INTERNATIONAL INVESTMENT TREATY ARBITRATION AS A POTENTIAL CHECK FOR DOMESTIC COURTS REFUSING ENFORCEMENT OF FOREIGN ARBITRATION AWARDS

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International commercial arbitration has proven a popular means for dispute resolution in commercial conflicts. Due to the New York Convention, many countries allow foreign arbitral awards to be recognized and enforced in their local courts, resulting in effective means for execution of the award. However, what happens when domestic courts are reluctant to enforce a foreign arbitral award?

Under the principles of state responsibility, a state can be held liable for the conduct of the state's independent local courts. If domestic courts wrongfully refuse to comply with their obligations under the New York Convention to recognize or enforce a foreign arbitral award, or if the courts cause undue delay in enforcing such an award, these actions can be attributed to the sovereign state itself. As such, the state can be held liable for breach of its obligations under international treaties.

The Article analyzes seven recent cases where domestic courts refused to enforce the foreign commercial arbitral awards, after which aggrieved parties have attempted to seek enforcement via international investment arbitration. Several investment arbitration tribunals have ruled that refusing such enforcement, under certain exceptional circumstances could amount to a breach of international law or to a breach of a Bilateral Investment Treaty (BIT), more specifically through breaching the "Expropriation-clause," the "Effective Means-clause" or the "Denial of Justice-clause" as found in these BITs.

The Note examines the growing use of international investment arbitration as a supervisory mechanism when domestic courts wrongfully refuse to enforce a commercial arbitral award, and argues why it is vital to attribute investment arbitration with such supervisory jurisdiction.

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I.
INTRODUCTION

The use of commercial arbitration has started to gain traction as a popular means for dispute resolution in commercial conflicts. Largely due to the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), many countries have allowed foreign arbitral awards to be recognized and enforced in their local courts. This trend is essential for making international arbitration an effective and efficient means of international dispute resolution. What happens, however, when domestic courts are reluctant to enforce a foreign arbitral award? After exhausting all domestic litigation remedies, are there still options left for a party seeking enforcement of the award? When domestic courts refuse to enforce foreign arbitral awards, some aggrieved parties have attempted to seek enforcement via international investment treaty arbitration. This use of investment treaty arbitration presents a new means for

foreign investors to enforce a commercial arbitral award. International treaty arbitration usually takes place under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) or before an ad hoc tribunal established under the arbitration rules of UNCITRAL.[1] These tribunals have the authority to decide whether an investment arbitration tribunal has jurisdiction over such a claim. To do so, tribunals must consider whether a commercial arbitral award constitutes an "investment" either under Article 25(1) of the ICSID Convention[2] or under the definition of "investment" within the applicable Bilateral Investment Treaty (BIT). If the tribunal finds it has jurisdiction, it must then consider on what grounds the domestic court's refusal to enforce an arbitral award could amount to a breach of the BIT or to a breach of international law.

This paper will begin by briefly explaining the important differences between international commercial arbitration and international investment arbitration. It will then show that under the principles of state responsibility, a state can be held liable for the conduct of the state's organs, including the conduct of the state's independent local courts. As a result, if domestic courts wrongfully refuse to comply with their obligations under the New York Convention to recognize or enforce a foreign arbitral award, or if the courts cause undue delay in enforcing such an award, these actions can be attributed to the sovereign State itself, and as such, make the State liable for its breach of obligations under international treaties. Part IV of this paper will then progress to examine seven cases in which investment arbitration was used as a potential check on the conduct of domestic courts. The paper concludes with a summary of the legal standards arising out of the holdings in these cases that show international investment arbitration as a growing supervisory mechanism when domestic courts wrongfully refuse to enforce a commercial arbitral award.

1. United Nations Comm'n on Int'l Trade Law, UNCITRAL Arbitration Rules (2010).

2. Convention on the Settlement of Investment Disputes between States and Nationals of other States, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

II.
INTERNATIONAL COMMERCIAL ARBITRATION VERSUS INTERNATIONAL INVESTMENT ARBITRATION

A. *International Commercial Arbitration*

International commercial arbitration is an alternative form of dispute resolution that involves transnational parties relying on one or more arbitrators. In order to waive their right to a regular court trial, parties must consent to the arbitration. Such consent is typically granted through an arbitration clause in the underlying agreement. The outcome of the arbitral award is binding on both parties,[3] and once an arbitral tribunal has rendered its award, the arbitral award is res judicata in relation to the dispute it resolves. International arbitration has increased in popularity as it provides for a flexible and efficient dispute resolution mechanism, it allows foreign parties to resolve their disputes in a neutral forum, and because the international legal regime significantly favors the enforcement of international arbitration agreements and awards. This acceptance of arbitration by the legal community is largely due to the New York Convention, which has been ratified by more than 140 countries. The New York Convention requires States to recognize and enforce international arbitration agreements and foreign arbitral awards issued in other contracting states, subject to certain limited exceptions.[4] An international arbitral award rendered in a State that is a signatory to the New York Convention can be enforced in any other signatory State, as if granted by the local courts of the enforcing State.

B. *International Investment Arbitration*

In contrast to international commercial arbitration, international investment arbitration is used as a dispute settlement mechanism to protect the rights of foreign investors in the host state where the investment is made. The rights of foreign investors are enshrined in a framework of more than 2800 BITs, multilateral investment treaties like the Energy Charter Treaty, and in certain provisions protecting foreign investment in a growing number of Free Trade Agreements such as the

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3. FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 11 (Emmanuel Gaillard & John Savage eds., 1999).

4. *Id.* at 250-52.

North American Free Trade Agreement (NAFTA).[5] These international investment agreements typically provide foreign investors with substantive legal protection and a means to enforce their rights against the host state when it breaches its obligations under the treaty. They also typically provide for the disputes to be settled through arbitration under the auspices of ICSID, or before an ad hoc tribunal established under the UNCITRAL Rules or the ICC Rules.[6] Such treaties grant investments made by investors of one contracting state in the territory of the other contracting state, substantive protection that typically include protection from unlawful expropriation, fair and equitable treatment, and full protection and security.[7] All the cases discussed in this paper involve alleged breaches of BITs.

Note that where international commercial arbitration usually involves private parties settling a commercial dispute arising out of a contract, in international investment arbitration it entails a private party versus a State (investor-State arbitration). The question to be discussed in this paper concerns the issue of whether, when a commercial arbitral award cannot be enforced in a certain State, because local courts wrongfully refuse to do so, that private party can than bring a claim against such State for a breach of its obligations under a BIT concluded between the host State, and the home State of the investor. One of the key elements to answer this question is whether an international commercial arbitration can qualify as an "investment", in order to grant international investment arbitration tribunals jurisdiction to rule on these disputes.[8]

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5. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993), (hereinafter NAFTA).

6. International Chamber of Commerce (ICC) Rules of Arbitration (2012).

7. *See, e.g.*, BUREAU OF ECONOMIC & BUSINESS AFFAIRS, U.S. DEP'T OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, *available at* http://www.state.gov/documents/organization/188371.pdf.

8. *See also* Loukas Mistelis, *Award as an Investment: The Value of an Arbitral Award or The Cost of Non-Enforcement*, Queen Mary School of Law Legal Studies Research Paper No. 129/2013 (Jan. 7, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195016.

III.
STATE RESPONSIBILITY UNDER PUBLIC INTERNATIONAL LAW

Under the doctrine of state responsibility, a state may be held liable for the conduct of its organs. Until recently, these principles had been primarily established through case law, but the adoption of the Draft Articles on the Responsibility of States for International Wrongful Acts ("Draft Articles") by the International Law Commission in 2001 has further developed the doctrine of state responsibility. The Draft Articles are broadly accepted and have also been cited by the International Court of Justice ("ICJ").[9]

For example, in *United States v. Iran*,[10] the ICJ found that although the attacks on the United States Embassy in Tehran could not "be considered as in itself imputable to the Iranian State," Iran had violated its own obligations under the Diplomatic and Consular Conventions, in particular to take all appropriate steps to protect the premises. In a latter case, the ICJ cited the rule of state responsibility as stated in the draft articles that the conduct of any organ of a State must be regarded as an act of that State, and categorized it as a customary rule of international law.[11]

So how does this rule of attributing the conduct of a state's organs apply to the state's judiciary conduct? If the judiciary operates independently from state governments, how can it be legitimate to hold the state liable for the conduct of its national courts? In the beginning of the twentieth century, some scholars argued that, unlike the conduct of the executive and the legislative branch, the acts of national judges could not be attributed to the government because they do not represent the expression of a state's will.[12] However, the contemporary view is that, under international law, courts are indistinguishable from their states. The rationale is that although courts may be independent of the government, they are not

9. James Crawford, *The International Law Commission's Draft Articles on State's Responsibility: Past and Future, Lecture Series on International Law* (2008), http://untreaty.un.org/cod/avl/ls/Crawford_S.html.

10. U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 12, 29-30 (May 24).

11. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion , 1999 I.C.J. 62, 87 (April 29).

12. THOMAS BATY, THE CANONS OF INTERNATIONAL LAW 127-28 (1930).

separate from the state.[13] This universally accepted view that a state is accountable for its judiciary is also reflected in Article 4(1) of the Draft Articles on State Responsibility, which provides the following:

> The 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.[14]

But do sovereign states owe a duty to the world to maintain an adequate judicial system? And if yes, to what extent is a state to be held liable for an imperfect system? The answer is that the duty to provide justice to foreigners arises from customary international law.[15] Although in 1938 Freeman argued that denial of justice was "one of the most poorly elucidated concepts of international law,"[16] over the past decades the scope for raising the allegation of denial of justice has broadened immensely.[17] In his book on denial of justice in international law, President of the International Council for Commercial Arbitration and Miami University's Professor of law, Jan Paulsson, says there are two fundamental explanations for this development.[18] First, it has become universally accepted that national courts are instrumentalities of a state. Just as the executive and legislative branches are a part of the state, the acts and omissions of the judicial branch are attributable to the particular state.[19] Second, the emergence of procedures under which victims may rely on international law to seek redress has greatly increased the frequency of "denial of justice" claims.[20]

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13. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 39 (2005).

14. Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l Law Comm'n. on its 56th Sess., Apr. 23 – June 1, July 2 – Aug. 10, 2001, U.N. Doc. A/56/10; U.N. GAOR, 56th Sess., Supp. No. 10, at 43, (2001) (emphasis added).

15. PAULSSON, *supra* note 13, at 1.

16. ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 31 (1938).

17. PAULSSON, *supra* note 13, at 2.

18. *Id.*

19. *Id.* at 3.

20. *Id.*

These procedures are especially prevalent under human rights treaties, and treaties protecting foreign investments. Although 'denial of justice' claims are invoked with increasing frequency, the kind of injustice or harm that is being alleged remains unclear.[21] Paulsson, who agrees that the notion is vague, defines denial of justice, at its most general, as follows: "A state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner."[22]

So what happens if a state does not grant aliens, in this case foreign investors, access to a proper justice system? The subsequent section will discuss several recent cases in which foreign investors engaged in commercial arbitration, or tried to enforce an arbitral award, but were obstructed in this process by local courts in the host state. In response, the investors initiated investment arbitration proceedings against these sovereign states for the conduct of their domestic courts. We can carefully say that recent case law is showing a trend in which the wrongful conduct of domestic courts in judging on the enforcement of arbitration awards, is being attributed to the host State itself. As a result, States have been held liable to pay large amounts of compensation in damages. The cases discussed below are very fact-intensive. To obtain a clear understanding of the relevant legal standards developed, it is essential to know the particular facts in each case that led the tribunal to decide to hold a State liable for the wrongdoing of its own courts.

IV.
CASE LAW

A. Saipem v. Bangladesh

In *Saipem v. Bangladesh*[23] the important question was whether the behavior of the Bangladeshi courts during an international commercial arbitration dispute governed by the ICC rules was a violation of the State's obligations under a BIT, in particular the expropriation clause.

On February 14, 1990, Saipem, an Italian oil and gas company, entered into a contract to build a gas pipeline in Ban-

21. *Id.*

22. *Id.* at 4.

23. Saipem S.p.A v. People's Republic of Bangl., ICSID Case No. ARB/05/7, Award (Jun. 30, 2009) [hereinafter *Saipem v. Bangladesh*].

gladesh with Petrobangla, a state-owned company of Bangladesh.[24] The contract was governed by the laws of Bangladesh and contained an ICC arbitration clause appointing Dhaka, Bangladesh, as the seat of arbitration.[25] The project was significantly delayed and a dispute arose over the resulting compensation and additional costs. On June 7, 1993, Saipem filed a request for ICC arbitration against Petrobangla, after which the ICC Tribunal was constituted on May 4, 1994.[26]

During the arbitration proceedings, the Bangladeshi courts interfered substantially with the ICC arbitration, and the particular facts of this interference are significantly important to the outcome of the award. In 1997, Petrobangla applied to the First Court of the Subordinate Judge of Dhaka seeking to annul the ICC Tribunal's authority.[27] The next day Petrobangla brought an action before the High Court Division of the Supreme Court of Bangladesh to stay all further proceedings of the ICC arbitration.[28] As a result, on November 24, 1997, the Supreme Court issued an injunction restraining Saipem from proceeding with the ICC arbitration. In April 2000, the First Court of the Subordinate Judge of Dhaka rendered a decision revoking the authority of the ICC Tribunal. However, 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."[29] Despite the interference by the local courts, on May 9, 2003, the ICC Tribunal rendered their final decision, holding that Petrobangla had breached its contractual obligations, and ordering Petrobangla to pay Saipem a total amount of US$6,148,770.80 in damages.[30] Subsequently, Petrobangla filed an action before the High Court Division of the Supreme Court to set aside the ICC award. The Court denied the application completely, stat-

24. *Id.* at ¶¶ 6-7.
25. *Id.* at ¶ 10.
26. *Id.* at ¶ 25.
27. *Id.* at ¶ 35.
28. *Id.* at ¶ 36.
29. *Id.* at ¶ 45.
30. *Id.* at ¶ 48.

ing it was "misconceived and incompetent inasmuch as there is no Award in the eye of the law, which can be set aside."[31]

As a result, on October 5, 2004, Saipem filed a request for arbitration with ICSID claiming that the undue intervention of the Bangladeshi courts in the ICC arbitration, which precluded the enforcement of the ICC award in Bangladesh or elsewhere, constituted an expropriation of Saipem's investments without any proper compensation and, thus, breached Bangladesh's obligations under the Italy-Bangladesh BIT.[32] The ICSID Tribunal ruled in favor of Saipem, concluding that the expropriated 'property' consisted of "Saipem's residual contractual rights under the "investment" as crystallized in the ICC Award."[33] The Tribunal stated that the actions of the Bangladeshi courts were not a direct expropriation, but constituted "measures having similar effects" within the meaning of Article 5(2) of the BIT,[34] and thus these court actions deprived Saipem of the benefit of the ICC Award.[35] The Tribunal emphasized, however, that the mere setting aside of an arbitration award does not automatically lead to a claim for expropriation, and considered that the "substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award was not sufficient for the Bangladeshi courts' intervention to be tantamount to an expropriation."[36] In addition to fulfilling the requirements for an expropriation claim as set forth in Article 5 of the Italy-Bangladesh BIT, the actions of the Bangladeshi courts would also have to be *illegal* to give rise to a claim for expropriation.[37] So were the actions of the Bangladeshi courts illegal?

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31. *Id.* at ¶¶ 49-50.

32. *Id.* at ¶ 52; Agreement Between Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investment, Mar. 20, 1990, http://unctad.org/sections/dite/iia/docs/bits/italy_bangladesh.pdf [hereinafter Italy-Bangladesh BIT].

33. *Saipem v. Bangladesh*, at ¶ 128.

34. Article 5(2) of the Italy-Bangladesh BIT contains the expropriation clause, stating that: "Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, . . .or subjected to any measures having similar effects . . .except for public purposes, or national interest, against immediate full and effective compensation."

35. *Saipem v. Bangladesh*, at ¶ 129.

36. *Id.* at ¶ 133.

37. *Id.* at ¶ 134.

First, the Tribunal held that the revocation of the arbitrators' authority by the Bangladeshi courts was an abuse of the courts' power, constituting a breach of international law.[38] The Tribunal explained that it is generally accepted in international law that when a state exercises its rights for a different purpose from that for which the rights were created, in this case the Bangladeshi courts improperly exercising their supervisory jurisdiction, it commits an abuse of rights.[39] Second, the Tribunal held that Bangladesh had breached its obligations under Article II(1) of the New York Convention, which compels states to recognize foreign arbitral awards. Therefore, the ICSID Tribunal held that the Bangladeshi courts' interference in the ICC arbitration was illegal and constituted an expropriation as defined by Article 5 of the BIT. The State was held liable for a breach of international law and Saipem was awarded the amount due under the ICC award plus interest.[40]

In *Saipem v. Bangladesh*, the unique circumstances of the case led the Tribunal to decide that there had been a breach of the expropriation clause. The Tribunal explained that the fact that Saipem was deprived from enjoying the benefits of the ICC Award constituted a "substantial deprivation,"[41] but it ruled that in this particular case the substantial deprivation was not sufficient to declare an expropriation. Therefore, it was also necessary that the actions of the Bangladeshi courts be deemed 'illegal'.[42] However, this additional requirement of 'illegality' should be explained in its limited scope, since not every illegality by the judiciary leads to an expropriation claim. For example, if a court applies an improper law to a case, or if a court applies the correct law but interprets this law incorrectly, both judgments rendered would be 'illegal.' However, such judicial errors should not give rise to an expropriation claim; otherwise ICSID tribunals would end up exercising a

38. *Id.* at ¶¶ 160-61.

39. *Id.*

40. *Id.* at ¶ 216.

41. *Id.* at ¶¶ 129, 133.

42. *See also* F. Suescun de Roa, *Comments on the ICSID Award* Saipem v. Bangladesh*: Would Its Rationale Be Applicable in Future Cases?* ¶ 3, INT'L CENTRE FOR SETTLEMENT INVESTMENT DISP. (May 9, 2011), http://www.icsidlawyers.com/news_dtls.php?nid=32.

substantive review on the merits of local court decisions, likely exceeding the jurisdiction of any ICSID Tribunal.[43]

Some commentators think that the legality test established in *Saipem v. Bangladesh* might only be applied in future cases with extreme circumstances where local courts, in abuse of their supervisory jurisdiction over arbitration awards, unlawfully obstruct the issuance of the award or deny its existence without analyzing its grounds.[44] However, as Michael Reisman[45] commented:

> *Saipem*, if ultimately cautious in its holding, is nonetheless far-reaching in its implications, for it adapts the mechanisms of international investment law as expressed in bilateral investment treaties, to serve as a review of the proper discharge by national courts of their responsibilities under the New York Convention.[46]

Martinez-Fraga[47] stated that, although the *Saipem* award is "being cloaked with the mantle of a very narrow and singular ruling limited only and exclusively to an extraordinary set of facts," in practice it has the effect of transforming international tribunals into second-guessing appellate venues that assess whether domestic courts have properly recognized and enforced foreign arbitral awards.[48] In other words, *Saipem* seems to have opened the door for investment tribunals to act as supervisory institutions analyzing whether domestic courts are correctly obeying the rules of the New York Convention. However, creating such an appellate venue is counterproductive to the initial purpose of the New York Convention itself, being to facilitate an adequate and reliable international re-

43. *Id.*

44. *Id.*

45. Michael Reisman is a renowned arbitrator and currently serves as a professor at Yale Law School.

46. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 5, 39 (2010).

47. Pedro J. Martinez-Fraga is a partner in DLA Piper's international arbitration and litigation practice and currently serves as an adjunct professor at the New York University (NYU) School of Law.

48. Pedro J. Martinez-Fraga & Harout Jack Samra, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 NW. J. INT'L L. & BUS. 419, 440 (2012).

gime for international commercial arbitration, allowing only domestic courts to have a supervisory power over the recognition and enforcement of these judgments through the application of the New York Convention. Giving investment arbitration tribunals the power to oversee these supervisory powers held by domestic courts would not only exceed the jurisdiction of investment arbitration tribunals, it would also create more uncertainty for commercial parties that resort to international arbitration, since it remains unclear when an award is actually final or whether a possibility for appellate review remains intact.

B. Romak v. Uzbekistan

In *Romak v. Uzbekistan*,[49] an UNCITRAL tribunal declined to hear a claim to enforce an arbitral award as an "investment" for the purpose of investor-state arbitration. Romak, a Swiss company, had contracted with three Uzbek entities to supply wheat to Uzbekistan. After a dispute arose, the parties proceeded to arbitration to resolve their differences. The arbitration award was decided in favor of Romak, which then sought to enforce the award before the Uzbek courts. When the courts in Uzbekistan refused to enforce the award, Romak initiated UNCITRAL arbitration against the Republic of Uzbekistan, claiming that the state had breached its obligations under the Swiss-Uzbek BIT.[50] Uzbekistan challenged the jurisdiction of the UNCITRAL tribunal, claiming that neither the wheat contracts nor the arbitral award constituted an "investment" under the BIT.[51]

The UNCITRAL Tribunal found it had no jurisdiction to hear the claim, and that this decision turned on the distinction between "investments" on the one hand, and "purely commercial transactions" on the other.[52] The Tribunal explained it would be untenable to qualify every contract between a Swiss national and a state entity of Uzbekistan, or every award or

49. Romak S.A. v. Republic of Uzbekistan, Permanent Court of Arbitration Case No. AA280 (Nov. 26. 2009) [hereinafter *Romak v. Uzbekistan*].

50. Accord entre la Confédération Suisse et la République d'Ouzbékistan concernant la promotion et la protection réciproque des investissements (Fr.), Switz.-Uzb., *opened for signature* Apr. 16, 1993 (entered into force Nov. 5, 1993).

51. *Romak v. Uzbekistan*, at ¶¶ 93-124.

52. *Id.* at ¶ 185.

judgment in favor of a Swiss national, as an "investment" under the BIT.[53] It then applied the so called "Salini- test" often used by tribunals to determine whether there is an "investment" in the meaning of the ICSID Convention,[54] which was established in the case of *Salini v. Morocco*.[55] The *Salini*-test sets out four criteria for an ICSID investment. There must be (i) a contribution of money or other assets of economic value; (ii) for a certain duration; (iii) that incurs an element of risk, and; (iv) makes a contribution to the host State's development. However, regarding the fourth requirement, 'contribution to a host State's development,' there is still ongoing discussion as to whether this is a necessary element to qualify as an "investment" under the definition of Article 25(1) of the ICSID Convention.[56] Although the Tribunal in *Romak v. Uzbekistan* was not an ICSID tribunal, the Tribunal found no basis to apply a different test for the definition of "investment" under the BIT than that used under the ICSID regime. It held that the definition of "investment" under the BIT entailed "a contribution that extends over a certain period of time and that involves some risk."[57] The Tribunal found that the wheat supply contracts and the arbitral award rendered pursuant to these contracts did not display the elements of an "investment" under the BIT (i.e. contribution, duration, and assumption of risk).[58]

Note that in this case the Tribunal thus ruled that the arbitral award did not constitute an 'investment', only because the underlying contracts could not be considered an 'investment' under the BIT. Would the underlying contracts have had the required characteristics of an investment as established in the Salini-test, described above, the Tribunal might have had ruled differently on whether the arbitral award that

53. *Id.* at ¶ 186.

54. *Id.* at ¶ 198.

55. Salini Costruttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (Jul. 31, 2004).

56. There is considerable discussion on whether (iv) 'contribution to a host State's development' is a necessary element to qualify as an investment. *See* Malaysian Historical Salvors v. Gov't of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (Apr.16, 2009).

57. *Romak v. Uzbekistan*, at ¶ 207.

58. *Id.* at ¶¶ 211-33.

was rendered pursuant to those contracts could have established an 'investment' under the Swiss-Uzbekistan BIT.

C. ATA v. Jordan

In *ATA v. Jordan*,[59] the ICSID Tribunal had to decide whether the interference by the Jordanian courts in a FIDIC[60] commercial arbitration procedure between ATA Construction Company ("ATA") and a Jordanian state-owned company, was a violation of Jordan's obligations under the Turkey-Jordan BIT.[61]

The underlying dispute concerned a 1998 contract between ATA and the Arab Potash Company ("APC"), an entity fully owned by the Government of Jordan, to build a dike on the Dead Sea.[62] APC initiated arbitration against ATA, and ATA responded by submitting a counterclaim against APC. In 2003, the arbitral tribunal dismissed APC's claim, exonerating ATA of any liability, and upheld, in part, ATA's counterclaim for damages.[63]

APC then appealed to the Jordanian Court of Appeal to have the award annulled. The appeals court annulled ATA's arbitration award on the basis that the Tribunal had misapplied Jordanian law. Citing the Jordanian Arbitration Law 2001, the appeals court also extinguished the contract's arbitration agreement. Jordan's Court of Cassation upheld the judgment.[64] Shortly thereafter, APC re-launched its contract claim against ATA – this time not through arbitration, but before the same courts that had annulled ATA's award and had extinguished the arbitration agreement. On January 14, 2008, ATA requested ICSID arbitration, claiming that the interference by the Jordanian courts with ATA's right to arbitrate, was a violation by the Jordanian State of the Turkey-Jor-

59. ATA Const., Indus. Trading Co. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, (May 18, 2010) [hereinafter *ATA v. Jordan*].

60. The agreement between ATA and APC was pursuant to a FIDIC (International Federation of Consulting Engineers) contract, which provides for FIDIC arbitration as the dispute settlement mechanism.

61. Agreement between the Hashemite Kingdom of Jordan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments, Aug. 2, 1993 (entered into force Jan. 23, 2006).

62. *ATA v. Jordan*, at ¶¶ 30-31.

63. *Id.* at ¶ 33.

64. *Id.* at ¶ 36.

dan BIT, more specifically a violation of the obligation to accord fair and equitable treatment to its investment.[65] In response, Jordan claimed that the Tribunal did not have jurisdiction because the BIT did not enter into force until 2006, and thus the ATA-APC contract and its accompanying disputes predated Jordan's obligations under the BIT.[66]

In its May 2010 award the ICSID Tribunal ruled on its jurisdiction regarding two different issues: (i) the annulment of ATA's arbitration award, and (ii) the extinguishment of the arbitration agreement between ATA and APC by the Jordanian Courts. On the first issue, the Tribunal declined to exercise jurisdiction based on temporal grounds. It held that the dispute over the annulment of the arbitration award was "indistinguishable" from the underlying contractual dispute that had arisen in 2000, before the 2006 Turkey-Jordan BIT became effected. As a result, the Tribunal lacked jurisdiction over ATA's claims.[67] Nevertheless, in dicta the Tribunal considered whether "an international commercial arbitral award constitute[s] an investment that could be . . . expropriated . . . by a national court."[68] The Tribunal explained that Article 25(1) of the ICSID Convention leaves the term "investment" to be defined by the parties in the relevant BIT.[69] In this case, article I(2)(a) of the Turkey-Jordan BIT stated that a "claim to money" is distinguishable from the investment in the dispute that gave rise to it.[70] So was the arbitral award itself a "claim to money" falling within the definition of investment? The Tribunal cited *Saipem v. Bangladesh*, noting that the *Saipem* tribunal explicitly refrained from deciding whether an award itself comprised an investment.[71] However, the *Saipem* Tribunal considered that the "entire operation . . . including the related ICC Arbitration" was an "investment" under Article 25(1) of the ICSID Convention.[72] Applying this standard to the *ATA* case, the *ATA* Tribunal noted that if it had had jurisdiction over the annulment claim, the ATA commercial arbitral award

65. *Id.* at ¶ 37.
66. *Id.* at ¶¶ 63-64.
67. *Id.* at ¶ 95.
68. *Id.* at ¶ 110.
69. *Id.* at ¶ 111.
70. *Id.* at ¶ 112.
71. *Id.* at ¶ 113.
72. *Id.* at ¶ 114.

would have been part of an "entire operation" and would have qualified as an investment under the ICSID Convention.[73]

On the second issue, the Tribunal ruled that the extinguishment of the arbitration agreement voided the right to arbitrate. This right to arbitrate is a distinct "investment" under the definition in the applicable BIT, as it is a "claim to . . . any other right to legitimate performance having financial value related to an investment."[74] This right was annulled by the Jordanian Court of Cassation after the BIT had already entered into force.[75] The Tribunal held that the dispute was in its jurisdiction,[76] and ruled that extinguishing the arbitration agreement between ATA and APC had violated the Turkey-Jordan BIT.[77] The Tribunal upheld ATA's claim and ordered the Jordanian courts to "immediately and unconditionally" terminate their long-standing interference with ATA's rights, allowing ATA to proceed with arbitration.[78]

This landmark case highlights several issues. First, it characterizes the retroactive extinguishment of an arbitration agreement as contrary to the "fair and equitable treatment" standard.[79] Such actions constitute a breach of Article II of the New York Convention, under which States are obliged to recognize valid arbitration agreements.[80] This situation differs from *Saipem v. Bangladesh*, which also dealt with Article II of the New York Convention.[81] In *Saipem*, the tribunal found the arbitration agreement was expropriated due to the interference in the arbitration proceedings by the local courts. In contrast, the Jordanian courts directly extinguished ATA's arbitration agreement.[82] This is one of the few recent cases of investment arbitration in which an ICSID tribunal found that it had jurisdiction to rule on the behavior of national courts interfer-

73. *Id.* at ¶ 115.
74. *Id.* at ¶ 117.
75. *Id.* at ¶ 118.
76. *Id.*
77. *Id.* at ¶ 121. See also Joanna Dingwall & Hussein Haeri, *Jordan: ICSID Tribunal Finds Jordan in Violation of its Investment Treaty Obligations*, 13 INT'L ARB. L.REV. 4 (2010), for a report on *ATA v. Jordan* by two of the counsels representing ATA in the dispute.
78. *ATA v. Jordan*, at ¶ 132.
79. Dingwall and Haeri, *supra* note 77.
80. *ATA v. Jordan*, at ¶ 124.
81. Dingwall and Haeri, *supra* note 77.
82. *Id.*

ing in a commercial arbitration proceeding. Just as in *Saipem*, an ICSID tribunal has expanded its jurisdiction to ruling on domestic courts' supervisory role in the process of recognizing and enforcing commercial arbitration awards.

D. Frontier v. Czech Republic

In *Frontier v. Czech Republic*,[83] the Tribunal had to decide whether the Czech courts' refusal to recognize and enforce a foreign arbitral award on grounds of public policy under the New York Convention amounted to a breach of the Canada-Czech Republic BIT.

Frontier, a Canadian company, applied to the Czech courts to enforce the interim and final awards it had obtained in a Stockholm arbitration against Moravan-Aeroplanes ("MA"), a Czech company.[84] However, before the awards were rendered, MA was declared bankrupt. The Czech court refused to recognize or enforce the awards, relying on the public policy exception provided for in Article V(2)(b) of the New York Convention.[85] Frontier claimed that the Czech court's wrongful refusal to enforce the awards amounted to a breach of the Czech Republic's obligations under the Canada-Czech Republic BIT,[86] specifically the obligation to provide fair and equitable treatment and full protection and security to Frontier's investment. On December 3, 2007, Frontier initiated arbitration proceedings against the Czech Republic, governed by the rules of UNCITRAL.[87]

The Tribunal dismissed Frontier's claim and held that the Czech courts' refusal to recognize and enforce the final award in full did not violate the BIT. The Tribunal first considered whether the Czech courts' refusal amounted to an abuse of rights contrary to the international principle of good faith, *i.e.*

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83. Frontier Petroleum Services Ltd. v. Czech Republic, UNCITRAL (Canada-Czech Republic BIT), PCA, Final Award, Nov. 12, 2010 [hereinafter *Frontier v. Czech Republic*].

84. *Id.* at ¶ 143.

85. *Id.* at ¶¶ 470-71. The public policy exception of the New York Convention allows domestic courts to refuse to enforce arbitral awards if such enforcement would be contrary to the public policy of their country.

86. Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investment, Can.-Czech Rep., Nov. 15, 1990.

87. *Frontier v. Czech Republic*, at ¶ 3.

"[whether] the interpretation given by the Czech courts to the public policy exception in Article V(2)(b) of the New York Convention made in an arbitrary or discriminatory manner or did it otherwise amount to a breach of the fair and equitable treatment standard."[88] The Tribunal explained that although Article V(2)(b)'s reference to "public policy" refers to international public policy, it is widely accepted that this is a reference to the particular *national* conception of international public policy.[89] In other words, States have a certain margin to define their own standards of what exactly falls under international public policy.[90] Therefore, it is sufficient to determine whether the Czech courts' decision was *reasonably tenable* and made in *good faith.*[91] In its assessment, the Tribunal referenced French and German courts that have found equal treatment of creditors in bankruptcy proceedings to be a principle of public policy sufficient to refuse enforcement of arbitral awards under the New York Convention.[92] Therefore, the Tribunal found the substantive interpretation of the international public policy adopted by the Czech courts to be "reasonably tenable."[93] Regarding the alleged breach of the fair and equitable treatment standard as provided for in the BIT, the Tribunal held that there was no indication that the courts acted either arbitrarily, discriminatory, or in bad faith.[94] As a result, the Tribunal ruled the Czech Republic had not violated its obligations under the BIT. In conclusion, the Tribunal in *Frontier v. Czech Republic* held that unless the conduct of local courts in refusing to enforce an arbitral award on public policy grounds is arbitrary, discriminatory, or made in bad faith, the refusal is not a breach of the applicable BIT.[95]

88. *Id.* at ¶ 525.

89. *Id.* at ¶ 526.

90. *Id.* at ¶ 527(citing FOUCHARD, GAILLARD & GOLDMAN, *supra* note 4, ¶ 1712).

91. *Frontier v. Czech Republic,* at ¶ 527.

92. *Id.* at ¶ 528.

93. *Id.* at ¶ 529.

94. *Id.*

95. *See also* Promod Nair, *State Responsibility for Non-Enforcement of Arbitral Awards: Revisiting Saipem Two Years On,* KLUWER ARB. BLOG, *available at* http://kluwer.practicesource.com/blog/2011/state-responsibility-for-non-enforcement-of-arbitral-awards-revisiting-saipem-two-years-on/.

E. GEA v. Ukraine

In *GEA v. Ukraine*,[96] the important question was whether the denial by the Ukrainian courts to enforce an ICC Award rendered in favor of Group Aktiengesellschaft ("GEA"), resulted in Ukraine's breach of the Germany-Ukraine BIT.[97] To determine its jurisdiction, the ICSID Tribunal first considered whether the ICC Award itself constituted an "investment" under the Germany-Ukraine BIT or under Article 25(1) of the ICSID Convention.

In 1995, a predecessor from GEA entered into a contract with Oriana, a Ukrainian state-owned oil refinery, regarding the supply of naphtha fuel.[98] In late 1997, one of GEA's representatives was sent to inspect the Oriana operations and was shot in the kneecap. Shortly thereafter, GEA discovered that 125,000 tons of naphtha fuel supplied to Oriana were missing.[99] The parties negotiated a resolution to this dispute, resulting in a Settlement Agreement and a Repayment Agreement in which Oriana agreed to pay US$27.6 million in compensation.[100] Both agreements contained an arbitration clause designating arbitration under the ICC rules.[101] A dispute arose between the two parties, and in 2002, the ICC rendered an award largely in favor of GEA.[102] When GEA attempted to enforce the award in Ukraine, Ukrainian courts refused the enforcement, agreeing with Oriana that the Repayment Agreement was not signed by an authorized person.[103] The agreement should have been signed by the president of the company, but it did not occur.

On October 24, 2008 GEA initiated an ICSID arbitration against Ukraine, claiming that refusal by the Ukrainian courts to enforce the ICC award should be attributed to Ukraine as a breach of their obligations under the Germany-Ukraine

96. GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16 (Mar.31, 2011) [hereinafter *GEA v. Ukraine*].

97. Agreement Concerning Promotion and Mutual Protection of Investment, Ger.-Ukr., Feb. 15, 1993 (entered into force June 29, 1996).

98. *Id.* at ¶ 44.

99. *Id.* at ¶¶ 46-47.

100. *Id.* at ¶¶ 51-52.

101. *Id.* at ¶¶ 51-53.

102. *Id.* at ¶¶ 62-63.

103. *Id.* at ¶ 65.

BIT.[104] However, unlike the Tribunals in *Saipem v. Bangladesh* and *ATA v. Jordan*, the Tribunal in *GEA v. Ukraine* ruled that a commercial arbitral award did not constitute a protected investment under the Germany-Ukraine BIT, or as defined in Article 25(1) of the ICSID Convention.[105] The Tribunal found that an award in itself does not constitute an investment. Even if the award determined the rights and obligations arising out of an investment, it remained "analytically distinct."[106] The award itself "involves no contribution to, or relevant economic activity within Ukraine," and is therefore not an investment.[107] The Tribunal further explained that failure to enforce an award could establish expropriation (as occurred in *Saipem v. Bangladesh*) only if the conduct of national courts is "egregious".[108] In *GEA v. Ukraine* the Tribunal found no evidence that the actions taken by the Ukrainian courts were "egregious" or "deliberately taken to thwart GEA's ability to recover on the ICC Award".[109]

The Tribunal clearly departs from earlier decisions rendered in *Saipem v. Bangladesh* and *ATA v. Jordan*, where Tribunals held that an arbitral award constituted part of the "entire operation" forming an investment and thus fell within the definition of "investment." The reactions to the *GEA* award have been mixed. Some commentators have supported the outcome, while noting disappointment that the *GEA* Tribunal stopped short in its analysis by not acknowledging that the reason for not determining the ICC Award as an "investment" was to avoid transforming international commercial arbitration into the field of investor-state arbitration.[110] In contrast, in the next case a tribunal ruling on a similar issue explicitly referred to *GEA v. Ukraine* as an "incorrect departure from the developing jurisprudence."[111]

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104. *GEA v. Ukraine*, at ¶ 87.

105. *Id.* at ¶ 162.

106. *Id.* at ¶¶ 161-62.

107. *Id.* at ¶ 162.

108. *Id.* at ¶¶ 232-34.

109. *Id.* at ¶ 236.

110. Martinez-Fraga & Samra, *supra* note 48, at 446.

111. White Indus. Austl. Ltd. v. Republic of India, UNCITRAL Final Award at ¶ 7.6.8 (2011), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf [hereinafter *White Industries*].

F. White Industries v. India

In *White Industries v. India*,[112] the main subject of the dispute was whether the unsuccessful attempts by White Industries Australia Limited ("White") to enforce an ICC Award before the Indian courts constituted a breach of the Republic of India's ("India") obligations under the Australia-India BIT.[113]

White entered into a contract with Coal India Limited ("Coal India") regarding the development of a coal mine in India.[114] Disputes relating to bonus and penalty payments as well as tot the quality of the extracted coal arose, and in 1999 White initiated arbitration proceedings at the ICC.[115] In 2002, the ICC Tribunal ruled in favor of White ("ICC Award").[116] Shortly thereafter, Coal India applied to the High Court at Calcutta to have the ICC award set aside.[117] White then applied to the High Court at New Delhi to enforce the ICC award.[118] The High Court of Calcutta rejected White's application to dismiss the set aside proceedings, and it was not until January 2008 that the Supreme Court of India heard White's appeal of the High Court's decision.[119] However, the two judges that heard the appeal merely referred the matter to another bench of three judges.[120] In July 2010, the appeal had still not been reheard. Also, the enforcement proceedings in Delhi had been stayed since March 2006.[121] Therefore, on July 27, 2010, White initiated an UNCITRAL investment arbitration against India for a breach of their obligations under the Australia-India BIT.

An important question regarding the jurisdiction of the UNCITRAL Tribunal was whether the ICC Award qualified as

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112. *Id.*

113. Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, Austl.-India, Feb. 26, 1999, http://unctad.org/sections/dite/iia/docs/bits/australia_india.pdf [hereinafter *Australia-India BIT*].

114. *White Industries*, at ¶ 3.2.13.

115. *Id.* at ¶¶ 3.2.24-25; 3.2.29.

116. *Id.* at ¶ 3.2.33.

117. *Id.* at ¶ 3.2.35.

118. *Id.* at ¶ 3.2.36.

119. *Id.* at ¶¶ 3.2.35-.61.

120. *Id.* at ¶ 3.2.62.

121. *Id.* at ¶ 3.2.60.

an "investment" as defined in the BIT. Article 1 of the BIT defined "investment" as "every kind of asset . . . invested by an investor of one Contracting Party in the territory of the other Contracting Party," including the "(iii) right to money or to any performance having a financial value, contractual or otherwise; and (iv) business concessions and any other right required to conduct economic activity and having economic value conferred by law or under a contract."[122] Since this was not an ICSID arbitration, the requirements of Article 25(1) of the ICSID Convention on the definition of "investment" were inapplicable. The Tribunal held that the Contracting Parties' definition of "investment" evidences that the BIT would capture investments in the broadest sense.[123] The mining contract between White and Coal India conferred on White a "right to money" for the purposes of sub-paragraph (iii), as well as a right to "conduct economic activity," as in sub-paragraph (iv). The contract thus constituted an investment under the BIT.[124] The Tribunal further ruled that the *Salini* test[125] did not apply in this case as this test was developed in order to determine whether an "investment" had been made for the purposes of the ICSID Convention.[126] White Industries was a UNCITRAL arbitration, not an ICSID arbitration. Note that in *Romak v. Uzbekistan*, (*infra* para. IV.(a)), the Tribunal ruled that the Salini-test could be equally applied to interpret the definition of 'investment' under a BIT, even though the case was not brought under the ICSID Convention but before an UNCITRAL Tribunal. It is the author's opinion that the tribunal in *Romak* erred in its analysis in this respect, and that the tribunal in *White Industries* rightfully determined that the *Salini*-test, if relevant, should only be applied in ICSID cases since the test was construed for the interpretation of Article 25(1) of the ICSID Convention.

The mining contract between White and Coal India was an "investment" under the BIT definition. How about the ICC Award rendered pursuant to this contract? On this point, the Tribunal ruled that the ICC Award was part of the original in-

122. *Australia-India BIT*, at 1(c)(i)-(c)(iv).
123. *White Industries*, at ¶ 7.4.5.
124. *Id.*
125. *See infra*, at Part IV.(b) for an explanation of the *Salini* test.
126. *Id.* at ¶¶ 7.4.8-.9.

vestment. The Tribunal cited the *Saipem* tribunal that had reached a similar conclusion when it held that:[127] "[t]he rights embodied in the ICC Award were not created by the Award but arise out of the Contracts [and the] ICC Award crystallized the parties' rights and obligations under the original contract."[128] Moreover, the Tribunal in *White Industries* mentioned the reasoning employed by the *Chevron* tribunal,[129] which characterized an arbitral award as "continuing" an investment under a contract.[130] Although the *Chevron* case did not involve domestic courts interfering in a commercial arbitration, this case has established several legal standards that are of great importance for the further development of the case law on this topic.[131]

As a result, the *White Industries* tribunal did not characterize the award *itself* as an investment, but instead extended BIT protections to the continuing interests the investor held in the original investment, *i.e.* the contract. Thus, the Australia-India BIT protected White's rights under the ICC Award as "a continuation or transformation of the original investment."[132] Remarkably, the *White Industries* tribunal also expressed displeasure with the findings of *GEA v. Ukraine* where the Tribunal had found that "the ICC Award – in and of itself – cannot constitute an investment,"[133] and described *GEA v. Ukraine* as an "incorrect departure from the developing jurisprudence."[134]

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127. *Id.* at ¶ 7.6.3.

128. *Saipem v. Bangladesh*, at ¶ 127.

129. *White Industries*, at ¶ 76 n. 37 (citing Chevron Corp. v. Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Interim Award, ¶ 298 (Dec. 1, 2008) [hereinafter *Chevron v. Ecuador I*]).

130. *Chevron v. Ecuador I*, at ¶ 7.6.5.

131. Chevron claimed that delays of the Ecuadorian courts in ruling on certain commercial disputes between Chevron and the government of Ecuador were a breach of Ecuador's obligations under the U.S.-Ecuador BIT and under international law. The UNCITRAL Tribunal ruled that because of the undue delays of the Ecuadorian courts in allowing the cases to proceed, Ecuador failed to provide "effective means" of enforcing rights with respect to investment agreements in the sense of Article II(7) BIT and thus breached their obligations under the U.S.-Ecuador BIT.

132. *Chevron v. Ecuador I*, at ¶ 7.6.8.

133. *GEA v. Ukraine*, at ¶ 161.

134. *White Industries*, at ¶ 7.6.8.

On the merits, White argued that India had breached its obligation under the BIT to accord fair and equitable treatment to its investments.[135] White claimed that the Indian courts had frustrated White's legitimate expectations, and denied White justice.[136] With respect to White's legitimate expectations, the Tribunal held that White's expectations had to be based on the present condition of India's judiciary and not on White's expectations of India's legal obligations under the New York Convention.[137] The Tribunal emphasized that only the factual situation within India at the time of White's investment, not India's alleged obligations under international law, should be taken into account.[138] The fact that at the time of the investment foreign arbitral awards were regularly being set aside in already overburdened Indian courts should have tempered White's expectations.[139] The Tribunal dismissed White's denial of justice claim, explaining that the proceedings before the High Court had not moved at an unreasonable pace.[140] The Tribunal pointed out that India's status as a developing country with a seriously overstretched judiciary had to be considered.[141] As a result, the Tribunal ruled that although the four-year delay before the Supreme Court was regrettable, it did not amount to "a particular serious shortcoming" or "egregious conduct that 'shocks or at least surprises, a sense of judicial proprietary.'"[142]

The Tribunal then turned to the "effective means" standard. Although this standard was not provided for in the Australia-India BIT, the Tribunal used the Most-Favored-Nation (MFN) clause to make the "effective means" clause from the

135. *Id.* at ¶¶ 4.3.1-.2.

136. *Id.* at ¶ 4.3.2.

137. *Id.* at ¶¶ 10.3.1-.2.

138. *Id.* at ¶ 10.3.7.

139. *Id.* at ¶¶ 10.3.13-.14.

140. *Id.* at ¶¶ 10.4.1-.24.

141. *Id.* at ¶¶ 10.4.18.

142. *Id.* at ¶ 10.4.23. Here, the Tribunal applied the test for "denial of justice" as established in *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 34877, Partial Award, ¶ 244, (Mar. 30, 2010) [hereinafter *Chevron v. Ecuador II*], which emphasized that "the test for establishing a denial of justice sets [. . .] a high threshold. It [. . .] requires the demonstration of 'a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.'" (citations omitted).

India-Kuwait BIT[143] equally applicable to the investments made under the Australia-India BIT.[144] Next, it referred to the analysis of the meaning and application of the "effective means" standard as produced by the *Chevron II* Tribunal,[145] and agreed *inter alia*:[146]

(i) That the "effective means" standard creates a 'distinct and potentially less demanding test' compared to the "denial of justice" standard;[147]
(ii) That the effective means standard 'requires both that the host State establishes a proper system of laws and institutions and that those systems work effectively in any given case;'[148]
(iii) That undue delay in the host State's courts may amount to a breach of the effective means standard;[149]
(iv) That a claimant does not need to prove that it has exhausted local remedies, but he must, however, adequately utilize the means available to enforce its rights. It will be up to the host State to prove that local remedies are available and up to the claimant to show that those remedies were ineffective or futile;[150] and
(v) That whether a delay before the courts will breach the standard depends on the facts of the case. As with a denial of justice under customary international law, factors that may be taken into account are the complexity of the case, the behavior of the litigant in-

143. Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investments, art. 4 ¶ 6, Nov. 27, 2001 (entered into force Jun. 28, 2003), *available at* http://unctad.org/Sections/dite/iia/docs/bits/India_Kuwait.pdf.

144. *White Industries*, at ¶¶ 11.2.1-.9.

145. *Id.* at ¶¶ 11.3–.4.15, citing *Chevron v. Ecuador II*, *supra* note 143, at ¶¶ 244-63.

146. For a discussion of the Tribunal's summary, *see also* Patricia Nacimiento and Sven de Lange, White Industries Australia Limited v. The Republic of India, at III, ICSID REVIEW (2012), *available at* http://icsidreview.oxfordjournals.org/content/early/2012/11/29/icsidreview.sis022.

147. *White Industries*, at ¶ 11.3.2(a).

148. *Id.* at ¶ 11.3.2(b).

149. *Id.* at ¶ 11.3.2(d).

150. *Id.* at ¶ 11.3.2(g).

> volved, the significance of the interests at stake in the case and the behavior of the courts itself.[151]

In applying these factors, the Tribunal held that the enforcement proceedings before the High Court in New Delhi did not constitute an undue delay and were not a breach of the "effective means" standard.[152] However, the Tribunal reached a different conclusion regarding the set aside proceedings before the Calcutta High Court and its relating appeal at the Supreme Court the Tribunal. According to the Tribunal, although the nine years of proceedings and the inability of the Supreme Court to hear White's jurisdictional appeal for over five years did not amount to a "denial of justice", it did amount to an undue delay, and constituted a breach of India's obligation to provide White with "effective means" of asserting its claims and enforcing its rights.[153] The Tribunal awarded White Industries A$4.08 million, the amount due under the initial ICC award, plus interest.

G. Kaliningrad v. Lithuania

The following case deals with the same subject matter discussed in this paper, but in contrast to the former cases, which dealt with the question whether refusal to enforce the award could give rise to a claim under the BIT, in *Kaliningrad v. Lithunia*[154] the question was whether the actual enforcement of an arbitral award could constitute a breach of a BIT.[155]

This dispute arose when a company from Cyprus enforced a 2004 LCIA[156] award rendered against the Region of Kaliningrad ("Kaliningrad') by seizing a building located in Lithuania

151. *Id.* at ¶¶ 11.3.2(h)-(i).

152. *Id.* at ¶¶ 11.4.4-.15.

153. *Id.* at ¶ 11.4.19.

154. Kaliningrad Region v. Lithuania, ICC (Jan. 28, 2009).

155. This question was dealt with by an ICC arbitral tribunal of which the Award has remained unpublished. However, since the Region of Kaliningrad (part of the Russian Federation, hereafter Kaliningrad) applied to the Paris Court of Appeal to have the award set aside, some significant facts of the case have been revealed. See Cour d'Appel de Paris [CA] [regional court of appeal], PÔLE 1 - CHAMBRE 1, Nov. 18, 2010, no. 09/19535 (Fr.).

156. London Court of International Arbitration.

that was owned by the regional government of Kaliningrad.[157] The LCIA award was enforced through the Lithuanian courts after which the courts gave the order to seize the building. Kaliningrad challenged the ruling. Kaliningrad then initiated an investor-State arbitration against Lithuania, claiming that Lithuania had violated the Russia-Lithuania BIT[158] by expropriating property lawfully owned by the government of Kaliningrad.[159] In effect, Kaliningrad tried to hold Lithuania liable for the fact that the Lithuanian courts had complied with the New York Convention. Could this conduct of the Lithuanian courts establish an expropriation?

The Tribunal explained that if national courts complying with the New York Convention would lead to a finding of expropriation and thus a breach of the BIT, this would mean that the BIT would be viewed as mandating the Contracting States to breach their obligations under the New York Convention.[160] Rather, the Tribunal decided it did not have jurisdiction to review judgments of national courts on questions of enforcement and recognition of foreign arbitral awards under the New York Convention. After this ruling, the Government of Kaliningrad applied to the French Court of Appeal to have the award set aside. The French Court of Appeal dismissed Kaliningrad's claim and ruled that the enforcement of an international arbitral award did not amount to expropriation under a BIT.[161] The Tribunal noted that a BIT could not be

157. Luke E. Peterson, *Lithuania Prevails in Investor-State BIT Claim Brought by Russian Regional Government; ICC Tribunal Rules That Enforcement of Commercial Arbitration Award in Lithuania Cannot Be Challenged as an Expropriation Under BIT*, 4 IAREPORTER (Mar. 17, 2009), available at www.iareporter.com/downloads/20100107_6/download.

158. Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments, Russ. – Lith., Jul. 29, 1999 (entered into force May 24, 2004).

159. Peterson, *supra* note 157.

160. *Id.* at 5.

161. Cour d'appel [CA] [Regional Court of Appeal] Paris, 1, Nov. 18, 2010, no. 09/19535 (Fr.); *see also* James Clark, *Paris Court of Appeal Rules That Enforcement of an Arbitral Award Did Not Amount to Expropriation Under a BIT*, PRACTICAL LAW (Dec. 21, 2010), available at http://uk.practicallaw.com/7-504-3152?service=arbitration.

interpreted to hold a state liable for complying with its obligations under the New York Convention.[162]

V.
LIKELY IMPACT OF CASE LAW ON FUTURE CLAIMS

A. *Stare Decisis in International Investment Arbitration*

Although the ICSID regime does not provide for rules of stare decisis, there is certainly emerging case law in the field of investment treaty arbitration. Jan Paulsson stated at ICCA's 2006 Congress that the fact "that a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes."[163] Also Gabrielle Kaufmann-Kohler, one of the best known arbitrators in ICSID arbitrations, commented that "whilst tribunals agree that there is no doctrine of precedent per se, they also concur on the need to take earlier cases into account.[164] If we look at the cases discussed in this paper, all tribunals have cited other rulings of investment arbitration tribunals to support or clarify their holding. When concluding that rights under a contract can indeed be qualified as an "investment", the Tribunal in *White Industries* cited *Chevron v. Ecuador* and *ATA v. Jordan.*[165] The Tribunal in *Chevron v. Ecuador I* said that tribunals may have recourse, as a supplementary means of interpretation, not only to a treaty's "preparatory work" and the "circumstances of its conclusion," but also to other supplementary means of interpretation, including the awards of other tribunals.[166] So although there is currently no rule mandating stare decisis in international arbitration, tribunals seem to be moving towards it, or at least taking prior case law into consideration.

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162. Clark, *supra* note 161.

163. Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law, in* ICCA CONGRESS SERIES NO. 13, INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 879, 886 (Albert Jan van den Berg ed., Kluwer, 2007).

164. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT'L 3, 368 (2007).

165. *White Industries*, at ¶ 7.4.7.

166. *Chevron v. Ecuador I*, at ¶¶ 21, 121.

B. *Legal Standards Developed in Case Law*

Despite the different fact patterns in the cases mentioned above, and the disparate legal regimes under which these cases were argued, several standards emerge from the judgments of the several tribunals:

(I) Arbitral Award as an Investment?:
Although in *GEA v. Ukraine* the Tribunal explicitly stated that the commercial arbitral award did not constitute an "investment" for jurisdictional purposes of the investment treaty arbitration, the Tribunals in other cases appear to disagree with *GEA*. *White Industries* held that rights under a contract may qualify as an "investment," concurring with the holdings in *Chevron v. Ecuador* and *ATA v. Jordan*. In *Saipem v. Bangladesh*, the Tribunal held that the "entire operation . . . including the related ICC Arbitration" was an investment under Article 25(1) of the ICSID Convention. It thus appears that *GEA v. Ukraine* is a case dissenting from the case law developed in regard to this question, and it is likely that tribunals in future claims will side with the majority view expressed by the Tribunals in *White Industries*, *Saipem v. Bangladesh*, and *ATA v. Jordan*.

(II) Expropriation:
In *Saipem v. Bangladesh*, the Tribunal held that the interference by the Bangladeshi courts in the ICC arbitration was illegal, and therefore constituted an expropriation and thus a breach of the relevant BIT. The tribunal specified that the actions of the court were not a direct expropriation, but "measures having similar effects" because the court actions deprived Saipem of the benefit of the arbitral award.[167] It is important to note that in *Saipem* it was the extreme facts of the case that led the Tribunal to find a violation of the expropriation clause. Thus, given the peculiar facts in *Saipem*, it is unlikely that future claims of judicial interference in the arbitration proceedings will meet the high threshold necessary to constitute expropriation.

(III) "Effective Means" standard:

167. *Saipem v. Bangladesh*, *supra* note 23, at ¶ 129.

In *White Industries* the Tribunal stated that the "effective means" standard creates a distinct and potentially less demanding test compared to the denial of justice standard. The Tribunal held that undue delay by domestic courts can indeed result in a breach of providing the foreign investor with "effective means" of asserting claims and enforcing their rights.[168]

(IV) Denial of Justice:
In *White Industries*, the Tribunal explained that the test for establishing a denial of justice sets a high threshold. Apart from requiring the exhaustion of local remedies, it requires the demonstration of "a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety."[169] Therefore, fighting the conduct of domestic courts through a denial of justice claim will be a difficult challenge for investors seeking compensation. A claim under the "effective means" standard has a lower threshold and thus will likely be easier to succeed before an investment arbitration tribunal.

C. *Investment Arbitration as a Supervisory Mechanism*

By providing jurisdiction to analyze whether domestic courts are following the rules of the New York Convention, investment arbitration tribunals have taken on the role of supervisory institutions. Even in cases where the tribunals found no evident violation of the New York Convention, the tribunals used other clauses such as the "expropriation" clause found in most BITs to claim supervisory power to condemn any wrongful actions of domestic courts. However, should investment arbitration function as the appeal mechanism for private parties' disagreement with domestic courts' rulings? Such an appellate venue may be said to be counterproductive to the initial purpose of the New York Convention itself, as it undermines its goal to create an adequate and reliable international regime for international commercial arbitration that allows only domestic courts to have such supervisory power over the recogni-

168. *Chevron v. Ecuador I*, *supra* note 130, at ¶ 250; *White Industries*, at ¶¶ 11.3.2(a), 11.4.19.

169. *Chevron v. Ecuador II*, *supra* note 142, at ¶ 244; *White Industries*, at ¶ 10.4.23.

tion and enforcement of these judgments. Since it remains unclear when an award is final and when appellate review is possible, giving investment arbitration tribunals the power to oversee these supervisory powers held by domestic courts does not only exceed the initial jurisdiction of the tribunals, it also creates greater uncertainty for commercial parties facing international arbitration.

On the other hand, it is also important to be realistic. In our increasingly globalized world, international politics aren't enough to effectively and efficiently protect foreign investors against abusive domestic courts. State sovereignty prevents the possibility for private parties that are wrongfully denied their commercial arbitration award by local courts to appeal anywhere outside the domestic court system. Even assuming the majority of courts worldwide function in a fair and non-arbitrary manner, some courts in the world harbor corruption or prejudice against particular foreign parties. In such cases, the system needs a mechanism for protection of such foreign parties from the abuse by local courts when it comes to the ability of the parties to engage in fair commercial arbitration proceedings. Therefore, although not initially established as an appeal mechanism, it is essential for international investment arbitration to be able to function as a supervisory power over domestic courts' conduct. However, this supervisory power should be applied cautiously, to be used only in cases where the interference of local courts is extreme, or the right to arbitration has been denied to private parties in an illegal manner.

VI.
CONCLUSION

Despite some inconsistencies, the awards discussed in this paper ultimately appear to support the theory that investment treaty arbitration provides an additional forum or an *ultimum remedium* to investors if the local judiciary has interfered with the arbitral process or with enforcing the arbitral award.[170] It is, however, questionable whether the possibility of being an additional forum is outside the scope of investment arbitration. In effect, the investment arbitration tribunals will now be able to supervise the conduct of domestic courts, when courts

170. *See also* Mistelis, *supra* note 8.

are using their supervisory jurisdiction to review the enforcement of commercial arbitral awards. Martinez-Fraga is one of the commentators that argue it is undesirable to afford investment arbitration with such a supervisory-supervisory jurisdiction.[171] However, it is the author's opinion that international politics on its own cannot effectively and efficiently protect foreign investors against abusive domestic courts. To maintain the confidence of foreign investors engaging in international trade and transactions, and to maintain confidence in international commercial arbitration as an effective dispute resolution mechanism for international business disputes, it is vital that investment arbitration tribunals are given such supervisory jurisdiction on domestic courts' conduct when enforcing arbitral awards.

171. Martinez-Fraga & Samra, *supra* note 48.