Commercial Arbitration Before International Courts and Tribunals – Reviewing Abusive Conduct of Domestic Courts

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I. THE TOPIC AND THE CHALLENGES

On observing the international dispute settlement scene in recent years, one is intrigued by the fact that international courts and tribunals have increasingly been asked to rule on national court decisions relating to commercial arbitrations. These national decisions mainly deal with the enforcement of arbitration agreements or the annulment or enforcement of arbitral awards. They apply the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] and/or national arbitration laws. The international courts and tribunals seized of claims involving these national court decisions are primarily investor-state arbitral tribunals[2] and human rights courts,[3] and, in one less recent instance, the Permanent Court of International Justice (PCIJ).[4]

The phenomenon is intriguing because it challenges traditional conceptions in at least two respects. First, it challenges the understanding of the overall architecture of international commercial arbitration. The term 'architecture' is borrowed from W. Michael Reisman, who has written extensively on the topic,

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 Jun. 1958, 330 UNTS 3 (hereinafter *New York Convention*).

2 See the cases discussed *infra* at II(b).

3 See the cases discussed *infra* at II(a).

4 See *Société Commerciale de Belgique (Belg. v. Greece)*, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

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including an article on some of the issues addressed in this contribution.[5] In fact, the traditional and most widely accepted conception of the architecture of international commercial arbitration builds on the finality of arbitral awards, with courts at the seat of the arbitration (sometimes called courts of primary jurisdiction) being competent to annul awards and courts at the place of enforcement (courts of secondary jurisdiction) being competent to rule on the enforcement or non-enforcement of awards in that particular forum.[6] This structure rests, above all, on the New York Convention as well as on national arbitration legislation.

This traditional architecture is a closed one in the sense that there is no recourse against a final decision by the courts at the seat of the arbitration on the annulment of an award. Similarly, there is no recourse against the final decision of the courts at the place of enforcement. The New York Convention, which has no dispute resolution clause, is silent when it comes to determining what kind of remedy (if any) an aggrieved party may have in case of violation of the treaty by a contracting state's court. Does this new development, where domestic decisions concerning commercial arbitration are brought before international courts or tribunals open up this closed system? In other words, does this development point to a shift from the conception which traditionally assigns the last word to national courts (at the annulment or enforcement stage) towards a new role for international courts or tribunals called to exercise a sort of 'super-supervisory' role over domestic courts' conduct relating to commercial arbitration?[7]

The second and closely related question goes to the organization of international dispute settlement. At least in its current design, this organization appears considerably fragmented and far from a 'system' in the meaning of a set of interdependent or interacting components forming an integrated whole.[8] Despite undeniable, yet marginal, interactions among these components,[9] different types of disputes – investment, trade, commercial, human rights disputes – are each referred to special dispute resolution mechanisms, investment arbitration, the dispute resolution system of the World Trade Organization, international

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5 See W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 Am. Rev. Intl. Arb. 5 (2010); W. Michael Reisman, *Investment and Human Rights Tribunals as Courts of Last Appeal in International Commercial Arbitration*, *in* LIBER AMICORUM EN L'HONNEUR DE SERGE LAZAREFF 521 (Laurent Lévy & Yves Derains, eds., 2011); W. Michael Reisman & Brian Richardson, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, Draft circulated at ICCA Geneva 2011 (on file with the author).

6 There are, of course, other schools of thought on the architecture of international arbitration. These will not be further taken into account here, because they are not reflective of the generally accepted conceptions of international arbitration. One of those school of thoughts is the French theory on the existence of an arbitral order, which found its most elaborate expression in Emmanuel Gaillard's recent writings. See, *e.g.*, Emmanuel Gaillard, *Legal Theory of International Arbitration* (2010).

7 Or 'supervisory-supervisory' in the terms of W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 Am. Rev. Intl. Arb. 5, 36–44 (2010).

8 See in particular, Pierre-Marie Dupuy, *L'unité de l'ordre juridique international*, 297 *Recueil des cours* (2002), esp. 460-478.

9 For instance, investment tribunals repeatedly cite jurisprudence of the International Court of Justice, or human right issues come up in any type of dispute settlement.

commercial arbitration and regional human rights courts. Does the fact that domestic decisions on commercial arbitration are now brought before international courts and tribunals build bridges among the components of this fragmented system? Does it work towards defragmentation or integration of the system?

Having set out the main challenges which these recent developments pose, this article will first briefly discuss certain cases where the intersection between a commercial arbitration dispute and a different dispute settlement mechanism may be observed (II). In this context, it will first look at cases brought before the European Court of Human Rights (II.(a)) and before investment tribunals (II.(b)). In each domain, certain cases will exemplify possible scenarios and relevant issues. The unique case before the PCIJ will also be briefly analysed (II.(c)). The following part of this contribution then discusses, more particularly, one of the dispute settlement mechanisms where intersection can be increasingly observed, namely investment arbitration (III). The recourse to investment arbitration as a platform to resolve issues arising out of national court decisions on commercial arbitrations raises several questions, relating both to the jurisdiction of investment tribunals (III.(a)) as well as the merits of these claims (III.(b)). This contribution then draws some conclusions (IV).

II. TYPOLOGY OF COMMERCIAL ARBITRATION ISSUES BROUGHT BEFORE INTERNATIONAL COURTS AND TRIBUNALS

The best way of understanding the extent to which a court decision may be brought before an international dispute settlement mechanism is to refer to concrete examples that have emerged till date.

(a) Kin-Stib v. Serbia (Gambling in Belgrade)

In the late 1980s, Kin-Stib, a Congolese company, entered into a joint venture with a Serbian state-owned agency for the establishment and operation of a casino in a state-owned hotel in Belgrade. The casino opened in 1990 and closed three years later as a result of financial difficulties. Kin-Stib initiated domestic arbitration seeking repossession of the casino and compensation for breach of contract. It obtained an award in its favour. Serbia complied with the payment obligations, but not with the repossession. As the hotel owner was bankrupt, the repossession was transformed into a money award under local enforcement laws. However, in spite of enforcement procedures, the money award remained unpaid. Exactly ten years after the initiation of the arbitration, Kin-Stib decided to file an application before the European Court of Human Rights seeking an order for payment of the outstanding part of the arbitral award.[10] The application was based on Article 1(1)

[10] Case of *Kin-Stib and Majkic v. Serbia* (Application no. 12312/05), Judgment, 20 Apr. 2010 (*Kin-Stib*). See also Yaraslau Kryvoi, *Introductory Note to European Court of Human Rights: Kin-Stib & Majkic v. Serbia*, 49 Intl. Leg. Materials 1183 (2010).

of Protocol No. 1 to the European Convention of Human Rights (ECHR), which guarantees the peaceful enjoyment of one's possessions.[11]

The European Court of Human Rights held that a claim – including a claim arising out of an arbitral award – can constitute a possession under Protocol No. 1 'if it is sufficiently established to be enforceable'.[12] It observed that a State had a 'responsibility to make use of all available legal means at its disposal in order to enforce a binding arbitration award'.[13] It then found that the Serbian authorities had not taken all necessary steps to enforce the award and held that such failure was a violation of Protocol No. 1.[14] Consequently, it made an order for payment of the outstanding amounts under the arbitral award.[15]

In holding that a claim arising out of an arbitral award may constitute a 'possession' under Protocol No. 1, the Court confirmed its earlier case law. In particular, relied on *Stran Greek Refineries v. Greece.*[16] There, the Court held that a state could not pass a law which had the effect of voiding an arbitration agreement.[17] It recalled the principle of the separability of an arbitration clause,[18] relied on a PCIJ precedent (as well as the *Lena Goldfields* and *Texaco* arbitral awards), and held that 'the unilateral termination of a contract does not take effect in relation to certain essential clauses of the contract, such as the arbitration clause. To alter the machinery set up by enacting an authoritative amendment to such a clause would make it possible for one of the parties to evade jurisdiction in a dispute in respect of which specific provision was made for arbitration'.[19]

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11 Incidentally, and subject to there being a BIT in force, Kin-Stib could also have started an investment arbitration. It was a foreigner and had made an investment in the host state, which investment gave rise to a claim. This shows that human rights claims can, in certain cases, be an alternative to an investment arbitration. See in particular Ursula Kriebaum, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?* in *Human Rights in International Investment Law and Arbitration* 219–245 (Pierre-Marie Dupuy et al. eds., 2009); Ursula Kriebaum, *Privatizing Human Rights. The Interface between International Investment Protection and Human Rights*, in *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* 165–189 (August Reinisch & Ursula Kriebaum eds., Eleven International Publishing, 2007).

12 *Kin-Stib*, para. 83.

13 *Ibid.*

14 *Ibid.*, paras. 81–85.

15 Although the dispute was international in nature because of the foreign nationality of Kin-Stib, the award was made in Serbia. Consequently, it did not fall under the ambit of the New York Convention. Thus, Serbia was blamed for the non-enforcement of a domestic (rather than foreign), award. This, however, does not affect the relevance of the case for the present discussion, because it deals with a court's misbehaviour relating to an arbitration which was, in essence, international.

16 *Case of Stran Greek Refineries and Stratis Andreadis v. Greece* (Application no. 13427/87), Judgment, 9 Dec. 1994 (*Stran Greek*).

17 See in particular, *ibid.*, paras. 59–62. The Court made the following observations: 'The Court agrees with the Government that it is not its task to approve or disapprove the substance of [the arbitral] award. It is, however, under a duty to take note of the legal position established by that decision in relation to the parties. According to its wording, the award was final and binding; it did not require any further enforcement measure and no ordinary or special appeal lay against it. [. . .] Accordingly, in the Court's view, [the right arising out of the award] constituted a "possession" within the meaning of Article 1 of Protocol No. 1'. *Ibid.*, paras. 61–62. This passage was quoted with approval by the Court in *Kin-Stib*, *supra* n. 9, at para. 83, as well as by the Arbitral Tribunal in *Saipem* (on which see *infra*, at II.(b)(iii)) in its Decision on Jurisdiction, at para. 103.

18 *Stran-Greek*, para. 73.

19 *Ibid.*, para. 72. For a similar constellation, see *Case of Regent Company v. Ukraine* (Application no. 773, 03), Judgment, 3 Apr. 2008 (dealing with non-enforcement of an arbitral award rendered by the International

(b) ATA v. Jordan (Death and Rebirth of an Agreement to Arbitrate)

While *Kin-Stib* provides an example of a human rights court dealing with the non-enforcement of a commercial arbitration award, *ATA v. Jordan* exemplifies a similar role played by an investment tribunal.

ATA, a Turkish consortium, entered into a construction contract with a Jordanian state entity.[20] A dispute arose after a dike built by the consortium broke. An arbitration under the contract in Amman resulted in an award in favour of ATA. The Jordanian entity filed an annulment action before a Jordanian court i.e., the court at the seat of the arbitration having primary jurisdiction. The court annulled the award on the ground that the arbitral tribunal failed to apply the law chosen by the parties.[21] The court also declared the 'extinguishment' – or the death – of the arbitration agreement based on a provision of Jordanian law under which 'the final decision nullifying the award results in extinguishing the arbitration agreement'.[22] Pertinently, this provision was introduced into the Jordanian legislation *after* the conclusion of the construction contract embodying the arbitration clause. The outcome of the court decision implied that the dispute had to be re-litigated in court. Accordingly, the Jordanian entity started a new action on the merits in the local courts.[23] Rather than defending the action in the local courts, ATA began an arbitration under the Jordan-Turkey bilateral investment treaty (BIT) at the International Centre for the Settlement of Investment Disputes (ICSID). It claimed that the annulment of the arbitral award and the extinguishment of the arbitration agreement breached the standards of protection contained in the BIT.

The ICSID tribunal denied jurisdiction on the issue of annulment for *ratione temporis* reasons, which are of no interest here.[24] In contrast, it accepted jurisdiction over the extinguishment claim. Surprisingly, without entering into a separate examination of the requirements of an investment under Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the tribunal considered that the arbitration agreement constituted an 'investment' under the BIT.[25] On the merits,

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Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. The Court found that Ukraine had violated Article 6(1) ECHR and Article 1 of Protocol No. 1). See also Sabine Konrad & Marcus Birch, *Non-Enforcement of Arbitral Awards: Only a Pyrrhic Victory?* 7 Transnatl. Dispute Mgt. (2010).

20 *ATA Construction, Industrial and Trading Company v. Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (*ATA*). All decisions in investment arbitration cases are available, unless otherwise indicated, at http://italaw.com.

21 *Ibid.*, paras. 46–54.

22 *Ibid.*, para. 54. See Art. 51 of the Jordanian Arbitration Law (Law no. 31 of 2001), quoted at para. 62 of the award, provides in its final sentence that: 'The final decision nullifying the award results in extinguishing the arbitration agreement'.

23 *Ibid.*, para. 55.

24 *Ibid.*, paras. 94–103.

25 *Ibid.*, paras. 110–120. The reasoning of the Tribunal is not entirely clear in this regard. The Tribunal first cited to *Saipem* (on which see *infra* at II.(b)(iii)) for the proposition that 'the Final Award at issue in the present arbitration would be part of an "entire operation" that qualifies as an investment' (*ibid.*, para. 115). Then, turning to the extinguishment claim, it analysed whether the right to arbitration was an 'investment' within the meaning of the BIT, which in its definition of 'investment' comprises 'claims to . . . any other rights to

the reasoning hinged on the retroactivity of the law providing for the extinguishment of the arbitration agreement. The tribunal concluded that if the law had existed when the parties entered into the arbitration agreement (i.e., when the parties chose the seat of the arbitration), then it may have been compatible with Article II of the New York Convention.[26] However, as the law did not exist at the time the parties entered into the arbitration agreement, its retroactive application resulted in a breach of the BIT.[27] The tribunal did not specify which BIT standard was breached. Granting a drastic relief, the tribunal ordered the 'restoration of the right to arbitrate' i.e., the re-birth of the arbitration clause, and the cessation of all local judicial proceedings.[28]

(c) Frontier Petroleum v. Czech Republic (Limits of the Public Policy Exception)

The preceding example dealt with an investment tribunal ruling on a national court decision on the enforceability of an *arbitration agreement.* This case involves an investment tribunal ruling on a national court decision on the enforceability of an *arbitral award.*

Here, a Canadian investor had entered into a joint venture with a Czech entity to invest in the aviation industry in the Czech Republic, and, in particular, to take over an insolvent aircraft manufacturer.[29] A dispute arose concerning the performance of the joint venture. Frontier initiated arbitration under the contract in Stockholm. Meanwhile, the Czech entity as well as the joint venture company were declared bankrupt. An award was issued in favour of Frontier in the Stockholm arbitration. Among other remedies, Frontier was granted a secured lien on all assets of the Czech entity and the joint venture company. The Czech courts refused enforcement of the award on the ground of public policy under the New York Convention. According to them, enforcement of the award would entail giving Frontier priority over the other creditors in the bankruptcy proceedings. This would breach the principle of equal treatment of creditors, a principle considered to be part of Czech international public policy under Article V(2)(b) of the New York Convention.

Following the refusal of enforcement, Frontier commenced an UNCITRAL investment arbitration under the Canada-Czechoslovakia BIT. It claimed that by

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legitimate performance having financial value related to an investment' (*ibid.*, para. 117). The Tribunal found 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"' (*ibid.*). On the characterization of an arbitration agreement as an investment, see *infra* at III.(a)(b).

26 *Ibid.*, para. 128 (noting that '[i]t is arguable (but the Tribunal takes no position on the point) 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.'

27 *Ibid.*, para. 128. See also *ibid.*, para. 121 (where 'the Tribunal finds that the extinguishment of the Claimant's right to arbitration by application of the last sentence of the 2001 Jordanian Arbitration Law was contrary to the Turkey-Jordan BIT.').

28 *Ibid.*, para. 131 and para. 133 for the *dispositif.*

29 *Frontier Petroleum Services Ltd v. Czech Republic*, PCA/UNCITRAL, Final Award, 12 Nov. 2010 (*Frontier*), *at* Oxford Rep. Intl. Inv. Claims [IIC] 465 (2010).

refusing to enforce the arbitral award, the Czech Republic had breached the fair and equitable treatment standard contained in the Treaty. After finding that there was an 'investment' for the purpose of jurisdiction (by reference to the initial contribution in cash into the joint venture),[30] the tribunal dismissed the respondent's argument that the arbitral tribunal lacked power to review a national court's decision rendered under the New York Convention. It considered that its role was 'to determine whether the refusal of the Czech courts to recognize and enforce the Final Award in full violate[d] Article III (1) of the BIT, i.e., the fair and equitable treatment standard'.[31] It went on to say that 'in order to answer this question the tribunal must ask whether the Czech courts' refusal amounts to an abuse of rights contrary to the international principle of good faith'.[32] Recognizing that '[s]tates enjoy a certain margin of appreciation in determining what their own conception of international public policy is'[33] the question, in the tribunal's view, was whether 'the decision by the Czech courts [was] *reasonably tenable* and made in *good faith*'.[34] The Frontier tribunal found that other national courts as well as scholars deemed the equal treatment of creditors to be part of international public policy under the New York Convention.[35] Accordingly, it concluded that the decision of the Czech courts was tenable.

(d) ...And Others

ATA and *Frontier* are just two illustrations of investment arbitration tribunals dealing with the enforcement of a commercial arbitration agreement and with an award. The last few years have seen several other cases raising similar issues. It is worth mentioning them here.

Saipem v. Bangladesh involved the conduct of domestic courts relating to an International Chamber of Commerce (ICC) arbitration seated in the respondent's capital, Dhaka.[36] During the ICC arbitration, the Bangladeshi courts intervened in several different ways, including issuing an injunction restraining Saipem from continuing with the ICC arbitration and by revoking the authority of the ICC tribunal. Once the ICC tribunal rendered its award, the courts ruled that there

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30 *Ibid.*, para. 231. The Tribunal noted that 'by refusing to recognize and enforce the Final Award in its entirety, the Tribunal accepts that Respondent could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its *original* investment.' (*ibid.*, emphasis added)

31 *Ibid.*, para. 525.

32 *Ibid.*

33 *Ibid.*, para. 527.

34 *Ibid.* (emphasis in the original).

35 *Ibid.*, paras. 528–530.

36 *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 Mar. 2007 (*Saipem Jurisdiction*); and Award, 30 Jun. 2009 (*Saipem Merits*). The author of this contribution was the President of the ICSID tribunal. For commentaries on *Saipem*, see Luca G. Radicati di Brozolo & Loretta Malintoppi, *Unlawful interference with International Arbitration by National Courts of the Seat in the Aftermath of Saipem v. Bangladesh*, *in* Liber Amicorum Bernardo Cremades 993 (M. Á. Fernández-Ballesteros & David Arias eds., 2010); Alexis Mourre & Alexandre Vagenheim, *Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem*, *in* Liber Amicorum Bernardo Cremades 843 (M. Á. Fernández-Ballesteros & David Arias eds., 2010).

'was no award in the eye of the law' which could either be set aside or enforced.[37] Saipem then initiated ICSID proceedings, by invoking the dispute resolution clause in the Italy-Bangladesh BIT.[38] The ICSID tribunal found that the investor's 'residual contractual rights under the investment as crystallized in the ICC award' constituted a property right that was susceptible of expropriation.[39] It held that the Bangladeshi courts had taken measures amounting to unlawful expropriation.[40] The measures also constituted an abuse of rights under international law[41] and breached the New York Convention.[42]

GEA v. Ukraine addressed a scenario of non-enforcement of an ICC award by the host states' courts.[43] Before an ICSID tribunal, the claimant argued that the Ukrainian courts had 'rendered a "travesty of justice in applying a discriminatory law to avoid enforcement of GEA's Award under the New York Convention", such that "their refusal to recognize GEA's ICC Award [was] tantamount to an expropriation"'[44]. The ICC arbitration (and consequent award) arose from a 'settlement agreement' and a 'repayment agreement', neither of which the ICSID Tribunal held sufficient to constitute an 'investment' for the purpose of its jurisdiction.[45] The Tribunal was also of the opinion that the ICC award 'in and of itself' could not be deemed an investment.[46] However, the Tribunal continued, even if, *arguendo*, the award was considered an 'investment', there was no reason to believe that the courts had applied a discriminatory law or that their actions were 'egregious' in any way.[47] Thus, even if jurisdiction had been established, the case was bound to fail on the merits.

Romak v. Uzbekistan dealt with a somewhat similar situation.[48] Here too, an investment arbitration tribunal (deriving its authority from the Switzerland-Uzbekistan BIT, operating under the UNCITRAL Rules) was faced with a commercial award in favour of the claimant, which could not be enforced in the host state. The Claimant argued that for purposes of jurisdiction it was sufficient to verify that the commercial award (rendered under the auspices of the Grain and Free Trade Association (GAFTA)) fell within the very broad definition of 'investment' contained in Article 1 of the BIT. The tribunal refused to follow this argument. Instead, it observed that the term 'investment' had an 'inherent' meaning. In effect, the Tribunal resorted to the criteria that ICSID jurisprudence

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37 *Saipem Jurisdiction*, paras. 26–36.

38 Article 9 of the Italy-Bangladesh BIT offers ICSID arbitration as a venue for the resolution of disputes 'relating to compensation for expropriation, nationalization, requisition or similar measures'. See *Saipem Jurisdiction*, para. 70.

39 *Saipem Merits*, para. 128.

40 *Ibid.*, paras. 129, 133, 201–202.

41 *Ibid.*, paras. 160–161.

42 *Ibid.*, paras. 167–168, 170.

43 *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 Mar. 2011 (*GEA*).

44 *Ibid.*, para. 227 (internal footnote omitted).

45 *Ibid.*, para. 157.

46 *Ibid.*, para. 161.

47 *Ibid.*, para. 236 (in relation to the expropriation claim) and paras. 314–319 (in relation to the fair and equitable treatment claim).

48 *Romak SA v. Republic of Uzbekistan*, PCA No. AA280, UNCITRAL, Award (26 Nov. 2009) (*Romak*).

has identified while defining the term 'investment' under Article 25 of the ICSID Convention. It found that the underlying transaction causing the GAFTA arbitration (a contract for the supply of goods) could not be considered as an 'investment' (in terms of an economic operation entailing a contribution, a certain duration, and a risk). Consequently, the Tribunal declined jurisdiction.[49] The tribunal thus had no opportunity to decide whether the Uzbek courts' conduct relating to the GAFTA award constituted a violation of the BIT.

The UNCITRAL award in *White Industries v. India* provides the most recent example of an investment tribunal's review of a decision of national courts relating to a commercial arbitration award.[50] The case arose out of a dispute between a Australian mining company and Coal India, a state-owned entity. The dispute was resolved through an ICC arbitration seated in Paris. The arbitration resulted in an award in favour of White Industries, which sought enforcement in India. Surprisingly, Coal India responded by filing an application to set aside the award before the Indian courts (although the seat of the arbitration was Paris).

After nine years of complex litigation involving enforcement and setting aside proceedings (none of which resulted in a determination), White Industries initiated an investment arbitration invoking the Australia-India BIT.[51] It claimed, *inter alia*, that its investment had been expropriated, that it had been treated unfairly and inequitably, that it had suffered a denial of justice and that it had not been provided 'effective means of asserting claims and enforcing rights' (a standard not included in the basic treaty, but which the claimant sought to incorporate through operation of the most-favoured nation clause contained in the basic treaty).[52] While the tribunal rejected the allegations of expropriation,[53] fair and equitable treatment[54] and denial of justice,[55] it found that the duration of the enforcement proceedings (which included more than five years on the docket of the Supreme Court) amounted to a breach of India's obligation to provide 'effective means of asserting claims and enforcing rights'.[56]

Finally, a few other investment arbitration cases have involved commercial arbitrations, but are less relevant to our discussion, either because of their unique fact patterns[57] or because they were settled before a decision.[58]

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49 See in particular, *ibid.*, para. 211.

50 *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 Nov. 2011(*White Industries*).

51 *Ibid.*, paras. 3.2.1–3.2.65.

52 *Ibid.*, paras. 4.1.1–4.7.2.

53 *Ibid.*, Section 12.

54 *Ibid.*, paras. 10.1–10.3.

55 *Ibid.*, Section 10.4.

56 See in particular *ibid.*, Section 11.

57 See *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award 6 Feb. 2008, involving a claim that the investor had signed a settlement agreement that overturned a previous domestic arbitral award under duress. The case involves no alleged misbehaviour by domestic courts. See *ibid.*, para. 202.

58 See *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2 (case discontinued, see Order of 16 Mar. 2006).

(e) The Socobelge Case (Greek Debt Issues before the International Court of Justice)

The European Court of Human Rights and investment arbitral tribunals seem the preferred *fora* for cases involving court decisions relating to commercial arbitration. However, it should not be overlooked that instead of seizing a court or tribunal where it can confront the disputing state directly, an aggrieved party could also seek diplomatic espousal by its home Government. A dispute relating to commercial arbitration could also be resolved by way of an inter-state dispute settlement mechanism for which the relevant jurisdictional requirements (*in primis*, consent to that dispute settlement method) could be established. This possibility is illustrated by *Socobelge v. Greece*, a case decided in 1939 by the PCIJ, the predecessor of the International Court of Justice (ICJ), in the aftermath of the Great Depression.[59] At a time when several sovereign states – including Greece – are facing default risks and when the competence of international courts and tribunals to deal with sovereign debt restructuring issues has come under close scrutiny,[60] the case makes instructive reading and may well foreshadow difficulties to come.

In 1925, the Belgian Société Commerciale de Belgique (Socobelge) entered into a contract with the Greek government for the construction of a railway. The works were to be financed by a loan from Socobelge, which the Government was to cover by issuing bonds. Payments on the bonds were to be made to Socobelge on completion of certain milestones. In 1932, while the construction was ongoing, Greece defaulted on its debt and thus stopped paying Socobelge. The latter in turn became unable to pay its sub-contractors and the works were suspended.

The following year, Socobelge started an arbitration under the construction contract and eventually obtained an award in its favour. The award terminated the contract and awarded Socobelge compensation of around USD 7 million. When Greece refused to pay on the ground that the award was part of its sovereign debt and that payment arrangements for the debts were being negotiated, Socobelge sought diplomatic protection from its home Government. Belgium filed an application before the PCIJ seeking a declaration that Greece had breached its international obligations by failing to satisfy a final arbitral award.[61]

The Court first addressed the issue of how it should deal with an arbitral award resulting from an arbitration agreement which provided that the award would be 'final and without appeal':

> Since the arbitral awards to which these submissions relate are, according to the arbitration clause under which they were made, 'final and without appeal', and since the Court has received no mandate from the Parties in regard to them, it can neither confirm nor annul them either wholly or in part.[62]

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59 *Société Commerciale de Belgique (Belg. v. Greece)*, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15) ('*Socobelge*').

60 See, *e.g.*, the recent decision involving bondholders in *Abaclat et al. v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 Aug. 2011, and Dissenting Opinion, 28 Oct. 2011.

61 *Socobelge*, at 160–172. For a detailed comment on the decision, see in particular W. Michael Reisman, *The Supervisory Jurisdiction of The International Court of Justice: International Arbitration and International Adjudication*, 258 *Recueil des cours* (1997), esp. 233-253.

62 *Socobelge*, at 174.

The parties appeared to agree on several issues in their submissions. The Court seemed unwilling to go beyond these agreements. After stating that a settlement by the two disputing states was 'highly desirable',[63] the Court, in the dispositive part of its judgment, merely held that the arbitral awards at issue were 'definitive and obligatory', an issue – the Court emphasized – on which the parties had agreed.[64]

The decision shows a considerable degree of caution in dealing with the review of a final and binding commercial award, which may, in part, have been due to the delicate debt situation of Greece in which the League of Nations had also been involved.[65] For the present purposes, the case also shows that a matter relating to a commercial arbitration may end up before an inter-state dispute settlement body.

III. INVESTMENT ARBITRATION AS A FORUM FOR THE ADJUDICATION OF ABUSES RELATING TO COMMERCIAL ARBITRATION – DIFFICULTIES AND IMPLICATIONS

The cases analysed under the previous sections show that investor-state arbitration (under ICSID or other arbitration rules, such as UNCITRAL) is increasingly being resorted to as a forum for adjudication of disputes arising out of domestic courts' 'misconduct' relating to commercial arbitration.[66] The choice of investment arbitration for these particular disputes raises distinct legal issues concerning both jurisdiction of investor-state arbitral tribunals to hear such disputes (III.1) and matters to be addressed on the merits (III.2).

(a) Questions of Jurisdiction

As the unfolding of investment cases reveals, objections to the tribunal's jurisdiction will likely turn on two main issues. The first relates to the question of whether jurisdiction exists over claims involving the application of the New York Convention (1.1). The second deals with the issue of whether an arbitral award or an arbitration agreement constitute an investment for the purpose of the relevant BIT (as well as of Article 25 of the ICSID Convention, if applicable) (1.2).

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63 The final sentence of the judgment, before the *dispositif*, reads: '[. . .] the two Governments are, in principle, agreed in contemplating the possibility of negotiations with a view to a friendly settlement, in which regard would be had, amongst other things, to Greece's capacity to pay. Such a settlement is highly desirable.' *Ibid.*, at 178.

64 'The Court [. . .], noting the agreement between the Parties, states that the arbitral awards made on January 3rd and July 25th, 1936, between the Greek Government and the *Société commerciale de Belgique* are definitive and obligatory.' *Ibid.*, at 178.

65 See W. Michael Reisman, *The Supervisory Jurisdiction of The International Court of Justice: International Arbitration and International Adjudication*, 258 *Recueil des cours* (1997), at 238.

66 Questions of attribution are generally not an issue in this constellation of cases, since the judiciary is considered an organ of the state (see Art. 4 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts). On state responsibility for conduct of domestic courts, see Christopher Greenwood, *State Responsibility for the Decisions of National Courts*, in *Issues of State Responsibility before Judicial Institutions* 55 (Malgosia Fitzmaurice & Dan Sarooshi eds., Hart Publishing, 2004).

(i) Jurisdiction of Investment Tribunals to Review Decisions of National Courts Applying the New York Convention

A first fundamental question addresses the role of investment tribunals in reviewing national court decisions applying the New York Convention. This question concerns mainly those cases where the investor's claim arises out of a failure by the domestic courts to *enforce* the arbitral award (rather than out of a court's annulment action, which is grounded on local law).[67]

In *Frontier*, the respondent argued that if the investment tribunal decided to entertain the claim concerning the non-enforcement of the ICC award, it:

> 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. Respondent observes that the drafters of the New York Convention gave the final word to the national competent authorities on the issue of public policy as a bar to recognition and enforcement.[68]

Similarly, in *GEA*, the respondent's argument was that:

> a finding that 'a domestic court's refusal to recognise and enforce an arbitral award under the New York Convention' constitutes an expropriation under international law would create an appellate jurisdiction for the recognition and enforcement of awards, which 'would undermine the present international legal system for the recognition and enforcement of arbitral awards.'[69]

These arguments are not convincing because an investment tribunal is called to rule on allegations of treaty breaches by a state. If the jurisdictional requirements provided in the relevant BIT (and the ICSID Convention, if applicable) are met, the tribunal is bound to exercise its jurisdiction. There is no reason why it 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). The investment tribunal is not arrogating the role of an enforcement court in addition to or in replacement of a national court; it is called to assess whether a state's conduct amounts to a violation of the applicable BIT.[70]

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67 The New York Convention's main object is the 'recognition and enforcement of arbitral awards'. This is not to say that the Convention is completely silent on the issue of *annulment* of awards. To the contrary, a plain reading of Art. V(1)(e) of the Convention requires actions to annul an international arbitral award be brought only in the place where the award was made (i.e., at the seat of the arbitration) or in the state whose procedural law is selected by the parties to govern the arbitration (although this is a rather theoretical situation). *See* Gary Born, *International Commercial Arbitration* 1260 (2009). In so doing, the Convention ensures that courts other than the courts at the seat may not purport to annul an international award. *Ibid.* It is the majority view, though, that the Convention does not limit the *grounds* under local law under which a competent court may annul an arbitral award. See *ibid.*, pp. 2556–2560 (also discussing possible implied limits imposed by the New York Convention on the grounds to annul awards).

68 *Frontier*, para. 485 (emphasis in the original, internal footnotes omitted).

69 *GEA*, para. 230 (internal footnotes omitted).

70 See for example the findings in *Frontier*, para. 525 ('[. . .] the Tribunal rejects Respondent's argument that this Tribunal does not have the power to review the decision of a national court's conception of the public policy exception under the *New York Convention*. The Tribunal's 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

Yet, an argument similar to the one advanced by the respondent in *Frontier* and *GEA* prevailed in *Kaliningrad v. Lithuania*, an ICC investment arbitration held in Paris under the Lithuania-Russia BIT.[71] There a Cypriot company enforced in Lithuania a commercial arbitration award rendered in its favour against the Russian Region of Kaliningrad under the auspices of the London Court of International Arbitration (LCIA). The Lithuanian courts (including the Lithuanian Court of Cassation) allowed enforcement of the LCIA award by freezing and selling assets belonging to Kaliningrad. Kaliningrad invoked the investor-state dispute resolution clause in the Russia-Lithuania BIT and argued that the conduct of the Lithuanian courts constituted an unlawful expropriation. The fact pattern of the case is highly unusual with a 'reverse' scenario in comparison to the investment cases analysed above (*Frontier*, *GEA*, *White Industries*). Indeed, the claimant in the investment treaty arbitration was protesting the *enforcement* of the LCIA arbitral award, not its non-enforcement.

The investment arbitration tribunal declined jurisdiction on the ground that to do otherwise would imply that it assumed the role of an appellate body scrutinizing the correctness of domestic decisions applying the New York Convention.[72] This view apparently relied on the tribunal's belief that the New York Convention provided exclusive jurisdiction to the courts at the place of enforcement for all enforcement issues, thereby excluding the jurisdiction of any other court or tribunal on these issues.

There is an obvious difficulty with this reasoning. Indeed, by adopting this view, the tribunal failed to exercise its jurisdiction under the BIT. While the unique facts of the case (i.e., a complaint of *enforcement* of an arbitral award rather than of non-enforcement) may, at least in part, account for the outcome, it cannot be ruled out *a priori* that a decision by a court granting enforcement, rather than denying it, may, in certain circumstances, be found to constitute a breach of an investment treaty.[73] Conceptually, one can see no reason for distinguishing between enforcement and non-enforcement and thus for reaching a different solution based on that distinction.

BIT,' emphasis in the original); and *Saipem Jurisdiction*, para. 156 ('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').

71 *Government of the Kaliningrad Region v. Republic of Lithuania*, ICC Arbitration, Final Award, 28 Jan. 2009 (*Kaliningrad*) (unpublished). The reasoning and certain excerpts of the award emerge from the Paris Court of Appeals decision of 18 Nov. 2010, rejecting the annulment application of the ICC award. See *Government of the Kaliningrad Region v. Republic of Lithuania*, Paris Court of Appeals, Decision of 18 Nov. 2010 (available at http://italaw.com).

72 *Government of the Kaliningrad Region v. Republic of Lithuania*, Paris Court of Appeals, Decision of 18 Nov. 2010, p. 3.

73 For example, one could think of a case where a court at the enforcement stage allows, under the New York Convention, the enforcement of an award which is so patently wrongful or defective that any reasonable court would have refused enforcement. There appears to be no reason for a treaty tribunal, in a case such as this (provided the treaty jurisdictional requirements are met), not to exercise jurisdiction and to assess, on the merits, whether the court's conduct amounts to a violation of the applicable investment treaty.

The prospect that an investment treaty tribunal may have to apply the New York Convention as an 'enforcement court', which (mis)guided the Kaliningrad tribunal, is illustrated by *White Industries*. Concluding that the conduct of the Indian courts constituted a breach of the relevant BIT, the arbitral tribunal had to assess the damage caused by such breach.[74] India argued that no compensation was due because White Industries had not established that the award would have been enforced had the award come up for enforcement.[75] To determine compensation, therefore, the tribunal had to first review whether 'the [ICC] Award [was] enforceable under the laws of India'.[76] It was careful to point out that, at the hearing, the parties had agreed to such review.[77] The tribunal thus proceeded to examine each of the grounds for refusal of enforcement invoked by the Indian party before the domestic courts. It examined whether the ICC arbitral tribunal was biased,[78] whether it had exceeded its jurisdiction,[79] whether the award rendered was not in accordance with the arbitral procedure agreed by the parties,[80] and finally whether it was against India's public policy.[81] The tribunal found that none of these grounds could be upheld and concluded that 'the Award [was] enforceable under the laws of India'.[82]

While such a review is an indispensable part of the analysis of the entitlement to compensation (if the award had not been enforceable, there would have been no loss) and sometimes also of the very existence of a treaty breach, it must remain within the confines of the application of the investment treaty. In *White Industries*, the tribunal did not and could not declare the award enforceable in India in lieu of the Indian courts. For purposes of enforcement in India, the latter could still refuse enforcement in spite of the contrary ICSID decision.

(ii) Is an Arbitral Award or an Arbitration Agreement an Investment?

The second issue in respect of jurisdiction concerns the question whether an arbitral award or an arbitration agreement constitutes an 'investment'. An investment is an allocation of resources made in cash, in kind, or in labour, entailing a certain duration and participation in the risks associated with the economic operation. Even where BITs have broad definitions covering 'any kind of asset' followed by an enumerative list, it is difficult to see how an arbitration agreement or an arbitral award could be an investment. Cases have rather held

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74 *White Industries*, sec. 14.

75 *Ibid.*, para. 14.2.1.

76 *Ibid.*, para. 14.1.1.

77 *Ibid.*, para. 14.2.2. During the course of the oral hearing (against the possibility of a finding of BIT breach by India), the Tribunal asked the parties whether they considered that it was in a position, without further evidence or submissions, to determine whether the Award was enforceable in India. The parties agreed that sufficient material had been provided to the Tribunal to enable it to undertake this task, if it arose, and that it should determine the question in that event.

78 *Ibid.*, paras. 14.2.35–14.2.45.

79 *Ibid.*, paras. 14.2.46–14.2.56.

80 *Ibid.*, paras. 14.2.57–14.2.64.

81 *Ibid.*, para. 14.2.65.

82 *Ibid.*, para. 14.2.66.

that the investment comprises of the contribution made in the course of the underlying transaction that gave rise to the dispute and to the award. This view was adopted in *Saipem*,[83] in *Frontier*,[84] and in *Romak*.[85]

The tribunal in *White Industries* believed to have identified a 'developing jurisprudence on the treatment of arbitral awards to the effect that 'awards made by tribunals arising out of disputes concerning "investments"... under BITs represent a continuation or transformation of the original investment'.[86] If the underlying transaction meets the definition of investment (this was not the case, for instance, in *Romak*[87]), then the fact that the rights flowing from the investment later crystallized in an arbitral award does not mean they have vanished altogether, and that they should be denied protection under the BIT. This does not mean, however, that the award is an investment in and of itself.

In the context of the definition of investment, one should add that the national courts whose decision is at issue must be a court of the host state of the investment, that is the state where the investment (in terms of original allocation of resources) was made. If a state fails to enforce a foreign arbitral award concerning a dispute arising out of an investment made in a third country, then the BIT jurisdictional requirement that the dispute concern an investment could hardly be met absent a territorial nexus between the original investment and the putative respondent state.[88]

(b) Questions of Merits – Has there been an Abuse of Rights?

If the jurisdictional hurdle is passed, the question arises as to what test should be employed by the arbitral tribunal to assess whether the national courts' conduct amounts to a violation of the BIT. To answer this question, one should distinguish whether the national courts' decision calls the New York Convention into play (2.1) or not (2.2).

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83 *Saipem Jurisdiction*, para. 110 ('for the purpose of determining whether there is an investment under Article 25 of the ICSID Convention, [the arbitral tribunal] will consider the entire operation. In the present case, the entire or overall operation includes the Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration', internal footnotes omitted). See also *ibid.*, paras. 125–128.

84 *Frontier Petroleum*, para. 231.

85 *Romak*, para. 211 ('the GAFTA Award is so inextricably linked to the Romak Supply Agreement that any determination as to whether Romak holds and investment under the BIT cannot be made without reference to the entire economic transaction that is the subject of these arbitral proceedings. The GAFTA Award merely constitutes the embodiment of Romak's contractual rights (as determined by the GAFTA Arbitral Tribunal) stemming from the wheat supply transaction entered into by Romak. If the underlying transaction is not an investment within the meaning of the BIT, the mere embodiment or crystallization of rights arising thereunder in an arbitral award cannot transform it into an investment' (internal footnotes omitted).

86 *White Industries*, para. 7.6.8 (internal footnotes omitted).

87 *Romak*, paras. 209–243. See also *GEA*, paras. 154–164 (the commercial arbitral award arose out of a 'settlement agreement' and a 'repayment agreement', none of which the tribunal found to constitute an investment).

88 See William W. Park, *Respecting the New York Convention*, 18 ICC Intl. Ct. Arb. Bull. 1, 4 (2007).

(i) Abusive Application of the New York Convention

In the first scenario, an award creditor complains of the failure by the domestic courts to enforce a foreign arbitral award under the New York Convention or – in what appears a rare occurrence – the award debtor complains of the enforcement of the award, such as in *Kaliningrad*. A first question which arises relates to the interplay between the two treaties which are at issue here, i.e., the BIT which confers jurisdiction on the investment tribunal, and the New York Convention, which represents the standard under which the national court has acted.

The issue of the interplay between the two treaties is not theoretical. It appears to have arisen and to have been discussed in *Kaliningrad* and in the ensuing decision of the Paris Court of Appeals on the challenge of the award.[89] The discussion focused on the ways to reconcile the provisions of the BIT with those of the New York Convention[90] in light of the Vienna Convention on the Law of Treaties (VCLT).[91]

The latter does provide some conflict rules. Unfortunately however, these rules do not seem helpful in this type of scenario. It appears difficult to invoke Article 30 VCLT (dealing with 'successive treaties relating to the same subject matter'), given that a treaty dealing with the recognition and enforcement of arbitration agreements and arbitral awards (i.e., the New York Convention) has a different subject matter than a treaty aimed at promoting and protecting foreign investment (i.e., the BIT). Similarly, recourse to Article 41 VCLT which addresses 'agreements to modify multilateral treaties between certain of the parties only', appears untenable. One can hardly argue that the later BIT has been concluded with the intention of modifying the New York Convention between the two BIT contracting states, which would be necessary for the application of Article 41 VCLT.[92] Yet, this argument was apparently made in the *Kaliningrad* and discussed in the decision of the Paris Court of Appeals.[93]

It is submitted that a more helpful rule in this context is Article 26 VCLT, which provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. Authoritative commentary notes that the principle of good faith enshrined in Article 26 encompasses the narrower doctrine

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89 *Government of the Kaliningrad Region v. Republic of Lithuania*, Paris Court of Appeals, Decision of 18 Nov. 2010, pp. 3–6 (see *supra* n. 72).

90 See *ibid.*, pp. 3–6. There is no conflict of treaty rule within the two treaties which could be of help in this kind of situation. Art. VII of the New York Convention contains a conflict rule, which is not relevant for these purposes. It is unlikely that a BIT will provide a conflict rule.

91 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

92 Art. 41(2) VCLT requires the parties to the bilateral treaty to notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides (on which Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 534–535 (2009)). See *also Fragmentation of International law: Difficulties arising from the diversification and expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682, 13 Apr. 2006, para. 317 (for the opinion that, absent such notification, the intention to modify the previous multilateral agreement must be 'universally apparent from the object of the *inter se* agreement').

93 See *Government of the Kaliningrad Region v. Republic of Lithuania*, Paris Court of Appeals, Decision of 18 Nov. 2010, esp. pp. 5–6.

of 'abuse of rights'.[94] The doctrine of abuse of rights is generally understood to refer to 'the exercise of a right for an end different from that for which the right was created, to the injury of another person or the community'.[95] Article 26 ensures that parties to a treaty shall abstain from acts calculated to frustrate the object and purpose and thus impede the proper execution of the treaty, and applies, in particular, where a treaty leaves states a large discretion.[96]

The place of the abuse of right doctrine in international law is not entirely clear.[97] According to the oft-cited sentence by Hersch Lauterpacht, '[t]here is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused'.[98] Some have argued that a review of decisions of international courts and tribunals and the practice of a number of states would warrant the conclusion that the principle of abuse of rights constitutes a general principle of law under Article 38(i)(c) of the Statute of the ICJ.[99] In fact, the principle was relied on by the PCIJ and the ICJ on several occasions.[100] The Appellate Body of the World Trade Organization (WTO) Appellate Body, has formulated the principle as follows:

> [The principle of good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, 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.[101]

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94 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 367 (2009) (internal footnotes omitted).

95 B.O. Iluyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 Harv. Intl. L.J. 47, 48 (1975).

96 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 367 (2009). See, *e.g.*, *La Bretagne* case between France and Canada, where the Arbitral Tribunal spoke of 'the principle of good faith, which, according to Article 26 of the Vienna Convention on the Law of Treaties, necessarily governs the performance of treaties, as affording a sufficient guarantee against any risk of the French Party *exercising its rights abusively*', *Filleting within the Gulf of St. Lawrence between Canada and France*, Award, 17 Jul. 1986, RIAA, vol. XIX, pp. 225–296, at 241–242, para. 27 (emphasis added). For a treaty explicitly recognizing the prohibition of abuse of rights, see United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (entered into force 16 Nov. 1994), Art. 300.

97 See Alexandre Kiss, *Abuse of Rights*, in *Max Planck Encyclopedia of Public International Law* (R. Wolfrum ed.,) (available at www.mpepil.com).

98 Hersch Lauterpacht, *Development of International Law by the International Court* 164 (Stevens & Sons, 1958), quoted in *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 9 Apr. 2009, para. 107, and *Mobil Corp. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 Jun. 2010, para. 172.

99 B.O. Iluyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 Harv. Intl. L.J. 47, 72–73 (1975).

100 See *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (Merits), PCIJ, 1926, Series A. No. 7, at 30, 37–38; *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, PCIJ, 1932), Series A/B, No. 46, at 167; *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*, 1951 ICJ Rep. 116, at 141–142. See also Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 Mcgill L.J. 389, 399–400 (2002).

101 *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WTO Doc. WT/DS58/AB/R, para. 158 (internal footnotes omitted).

The principle is also well-established in investment arbitration, where on several occasions, it has been relied on as a bar to investors' rights.[102]

Regarding the specific issue addressed in this contribution, certain tribunals have also resorted to the concept of abuse of rights as a tool for evaluating the state conduct at stake. The tribunal in *Saipem*, after analysing the Bangladeshi courts' conduct relating to the ICC arbitration, concluded that:

> [...] the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process. It 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 order national courts do 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.[103]

In *Frontier Petroleum*, the claimant made the argument that the failure by the host state to enforce an arbitral award under the terms of the New York Convention constituted a breach of the international principle of good faith, reflected in Article 26 of the VCLT,[104] and an abuse of right.[105] The tribunal examined whether the Czech courts' conduct – refusing to enforce the award for reasons of public policy – could amount to an abuse of rights, thus impliedly confirming that it shared the view that this doctrine has a role to play in the review of a state's discretion in application of the New York Convention.[106] In the end, the Tribunal found that no abuse had been committed. It noted that states enjoy a certain margin of appreciation in determining what their own conception of international public policy is. To exclude a violation of the BIT, it was sufficient for the tribunal to find that the courts' interpretation of the public policy exception was 'plausible', 'reasonably tenable' and 'made in good faith'.[107] Thus, under the *Frontier* standard, a violation would only occur if the court's decision is 'untenable', which is a very different standard from saying that the decision is simply wrong. The threshold

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102 *See Saluka Investments BV v. Czech Republic*, UNCITRAL/PCA, Partial Award, 17 Mar. 2006, paras. 235–236; *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 9 Apr. 2009, paras. 107, 143–144; *Mobil Corp. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 Jun. 2010, paras. 167–185; *Chevron Corp. and Texaco Petroleum Corp. v. Ecuador*, UNCITRAL, Interim Award, 1 Dec. 2008, para. 143 (adopting a rather cautious approach to the issue); *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 Aug. 2011, paras. 642–658.

103 *Saipem Merits*, para. 159. See also *ibid.*, para. 161 (the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights).

104 *Frontier*, para. 471.

105 *Ibid.*, para. 472.

106 *Ibid.*, para. 525 (noting that '[t]he Tribunal's 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. In order to answer this question, *the Tribunal must ask whether the Czech courts' refusal amounts to an abuse of rights contrary to the international principle of good faith*, i.e. was 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', emphasis added).

107 *Ibid.*, para. 527.

required for the court's conduct to amount to a treaty breach in this case (similarly to the standard of abuse) is much higher than a mere error in the decision.

Similarly, as above, the tribunal in *GEA* found that the underlying transaction (and the ICC award arising out of it) was not an 'investment' (see *supra* at II.2.3), and thus denied jurisdiction over the claim. However, it observed that, even if *arguendo* there was an investment, there was no 'egregious' conduct which would justify a finding of treaty breach. Thus, without resorting explicitly to the abuse of rights principle, the tribunal suggested a similar threshold: a simple mistake by the courts at the enforcement stage would not suffice to amount to a treaty breach; something more serious – 'egregious' – would be required. [108]

In this sense, the abuse of right principle becomes a sort of 'cross-cutting' concept which may be employed when applying the standards of treatment of the investment treaty (fair and equitable treatment, expropriation, denial of justice, etc.). Sometimes, the principle of abuse of right in the application of the New York Convention may coincide with the investment treaty standard (for instance when the treaty prohibits arbitrary or discriminatory conduct or denial of justice). Where there is no such coincidence (for example regarding a claim of expropriation), the principle of abuse of right will serve as a tool which, in the application of the treaty standard, will help qualify that particular state conduct relating to the (mis)application of the New York Convention.

(ii) Abusive Application of National Arbitration Law

Misconduct by domestic courts may also occur outside the New York Convention framework, when domestic courts apply domestic arbitration legislation. For example, courts may apply domestic arbitral legislations in annulment proceedings. An award creditor may see its validly issued commercial arbitral award unlawfully set aside by the host state courts, and may thus attempt to turn to investment treaty arbitration for justice.

The framework is different from a situation involving the New York Convention, where the contracting state is bound by the grounds for non-enforcement (subject to a margin of discretion in the interpretation of certain concepts, especially the public policy exception). In the field of annulment, the discretion of states and their judiciary is wider. Each state enjoys sovereignty in deciding what its own measure of review of arbitral awards ought to be. While today most states (especially those which have adopted the UNCITRAL Model Law) have ensured that the grounds for annulment parallel those for non-enforcement of the award set forth in the New York Convention, others still provide broader room for court review at the annulment stage, which in certain instances even addresses the merits of the award.[109]

While one may take issue, from a policy point of view, with an excessively intrusive review of arbitral awards, such an attitude *per se* is not subject to scrutiny

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[108] See *GEA v. Ukraine*, paras. 236, 319.

[109] See Gary Born, *International Commercial Arbitration* 2553, 2636–2657 (2009).

by any international court or tribunal. Thus, if parties choose a seat for their arbitration in a country which provides for idiosyncratic grounds of annulment, the application of such grounds by the courts at a later stage will not be able to trigger any condemnation by an investment tribunal. However, if the courts at the seat *abuse* their powers in connection to annulment actions, i.e., their action appears not simply wrong but egregious or not reasonably tenable, the aggrieved party may have a claim under an investment treaty.

An obiter dictum in *ATA* seems to confirm this approach. As observed above, the Jordanian courts had applied an unusual rule present in the national arbitration law, whereby the annulment of an award entailed the extinguishment of the underlying arbitration agreement. While the investment tribunal said it was taking no position on this point,[110] it suggested that had the rule existed at the time the arbitration agreement was signed, an aggrieved party would be barred from raising a complaint at a later stage.[111] But since the rule was enacted after the conclusion of the arbitration agreement and was applied retroactively, Jordan could not escape liability.[112] One could thus say that by applying the rule retroactively (the prohibition of retroactivity arguably also being a general principle of law), Jordan, through its courts, had violated the prohibition of abuse of rights. The operation of the principle of abuse of rights is therefore no different and no less important in situations involving national arbitral legislation than it is in circumstances which call the application of the New York Convention into play.

IV. CONCLUSIONS

The foregoing analysis of the fact patterns and legal issues brings us back to the questions presented at the outset of this contribution. Do these recent developments challenge the traditional architecture of international commercial arbitration? How do they affect the current organization of international dispute settlement?

Regarding the first query, the answer is affirmative. The cases show that the traditionally closed architecture is being opened up, modified. To what extent is it being modified? The answer to this question boils down to grasping the role which an international court or tribunal should assume when ruling on these types of claims. The answer calls for several observations. First, domestic courts all over the world routinely make decisions affecting international commercial arbitrations.

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110 *ATA*, para. 128.

111 *Ibid.* ('It is arguable (but the Tribunal takes no position on the point) 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').

112 *Ibid.* ('. . . this argument cannot work retroactively. Retroactivity is the problem here. The new rule should cover only those arbitration agreements concluded after the coming into force of the Jordanian Arbitration Law in 2001 and not arbitration agreements existing before the 2001 Law came into force, such as the Arbitration Agreement at issue in this proceeding. In the Tribunal's view, the Jordanian Court of Appeal and Court of Cassation could have complied with their duty in this case by refusing to apply retroactively the new rule introduced in the last sentence of Article 51 of the Jordanian Arbitration Law').

Second, it lies within human nature that courts, when making decisions on international commercial arbitration matters, may make mistakes. Third, far from having achieved complete autonomy from national legal orders, the current design of international commercial arbitration is still characterized by the important role played by national law and domestic courts. States enjoy broad powers in enacting and applying national legislation and in organizing mechanisms for the review of judicial decisions. They also enjoy certain discretion in interpreting the New York Convention.[113] As a result, the idea that a party dissatisfied with any domestic court decision would have automatic access to an international court or tribunal must be dismissed.[114] However, when the national court's mistake reaches the threshold of an egregious misconduct, then access to an international dispute resolution body may be open.[115]

In the context of investment arbitration, it is submitted that the principle of abuse of rights deriving from the duty of good faith may provide guidance to an international court or tribunal when evaluating whether the allegations made by the aggrieved party amount to a treaty breach.

With respect to the second query about a possible challenge to the overall organization of international dispute settlement as a whole, the developments of these last few years seem to show that bridges and connections are being built between certain fragmented pieces of the overall system. Can one speak of defragmentation? Of the rise of an integrated system of international dispute settlement? It may be premature to venture an answer to these questions. The cases are still modest in number, and it remains to be seen whether they signal the emergence of a permanent phenomenon. What is clear is that the world of international dispute settlement is evolving, and that this evolution deserves our continued attention in the years to come.

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113 One may agree with William W. Park that 'much judicial failure to respect the [New York] Convention will likely remain without practical sanction'. William W. Park, *Respecting the New York Convention*, 18(2) ICC Intl. Ct. Arb. Bull. 1, 13 (2007).

114 See also the observations made by the arbitral tribunals in *Romak*, para. 186, and in *Saipem Merits*, paras. 133, 187.

115 Luca G. Radicati di Brozolo & Loretta Malintoppi, *Unlawful interference with International Arbitration by National Courts of the Seat in the Aftermath of Saipem v. Bangladesh*, *in* Liber Amicorum Bernardo Cremades 993, 1000 (M. Á. Fernández-Ballesteros & David Arias eds., 2010).