of the national courts, in order to establish if a breach of the standards of protections envisaged by the investment instrument has occurred.

However, this is not a straightforward passage. In fact, *prima facie*, the link between an arbitral award and an investment is not immediate. In order to include arbitral awards within the scope of the protected investment, the concept of investment must be over-expanded. In addition, even assuming that access is obtained, investment tribunals need to be granted with the right to verify the correctness of the actions of national courts in a field where the latter have a large degree of discretion and in the lack of a system of revision of national court decisions by an international ad-hoc body.

The six Relevant Cases address these topics: in four of them the tribunals accepted jurisdiction, and in three a liability of the State for a wrongful interference with the arbitration process was found.

While it may be too early to acknowledge the existence of an effective trend, these awards have contributed to the development of a theory pursuant to which the abusive interference of a State with international arbitration constitutes an international wrong. This is also witnessed by the fact that at the time of writing, at least three more investor-State claims have been brought before investment tribunals for issues connected to, *inter alia*, the non-

State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern, 13 April 2012 (available at: http://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-ininvestment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/#_ftn2).

enforcement of commercial awards.⁹²⁴ Of course, the decisions in the Relevant Cases are very fact-specific, yet ‘they are all inspired on the assumption that states are under some form of obligation to respect arbitration, the violation of which may entail international responsibility.’⁹²⁵

2. The existence of an investment

As known, there are several conditions that must be met for an investor to access the jurisdiction of investment tribunals. These conditions vary depending on the wording of the invoked investment instrument and on whether the case is brought before ICSID or other tribunals.

First of all, it is true that a pre-requisite to access investment treaty arbitration is the existence of an investment made by a national of one contracting State in the other contracting State.

Each treaty normally contains its own definition of investment and the claimant should prove before the investment tribunal that its claim concerns an investment falling within the definition envisaged by the applicable treaty. In this respect, it should however be noted that nearly all of the current international investment treaties provide for a broad definition of investment. More precisely, investment is defined as ‘every kind of asset’, followed by a list of investments, which is illustrative and not exhaustive, and which often includes ‘claims to payment or performance having a financial value’. It is self-explanatory that such a broad definition is of support in the attempt to access Investor-State arbitration in those cases where the alleged investment is represented by a commercial arbitral award. In particular, if a claim to money is an investment, any right to any amount under a commercial award may be included in the definition. In any case, whether the investment in question falls into the scope of investment defined in the applicable investment treaty has to be decided by the tribunal established for the dispute, and practice shows that

⁹²⁴ See, *supra*, note 896.

⁹²⁵ L.G. RADICATI DI BROZOLO, *Enhancing the Effectiveness of Arbitration in Asia – Towards Less State Interference*, *supra*, note 897, at p. 14.

tribunals tend to broadly interpret the investment at issue so as to acquire jurisdiction over the case.⁹²⁶ This is evident in the Relevant Cases.

However, in case of ICSID Arbitration, the definition of investment set out in the investment treaty is not the only element that comes into play. Art. 25(1) of the ICSID Convention states that: '[t]he jurisdiction of the Centre shall extend to any dispute *arising directly out of an investment* between a contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre'. This means that the Centre imposes its own jurisdictional requirements, which add to those of the applicable investment treaty where consent is granted. Among such requirements, the Centre compels the existence of an investment. However, it should be noted that the Convention itself does not provide for a definition of investment. ICSID tribunals have attempted to fill this gap and define the term, but have failed to come up with a consistent approach. More precisely, some tribunals have adopted an 'objectivist' approach, pursuant to which investment under the Convention has a self-standing meaning that does not depend on the instrument containing consent to ICSID jurisdiction. According to the supporters of the objectivist approach, the meaning of investment is to be found in a number of criteria that distinguish it from an ordinary commercial transaction; the absence of any of them means that the operation at issue cannot qualify as an investment. The main problem with this approach is that tribunals have not yet agreed on the number and the content of the elements that must be met for an investment to exist. This of course does not come out in favour of an approach that is grounded on the idea that investment has an objective intrinsic meaning.

Other tribunals have adopted a more flexible approach, pursuant to which the criteria that have been developed by tribunals for the clarification of the notion of investment should not be considered as mandatory conditions of an investment, but rather as descriptive features. Therefore, the absence of any of

⁹²⁶ C. HUIPING, *The Expansion of Jurisdiction by ICSID Tribunals: Approaches, Reasons and Damages*, *supra*, note 138, pp. 671-687.

them would not *per se* impair the qualification of a given transaction as an investment. Finally, other tribunals have deemed that, having the drafters of the Washington Convention decide not to give a definition of the term investment, it is left to the parties to the legal instruments embodying their consent to ICSID jurisdiction to identify what an investment is. According to this approach (which is named ‘subjectivist’), the only test to be made regards the definition of investment included in the applicable investment treaty.⁹²⁷

In this context, four out of six arbitral tribunals dealing with the Relevant Cases accepted the subject matter jurisdiction. Notably, two of them were constituted under the auspices of the Centre.

However, in none of the Relevant Cases did the tribunals go so far as to state that an arbitral award *per se* constitutes an investment for the purposes of the BIT and/or the ICSID Convention.

The case where the tribunal pushed itself the most forward in this respect is *ATA v. Jordan*, whereby the arbitrators recognised that the arbitration agreement in itself represented an investment. This result was reached by the application by an ICSID tribunal of the subjectivist approach, which, as illustrated, relies exclusively on the treaty definition of investment. Since the applicable treaty contained a broad definition of investment, the tribunal found it easy to accept the jurisdiction. Notably, the tribunal did not take a position on whether an arbitral award can also constitute in and of itself an investment, since it dismissed that part of the claim on temporal grounds. However, if an arbitration agreement can be considered as an investment, I see no reason why the tribunal should have taken a different position with respect to an award.⁹²⁸

Another ICSID tribunal, in *Saipem v. Bangladesh*, adopted a different approach to reach the same result as *ATA v. Jordan*. In *Saipem v. Bangladesh*, the tribunal adhered to the objectivist approach, but in order to assess its jurisdiction it looked at the entire underlying economic transaction out of which the arbitral award resulted. The tribunal therefore considered the operation that started with the construction contract and ended with the award

⁹²⁷ For more *see* Chapter II, section 3.

⁹²⁸ For more *see* Chapter II, section 5.3.

that *crystallized* the rights and obligations arising from the original contract. In having recourse to the objectivist approach, through the application of the Salini test,⁹²⁹ the arbitrators basically referred to the features of the underlying transaction. Having established that the underlying transaction satisfied the Salini test, the tribunal concluded that the ICC award, which represented the residual outstanding portion of the transaction, was part of Saipem's investment. On these grounds the tribunal accepted its jurisdiction.

Following the path traced by *Saipem v. Bangladesh*, other investment tribunals stated that they have subject matter jurisdiction. In *Frontier v. Czech Republic* the tribunal aligned with *Saipem v. Bangladesh*'s line of reasoning, considering not the award *per se*, but rather the overall operation carried out by the investor. However, differently from *Saipem v. Bangladesh*, the UNCITRAL tribunal did not have to consider the gateway conditions set out by the Convention and simply relied on the wording on the BIT, according to which '[a]ny change in the form of an investment does not affect its character as an investment'.⁹³⁰ On that basis, the panel ruled that *Frontier* made an investment by way of, *inter alia*, the loans granted to a JV company incorporated in the Czech Republic, which was transformed into an entitlement of a first security charge by means of the commercial arbitral award.⁹³¹

Also in *White v. India*, the most recent of the Relevant Cases, the tribunal, in line with *Saipem v. Bangladesh*, considered that the award was part of the overall transaction made by the investor and that, through it, the rights of the investor arising from the original investment had been crystallised. Interestingly, in this case, the tribunal identified a *developing jurisprudence*, pursuant to which awards made by tribunals arising from investments represent

⁹²⁹ As mentioned, there is no unanimous consent as to the features of an investment among the supporters of the objectivist approach. However, as better explained in section 3.1 of Chapter 2, the most relied upon method to establish if there is an investment is to rely upon the Salini test, which defines an investment as having at least three elements: (1) a contribution of money or assets (2) a certain duration and (3) an element of risk.

⁹³⁰ Art. 1(1) of the Canada-Czech Republic BIT.

⁹³¹ For more *see* Chapter II, section 5.4.

a continuation or a transformation of the original investment and, therefore, are capable of being protected under the applicable investment treaty.⁹³²

In light of the above in *Saipem v. Bangladesh*, *Frontier v. Czech Republic* and *White v. India*, the tribunals had recourse to an expedient to accept jurisdiction that otherwise would have had to have been declined. Considering the entire transaction, rather than the award in and of itself, these tribunals were able to accept the jurisdiction. In *ATA v. Jordan*, the tribunal adopted a different approach and considered the arbitration agreement by itself: relying exclusively on the wording of the BIT, the tribunal recognised its subject matter jurisdiction.

In two of the Relevant Cases, the arbitrators declined their jurisdiction. However, the positions taken by the said tribunals are divergent. In the first one, the UNCITRAL case *Romak v. Uzbekistan*, the tribunal, on the one hand, considered the overall transaction, rather than the commercial award *per se*, following the path traced by *Saipem v. Bangladesh*, but, on the other hand, applied the objectivist approach developed by ICSID tribunals, notwithstanding the fact that it was not bound by Washington Convention. In fact, being an UNCITRAL case, the tribunal could have simply relied on the very broad wording of the applicable BIT in order to assess if the transaction at issue represented an investment. Still, the tribunal decided to bring the Salini test into play. This can be perceived as a stratagem used by the panel to decline jurisdiction, possibly due to the fact that the arbitrators were not ready to review the host State court's behaviour.⁹³³

In *GEA v. Ukraine*, the tribunal took a completely different approach. Indeed, the tribunal denied *tout court* that an arbitral award could represent an investment *per se* or a part thereof. For this tribunal, a commercial award was considered analytically different from the underlying transaction. Therefore, even if the operation underpinning the award could qualify as an investment, the award would not be considered as part of that investment or a crystallization thereof. In other words, for the tribunal, an arbitral award does

⁹³² For more *see* Chapter II, section 5.6.

⁹³³ For more *see* Chapter II, section 5.2.

not represent the continuation or the transformation of an investment, even when the award concerns rights and obligations arising from an investment, as stated by other tribunals in the Relevant Cases and therefore investment tribunals are not entitled to deal with the non-recognition/enforcement of arbitral awards and/or arbitration agreements.⁹³⁴

GEA v. Ukraine can, however, be regarded as an exception to the tendency of investment tribunals to review acts of the judicial body of a State that interfered with the enforcement of a commercial award. This tendency is probably based more on a ‘sense of justice’, rather than on pure legal grounds, as none of the tribunals, including non-ICSID tribunals, whose gateway conditions are less narrow, dared to say that an award by itself represents an investment for the purposes of the Convention and/or the applicable BITs. Rather, the tribunals worked on the concept of investment to broaden its boundaries in order to include commercial awards and the rights arising therefrom in the overall transaction, which qualifies as an investment. As noted by the tribunal in *White v. India*, it is possible to assist in ‘developing jurisprudence on the treatment of arbitral awards to the effect that *awards made by tribunals arising out of disputes concerning ‘investments’ (...) represent a continuation of transformation of the original investment*’.⁹³⁵

This approach, if understandable from a practical point of view, can hardly be supported from a merely juridical standpoint. Indeed, an award may arise out of a claim connected to an operation that could qualify as an investment, but it is logically and structurally distinct therefrom. In *Saipem v. Bangladesh* and in subsequent awards that followed its lines of reasoning, the tribunal functionally applied investment law to accept jurisdiction, but, as noted by the arbitrators in *GEA v. Ukraine*, the *Saipem* tribunal ‘made statements that are difficult to reconcile’⁹³⁶ in order to achieve this result.

It should however be noted that if a tribunal wants to accept jurisdiction, *Saipem*’s approach is probably the only solution, at least in the context of

⁹³⁴ For more *see* Chapter II, section 5.5.

⁹³⁵ *White v. India*, para. 7.6.8.

⁹³⁶ *White v. India*, para. 163.

ICSID arbitration, whereby the majority of tribunals concur on the existence of outer limits to the notion of investment, and a commercial award could barely fall within those boundaries *per se*. But a different approach may be taken in non-ICSID arbitration. As already stated, in that contest, the arbitrators are free to base their jurisdiction exclusively on the wording of the investment treaty where consent to arbitration is given. Therefore, if the contracting States included in the treaty a definition of investment broad enough to cover an arbitral award, the arbitrators should simply assess that, pursuant to the language of the treaty, the subject matter jurisdiction is grounded.

As a final remark, it must be noted that, as already highlighted in Chapter II, the approach tracked by *Saipem v. Bangladesh* may not always guarantee access to ICSID jurisdiction.⁹³⁷ Many bilateral and multilateral investment treaties expressly require that the investment is located in the territory of one of the contracting States (different from the one of which the investor is a national). This implies that the frustrated award creditor will not be allowed to bring a claim against the State whose courts wrongfully interfered with the enforcement of the award, unless this State is the same as the one where the original investment was made. Indeed, if the award is not considered by itself as an investment, but a crystallisation of the underlying original operation, the investment is not constituted by a single activity, but by a number of activities that collectively make it. Thus, it needs to be determined at what point sufficient activity has taken place in the host country to meet the territoriality requirement. Even if the existing case law does not come with a conclusive answer to this question, the few tribunals that have considered the question seem to support that the operation in the entirety is decisive and not whether a particular aspect of it is performed inside or outside the territory of the host State. On the basis of this line of reasoning, in all cases where enforcement to an award is wrongfully denied in a country different from the one where most of the original transaction was made, the aggrieved award creditor will likely not be entitled to bring an investment claim against the State for a

⁹³⁷ See, *supra*, Chapter II, section 6.

misbehaviour of its courts. Please however note that this issue was not addressed in the Relevant Cases since there was only one country involved, which was the place where the debtor was domiciled and in which the investment had the closest link.

3. Conducts that can be sanctioned

Once the jurisdiction is established, the award winner (i.e., the investor) must frame its claim to show that the national courts breached the State's obligations under the applicable investment treaty and that the claim is covered by the consent to jurisdiction clause.

Starting with this second aspect, it is worth recalling that in investment treaty arbitration, jurisdiction is generally structured as a standing offer to arbitrate made by each contracting State in favour of the investors of the other Contracting State(s). This offer may be accepted by nationals of another State party to the relevant investment treaty, also through the commencement of arbitration proceedings. The scope of a tribunal's jurisdiction varies considerably from one treaty to another. Based on treaty practice, scholarly writings⁹³⁸ have identified four core typologies of consent to arbitrate provisions. The first one is the broadest and allows 'all' or 'any' investment disputes to be submitted to arbitration. This means that the only element that matters is that the dispute concerns an investment, as defined in the investment treaty. The second one limits consent to arbitration to disputes arising out of or related to: (i) an investment authorization; (ii) an investment contract; or (iii) the allegation of a violation of any right conferred, created or recognized by the respective treaty in relation to an investment. The third kind of provision allows jurisdiction only to violations of the substantive provisions of the treaty itself. The fourth and more restrictive typology confines the relevant tribunal's jurisdiction to disputes about expropriation or the *quantum* to be paid in the event of an illegal expropriation.⁹³⁹ Obviously, depending on the breadth of the

⁹³⁸ See, *supra*, note 859.

⁹³⁹ For examples thereof, see, *supra*, Chapter III, section 10.

consent to jurisdiction clause, the investor has more or less chance of bringing a claim against the State.

The provisions regarding consent to jurisdiction must be coupled with those setting out the protection allowed to the foreign investor. Usually, investment treaties provide a wide spectrum of obligations on the State hosting the investment. Though each treaty has its own wording, in general terms it can be stated that investment protection includes the prohibition to expropriate, as well as various standards of investment protection, including full protection and security, effective means of asserting claims, FET and MFN. It is largely considered that the FET obligation comprises the obligation of the host State not to deny justice. Denial of justice is the typical misconduct attributable to national courts. At its most general, denial of justice occurs when a State administers justice to aliens in a fundamentally unfair manner.⁹⁴⁰

According to the majority of scholarly writings, in order for a denial of justice to occur, certain elements must be met. First, the factual situation must be egregious, embodying a fundamental violation of the principle of fair process. Several investment arbitral tribunals have highlighted the high threshold of misconduct required to establish a denial of justice. Second, no denial of justice can be claimed unless the investor has exhausted all (reasonable) municipal remedies. Third, denial of justice occurs exclusively in the event of procedural misbehaviour.⁹⁴¹

From the above it emerges clearly that the bar for establishing a denial of justice is high, which probably explains why in the Relevant Cases none of the involved tribunals found that the national courts had committed a denial of justice. Rather, tribunals accepted the claimants' reconstructions, pursuant to which the misconduct of national courts entailed a breach of different treaty guarantees, including the prohibition of unlawful expropriation, or the violation of the FET or the effective means standards.

⁹⁴⁰ For more on denial of justice, *see, supra*, Chapter III, section 2.

⁹⁴¹ This latter requirement is not unanimously agreed. *See* Chapter III, para. 2 and the relevant notes.

Certain authors⁹⁴² have strongly criticized this approach, maintaining that the tribunals' intent was to accord justice to investors in cases where the conditions for a denial of justice would have not been met. What is sure is that the cases of actionable judicial wrongs have increased, as accordingly have the possibilities for an aggrieved award creditor to obtain redress.

Starting with the Saipem Award, the tribunal recognized that the national courts committed a judicial expropriation, by means of the revocation of the powers of the arbitral panel and the labelling of the award issued by this panel as a nullity. In order to come to its conclusion, the tribunal took an innovative approach. Indeed, even though it overtly declared it was applying the sole effect doctrine – pursuant to which the effect of the government action is the only factor to be considered in the determination of the existence of an indirect expropriation – it introduced an additional element allegedly necessary due to the *peculiar circumstances of the case*. More precisely, after having established that the Bangladeshi courts' conduct substantially deprived Saipem of the residual contractual rights under the investment as crystallized by the ICC Award,⁹⁴³ and that such deprivation was irreversible,⁹⁴⁴ the tribunal considered whether the conduct of the courts was *illegal*. For the panel, a different approach would have entailed that any setting aside of an award could have implied a claim for expropriation, even when the setting aside was legitimate. In this respect, the ICSID tribunal found the Bangladeshi courts' actions illegal as they committed an abuse of right and violated the spirit of the New York Convention.⁹⁴⁵

This solution is probably correct: as noted by the tribunal, the mere application of the sole effect doctrine would imply that any exercise of the right to set aside awards amounted to an expropriation. Once again, the tribunal should maybe have thought twice before accepting its jurisdiction, rather than adapting and amending well-established principles of international law in order to square the circle.⁹⁴⁶ In addition, it is worth noting, as stated in *White v. India*, that a

⁹⁴² See, *supra*, Chapter III, section 4.2.1.

⁹⁴³ Saipem Award, para. 128.

⁹⁴⁴ Saipem Award, para. 130.

⁹⁴⁵ Saipem Award, para. 167.

⁹⁴⁶ See, *supra*, Chapter III, section 4.

claim for judicial expropriation along the same lines of those of *Saipem v. Bangladesh* may be hosted only if the arbitral agreement is set aside; on the contrary, in cases of specious delays in the recognition and /or enforcement process of an arbitral award or arbitration agreement, such a claim shall be declined.⁹⁴⁷

The *ATA v. Jordan* case and the *Frontier v. Czech Republic* case considered the FET standard. Despite the fact that the panel's reasoning in the *ATA v. Jordan* case was very succinct and that the tribunal in the *Frontier v. Czech Republic* case came to the conclusion that no breach of the FET had occurred, these cases are still relevant as they considered in principle possible that a State may be responsible for the municipal courts' breach of the FET standard for a cause different from denial of justice.⁹⁴⁸

In *White v. India*, the tribunal recognised that the delays in proceeding concerning the set-aside of an arbitral award entailed a breach of the effective means clause. This case is also to be considered relevant because it is the fifth public case in the history of investment arbitration in which an arbitral tribunal dealt with the effective means guarantee, and the second one in which effective means was expressly considered as an autonomous standard, detached from the denial of justice.⁹⁴⁹

In light of the above, an award creditor frustrated in its rights due to the non-recognition or set-aside of an arbitral award or the non-recognition of an arbitration agreement potentially has a variety of substantial claims to lodge, depending on the factual situation and the provisions of the invoked international instrument.

The possible claims could regard:

- (i) a denial of justice, which is the traditional cause of action in case of judicial wrongs. However, the bar to find a violation thereof remains high as it requires, *inter alia*, egregious misconduct;

⁹⁴⁷ See, *supra*, Chapter III, section 9.

⁹⁴⁸ See, *supra*, Chapter III, sections 6 and 8.

⁹⁴⁹ Even if, as noted in Chapter III, section 9, the identifying features remain unclear.

- (ii) a judicial expropriation, whose existence has been recognized by investment tribunals. In the context of the *Saipem v. Bangladesh* case, the panel accepted that an arbitral award can be expropriated and suggested that, in addition to the sole effect doctrine, tribunals must also consider whether the conduct of the national courts was illegal under an international law perspective;
- (iii) a violation of the FET standard, for a reason different from denial of justice, such as for breach of legitimate expectations;
- (iv) a violation of the ‘effective means’ standard, whose contours are somewhat vague, as it is a recent standard that probably needs to be further elaborated by case law. On the basis of the current background, it can be argued that undue delays in the recognition process not amounting to a denial of justice can imply a violation of this standard.

The conclusions that may be drawn from the above is that, if it is accepted that: (i) an arbitral award may be an investment, and (ii) the wrong interference of the courts can entail a State’s responsibility, a State’s liability shall not be limited to the delict of denial of justice, but may also concern the breach of different investment protections, as long as the relevant constitutive elements are met.

One may also take a step further and argue that a mere violation of the New York Convention may represent the substantive claim before the investment tribunal. Even if none of the Relevant Cases has taken this route, it could still be argued that if the consent to jurisdiction is sufficiently broad – making reference, for example, to any claims concerning an investment – and the provisions of law included in the applicable investment treaty do not make reference only to the BIT and the national law, but also to international law, then the tribunal could be allowed to establish a responsibility of the State for the misapplication of the New York Convention by its national courts.⁹⁵⁰ This approach would, however, imply the final dismantling of the architecture of international arbitration, with the recognition of the role of investment

⁹⁵⁰ See Chapter III, sections 9 and 11.

tribunals as the final reviewers of the application by the national courts of the New York Convention.⁹⁵¹

4. What is next: a difficult forecast of the impact of the Relevant Cases on the investment arbitration plane

Saipem v. Bangladesh and the Relevant Cases that followed the line traced by it can be certainly considered revolutionary. However, as often happens in cases of revolutionary decisions, it is difficult to establish the exact consequences that they may have. As stated by one eminent author, it is difficult to predict what will happen now that the Pandora's box has been opened.⁹⁵²

However, a few predictions can be made. First, it is undeniable that investors will feel safer if they know that they have a powerful weapon to use in case the award rendered in the context of a commercial arbitration is disregarded by the courts of the State, where enforcement and recognition is sought because it goes against the interests of the relevant State. This is even more important in a context where domestic courts sometimes seem reluctant to acknowledge the difference between judiciary decisions and arbitral awards and appear keen to treat awards as if they were decisions rendered by an inferior court, rather than a different form of dispute settlement. As a consequence, it is possible that new investments will be made under the protection of investment treaties currently in force and also that new cases will be brought with the same underlying reasons of the Relevant Cases, which may lead to an increase and development of investment arbitration.

However, such an increase of investment law cases is not necessarily a positive consequence, especially in the long term. Indeed, contracting States have shown their concern with respect to decisions that, in their opinion, go beyond what the parties to the investment treaty wanted to included within the scope of protection of the investment treaty.⁹⁵³ Taking as an example Saipem v.

⁹⁵¹ See Chapter III, section 7.2.1.

⁹⁵² E. ALVAREZ, Crossing the “Public/Private” Divide: Saipem v. Bangladesh and Other Crossover Cases, *supra*, note 332, p. 410.

⁹⁵³ S. BOUWHUIS, Investor-State Dispute Settlement: Some Concerns, in N.J. CALAMITA, D. EARNEST, M. BURGSTALLER, The Future of ICSID and the Place of Investment Treaties

Bangladesh, I feel relatively safe to say that neither Italy nor Bangladesh expected, at the time when the Italy-Bangladesh BIT was entered into, that a commercial award could be considered as an investment protected thereunder. The same can be probably said in relation to the expectations of the fathers of the ICSID Convention, when they decided not to define the term investment in the Convention.⁹⁵⁴

The expression of this concern is evident by the fact that certain States, including western ones, have in recent times declared that they do not intend to include investor-States dispute settlement clauses in future investment treaties or national investment laws,⁹⁵⁵ or by the denunciations submitted by certain States in order to withdraw from the Convention.⁹⁵⁶ In addition, States have rather decided to circumscribe the definition of investment included in the treaty or to clarify in which cases the standard of protection can apply.

This represents the Governments' counteraction to the proliferation of claims by investors that take advantage of drafting gaps to achieve advantages that go beyond the parties' will.

The blame in these cases should be put on certain arbitration practices, pursuant to which provisions of investment treaties are extensively interpreted

in International Law, Investment Treaty Law Current Issues IV, British Institute of International and Comparative Law, 2013, pp. 325-338.

⁹⁵⁴ See Chapter II, section 3.

⁹⁵⁵ The Australian Government was the first developed state openly to declare that it will no longer agree to investment arbitration as the mechanism of dispute resolution within its bilateral and regional trade agreements. Nicaragua has recently passed a legislation to avoid investment arbitration. For more see L.E. TRAKMAN, Investor State Arbitration or Local Courts: Will Australia Set a New Trend?, *Journal of World Trade*, Vol. 46, February 2012, pp. 83-120.

⁹⁵⁶ For example, Venezuela gave notice in 2008 that it was terminating its BIT with Netherlands and in 2012 it announced its withdrawal from the ICSID Convention. Bolivia withdrew from the ICSID Convention in 2007 and, there since, it has stated that it intends to renegotiate several BITs, particularly their dispute resolution clauses. Ecuador gave notice in 2007 that it would not recognise ICSID tribunals' jurisdiction over disputes concerning certain natural resources, terminating nine BITs in 2008 and then withdrew from the ICSID Convention altogether in 2009.

and there is a presumption of favour towards the investor. In this respect it is worth noting that Prof. Radicati di Brozolo, who acted as counsel for Saipem in the Saipem Cases, in a speech he gave at the Law School of NYU in February 2014, candidly admitted that such decision went far beyond its expectations. Of course, he endorsed the decision and he considered it as a big step forward in the safeguard of foreign investors, but he was undoubtedly surprised by it. The astonishment should be greater if one considers that this decision has been followed by subsequent tribunals, and now additional claims are brought before investment tribunals on the same grounds. Indeed, all changes in the drafting policies of States will start to be relevant once the previous treaties have expired and new treaties will have been entered into. Until then arbitrators shall continue to rely on the previous wording and shall be free to accord the protection they deem more adequate.

In theory, arbitrators should be independent, neutral and impartial in deciding cases. However, from the above, States saw that some arbitrators are prone to expanding interpretations to investment treaty provisions and show keenness to acquire jurisdiction over some cases. This is for a number of reasons, including the fact that arbitrators have an individual interest in the expansion and that, broadly, tribunals pay more attention to private investors' interests.

In light of the above, a turnaround in this approach needs to be made in order for investment law and investment arbitration to continue to proliferate in the future and be seen as a tool where both parties, the State and the investor, are effectively put on an equal footing with the purpose of reducing injustice and proliferating international investments, and consequently development and wealth.

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