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Investment Tribunals as Courts of Appeal? Determining State Responsibility for Substantive Denial of Justice

By Vid Prislan *

Abstract

The contribution looks into the circumstances under which states can held be responsible for the content of judgments rendered by their courts pursuant to the denial of justice standard. The standard has received increased attention in the context of investor-state arbitration, where it has become widely used as a measure for determining the propriety of judicial conduct. Although ostensibly claimed to concern solely the propriety of judicial procedure, in the practice of investment tribunals, the standard has no less frequently been applied to measure the substantive adequacy of domestic courts' judgments. The contribution examines this emerging practice by mapping the jurisprudence and evaluating the nature of arbitral tribunals' scrutiny. It also sets out certain normative considerations that should guide the tribunals' assessment of whether or not a particular judicial outcome is an adequate one from the standpoint of international standards of administration of justice. The contribution advances three arguments: first, that judicial decisions, as the final product of the domestic adjudicative process, can properly be the object of scrutiny by arbitral tribunals; second, that the task of arbitral tribunals must be limited to determining whether the particular decision is supported by adequate reasoning, and does not extend to inquiring whether the substantive outcome – i.e. the judicial decision on its merits – is also reasonable as such; and third, that the substantive review performed under the denial of justice standard necessarily requires the application of deferential standards of review.

Keywords: Denial of justice, supranational review of domestic judgments, adequacy of judicial reasoning, state responsibility for judicial conduct, standards of review.

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I. Introduction

On 25 January 2018, an Arbitral Tribunal established pursuant to the 1993 US-Ecuador Bilateral Investment Treaty (BIT) determined that Ecuadorean courts committed a denial of justice by ordering the US pharmaceutical company Merck Sharpe & Dohme (Merck) to pay a 'wholly disproportionate sum' in a local civil suit brought against the company by an Ecuadorean pharmaceutical manufacturer.[1] This was not the first time that an investment tribunal found a State responsible under an applicable investment treaty for the conduct of its courts. In recent years, the US oil company Chevron successfully used the same BIT to obtain compensation for undue delays resulting from inactivity of Ecuadorean courts,[2] and to stay the enforcement of an Ecuadorian court judgement that proved to have been procured through corruption.[3] And so have other investors effectively used arbitration procedures available under different BITs for the purpose of obtaining redress for judicial inaction,[4] or to rectify abuses of judicial power.[5] What makes the *Merck* case stand out is rather the factual predicate of the claim: unlike most cases brought before investment tribunals with respect to judicial wrongdoing, the responsibility of the Ecuador was apparently engaged as a result of the substantive outcome of the domestic adjudicative process, and not because of procedural irregularities and other mishaps in the judges' treatment of domestic lawsuits.

Admittedly, deploying arbitration proceedings chiefly in response to adverse judicial acts, or even in anticipation thereto, remains rather exceptional.[6] Still, it is with increased frequency that investment tribunals are nowadays presented with incidental complaints about investors' treatment by domestic courts. It has become almost common practice to plead an additional denial of justice any time the investor had been

[1] *Merck Sharpe & Dohme (I.A.) Corporation v The Republic of Ecuador*, PCA Case No 2012-10 (Partial Final Award, 25 January 2018). At the time of the writing, the award remained confidential. However, the key findings are discussed in D Charlotin and LE Peterson, 'The Merck Award (Part Two): On the merits, Ecuador found liable for denial of justice after foreign investor is ordered to pay 'wholly disproportionate sum' without court engaging in objective analysis or calculation' (IA Reporter, 27 March 2018).

[2] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, PCA Case No 34877 (Partial Award on the Merits, 30 March 2010) ('Contract Claims').

[3] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, PCA Case No 2009-23 (Second Partial Award on Track II, 30 August 2018) ('Track II').

[4] See *White Industries Australia Limited v The Republic of India*, UNCITRAL (Final Award, 30 November 2011).

[5] See, eg, *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07 (Award, 30 June 2009), concerning domestic courts' interferences with ongoing commercial arbitrations; *Dan Cake v Hungary*, ICSID Case No ARB/12/9 (Decision on Jurisdiction and Liability, 24 August 2015) [113], concerning judicial fiat in bankruptcy proceedings.

[6] Although the trend may be changing. See *Manchester Securities Corporation v Republic of Poland* PCA Case No 2015-18 (Award, 7 December 2018); *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v Republic of Panama*, ICSID Case No ARB/16/34 (Award, 14 August 2020), both arising primarily out of dissatisfaction with the domestic adjudication of disputes with private parties.

unsuccessful at judicially challenging the impugned regulatory measures that otherwise formed the main object of proceedings.[7] With investors thus increasingly using arbitration to challenge unfavorable judicial outcomes, arbitral tribunals increasingly sit in judgment over the conduct of domestic courts and the products of the domestic adjudicative process. This necessarily poses questions about the relationship between arbitral tribunals and host State courts. Investment arbitration was surely not conceived as a supranational instance of appeal against domestic judgments. Yet, with the tribunal's ability to order injunctive relief,[8] the mechanism can be effectively deployed to pre-empt adverse judicial outcomes, and through the awarding of compensatory damages, at the very least capable of offsetting the consequences thereof. Intentionally or not, investment tribunals therefore exercise some degree of authority over domestic adjudicators, and this necessarily prompts questions about the proper scope and intensity of their review.

The purpose of the present contribution is twofold: in the first place, to map current practice and evaluate the nature of tribunals' scrutiny of domestic judicial outcomes; and in the second step, to set out normative considerations relevant to the tribunals' assessment of whether or not a particular judicial outcome is an adequate one. While the propriety of judicial conduct can be assessed against a variety of standards, the present contribution limits itself to the benchmark most commonly applied to that end by arbitral tribunals: the standard of denial of justice. As noted by Francioni, the standard of denial of justice is one that 'lies at the heart of the development of international law on the treatment of aliens and of foreign investment.'[9] Despite its general demise as a cause of action in proceedings before international courts and tribunals, it is not that surprising that the standard has experienced an unexpected revival in the context of investment arbitration, where it is applied as part of the minimum standard of treatment, or even more commonly, as part of the fair and equitable treatment standard. Concerned with all aspects of administration of justice, the standard is of course susceptible of being engaged in different ways through the conduct of courts. The intention here is not to examine all possible facets of its application. The focus is rather on situations where domestic judicial decisions themselves are claimed to have resulted in a miscarriage of justice. For it is in dealing with these situations – described typically as situations of 'substantive' denial of justice – that investment tribunals have come closest to performing a substantive review of domestic court decisions and which therefore present for consideration the question of the proper parameters of arbitral review.

[7] According to the author's own estimates, in over forty cases thus far claimants have raised allegations of improper judicial treatment, either individually or in relation to other claims.

[8] See generally D Kalderimis, 'The Authority of Investment Treaty Tribunals to Issue Orders Restraining Domestic Court Proceedings' (2016) 31(3) ICSID Rev 549.

[9] F Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20(3) EJIL 729, 729.

The discussion moves in the following way. The contribution begins by providing some background into the classical and the modern understandings of denial of justice and considers the ways in which the standard is deemed to be engaged as a result of the content of specific judicial decisions (II). It then goes on to examine investment tribunals' actual practice in reviewing domestic judgments under the denial of justice standard, evaluating specifically the scope and intensity of the review performed by arbitrators, as well as the standard of review applied thereto (III). Drawing on that analysis, the contribution moves to sketch out the parameters that should arguably inform the review performed by investment tribunals over the ultimate product of the domestic process of adjudication (IV). The contribution advances three arguments: first, that judicial decisions, as the final product of the domestic adjudicative process, can and must be the proper object of scrutiny by arbitral tribunals; second, that the task of arbitral tribunals must be limited to determining whether the particular decision is supported by adequate reasons, and does not extend to inquiring into the reasonableness of particular substantive outcomes; and third, that the substantive review performed under the denial of justice standard necessarily requires the application of deferential standards of review.

II. Scoping Out the Modern Standard of 'Substantive' Denial of Justice

Though once providing the principal basis in which reparations for injuries to aliens would be grounded, denial of justice had made it almost into the dustbin of history in the post-WWII era. With the process of decolonisation, the practice of forceful interventions on the part of capital exporting States, which were traditionally predicated on injustice allegedly suffered by their citizens at the hands of foreign sovereigns, has fallen into disrepute and thereby also the work of various claims commissions that had been typically deciding on such claims.[10] Concurrently, with the development of human rights law, many elements of the denial of justice standard were superseded by more concrete conventional obligations.[11] Specifically, the treatment that individuals were entitled to

[10] In the post-WWII era, the few international adjudications that concerned questions of domestic administration of justice did not involve developing countries. See, eg, *Interhandel Case (Switzerland v US)* (Judgment) [1959] ICJ Rep 6; *Ambatielos (Greece v United Kingdom)* (Merits) [1953] ICJ Rep 10; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase Judgment) [1970] ICJ Rep 3.

[11] cf *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase Judgment) [1970] ICJ Rep 3, [91], recognizing in general terms that 'human rights. . .also include protection against denial of justice'.

receive in the administration of justice found now explicit recognition in the right to a fair trial.[12]

But with the expansion of investment treaty arbitration, denial of justice has experienced something akin to a renaissance. As most investment treaties do not contain standards ostensibly directed at regulating judicial conduct (let alone expressly prescribing specific procedural treatment in the context of the domestic adjudicative procedures),[13] claimants invoked the denial of justice standard whenever the need arose to assess the propriety of judicial conduct. After all, denial of justice was historically the standard most closely associated with the conduct of the courts (and in fact, sometimes even treated as the only wrong capable of being committed by courts).[14]

A. The nature of the delict of denial of justice

Denial of justice was originally treated as a condition precedent to the lawful exercise of private reprisals. Since the Middle Ages, these could only be exercised when a sovereign had failed to accord justice to a foreign subject when the latter was ill-treated at the hands of its subjects. In its original meaning, denial of justice (*denegatio iustitiae*) was thus primarily understood in the sense of a failure of protective justice.[15] The present day understanding of the concept began to crystalize in the late nineteenth and early twentieth century, through the jurisprudence of various mixed commissions established for the purpose of settling claims concerning damages suffered by foreign subjects abroad. In the jurisprudence of those commissions, the notion of denial of justice was used in a variety of senses. This led to a lively debate among academics as to the

[12] cf Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 6; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14.

[13] Some investment treaties do set out specific obligations pertaining to the investors' access to local courts or the organization of the host State's judicial system. See, eg, art 3 Korea-Japan BIT (2002), requiring the parties to accord to foreign investors national- and MFN-treatment 'with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defense of such investors' rights'; art 2(7) US-Ecuador BIT (1993), requiring that parties 'provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.' Note that in *White Industries Australia Limited v The Republic of India*, UNCITRAL (Final Award, 30 November 2011), the latter type of obligation has been construed as requiring a system of justice that also works effectively in any given case: at [11.3.2]. But such an interpretation is not convincing. Contra *AMTO v Ukraine*, SCC Case No 080/2005 (Final Award, 26 March 2008) [88].

[14] See, eg, *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1 (Award, 20 November 1984) [150], arguing how it was 'common ground in international law that the international responsibility of a State is not committed by the acts of its municipal Courts, except where such acts amount to a denial of justice.' The proposition finds no support in current international law. The principle is well recognized that denial of justice is not the only wrong that can be committed by the judiciary. See, eg, *SS 'Lotus' (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10 26–30, 24.

[15] On this, see HW Spiegel, 'Origin and Development of Denial of Justice' (1938) 32 AJIL 63.

precise contours of denial of justice.[16] Eventually, the concept crystalized into an umbrella term applicable to all sorts of defects in the administration of justice, including those occasioned by non-judicial branches of government.[17]

Conceptually, the prohibition of denial of justice has found its underpinning in the obligation – one said to be incumbent upon all States as part of the minimum standard of treatment under customary international law – to maintain and make available to foreigners a system of justice that treats them fairly and impartially, and that generally affords adequate judicial protection of their rights.[18] In essence, cases of denial of justice are thus nothing but instances of States failing to live up to this essential obligation. Establishing states' compliance with this duty, however, has proven all but straightforward in practice. The difficulty lies in the fact that the substantive content of the obligation has traditionally been kept ill-defined.[19] International law was claimed roughly to require States to provide laws that are consistent with their international obligations, as well as judicial organs that are capable of administering justice impartially, in accordance with certain minimum standards indispensable to an objective determination of foreigner's rights.[20] Save for these relatively vague prescriptions, the law was not considered to impose any precise requirements concerning internal judicial organization or procedure,[21] nor any concrete, substantive demands as to how domestic law should be applied.[22] In fact, the prescriptions were all but exacting ones: States were not expected to ensure that all their organs scrupulously adhere to the provisions of domestic law, or to ensure that their judges never make mistakes; let alone to maintain a judicial system that operates

[16] Among the various contributions on the topic, see in particular EM Borchard, *The Diplomatic Protection of Nationals Abroad* (Banks Law Publishing 1919); C Eagleton, 'Denial of Justice in International Law' (1928) 22 AJIL 538; JW Garner, 'International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice' (1929) 10 BYBIL 181; FS Dunn, *The Protection of Nationals* (The John Hopkins Press 1932); GG Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 BYBIL 93; C De Visscher, 'Le déni de justice en droit international' (1935) 52(II) Recueil des cours 365; OJ Lissitzyn, 'The Meaning of the Term Denial of Justice in International Law' (1936) 30 AJIL 632.

[17] AV Freeman, *The international responsibility of states for denial of justice* (1938).

[18] See D Anzilotti, 'La responsabilité internationale des états: a raison des dommages soufferts par des étrangers' (1906) 13 RGDIP 5, 21; CC Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little, Brown 1922) 464ff; WE Hall, *Treatise on International Law* (Clarendon Press 1924) 59-60. For a contemporary confirmation, see *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3 (Award, 26 June 2003) [129].

[19] cf Fitzmaurice, 'Meaning of Denial of Justice', 112; De Visscher, 'Le déni de justice', 381; Freeman, 'Responsibility for denial of justice', 1.

[20] These standards would today be deemed to include elements such as the right to an independent and impartial court established by law, the right to have the case heard and determined within a reasonable time, the right to a reasonable opportunity to present the case, the right to equality of arms, or the right to a reasoned decision. Cf *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 166, [92].

[21] cf De Visscher, 'Le déni de justice', 397; A Roth, *The Minimum Standard of International Law Applied to Aliens* (Sijthof 1949) 180.

[22] cf D Anzilotti, *Cours de Droit International* (1929) 481.

perfectly in every case.[23] With the contours of the underlying obligation thus left relatively indeterminate, the resulting wrong has necessarily been kept at a certain level of abstraction. The various attempts at arriving at a more precise definition of denial of justice resulted in enumerations of various categories of acts or omissions susceptible of engaging responsibility in the process of administration of justice. In most codifications of the law of State responsibility, denial of justice would thus commonly be defined as consisting of (1) denial or obstruction of access to courts; (2) unwarranted judicial delays; (3) serious deficiencies in the conduct of judicial proceedings; and (4) judgments that are manifestly unjust or otherwise improper.[24]

Thus conceived, the standard of denial of justice was then also applied in the context of modern investment treaty arbitration. Where the applicable investment treaties prescribed treatment in accordance with international law, claims of denial of justice were simply considered against the background of the State's fundamental duty to provide a fair and efficient system of justice in accordance with the minimum standard of treatment required by customary international law.[25] More commonly, however, claims of denial of justice were simply presented as violations of the fair and equitable treatment (FET) obligation. With the requirement of due process being inherent to the notions of fairness, investment tribunals invariably considered the prohibition of denial of justice to be subsumed under the FET standard.[26] The prohibition of denial of justice

[23] See Judge Huber's admonition in the *Spanish Zone of Morocco (Spain v UK)* (1925) II RIAA 615, 641, that '[a]ucune police ni aucune administration de justice n'est parfaite, et il faut sans doute accepter, même dans les pays les mieux administrés, une marge considérable où la tolérance s'impose'.

[24] See, eg, 'Draft Articles on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners' (1929) (Harvard Draft) (1929) 23 AJIL Spec Supp 131, art 9; IDI, 'Responsabilité internationale des États à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (1927), reproduced (in English) in (1928) 22 AJIL Spec Supp 333, arts 5 and 6; 'Project No. 16 Diplomatic Protection' (April 1927), reproduced in (1929) 23 AJIL Spec Supp 232, arts 3 and 4; League of Nations Conference for the Codification of International Law, 'Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners: Basis of Discussion No 5' in S Rosenne (ed) *Conference for the Codification of International Law (1930)* (Oceana Publications 1975) 470. See also 'Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens' in RR Baxter and LB Sohn, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545, arts 6-8.

[25] See, eg, *Loewen v USA* [153].

[26] See *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3 (Award resubmitted, 20 August 2007) [7.4.11]; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2 (Award, 8 May 2008) [652]-[657]; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16 (Award, 29 July 2008) [651], [654]; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13 (Award, 6 November 2008) [188]; *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania*, ICSID Case No ARB/07/21 (Award, 31 July 2009) [93]; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14 (Award, 22 June 2010) [268]; *Frontier Petroleum Services Ltd v The Czech Republic*, UNCITRAL (Final Award, 12 November 2010) [293]; *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1 (Award, 7 December 2011) [315]; *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL (Final Award, 23 April 2012) [272]; *Krederi Ltd v Ukraine*, ICSID Case No ARB/14/17 (Award, 2 July 2018) [436].

under customary international law has thereby been considered as identical in content to that under the FET standard.[27] This notwithstanding, denial of justice remains today a contested standard, with adjudicatory bodies disagreeing on its exact content and scope of application.[28] But this has not prevented the standard from being broadly applied in arbitral practice. Before examining some of this practice, however, it is first necessary to consider how the standard has been deemed to operate in relation to the content of judicial decisions.

B. The classical, pre-WWII take on 'substantive' denial of justice

The possibility for a State to be held responsible for the content of judicial decisions – the so-called problem of '*mal jugé*' – was one of the most vexed issues in the classical discussions on denial of justice.[29] What was contested was not so much whether a denial of justice could arise as a result of defects in the judgments as such.[30] The majority of the commentators seemed to admit as much.[31] Where the opinions differed was on the kind of defects that would render a judgment improper from the perspective of international law. The rule was generally accepted that 'mere' errors or mistakes in the interpretation or application of domestic law were not sufficient to turn a domestic judgment into an internationally wrongful one.[32] What was instead required was 'manifest injustice': a judgment was considered defective from the standpoint of international law when it was manifestly (or 'notoriously', 'grossly', or 'palpably') unjust.[33]

[27] See *Chevron v Ecuador (Track II)* [7.12]-[7.13]; [8.24]-[8.25].

[28] cf *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No ARB/11/23 (Award, 8 April 2013) [433]-[442]; *OAO Taftneft v Ukraine*, PCA Case No 2008-8 (Award on the Merits, 29 July 2014) [481]; *Eli Lilly and Company v The Government of Canada*, ICSID Case No UNCT/14/2 (Final Award, 16 March 2017) [218]-[226].

[29] Fitzmaurice, 'Meaning of Denial of Justice', 109, considered the question to be 'in some respects the most difficult of all those connected with this topic'. Freeman, 'Responsibility for denial of justice', 308, even described it as 'one of the most confused and difficult problems in the whole field of international responsibility'.

[30] A minority of commentators did champion the idea that domestic judicial decisions should not be open to international review. See, eg, M Guerrero, 'Report to the League of Nation's Committee of Experts for the Progressive Codification of International Law', reproduced in 'Questionnaire No 4: Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners' (1926) 20(3) AJIL Supp 176, 190-91.

[31] See, eg, Anzilotti, 'La responsabilité', 25; C Dupuis, 'Liberté des voies de communication. Relations internationales' (1924) 2 Recueil des cours 125, 356; C Durand, 'La responsabilité internationale des Etats pour déni de justice' (1931) 5 RGDIP 694, 735.

[32] Freeman, 'Responsibility for denial of justice', 82; Borchard, 'Diplomatic Protection', 332; Fitzmaurice, 'Meaning of Denial of Justice', 111. For judicial confirmation of the principle, see, eg, *SS 'Lotus' (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10 26–30, 24.

[33] The formula can be found already in the classical writings on reprisals (see, eg, E Vattel, *Droit de Gens* (1758) 354-55 [350], explaining that justice is refused 'by a judgment manifestly unjust and partial', characterized by injustice that is 'evident and palpable') and persisted in the various codification attempts of the 1920s and 1930s. The formula was also applied in arbitral practice. See, eg, *Yuille, Shortridge Company* case (21 October 1861), reported in A Lapradelle and N Politis, *Recueil des arbitrages internationaux* vol 2 (Pedone 1905) 103; *Salem Case (Egypt v United States) (1949)* 2 RIAA 1161, 1202 ('palpable and malicious iniquity').

The formula of 'manifest injustice' was premised on the idea that an improper judicial outcome was a readily cognizable one.[34] Though notoriety implied a certain element of seriousness, the formula was necessarily fraught with imprecision. As the degree of injustice depends on adjudicators' subjective opinions, the benchmark did not provide for an objective standard and was hence susceptible for abuse, as also recognized by certain lawyers in capital-importing states.[35] Besides, reliance on the idea of injustice was itself conceptually flawed, since doctrine at the same time recognized that international law did not go as far as requiring that domestic judgments be inherently just.[36] Various schools of thought eventually emerged as to how the formula of 'manifest injustice' be applied in practice.

An often-made suggestion was that a manifestly unjust judgment was one resulting from domestic courts' misapplication of *international* law.[37] The cases typically invoked were those of judicial decisions violating the provisions of an extradition treaty, or judgments rendered in the exercise of a competence not recognized under international law. Some in fact even considered such situations as the only type of judicial error capable of engaging responsibility.[38] For sure, there was largely agreement that the State is responsible for injuries to aliens resulting from the courts' erroneous interpretation or application of treaties or rules of customary international law, even where the judgment in question had been rendered in perfect good faith, by an honest and competent court.[39] But as the idea was gradually recognized that domestic courts can violate international law also in other ways than through denying justice to foreigners,[40] this prompted the question about the precise line dividing instances of denial of justice from 'other' international wrongs occasioned by the judiciary. The question was seldom fully addressed, but some have considered the distinction to turn on the nature of the norm

[34] The idea was occasionally expressed in practice. See, eg, Opinion of Commissioner MacGregor in the case of *Ida Robinson Smith Putnam (USA) v United Mexican States* (RIAA1927) IV RIAA 151, 153, explaining that '[o]nly a clear and *notorious injustice, visible, to put it thus, at a mere glance*, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law' (emphasis added).

[35] See, eg, Guerrero, 'Report', 190, warning how measuring judicial decisions against justice would allow for 'abuses of every kind, for the most serious violations of internal sovereignty and for countless international conflicts'.

[36] See Anzilotti, 'La responsabilité', 22. See further K Eustathiadès, *La responsabilité internationale de l'État pour les actes des organes judiciaires et le problème du déni de justice en droit international* (Pedone 1936) 202-203.

[37] See, eg, Garner, 'International Responsibility', 183; Eagleton, 'Denial of Justice', 553; Dupuis, 'Liberté', 359; Durand, 'La responsabilité', 738; A Verdross, 'Règles générales sur le traitement des étrangers admis dans le territoire d'un état' (1931) 37 Recueil des cours 323, 385-86; De Visscher, 'Le déni de justice', 401ff. See also Harvard Draft, art 8; JL Brierly, *The Law of Nations* (Clarendon Press 1963) 287.

[38] Durand, 'La responsabilité', 742-45.

[39] Fitzmaurice, 'Meaning of Denial of Justice', 110; Dupuis, 'Liberté', 359; Eagleton, 'Denial of Justice', 553; De Visscher, 'Le déni de justice', 401-402.

[40] See, eg, *SS 'Lotus' (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10 26–30, 24.

violated: the non-observance by courts of concrete obligations under treaties or customary international law was deemed capable of qualifying as a denial of justice whenever the international norm in question was one aiming at the legal protection of an individual right.[41] The proposition found also some support in practice.[42]

Much more difficult, in contrast, was the identification of the circumstances in which the *application of domestic law itself* was such as to give rise to the responsibility of the State under international law: for when was the law applied in a manifestly unjust way? One way to work around this problem was to focus on potential *faults in the procedure* leading to the purportedly defective decision, as opposed to searching for defects in the judicial decision itself. A decision was thus manifestly unjust if it were rendered in a procedurally unjust manner, resulting from a trial in which the foreigner had been denied the benefit of due process of law.[43] But this approach did not necessarily provide a more objective benchmark, since it was common ground that procedural faults had to be sufficiently gross before they would meet the threshold of denial of justice: international law did not guarantee perfect trials.[44] Not to mention that the inquiry became increasingly delicate when the judgment alleged to be unjust was reached by the observance of the regular forms of procedure.

Another solution was then to focus on the *nature of the judicial error* involved. Here, a variety approaches emerged in practice. According to some views, to give rise to manifest injustice, the error in question had to be an *intentional* one, inspired by ill will or bad faith, discrimination, or general malevolence towards foreigners.[45] The element of malice could be inferred from some evidence of bias, fraud, or corruption on the part of the judges; of collusion between the different branches of government; or of the lack of judicial impartiality in general.[46] But this was difficult to prove in practice: the necessary extrinsic evidence was not always readily

[41] See particularly Freeman, 'Responsibility for denial of justice', 41-52. For a contrary view, see Eustathiadès, *'La responsabilité'*, 67-68, who considered the general duty of judicial protection to concern solely how courts apply domestic law with respect to foreigners.

[42] See *Martini Case (Italy v Venezuela)* (Award, 3 May 1930), reproduced in (1931) 25 AJIL 554, where the Arbitral Tribunal found a decision of Venezuela's Court of Cassation in relation to the Martini Company not to have violated a provision in a 1861 treaty between Venezuela and Italy prohibiting the granting of any monopoly to the prejudice of the citizens of the other State, as such a general provision was not capable of being invoked by 'a private citizen' of one State himself before the courts of the other State (at 564-65), but at the same time found the decision to be incompatible with an international arbitral award previously rendered in favour of the company, and thus amounting to a denial of justice (at 577ff).

[43] Borchard, 'Diplomatic Protection', 338-39, 341.

[44] Anzilotti, 'Cours', 481; *Spanish Zone of Morocco (Spain v UK)* (1925) II RIAA 615.

[45] See, eg, Fitzmaurice, 'Meaning of Denial of Justice', 109; De Visscher, 'Le déni de justice', 406. See further Arbitrator van Vollenhoven's opinion in *BE Chattin Case (United States v Mexico)* (1927) 4 RIAA 282, 286-87, and IDI Resolution Lausanne, art 6.

[46] cf Borchard, 'Diplomatic Protection', 341; Fitzmaurice, 'Meaning of Denial of Justice', 112.

available and bad faith could not be presumed.[47] The solution to this was to focus instead on the *grossness* of the error. A defective judgment was supposedly one based on an error of such a magnitude that could not be explained otherwise than by the presence of bad faith on the part of the judges, or else by their utter incompetence.[48] The approach had obvious advantages. If the error itself could be taken as proof that the State had failed in its obligation to provide honest and competent judges, claimants were relieved from their onus of proving the presence of bad faith on the part of domestic judges. Furthermore, if the judgment itself was taken to provide the necessary elements for appreciation, the inquiry was held to proceed on a more objective basis.[49] The benchmark, however, was not necessarily much more precise than the criterion of manifest injustice: opinion may obviously differ as to when a judgment is so erroneous that it transpires bad faith, or is one that no court composed of competent judges could have rendered.[50] Some did suggest though that this would probably be the case when the failing is of such a degree that it could not be explained by any factual consideration or by any valid legal reason.[51]

Hence, others considered it more appropriate to simply rely on the *manifestness* of the judicial error. A defective judgment was accordingly one that was 'obviously erroneous' or involving a 'clear' or 'open' violation of the law.[52] But this was difficult to reconcile with the general rule that 'mere' error in the application of domestic law is not sufficient to engage responsibility under international law.[53] In some of the proposals, the manifest nature of the violation was therefore linked to other elements, such as the requirement that the error be also a serious one,[54] or

[47] cf Durand, 'La responsabilité', 739.

[48] The primary proponents of such an approach were Fitzmaurice, 'Meaning of Denial of Justice', 113; Freeman, 'Responsibility for denial of justice', 330-331. See also Brierly, *The Law of Nations*, 287, referring to the 'competent and honest' judge test.

[49] De Visscher, 'Le déni de justice', 407. Cf *Martini case*, 567-68.

[50] Fitzmaurice himself seemingly recognized the difficulty, admitting (Fitzmaurice, 'Meaning of Denial of Justice', 114) that 'many gaps and difficulties remain' and that the question was 'really one of fact in respect of which no definite rule can be formulated'. Cf also Freeman, 'Responsibility for denial of justice', 331-32, admitting that 'further simplification and precision are not possible in a domain where the question is really one of degree and in which an extensive margin of latitude must necessarily be left to those arbitrators up whom devolves the duty of adjudicating claims'.

[51] See, eg, De Visscher, 'Le déni de justice', 404.

[52] See *Teodoro García and MA Garza (United Mexican States) v United States of America* (Dissenting opinion Nielsen) (1926) IV RIAA 119, 126; *Cotesworth and Powell (Great Britain v Colombia)*, reproduced in JB Moore, 'History and digest of the international arbitrations to which the United States has been a party' (1898) 2083. Apart from endorsements of principle, at least in one of the cases decided by claims commissions, denial of justice was established on the ground of the erroneous application of a domestic criminal statute: see *Abraham Solomon (United States v Panama)* (1933) VI RIAA 370, 371-72. The idea that a judgment would be internationally wrongful if 'clearly' contrary to law was itself not new. See H Grotius, *De Jure Belli ac Pacis*, bk III (1625, edn 1925) chs II, V, 627, referring to a judgment 'rendered in a way manifestly contrary to law'; Vattel, 'Droit de Gens', referring to 'violation manifeste des regles et des forms'.

[53] Dupuis, 'Liberté', 357; De Visscher, 'Le déni de justice', 403.

[54] G Salvioli, 'Les règles générales de la paix' (1933) 46 Recueil des cours 1, 122.

that it be discriminatory in nature.[55] Formulated in this way, the test provided perhaps the most workable standard for establishing a denial of justice (even if the manifestness still depended upon the observers sensibility for errors). Yet, the application of such test clearly had the potential of bringing international adjudicatory bodies dangerously close to becoming courts of appeal.

These considerations had, naturally, implications for the review that the international body was expected to perform. The idea was consistently maintained that the task of the international adjudicator was never to conduct substantive review. This was in theory possible where there was evidence revealing that certain guarantees indispensable to the proper administration of justice had not been observed in the course of the local proceedings, or else showing the presence of ill will, bad faith, corruption, or bias on the part of the judges. But classical writers conceded that, in reality, even determining the regularity of the local trial would mostly be impossible without considering to some extent the substance of the decision (be it only to determine whether the claimants' evidence was duly considered).[56] Substantive review was that much more unavoidable where the faultiness of a decision had to be conditioned upon the nature of the judicial error. To determine whether an error was a gross or manifest one, the international adjudicator could not avoid re-considering (at least, to some degree) the facts and points of law upon which the local judgment was founded. Indeed, how was the international judge to establish whether the decision 'is only apparently based on law, but is in reality an arbitrary act',[57] or whether it exhibits an 'extreme defectiveness of reasoning',[58] if it were not to review the substance of the judgment as such?

This gave rise to the question of the appropriate standard of review. Given the real apprehension that allowing international adjudicatory bodies to review domestic judgments on their substance could transform such bodies into appellate courts, there appeared to be consensus in both doctrine and jurisprudence that the task of examining proceedings before domestic courts and their outcomes had to be approached with reserve and that the standard of review had therefore to be a deferential one. The conviction was thus expressed about the 'political and international delicacy to disacknowledge the judicial decision of a court of another country',[59] and in several cases, adjudicators spoke out in favour of

[55] See also 'Draft Convention on the International Responsibility of States for Injuries to Aliens', reproduced in FV Garcia-Amador, LB Sohn and RR Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana 1974) 196, art 8, identifying an internationally wrongful domestic judicial decision as one that involved 'a clear and discriminatory violation of the law of the State concerned'.

[56] Salvioli, 'Les règles générales', 121-22; Freeman, 'Responsibility for denial of justice', 171.

[57] Verdross,'Règles générales', 385.

[58] De Visscher, 'Le déni de justice', 407.

[59] *Garrison's case (US v Mexico)* (7 November 1871); reproduced in JB Moore, History and digest of the international arbitrations to which the United States has been a party, vol 3 (1898) 3129. The proposition was later endorsed in the *Chattin Case*, 288. For a similar proposition, see *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Separate Opinion of Judge Tanaka)

the general principle that respect was due by an international tribunal to the domestic judiciary, particularly to a State's highest courts.[60] The deference thus owed to the domestic judiciary did not exclude the possibility of an international adjudicator performing a searching examination of the domestic adjudicative process; indeed, the international adjudicator was claimed to have a duty to do so.[61] Deference had rather to be applied to the assessment of domestic courts' findings on points of law or fact. Deference was particularly to be accorded to domestic judges' findings of fact, which international adjudicators were not supposed to second-guess, but were solely to appraise the adequacy of the evidence supporting such findings.[62] All in all, the standard required for a finding of denial of justice was that of 'convincing evidence',[63] and there was a presumption operating in favour of the adequacy of domestic proceedings.[64] Most importantly, the test that was to be applied to the appraisal of judicial errors was not one of correctness, but one of reasonableness. As Freeman explained: 'The case must be one as to which there is no possible doubt. As long as a reasonable difference of opinion subsists as to the propriety of the decision, resort to the

[1970] ICJ Rep 114, 160, where Judge Tanaka observed that: '[i]t is an extremely serious matter to make a charge of a denial of justice vis-à-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible'.

[60] See, eg, *Ida Robinson Smith Putnam (USA) v United Mexican States* (1927) IV RIAA 151, 153 (noting that '[t]he Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.'); *Margaret Roper (USA) v United Mexican States* (1927) IV RIAA 145, 148 (expressing the view that '[t]o undertake to pick flaws in the solemn judgments of a nation's highest tribunal is something very different from passing upon the merits of an investigation conducted by an official').

[61] See, eg, the views of Commissioner Nielsen in *George Adams Kennedy (USA v United Mexican States)* (1927) IV RIAA 194, 201 ('[i]n considering the contentions advanced by the United States with regard to the impropriety of the proceedings instituted against the person who shot Kennedy, the Commission of course must have in mind the general principles asserted in behalf of Mexico with regard to the respect that is due to a nation's judiciary and the reserve with which an international tribunal must approach the examination of proceedings of domestic tribunals against which a complaint is made. As said by counsel for Mexico, such a tribunal of course does not act as an appellate court, but it is not precluded from making a most searching examination of judicial proceedings, and it is the duty of a tribunal to make such an examination to determine whether the proceedings in a given case have resulted in a denial of justice as that term is understood in international law').

[62] See *Chattin*, 293 (explaining that 'an accused person cannot be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal can never replace the important first element, that of the Judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, that is: the legality and sufficiency of the evidence'). For the endorsement of this view, see *Solomon* case, Dissenting opinion of Panamanian Commissioner, 376.

[63] *García & Garza*, 123.

[64] cf *Putnam*, 153 (confirming that '[a] question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined.'). For the same proposition, see Freeman, 'Responsibility for denial of justice', 331, arguing that '[t]he presumption of adequacy which surrounds municipal proceedings will operate to shield domestic judgments up until the time it is shown that the error was so serious that it could not be considered as a normal risk in the exercise of civilized judicial functions'.

international remedy is excluded.'[65] Or in the words of the famous *Neer* standard, denial of justice was deemed to entail 'an insufficiency of governmental action so far short of international standards that *every reasonable* and impartial man would readily recognise its insufficiency.'[66]

C. The modern approach to 'substantive' denial of justice: same old, same old?

The standard for 'substantive' denial of justice was never conclusively settled. Paulsson's leading modern treatise on the topic, *Denial of Justice in International Law* (2005), builds on the proposition that denial of justice is always procedural in nature and that the objective of the international adjudicator is never to conduct a substantive review.[67] This is also endorsed by Newcombe and Paradell.[68] Still, in most of the post-WWII and more recent scholarship, the distinction between 'procedural' and 'substantive' denials of justice has remained well accepted,[69] or at least the cogency of the latter category was never seriously questioned.[70] As of lately, authors such as Douglas and Damirkol have more firmly been making the case why a purely procedural approach to denial of justice is unsustainable and why the delict must necessarily cover the substantive aspects of the domestic adjudicative process.[71] Nevertheless,

[65] Freeman, 'Responsibility for denial of justice', 331. See also De Visscher, 'Le déni de justice', 407. Cf Baxter and Sohn's opinion as to the appropriate standard of review: '[i]t is not enough that the international arbiter of the claim be persuaded that the result reached by the court of the respondent State was a doubtful one when measured against the law of that State or even that, on balance, the international arbiter would be inclined to reach a different result. The alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice'. LB Sohn and RR Baxter, 'Convention on the International Responsibility of States for Injuries to Aliens' (Draft No 12 with Explanatory Notes, 1961) 98.

[66] *LFH Neer and Pauline Neer (USA) v United Mexican States* (1926) IV RIAA 60, 62 (emphasis added). In *Neer*, the formula was employed as a standard for measuring the 'propriety of governmental acts' in general. But the same standard was subsequently employed also specifically as a measure for determining denial of justice. See, eg, *García & Garza*, 123.

[67] J Paulsson, *Denial of Justice in International Law* (CUP 2005) 7, 82-84. Paulson continues to hold on to this proposition. See J Paulsson, 'Issues arising from Findings of Denial of Justice' (2019) 405 Recueil des cours 35, 38.

[68] A Newcombe and L Paradell, *Law and practice of investment treaties: standards of treatment* (Kluwer Law 2009) 241.

[69] See AK Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2005) 45 Virginia Journal of International Law 809, 843-47; M Paparinskis, *The international minimum standard and fair and equitable treatment* (OUP 2013) 215-16. For earlier examples, see E Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159(1) Recueil des cours 1, 281-82; AO Adede, 'A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law' (1976) 14 Canadian Yearbook of International Law 73, 88-93.

[70] D Wallace, 'State Responsibility for Denial of Substantive and Procedural Justice under NAFTA Chapter Eleven' (2000) 23 Hastings International and Comparative Law Review 393; C Focarelli, 'Denial of Justice' in Max Planck Encyclopaedia of Public International Law (OUP 2013); A Ehsassi, 'Cain and Abel: Congrulence and Conflict in the Application of the Denial of Justice Principle' in S Schill (eds) *International Investment Law and Comparative Public Law* (OUP 2010) 225, 231ff.

[71] According to Douglas, '[t]he purpose of a system for the administration of justice is to decide cases and generate good outcomes. The merits of an outcome are inexorably linked to the substantive law governing the rights and obligations in question. A theory of procedural fairness must be linked

compared to the classical discussions, little appreciable progress has been made in determining the circumstances in which a judgment would be so defective to amount to a denial of justice. With the exception of Demirkol, who has proposed the standard of reasonableness as a way for measuring the propriety of judicial outcomes,[72] most scholars have continued to presume that a defective judgment was one of a readily identifiable kind.[73] According to de Aréchaga, it was the 'result' of the decision that had to be evaluated whilst 'taking into account elements of justice and equitable considerations'.[74]

The different scholarly positions find resonance in present day jurisprudence of investment tribunals. In following Paulsson's proposition, some investment tribunals had thus difficulties accepting that denial of justice could occur as a result of judicial decisions as such.[75] According to this line of jurisprudence, the substance of the judgment could only be of relevance to the extent that it provides evidence of lack of due process.[76] Nonetheless, the majority of the tribunals have continued to work under the presumption that the outcome of the domestic legal process could ultimately be of such a nature as to constitute reason to engage the responsibility of the State on account of denial of justice. Determinative in that respect became the test of 'judicial propriety'.[77] The question, as the Tribunal in *Mondev* (2002) would notably explain, was 'whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome'; an issue which ultimately boiled down to the question whether the judgment can

to substantive rights and outcomes to have any explanatory force in terms of identifying the fundamental elements of procedural fairness': Z Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63 ICLQ 867, 870. In the view of Demirkol, who defines denial of justice as 'an outcome of an inaccessible or preposterous judicial process which prevents the individual from obtaining the procedural and substantive protection granted by the law', the proper administration of justice 'also covers substantive aspects of the judicial process, that is, the assessment of the facts and of the law'. B Demirkol, *Judicial Acts and Investment Treaty Arbitration* (CUP 2018) 161, 163.

[72] Demirkol, 'Judicial Acts', 163ff.

[73] Adede, 'A Fresh Look', 91-93, and especially, *Barcelona Traction*, Separate Opinion of Judge Tanaka) 156-58.

[74] De Aréchaga, 'International Law', 282.

[75] See *Lion Mexico Consolidated L.P. v United Mexican States*, ICSID Case No ARB(AF)/15/2 (Award, 20 September 2021) [217], rejecting the differentiation between substantive and procedural denial of justice as any useful.

[76] See, eg, *Rumeli/Telsim v Kazakhstan*, [653]; *Liman Caspian v Kazakhstan*, [279]; *Chevron v Ecuador (Track II)*, [8.37].

[77] For examples endorsing and applying the test of 'judicial propriety', see, in particular, *AMTO v Ukraine*, [76]; *Jan de Nul*, [192]-[193], [209]; *Chevron v Ecuador (Contract Claims)*, [244]; *Liman Caspian v Kazakhstan*, [275]-[279], [285]; *GEA Group v Ukraine*, ICSID Case No ARB/08/16 (Award, 31 March 2011) [312] [319]; *Spyridon Roussalis v Romania*, [471]; *Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia*, ICSID Case No ARB/09/16 (Award, 6 July 2012), [263]; *Vannessa Ventures v Venezuela*, ICSID Case No ARB(AF)04/6 (Award, 16 January 2013) [227]; *Iberdrola Energía SA v Guatemala*, ICSID Case No ARB/09/5 (Award, 17 August 2012) [429]; *Oostergetel v Slovak Republic*, [225], [291]; *Arif v Moldova*, [447]; *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v Hashemite Kingdom of Jordan*, ICSID Case No ARB/13/38 (Award, 14 December 2017) [471]; *Chevron v Ecuador (Track II)*, [8.26].

be considered 'clearly improper and discreditable'.[78] Formulated in that way, the test of 'judicial propriety' was of course nothing but a euphemism for the old imprecise formula of 'manifest injustice', leaving a great deal of discretion to arbitrators deciding each case and their subjective perceptions of 'propriety'.[79] Indeed, the *Mondev* Tribunal admitted that the standard may be 'somewhat open-ended' but considered that 'in practice no more precise formula can be offered to cover the range of possibilities.'[80]

As scholarship in the past, investment tribunals have continued to differ in their opinion as to the circumstances in which the required level of impropriety had been reached. In the view of some tribunals, denial of justice could be pleaded in the event of a 'clear and malicious misapplication of the law'.[81] To other tribunals, the judgment would have to be 'egregiously wrong', of the kind that no 'competent judge could reasonably have made.'[82] Then again others considered the test to turn on the question of 'clear and manifest illegality'.[83] Variations notwithstanding, the view has been largely maintained that a high threshold must be applied before a State can be found to have failed to accord justice. To be considered discreditable from the standpoint of international law, the improprieties experienced in judicial proceedings had to be grave or serious ones,[84] and 'mere' error committed by a domestic court in the interpretation or application of domestic law was not sufficient to establish liability.[85] The burden of proof was thereby taken not to be lightly discharged, with tribunals accepting that a national legal system will benefit from the general

[78] *Mondev International Ltd. v USA*, ICSID Case No ARB(AF)/99/2 (Award, 11 October 2002) [127].

[79] Note that even in recent jurisprudence references can still be found to the classic formula of 'manifest injustice'. See *H&H Enterprises Investments, Inc. v Arab Republic of Egypt*, ICSID Case No ARB 09/15 (Award, 6 May 2014) [403].

[80] *Mondev v USA*, [127].

[81] *Azinian, Davitian and Baca v The United Mexican States*, ICSID Case No ARB(AF)/97/2 (Award, 1 November 1999) [103]; *Marco Gavazzi and Stefano Gavazzi v Romania*, ICSID Case No ARB/12/25 (Decision on Jurisdiction, Admissibility and Liability, 21 April 2015) [264].

[82] See, eg, *Rumeli/Telsim v Kazakhstan*, [619]; *Arif v Moldova*, [442], [445], [453], [489]; *Unglaube v Costa Rica*, ICSID Case No ARB/08/1 (Award, 16 May 2012) [277]; *Iberdrola Energía v Guatemala*, [432]; *Hassan Awdi v Romania*, ICSID Case No ARB/10/13 (Award, 2 March 2015) [326]; *Pantechniki v Albania*, [94]; *Alghanim v Jordan*, [281], [334], [429], [432]; *Krederi v Ukraine*, [486].

[83] See *Mohammad Ammar Al Bahloul v Republic of Tajikistan (Partial Award on Jurisdiction and Liability)* (SCC Case No V(064/2008), 2 September 2009), [237]; *Flughafen Zurich AG v Venezuela*, ICSID Case No ARB/10/19 (Award, 18 November 2014) [635]; *OI European Group v Venezuela*, ICSID Case No ARB/11/25 (Award, 10 March 2015) [525].

[84] See in particular *Oostergetel v Slovak Republic*, [273]; *H&H Enterprises v Egypt*, [400].

[85] See, eg, *Azinian v Mexico*, [99]; *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8 Award, 11 September 2007) [313]; *Pantechniki v Albania*, [94]; *Liman Caspian v Kazakhstan*, [274]; *Alps Finance and Trade AG v The Slovak Republic*, UNCITRAL (5 March 2011) [250]; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL (Award on Jurisdiction and Liability, 28 April 2011) [628]; *Spyridion Roussalis v Romania*, [315]; *Oostergetel v Slovakia*, [273]; *Iberdrola Energía v Guatemala*, [432]; *Arif v Moldova*, [441]; *Flughafen v Venezuela*, [640]-[641]; *Alghanim v Jordan*, [476]; *Krederi v Ukraine*, [470]; *Bridgestone v Panama*, [222(iii)].

evidentiary presumption that its courts have acted properly, and that the judiciary shall be permitted a margin of appreciation before the threshold of a denial of justice will be met.[86]

In the end, one is left to wonder how investment tribunals have actually decided claims of putative substantive denial of justice. What factors did adjudicators take into account in examining whether or not a judgment was defective from the standpoint of international standards? Were they sitting as courts of appeal? If not, what was the nature of their review? Ultimately, can the relevant benchmark really not be spelled out with greater precision than by reference to the indeterminate formula of 'manifest injustice' or the generic 'judicial propriety' test? It is to this questions that we now turn.

III. Arbitral Review of Domestic Judgements in Practice

In looking for answers to the above questions, the contribution proceeds to dissect investment tribunals' jurisprudence involving claims of substantive denial of justice. Before discussing the approaches followed by tribunals in such cases, however, a few clarifications about the method employed shall first be made.

A. Method

The analysis proceeds on the premise that an investment tribunal, as any other international body exercising some form of supervisory jurisdiction over States' actions, can assess an impugned judicial measure in different ways. The type of review will depend on the aspect of the decision that will be subject to assessment and the method adopted by the tribunal to accomplish its supervisory function. Consequently, the tribunal's scrutiny may thus vary in nature, but also in intensity. The *nature and intensity* of the tribunal's scrutiny is a question of 'standard of review'.[87]

The concept of standard of review is conventionally defined as the degree of *intrusiveness* into the decision-making process of the reviewed body, or conversely, to the degree of *deference* that the reviewing body grants to the reviewed body before it is prepared to substitute the latter's decision with its own.[88] Standards of review are usually classified along a

[86] See *Chevron v Ecuador (Track II)*, [8.41]-[8.42].

[87] On the different uses of the concept in the international context, see L Gruszczynski and W Werner (eds), *Deference in international courts and tribunals: standard of review and margin of appreciation* (OUP 2014). See further E Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (CUP 2021).

[88] J Bohanes and N Lockhart, 'Standard of Review in WTO Law' in D Bethlehem and others, *The Oxford Handbook of International Trade Law* (OUP 2009) 378, 379. This is the understanding that the concept has also gained in some investment law literature. See, eg, WW Burke-White and A von Staden, 'Private Litigation in a Public Law Sphere: the Standard of Review in Investor-State Arbitrations' (2010) 35 Yale Journal of International Law 283, 286; T Chen, 'The Standard of

spectrum, ranging from most stringent scrutiny at one extreme, to total deference at the other, with intermediate variations in between. While each legal system labels these standards differently, the following could be considered as essential archetypes. On the one hand of the spectrum, there is *de novo*-type of review. This represents the most intrusive/least deferential standard, which entails full scrutiny of the initial action and its motivation, whereby the reviewing body reassesses the determinations made by the reviewed body as if the latter had not taken a decision at all. The assessment takes the form of a 'correctness' test, which means that the reviewing body determines whether a particular decision is the best one. At the other end of the spectrum, one can find *full deference*, which implies that the determinations underlying the initial decision, including the decision itself, are not questioned.[89]

In between these two extremes, there is a variety of more or less deferential standards, which vary with respect to the quality and quantity of the reasons and evidence they demand to support the decision under review. A commonly used test, applied especially in the domestic review of administrative action, is that of *reasonableness*. The assessment in this case requires the reviewing body to determine whether the decision in question falls within a range of possible/acceptable options. The acceptability of the option chosen will, as a minimum, depend on whether or not the particular choice is open to justification. Usually, however, the justification itself will have to be backed by cogent reasons to satisfy the standard. The intensity of this type of assessment depends then on how far the cogency of those reasons is scrutinized by the reviewing body.[90] A particular form of reasonableness-type standards is that of *good faith* review. This seeks only to identify a minimal justification for the State's decisions and/or to ensure that decisions are not informed by opportunistic or bad faith motives.[91] Other examples of deferential standards would include various types of *procedural* review, where the reviewing body only verifies whether there has been appropriate procedural compliance, without engaging in a review of the merits.[92]

Review and the Roles of ICSID Arbitral Tribunals in Investor-State Dispute Settlement' (2012) 5 Contemporary Asia Arbitration Journal 23, 26; C Henckels, *Proportionality and deference in investor-state arbitration* (CUP 2015) 6.

[89] cf C Henckels, 'Indirect expropriation and the right to regulate: revisiting proportionality analysis and the standard of review in investor-state arbitration' (2012) 15 JIEL 223, 238.

[90] See J Wouters and S Duquet, 'Reasonableness as a Standard of Judicial Review: Comparative, European and International Perspectives' (2014) 64(1) Rivista Trimestrale di Diritto Pubblico 33, 37-47, generally distinguishing between a manifest unreasonableness test, a soft-look test, and a hard-look reasonableness test.

[91] Shirlow, 'Judging at the Interface', 177ff.

[92] An example of such a standard is the test of Vertretbarkeitskontrolle used by the Federal Constitutional Court. Another is the standard of abuse of discretion used by US courts. See Burke-White and von Staden, 'Private Litigation', 321. See further Shirlow, 'Judging at the Interface', 179ff.

With these distinctions in mind, the inquiry will proceed in the following way. To simplify the analysis,[93] a broad distinction will be drawn in relation to the nature of the review performed by investment tribunals. In practice, two broad approaches[94] can namely be observed.[95] The first has been to appraise a domestic decision solely by reference to its formal qualities; an approach that can best be described as *narrow substantive review*, and which shall be analysed first (B). The other approach has been to engage in a *full-fledged substantive review*, with investment tribunals assessing whether a decision was also 'proper' in its material aspects, either over a more deferential test of reasonableness (C), or a more exacting test of correctness (D). Under neither of these approaches has the exact scope of review been spelled out, though, by arbitral tribunals.

B. Narrow substantive review: assessing judgments on their formal qualities

When dealing with claims of substantive denial of justice, one of the approaches was to place emphasis on the formal aspects of the domestic adjudication process. The focus of the tribunals' inquiry was on determining whether due process had been observed in the proceedings leading to the judgment in question; a matter that was to be established primarily on the basis of evidence extraneous to the judgment as such. To the extent that the judgment itself was the object of examination, the inquiry was limited to establishing issues such as whether the decision was reasoned, whether it responded to parties' submissions, or whether it was grounded in some legal basis. Though the scope of the tribunal's review was thus a narrow one and was seemingly aimed at avoiding assessments of the substantive/material propriety of the outcome itself, the intensity of the scrutiny nonetheless varied in practice, ranging from very superficial assessments to more probing examinations.

[93] To avoid unduly complicating the analysis, no distinction will further be drawn between domestic judicial decisions on matters pertaining to the merits of the case, and decisions on matters of procedure that could have the effect of unfairly preventing an investor from defending or from prosecuting its case.

[94] Whether or not these 'approaches' are really the result of a tribunal's deliberate choice can be left open here. In some cases, the tribunal's approach seems to have been influenced by the way the case was pleaded, and particularly, by the grounds on which the particular judgments was challenged. Where a particular decision was primarily challenged on account of specific defects of due process, this usually resulted in a narrower scope of review. But it must also be noted that in some awards, both narrow and broader substantive reviews were performed of different judicial decisions in the domestic adjudication process. With respect to those cases, only the instances of broader review will be examined, without further attention being devoted to instances of a narrow review pursued in those same cases. For illustrations, See, eg, *Jan de Nul v Egypt*, (scrutinizing the procedural propriety of decision appointing a panel of experts); *Arif v Moldova*, [466]-[496] (scrutinizing whether decisions were *ultra petita* and whether other due process violations had occurred).

[95] In some cases, the intensity of the review was actually impossible to ascertain. See, eg, *Gavazzi v Romania*, [264]-[267], where the Tribunal rejected all claims pertaining to the conduct of the courts, on the ground that Claimants simply *failed to prove* 'clear and malicious application of the law' or 'extremely gross misconduct by the Respondent's judiciary'.

In a handful of cases, the approach appeared to be utterly formalistic, with tribunals appearing not to have gone much further than ascertaining whether the requirements of due process had been nominally complied with. In *Rumeli v Kazakhstan* (2008), the Tribunal limited itself to observing that the issues decided by Kazakh courts 'were sometimes highly disputed ones', but after noting that 'when the decisions were appealed, they were carefully reviewed by the appellate courts and sometimes partially reversed by them', it ultimately found nothing to suggest the reviewed judgments were 'wrong procedurally or substantially, or were so egregiously wrong as to be inexplicable other than by a denial of justice.'[96] Even more scant was the tribunals' substantiation in a few other cases. In *Binder v Czech Republic* (2011), the Tribunal restricted itself to observing that in the impugned judgments the courts examined plaintiff's arguments and 'delivered extensively reasoned judgments', which in some cases also obtained 'a further examination' by the Supreme Administrative Court and the Constitutional Court.[97] In *Spyridion Roussalis v Romania* (2011), the Tribunal referred solely to the fact that the impugned court orders were 'motivated' and were 'communicated to Claimant' who had the opportunity to contest them.[98] Then again in *H&H Enterprises Investments v Egypt* (2014), the Tribunal found denial of justice not to be proven since 'Claimant had the opportunity not only to participate in the local proceedings but also to present its claims and counterclaims.'[99]

In some cases, tribunals proceeded to consider what domestic courts actually decided, but without further addressing the adequacy of the courts' reasoning. In *GEA Group v Ukraine* (2011), the impugned decisions were said to have offended any sense of judicial propriety because the Ukrainian courts, in refusing to recognise and enforce a commercial award, purportedly failed to address the arguments raised in the local proceedings. Despite the claimants characterizing the judgments as being 'grossly improper decisions in the application of the law'[100] and thus inviting the Tribunal to opine on the adequacy of the courts' reasoning, the Tribunal confined itself to establishing that claimants' arguments were actually addressed and rejected the denial of justice claim without further substantiation.[101] Similarly restrained was the assessment in *Paushok v Mongolia* (2011). A decision of the Mongolian Administrative Court was found not to constitute a manifest failure of justice, with the Tribunal merely observing that 'after having made a summary of the views of the parties' the decision 'proceeds to an extensive analysis of the facts and the legislation applying to them'.[102] Nor could a denial

[96] *Rumeli/Telsim v Kazakhstan*, [619].
[97] *Rupert Joseph Binder v Czech Republic (Final Award)* (UNCITRAL, 15 July 2011), [461].
[98] *Spyridion Roussalis v Romania*, [607].
[99] *H&H Enterprises v Egypt*, [403].
[100] *GEA Group v Ukraine*, [310].
[101] ibid [315]-[317].
[102] *Paushok v Mongolia*, [627].

of justice be established with respect to the subsequent decision of the Mongolian Supreme Court that upheld the Administrative Court's decision. According to the Tribunal, 'looking at the actual decision', one had to conclude that the Supreme Court 'gave serious consideration to the positions of each party' and that its judgment contained 'a solid summary of the views expressed by each party'.[103] It is not that the Tribunal was oblivious of the Courts' reasoning. Whilst Claimant took serious issue with one of the Administrative Court's findings, the Tribunal dismissed the criticism by noting how that finding constituted merely 'supplementary reasoning' but not 'the rationale for the decision'.[104] Yet, the Tribunal refrained from addressing the adequacy of the Court's reasoning, despite the fact that the Mongolian courts happened to have reached a conclusion different from that of the Tribunal itself with respect to the legal nature of the underlying contract. In both *GEA Group* and *Paushok*, the mere fact that the courts addressed the arguments was thus apparently sufficient to dispel doubts about the propriety of the impugned judgments; something that may be difficult to fathom.

In other cases again, tribunals explicitly endorsed the adequacy of the court's reasoning, but without providing the grounds for holding the reasoning adequate. Such was the approach in *Iberdrola v Guatemala* (2012), where Guatemala's Constitutional Court was accused of having failed to review the issues submitted to it for consideration, and was further reproached for having provided inadequate reasoning for its findings. Having established that the Court did address the contested issue,[105] the Tribunal observed that the Court 'could have been more precise in its concepts, or not have confused, as it appears to have done, the sequence in which certain acts should have occurred in the process', but at the same time held that 'mere discrepancy with the reasoning of the court decision, with the quality of the judgment, with the persuasiveness of its content or the surprise that the result may cause the claimant, do not constitute a denial of justice.'[106] The Tribunal refrained from further elaborating upon why the court's reasoning on that point was not 'clearly inappropriate'.[107] Nor did the Tribunal further substantiate its finding that the judgment did not only give the appearance of reasoning, as contended by Claimant. According to the Tribunal, it was 'obviously' not its function to declare a denial of justice simply 'because the Court should have applied different interpretive criteria and reasoning.'[108] Save for holding that the Court's interpretation was not 'aberrant or arbitrary', the Tribunal did not further explain why the interpretation really was adequate.[109] Similarly

[103] ibid [629].
[104] ibid [628].
[105] *Iberdrola Energía v Guatemala*, [489].
[106] ibid [490]-[491].
[107] ibid [492].
[108] ibid [503].
[109] ibid [504].

unsubstantiated were the assessments in the *Lidercón v Peru* (2020) and *Nelson and Blanco v Mexico* (2020) cases. In the former, the Tribunal merely concluded that it could not 'be said that the reasoning of the Peruvian judgments is so inept as to be inexplicable otherwise than as the result of bias against the foreign investor, or otherwise deserving of condemnation as 'clearly improper and discreditable'.'[110] In the latter, the Tribunal observed that 'a mere disagreement with the reasoning does not amount to a lack of reasoning nor does it allow this Tribunal to consider that the Court administered justice in a seriously inadequate way or that it clearly and maliciously misapplied the law.'[111]

In a handful of cases, in contrast, tribunals went as far as opining on the adequacy of the reasoning as such. This was done by assessing the courts' treatment of factual evidence and/or the legal basis under which the claims were decided. One such instance is the award in *Philip Morris v Uruguay* (2016), where the claim of denial of justice was grounded in the purported failure on the part of Uruguay's Administrative Court to address plaintiff's arguments. Specifically, Claimants maintained that the Court ignored legal evidence submitted by Claimants' experts, relying instead on the expert evidence submitted to the Court by a different party, which challenged the same regulatory measure in separate proceedings. Furthermore, Claimants took offence at the fact that their judgment contained frequent references to the party in the parallel proceedings and the latter's trademarks, suggesting that the Court did not actually address the arguments submitted to it. The Tribunal did find the judgment to raise questions of procedural propriety, but ultimately found the defects in the judgment not sufficient to give rise to liability.[112] The Tribunal established that the Court had the liberty to disregard expert legal opinions under Uruguayan law,[113] whilst considering the Court's reliance on another expert's opinion to be of lesser significance insofar as the reference to that opinion was 'not in the dispositive section' and 'not as a key part of the reasoning'.[114] The Tribunal also determined that the impugned judgment was not 'simply a photocopy' of the other decision, that the Court 'correctly identified' the arguments that Claimant was making, and that Claimant's legal argument focused 'on the other side of the same coin' than the argument of the party in the parallel proceedings; since the Court thus dealt with the substance of

[110] *Lidercón, S.L. v Republic of Peru*, ICSID Case No ARB/17/9 (Award, 6 March 2020) [226]. See also [267], where the Tribunal similarly noted that it was not possible to 'conclude that the Peruvian judgments of which Lidercón complains are aberrant to the point of being explicable only as a denial of justice'.

[111] *Joshua Dean Nelson and Jorge Blanco v United Mexican States*, ICSID Case No UNCT/17/1 (Award, 5 June 2020) [376]. See also at [383], concluding with respect to the alleged lack of reasoning in another judgment that 'a mere disagreement with the reasoning of the court does not amount to a denial of justice'.

[112] ibid [568], [578].

[113] ibid [564].

[114] ibid [565].

Claimant's 'closely related claim', the Tribunal considered that 'in substance' the Claimant's arguments were addressed.[115] In the Tribunal's view, the fact that the Court's reasoning 'may have fallen under a different heading, or may have not been clearly structured' did not mean the Court had failed to deal with the substantive arguments; what mattered was whether 'in substance' the domestic court had failed to decide 'material aspects' of the relevant claim, such that the Court could not be said to have decided the claim at all.[116] The Tribunal ultimately concluded that the Court addressed separately each of plaintiff's claims 'in a reasoned manner'.[117]

Other times, however, a similarly intensive scrutiny resulted in a finding of liability. In *Energoalians v Moldova* (2013), the Tribunal determined that a decree of the Moldovan Audit Chamber, a body performing a quasi-judicial role, constituted a denial of justice from the point of view of both procedure and its contents.[118] At issue in that case was the Chamber's finding that Claimant had not supplied power to the Moldovan State-owned enterprise operating the power grid. This finding eventually led to the invalidation of certain assignment contracts in Claimant's favor. Upon close scrutiny, the Tribunal established that the Chamber's decision 'did not follow, from a strictly logical point of view' from its prior conclusion that no proper accounting records were presented, for 'no legal grounds for that conclusion, based on the respective laws on accounting, were provided by the Audit Chamber.'[119] The Tribunal furthermore established that the decision 'was in conflict with the evidence' received by the Chamber.[120] Not only was the Chamber's conclusion in contradiction with the operator's own repeated admissions that the power had been supplied. The Tribunal could also not understand the factual grounds on which the Chamber concluded that the operator had paid for the electricity supplied, for there was no evidence to such effect, which made the decision appear 'particularly arbitrary.'[121] The decision was thus improper as it lacked logic and support in the factual evidence. A similar finding could have been made with respect to the decisions of Moldovan courts that, pursuant to the Chamber's findings, proceeded to annul certain assignment contracts. Also with respect to those, the Tribunal noted 'the existence of inconsistency of the grounds used by Moldavian courts to issue their judgements'[122] and thus found 'the ground stated in the text of some court judgements to be unclear or unconvincing'.[123] Due to Claimant's failure to sufficiently

[115] ibid [577]-[578].
[116] ibid [563], [557].
[117] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 (Award, 8 July 2016) [559]; cf [558]-[562].
[118] *Energoalians TOB v Republic of Moldova*, UNCITRAL (Award, 23 October 2013) [356].
[119] ibid [354].
[120] ibid.
[121] ibid [355].
[122] ibid [364].
[123] ibid [365].

substantiate its claims on that point, however, the Tribunal ultimately refrained establishing impropriety.

In *Manchester Securities v Poland* (2018), the Tribunal performed a similarly detailed assessment of courts' reasoning and determined a degree of impropriety sufficient to establish the responsibility of the State. Specifically, the Tribunal concluded that in the lawsuits concerning an unfinished apartment development project (which resulted in the Claimant being prevented from recovering certain mortgage-secured debts), Claimant was subject to arbitrary and discriminatory treatment at the hands of Poland's Supreme Court, and thus a victim of a denial of justice.[124] The Tribunal largely avoided assessing the gravity of the errors, establishing instead that the Supreme Court inconsistently engaged in a determination of facts. Not only did the Tribunal find no explanation as to why Poland's Supreme Court, despite being a court of cassation, disregarded the facts established by the Court of Appeal in the case involving the Claimant. What remained also 'wholly unexplained' was why the Supreme Court pursued a fact-finding exercise in the case of the claimant, but not in the cases involving domestic investors, especially as the Court of Appeal's factual findings were the same in all the other cases considered.[125] Furthermore, the Tribunal remained 'unconvinced' by the Supreme Court's differentiation between the mortgages of different investors in one case, inasmuch as such differentiation was at variance with the reasoning of the Supreme Court in another case.[126] As the Tribunal explained, it was not a question of 'whether the Supreme Court committed a procedural error, but whether the error was committed selectively to justify a finding against Manchester.'[127]

* * *

What follows from the foregoing analysis is that the narrow review thus pursued has not always been equally narrow. The judicial decisions reviewed were subject to varying degrees of scrutiny: in some cases, the assessment appeared utterly superficial and formalistic; in others, it gave rise to probing, demanding examinations. The problem, however, is not in the variable approach, but in the disparity in the tribunals' justifications for their findings. With the exception of the *Philip Morris, Energoalians*, and *Manchester Securities* cases, the approach has generally led to poorly reasoned awards. One is left wondering what circumstances then precisely do make a court's reasoning 'clearly improper' so as to amount to a denial of justice.

[124] *Manchester Securities v Poland*, [429]ff.
[125] ibid [444]-[445].
[126] ibid [466][467].
[127] ibid [480].

C. Full-fledged substantive review over a test of reasonableness

In dealing with claims of substantive denial of justice, it has been more common for tribunals to engage more directly with the 'substance' of the courts' decisions; to examine not solely whether the judgments were proper as to their form, but also as to their content. A common way to proceed with such an examination was to assess the material propriety of the judgments over a test of reasonableness. This standard of review was in some cases expressly stated; in others, it could be inferred from the tribunals' reasoning. The intensity of the scrutiny again varied, ranging from less elaborated assessments as to whether a decision was reasonable or plausible (i), to more elaborated and more intrusive assessments of their juridical (ii), economic, (iii), or otherwise factual (iv) propriety.

i. Simple reasonableness

In many cases, the assessment happened not to be a particularly elaborate one. Tribunals characterized a decision as reasonable, without reference to an objective external benchmark or measure against which such reasonableness was measured. In *Ares v Georgia* (2008), the claim of denial of justice was thus dismissed rather succinctly on the ground that the Georgian courts issued 'thoughtful, reasoned and *reasonable* decisions that expressly incorporated references to each of the parties' submissions'.[128] Even more oblique were the Tribunal's findings in *Arif v Moldova* (2013) in relation to the claim that the local court committed a denial of justice by supposedly wrongfully arrogating jurisdiction over domestic suits involving the Claimant's subsidiary. The claim was dismissed, with the Tribunal merely noting how its role was 'limited to determine whether the judiciary has denied justice by applying procedures that are so void of reason that they breathe bad faith'.[129] Given that no denial of justice was found, the court's arrogation of jurisdiction was thus apparently found to be reasonable. In *Flughafen v Venezuela* (2014), the assessment was equally circuitous. The claim that the Supreme Court had unlawfully taken over Claimants' case from the regular administrative court and thereby committed a denial of justice was dismissed, with the Tribunal observing that the act of denial of justice was 'reserved for situations in which the courts have flagrantly violated the law, not for doubtful situations in which you can legitimately defend different interpretations of the applicable rules'.[130] As different conclusions were hence seemingly conceivable, the judgment was thus accepted as reasonable.

In some cases, reasonableness appeared to have been determined at the hand at how convincing the judgment was. This approach to reasonableness was usually adopted where the grief was directed at the courts'

[128] *Ares International Srl and MetalGeo Srl v Georgia*, ICSID Case No ARB/05/23 (Award, 28 February 2008) [9.3.41] (emphasis added).
[129] *Arif v Moldova*, [482].
[130] *Flughafen v Venezuela*, [687].

interpretation of domestic law provisions. Illustrations can be drawn from three cases. In *Al Bahloul v Tajikistan* (2009), the contention was made that a Tajik Economic Court consciously misapplied Tajik law for the purpose of reducing Claimant's interests in a local subsidiary, by interpreting the requirement that a shareholder's capital contribution must be paid in full within one year to mean one year from registration of the company as opposed to one year from the commencement of a company's activity. Upon closely reviewing the legal basis in which the impugned decision was grounded, the Tribunal found the position taken by the court to be 'more persuasive' than that taken by Claimant's legal expert and limited itself to concluding that the court's application of Tajik law on this issue was not 'malicious or clearly wrong'.[131] In *Liman v Kazakhstan* (2010), claimants contested the propriety of a decision by Kazakhstan's Supervisory Court to deny an appeal by reference to a new law that happened to be published in Russian language only. The Tribunal found nothing improper in such a decision, observing that the Court's acceptance of that law as an official publication in terms of the Kazakh Code of Civil Procedure 'at least can be considered as plausible'.[132] A similar approach was seemingly followed in *Arif v Moldova* (2013) when assessing the propriety of Moldovan courts' decisions, which invalidated the results of a tender that Claimant's subsidiary had won by adopting a narrow interpretation of one of the tender requirements. Having carefully studied the text of the tender specifications in different languages, the Tribunal concluded that the text of the tender, although imprecise, 'allows to uphold the restrictive argumentation of the Supreme Court.'[133] Without seeking to justify the Moldovan courts' interpretation by reference to external rationales, the Tribunal was simply 'convinced that the Moldovan courts did not render decisions that no competent and honest court would have possibly been able to render'.[134] The tribunal further considered it was 'not entitled to make a final finding on the question', since that would amount to a 'revision of the merits'.[135]

ii. Juridical reasonableness

In practice, however, it has been much more common for the assessment of reasonableness to be substantiated by reference to some external benchmark. One particularly prevalent approach has been to rely on *comparative legal methods* to determine juridical reasonableness. Whether or not a domestic judgment would be considered as reasonable depended on whether the same rules or principles would be applied or similar conclusions reached in other legal systems.

[131] *Al Bahloul v Tajikistan*, [237].
[132] *Liman Caspian v Kazakhstan*, [390].
[133] *Arif v Moldova*, [462].
[134] ibid [463].
[135] ibid.

An early and particularly paradigmatic example of such an approach can be found in *Mondev v USA* (2002). There the Tribunal had to consider whether a decision of the Supreme Judicial Court of Massachusetts dismissing a contractual claim was arbitrary and profoundly unjust in being improperly grounded in an earlier judicial precedent. The Tribunal was of the view that the principle laid down in that precedent was one '*embodied in many other systems of contract law*' and was dealing with a question '*which all legal systems have to face*' (namely, whether an agreement in principle to transfer real property was binding, and whether all the conditions for the performance of such an agreement had been met). It therefore found nothing in the impugned decision 'to shock or surprise even a delicate judicial sensibility'.[136]

Similar argumentation can be found in several other cases. In *Mamidoil v Albania* (2015), the question arose whether the Supreme Court of Albania committed a denial of justice by dismissing a claim for tax reimbursement as a public law claim under the Customs Code that required compliance with a mandatory pre-trial administrative procedure, instead of accepting it as claim for unjust enrichment under the Civil Code, as Claimant's subsidiary attempted to do. The Tribunal understood that 'Albania – *like many other civil law countries* – distinguishes between civil courts and administrative courts', that 'in situations where a private physical or legal person complains under public law about the conduct and decisions of the administration, it has to address its claim first – *again like in many other civil law countries* – to the administrative body and its hierarchy', and that '[i]n Albania – *again like in many other countries* – tax law is part of the body of public law.'[137] In the view of the Tribunal, the impugned decision was thus not clearly improper, discreditable or in shocking disregard of Albanian law, but one that was 'reasoned, understandable, coherent and *embedded in a legal system that is characterized by a division between public and private law as well as civil and administrative procedures*.'[138]

In *Alghanim v Jordan* (2017), systemic considerations played a similar role in the assessment whether the Jordanian Court of Cassation committed a denial of justice by upholding the tax levied by Jordanian authorities on the investor's sale of its stake in a Jordanian telecommunications company. While claimants contended that the profit on the sale of those shares was wholly exempted from taxes, the Court of Cassation concluded that the sale price included an element of goodwill that as such was not subject to a tax exemption. The Tribunal reviewed the Court's decision against the backdrop of the '*general proposition (not specific to Jordanian law)* [that] the value of a share in a company may well include not only the material assets of the company but also an element in respect

[136] *Mondev v USA*, [133] (emphasis added).

[137] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No ARB/11/24, 30 March 2015) [765] (emphasis added).

[138] ibid [769] (emphasis added).

of goodwill'.[139] The Tribunal was also mindful that the Court was resolving an apparent tension between certain provisions of the Jordanian law, the occurrence of which was '*not unusual in tax legislation generally*, since *a common legislative technique in taxing statutes* is for the legislator to impose taxes in one operative provision and then carve out exemptions from that which would otherwise be taxable in an exemption provision.'[140] Further noting that the 'compressed form' in which the Court's reasons were expressed was '*not unusual for a judgment rendered by a Court in the Civil Law system*',[141] the Tribunal eventually concluded that the Court's interpretation of the tax law was 'reasonably open to it' and that the judgment therefore was not inexcusable so as to amount to a denial of justice.[142]

In some arbitral awards, comparisons with other legal systems were less explicit. They could instead be inferred from tribunals characterising of particular court findings as 'common' or 'not unusual' ones. In *Waste Management* (2004), the question was whether the Mexican courts denied justice when they dismissed suits brought by the Claimant's subsidiary because the latter failed to materially prove the actual indebtedness under a concession contract. The Tribunal took the view that '[c]ertain of the decisions appear to have been founded on rather technical grounds, but the notion that the third party beneficiary of a line of credit or guarantee should strictly prove its entitlement *is not a parochial or unusual one*.'[143] It therefore concluded that, 'however these cases might have been decided in different legal systems', the decisions did not amount to any denial of justice.[144] In *Liman Caspian v Kazakhstan* (2010), the claim of denial of justice was dismissed in a similar way. The Tribunal explained that even if the impugned decisions 'were incorrect as a matter of Kazakh law, the conclusion that the right to bring suit for invalidation of a transaction is associated with the share and passes from a seller to a buyer certainly is not a decision which can be characterized as arbitrary, grossly unfair, unjust, idiosyncratic or involving lack of due process. *The rules governing corporate conduct [. . .] may often be underpinned by serious legal consequences, such as the voidability of the transaction in question*. In such cases the law may well be that the loss lies where it falls.'[145] And in the same *Mamidoil* case already discussed above, the Tribunal concluded with respect to another impugned decision that the Constitutional Court's holding was '*neither extravagant* nor unreasonable'.[146]

[139] *Alghanim v Jordan*, [442].
[140] ibid [445].
[141] ibid [463].
[142] ibid [469], [479].
[143] *Waste Management, Inc v United Mexican States (II)*, ICSID Case No ARB(AF)/00/3 (Award, 30 April 2004) [129].
[144] ibid [130].
[145] *Liman Caspian v Kazakhstan*, [365].
[146] *Mamidoil v Albania*, [796].

Further illustrations of arbitrators both implicitly and explicitly drawing on experiences with other legal systems can be found in *Krederi v Ukraine* (2018). There, the Tribunal reviewed a series of judgments that lead to claimant's loss of ownership over certain plots of land acquired from the Kiev City Council. The Claimant challenged each of those judgments on various denial of justice grounds; some in relation to defects in procedure, others with respect to shortcomings on substance. In assessing the alleged improprieties, the arbitrators again sought support in comparative legal reasoning. Thus, the fact that Ukrainian courts permitted the Prosecutor to institute annulment proceedings despite the passing of a limitation period was held to be justified, for it 'may not be unreasonable' to consider that the Prosecutor's Office 'would not be able to detect all problematic aspects of all [relevant Council] decisions' within the normally prescribed time.[147] The fact that the Prosecutor's delayed investigation was thereby triggered by a request of Ukraine's President was not problematic since '*[m]any legal systems place the powers of public prosecutors under the political control of ministers or other high-ranking State officials*' and therefore 'such powers, their exercise and the ensuing investigation cannot be regarded as intrinsically improper and unacceptable'.[148] Following a similar approach, the Tribunal concluded that the courts' decision to annul the sale of the plots for mere lack of prior debate in the City Council was 'not unjustifiable', for 'it appears plausible to assert that the internal decision-making procedures of state organs are important. *They serve the important policy function of leading to a correct formation of an entity's will*, in the present case of its consent to dispose of property into public hands.'[149] And neither was the Tribunal convinced of any wrongdoing with respect to the courts' denial of restitution or damages, as it was 'obvious' in that respect that the specific application of the civil code '*requires complex legal assessments of causality and wrongdoing*' and that 'can give rise to a violation of an international due process standard only if the reasoning applied is far from anything a reasonable adjudicator may have relied upon in order to arrive at a certain result.'[150] None of the decisions involved was thus such that 'no reasonable adjudicator' could have reached.[151]

In some cases, the comparative approach was noticeable from arbitrators drawing on certain fundamental legal principles or principles of juridical logic. In *Karkey v Pakistan* (2017),[152] a judgment of the Pakistan

[147] ibid [525].
[148] ibid [526] (emphasis added).
[149] ibid [590]-[591].
[150] ibid [620].
[151] ibid [589], [620].
[152] *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/13/1 (Award, 22 August 2017). NB: In the circumstances of that case, the propriety of the judgment was not challenged as a separate head of claim. The Tribunal had to review it for the purpose of establishing whether or not there was an investment that actually fell within the Tribunal's jurisdiction.

Supreme Court was found to present deficiencies that were unacceptable from the viewpoint of international law, in three ways. First, the Tribunal deemed that, in circumstances where the Court proceeded on the basis of plaintiff's assertion that later proved to be wrongful, it was 'reasonable to expect that a court acting *ex proprio motu*, and having had the point drawn to its attention, would, at the very least, have sought independent confirmation of [that] assertion.'[153] Second, whereas the Court imposed identical liability on electricity providers holding similar contracts despite material differences between them, the Tribunal though it was 'reasonable to expect that a Judgment having such serious consequences for those concerned would have defined with some particularity the evidential and legal basis on which each of them, considered separately, was liable to suffer such consequences.'[154] And third, whereas the Court declared the contract both void ab initio and rescinded forthwith, such a holding was found by the Tribunal to amount to a contradiction in terms and thus to be irrational, since a contract that was void was by its nature unenforceable (and thus could not be ordered to be rescinded).[155]

In other cases, again, the analysis was instead supported by actual examples from foreign jurisprudence. In *Frontier Petroleum Services* (2010), the question arose whether the courts justifiably refused to fully enforce a foreign commercial award against two Czech companies placed under bankruptcy proceedings by holding such enforcement contrary to Czech public policy. The Tribunal concluded that the Courts applied a plausible interpretation of the public policy ground in article V(2)(b) of the 1958 Convention,[156] expressly referring to decisions of the French Cour de Cassation and the German Bundesgerichtshof, as well as the opinions of academic writers, confirming that the equality of creditors in bankruptcy proceedings and the equitable and orderly distribution of assets were well recognized public policy principles sufficient to refuse the enforcement of arbitral awards under the New York Convention.[157] The judgments were thus not improper as a matter of international law.

[153] ibid [553].
[154] ibid [554].
[155] ibid [555].
[156] *Frontier Petroleum Services v Czech Republic*, [527]. The issue before the Tribunal was not one strictly concerning domestic law, but also the scope of State's discretion under the 1958 New York Convention not to grant enforcement of a foreign arbitral award. Yet, the Tribunal considered that 'States enjoy a certain margin of appreciation in determining what their own conception of international public policy is' and therefore did not find it necessary 'to determine whether the findings of the Czech courts meet the applicable standard of international public policy, or to determine the precise contents of that standard'; rather, it was sufficient for it to examine whether the Czech courts applied 'a plausible interpretation' of the public policy exception under art V(2)(b) of the New York Convention – that is, whether the decision by the Czech courts were 'reasonably tenable and made in good faith', ibid. The issue was therefore one where international law makes *renvoi* to domestic law.
[157] ibid [527]-[529].

iii. Economic reasonableness

The benchmark relevant to the tribunals' assessment, however, was also sought in other criteria. What frequently mattered then was whether or not a particular decision had an *economic rationale*.

In some cases, economic rationales were invoked alongside juridical considerations. In the *Frontier Petroleum Services* award just discussed, the Tribunal thus referred also to economic considerations to further support its findings that the courts' interpretation of the 'public policy' exception 'was not unreasonable or impossible': had the courts enforced the foreign arbitral award against the bankrupt companies, the Claimant would have received preferential treatment in bankruptcy proceedings to the detriment of other creditors.[158] In *Eli Lilly v Canada* (2017), the reasonableness of the impugned decisions was likewise assessed pursuant to both juridical and economic rationales. In the circumstances of that case, Canadian courts invalidated two of Claimant's drug patents on the basis of a stringent interpretation of the requirement under Canadian patent law that an invention must be useful. This strict interpretation developed over a broader series of cases, giving rise to what became known as the promise utility doctrine. Whilst Claimant challenged the development of this case-law as in itself contrary to international standards, the Tribunal also examined whether the application of the doctrine – including with respect to the decisions involving the claimant's patents – could be arbitrary for lacking predictability and legitimate public purpose. But the Tribunal ruled out arbitrariness first on juridical grounds: not only was '[s]ome level of unpredictability [...] present in the application of all law,' but inconsistency in the courts' determinations of a patent's promise was, at the limited scale occurring in the Canadian jurisprudence, also 'to be expected, especially in an adversarial system in which courts are presented with different evidence and expert testimony across cases.'[159] The Tribunal then ruled out arbitrariness also for reason of a legitimate public policy justification for the doctrine. The doctrine was accepted to have an economic rationale, in that 'enforcing promises contained in the disclosure helps ensure that 'the public receives its end of the patent bargain' [...] and that it 'encourages accuracy while discouraging overstatement in patent disclosures'.[160] What mattered was not 'whether the promise doctrine is the only, or the best, means of achieving these objectives', but whether the doctrine was 'rationally connected to these legitimate policy goals', which in the Tribunal's view was certainly the case.[161] This brought the Tribunal ultimately to conclude that there was nothing arbitrary in the courts' application of the doctrine in the specific decisions involving the claimant's patents. Having established that the

[158] ibid [530].
[159] *Eli Lilly v Canada*, [421].
[160] ibid [423].
[161] ibid [423].

decisions had 'a foundation in Canadian law' and were 'coherent and consistent with the policy justifications stated by Respondent', the Tribunal deemed it inappropriate to 'question the correctness of the policies or the courts' decisions.'[162]

On a few other occasions, on the other hand, economic rationales served as an autonomous benchmark in determining the reasonableness of particular judgments. One such case was *Arif v Moldova* (2013), where the Tribunal considered whether Moldovan courts denied justice by invalidating an airport lease agreement on the ground that no prior approval or authorization for such agreement had been obtained by the competent agency as required by law, despite the fact that such approval had been granted subsequently. The Tribunal found nothing improper in the impugned judgements, observing how:

> [i]t is well possible that courts in jurisdictions with a different legal tradition would have been less formalistic, that they would have reasoned in a more teleological way, that they would have tried to remedy the formal defect by economic considerations. All these arguments are valid in appeal proceedings. They may be better than the ones used by the Moldovan courts. They do not disqualify, however, the national courts' application to such a degree to be so egregiously wrong that no competent and honest court would use them. This is all the less so, because the argument in favour of an imperative prior authorization is not void of economic sense.[163]

In the circumstances of that case, the authorization was intended to guarantee the best and most profitable use of unused state property.

Another illustration is found in *Marfin v Cyprus* (2018). In the circumstances of that case, the question was whether a Nicosia court committed a denial of justice in issuing a worldwide freezing order with respect to the claimants' funds related to their shareholding interests in Cyprus' second largest bank, following the latter's failure as a result of the reverberations of the 2008 financial crisis. The Tribunal agreed with the Claimants that 'the amounts involved in the freezing order were undoubtedly significant' if not 'extreme'.[164] However, the Tribunal bore in mind that 'due to the magnitude of the Bank's involvement in the Cypriot economy and the impact of its down fall, the sums sought in these proceedings would necessarily have been of a considerable magnitude'.[165] In the circumstances of the case, the claim for denial of justice could not be sustained.[166]

[162] ibid [430].
[163] *Arif v Moldova*, [453].
[164] *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No ARB/13/27 (Award, 26 July 2018) [1281].
[165] ibid.
[166] NB: the Tribunal's pronouncements on this point were essentially obiter dicta, since the claimants failed to exhaust local remedies and could therefore not assert a claim of denial of justice in the first place: ibid [1272]-[1277].

In *Dan Cake v Hungary* (2015), on the other hand, the lack of an economic rationale behind the impugned court decision appeared to be the main reason for the latter being found to be improper, and thus leading to a finding of liability. At the centre of that case was the propriety of a Hungarian Court judgment rejecting the convening of a composition hearing in the liquidation proceedings involving the Claimant's subsidiary. While the subsidiary had submitted all the documents required under the law for such a hearing to be convened, the Court demanded supplementary filings. The Tribunal established that, despite not stipulated in the Bankruptcy Act, additional documents could be requested where they were 'necessary'.[167] But on the facts of the case, none of the seven requirements, upon which the Court conditioned the convening of the hearing, were found to be necessary. The Tribunal found two of them to be even in direct violation of the Claimant's creditor rights, and at least one of them impossible to satisfy within a reasonable time.[168] By requiring the submission of documents that were 'not required by the law and were obviously unnecessary', the Tribunal was of the opinion that the impugned judgment 'shocked' a sense of juridical propriety and amounted to a denial of justice.[169] In assessing the reasonableness of the Court's decision, economic rationales played an important role. As the Tribunal observed:

> It is not the task of this Tribunal to determine whether it agrees, or disagrees, with the Metropolitan Court of Budapest as to whether the items required were indeed necessary. The Tribunal is not a court of appeal. A mere disagreement with what the Metropolitan Court of Budapest decided on one or another point would not establish that the decision was unfair or inequitable. However, the Tribunal might regard the decision to be unfair or inequitable if it found that some of the requirements were obviously unnecessary or impossible to satisfy, or in breach of a fundamental right, *having in mind that since many employees had been laid off by the liquidator, the factory was not running at full capacity, as underlined in the request, so that unnecessarily postponing the convening could but ruin the possibility of a successful hearing, thereby dooming the investment to disappear.*[170]

From the point of view of economics, the Court's judgment was thus unreasonable.

iv. Factual reasonableness

Finally, in some cases, the reasonableness of the reviewed judicial decision appeared to have been determined primarily at the hand of the *facts* available to the tribunals. An illustration can be found in *Azinian v Mexico* (1999), where the question was considered whether the Mexican

[167] *Dan Cake v Hungary*, [113].
[168] ibid [142]; for the Tribunal's analysis, see [119]-[139].
[169] ibid [145].
[170] ibid [117] (emphasis added).

courts committed a denial of justice by upholding as legally valid the annulment of Claimants' concession contract on grounds of misrepresentation. The Tribunal considered the relevant inquiry to turn on whether the evidence for such a finding was 'so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious'.[171] What ultimately mattered to the Tribunal was not how courts' interpreted the evidence, but whether the conclusions reached by the courts were reasonable on the facts. The Tribunal accentuated how Claimants 'have vigorously combated the *inferences*' made by the courts, but 'have not denied that *evidence exists*' that the Municipality was misled as to Claimants' capacity to perform the concession.[172] This was sufficient for the Tribunal to rule out the judgments as being arbitrary or unsustainable in light of the evidentiary record.[173] In fact, the available evidence of Claimants' misrepresentation was 'sufficient to dispel any shadow over the *bona fides* of the Mexican judgments.'[174]

In *Azinian*, the situation was admittedly somewhat peculiar: since Claimants challenged the annulment directly under the NAFTA, the Tribunal was presented with factual evidence that also underpinned the domestic courts' decisions and was therefore in a position to fully review the material propriety of the Mexican judgments. In most other cases, tribunals did not have at their disposal the same amount of factual evidence permitting an equally intensive scrutiny. Hence, the reasonableness of a domestic judgment appeared to have been inferred instead from the decision itself. In *Loewen v US* (2003), the Tribunal thus expressed the view that the verdict rendered against Claimant in the contractual litigation with a local competitor was 'excessive', basing this view not on comparative US judicial practice, but simply on the fact that the verdict 'appeared' to be 'grossly disproportionate' to the damage suffered by the plaintiff.[175] The Tribunal further noted that the verdict was probably inaccurately calculated, in that it seemingly resulted from a multiplication of damages on overlapping claims.[176] In the circumstances of that case, however, the claim of denial of justice could not be upheld as Claimant had failed to exhaust local remedies. In *Jan de Nul v Egypt* (2008), a factual assessment of reasonableness was instead sufficient to uphold the propriety of a court's procedural decision to join proceedings in two cases involving the Claimant. The Tribunal found the joinder not to have pursued dilatory purposes and the decision not to offend a sense of judicial propriety, reasoning that the cases 'related to the same Contract' and 'had the Contract been declared void for mistake or fraud as requested

[171] *Azinian v Mexico*, [105].
[172] ibid [105].
[173] ibid [120].
[174] ibid [103].
[175] *Loewen v USA*, [113].
[176] ibid [106].

by the Claimants in the First Case, this would have had consequences on the Second Case.'[177]

The award in *Flughafen v Venezuela* (2014), though, provides perhaps the best illustration of reasonableness being assessed on the basis of facts and considerations advanced in the very judgment under review. In the circumstances of that case, Claimant was stripped of its investment in a local airport as a result of a decision of the Constitutional Chamber of Venezuela' Supreme Court which had the effect of transferring control over the airport to the Central Government. The Tribunal ultimately found the decision to amount to a denial of justice and did so not solely on account of grave procedural irregularities, but also of defects in the decision itself. First, the judgment was found to lack an adequate legal basis, since the transferral of the airport was not based on a valid legislative act (missing, in fact, any reference whatsoever to an applicable legal basis).[178] Second, the Court's reasoning, too, was found to be 'manifestly insufficient'.[179] The Tribunal considered the Court's arguments to be 'irrelevant': the same reasoning that the Court advanced in an earlier decision to justify the transfer of the airport's management to a temporary oversight board, were now used to justify the removal of the management from that same board and its transfer to the Central Government.[180] The Tribunal's assessment was thereby far from a superficial one. The unreasonableness of the Court's decision was established pursuant to deep probing, with the arbitrators ultimately split in their assessment: while a dissenting arbitrator found the discrepancy in the Court's reasoning explicable,[181] the majority considered the 'real justification' for the Court's judgement to lie in an earlier decision, to which the Supreme Court made reference.[182]

D. Full-fledged substantive review over a test of correctness

Lastly, in a handful of cases, tribunals proceeded to assess the material propriety of domestic courts' decisions over a test of correctness. This formed the most intrusive type of scrutiny, with arbitrators opining on whether the impugned judgment was materially correct, be it as a matter of law, be it as a matter of fact, be it on both counts.

Also in this type of assessments, the tribunals' substantiation of their findings diverged. In *Oostergetel v Slovak Republic* (2012), the assessment was rather cursory. The claim of substantive denial of justice pertaining to the adjudication of the bankruptcy of Claimant's subsidiary was rejected without much substantiation, with the Tribunal merely

[177] *Jan de Nul v Egypt*, [200].
[178] *Flughafen v Venezuela*, [700]-[706].
[179] ibid [698].
[180] ibid [698]-[699].
[181] ibid [616] -[698].
[182] ibid [700]-[701].

observing how the evidentiary record 'confirms the *correctness* of the bankruptcy adjudication'[183] and shows that the bankruptcy was 'the *lawful* consequence of the Claimants' persistent default on their tax debts'.[184] No more elaborate was the Tribunal in *AMTO v Ukraine* (2008) in assessing the propriety of several court proceedings, through which Claimant unsuccessfully attempted to enforce its contractual claims against a state entity. The Tribunal confined itself to noting that the decisions 'adopt a formalistic approach to the requirements of the bankruptcy law, and indicate some uncertainty over the proper procedural treatment of debts', but that at the same time 'respond to legal and procedural issues raised by these bankruptcy proceedings', and hence 'in any event' the Tribunal did 'not accept that these decisions are *wrong in law*.'[185]

In other cases, the tribunals' substantiation was more detailed and the scrutiny more intensive, often even effected against specific provisions of the applicable domestic law. In *Al Bahloul v Tajikistan* (2009), a procedural decision of a Tajik court was thus assessed directly against the relevant provisions of the Law on Limited Liability Companies. The Tribunal ruled out denial of justice after finding the Tajik court did not violate due process in admitting a purportedly late-filed claim to annul a particular company board decision: contrary to the Claimant's suggestion, the Tribunal found the right to challenge such decision not to be time bared under Tajik law.[186] Similarly intensive was the review performed in *OI European Group v Venezuela* (2015) in determining whether an injunction issued by an administrative court that ordered the temporary occupation of the Claimant's glass production plants amounted to an abuse of power, and thus to a denial of justice. Though unable to uphold the denial of justice claim because Claimant failed to exhaust local remedies, the Tribunal considered the injunction to raise 'serious doubts as to its legality'.[187] The injunction was not without a base in law: the Court grounded it in a variety of legal provisions, including the constitution. Yet, the Tribunal doubted the adequacy of the legal bases, inasmuch as the invoked provisions were not deemed to provide for the same legal guarantees as the 2002 Law on Expropriation for Public or Social Purposes on which the injunction would have been expected to be based.[188]

Even more searching was the inquiry in *Unglaube v Costa Rica* (2012), where the Tribunal assessed the material propriety of the impugned judgments as a matter of both law and facts. Under scrutiny in that case

[183] *Oostergetel v Slovak Republic*, [292].
[184] ibid [297].
[185] *AMTO v Ukraine*, [80].
[186] *Al Bahloul v Tajikistan*, [224]-[225].
[187] *OI European Group v Venezuela*, [532]. It needs to be noted, however, that the Tribunal refrained from determining whether the injunction amounted to a denial of justice in view of Claimant's failure to pursue local remedies.
[188] ibid [530].

was a decision of the Supreme Court of Costa Rica that imposed a buffer zone temporarily suspending further development of an area adjacent to Claimant's property. The Tribunal found the decision to raise 'serious and troubling questions' because 'despite a careful search' there was nothing in the evidence regarding a technical or scientific basis for the establishment of such a zone.[189] The decision was also problematic because the Law on National Parks did not appear to provide the possibility of establishing such a buffer zone, and the possibility of introducing such a zone was also never considered by any of the Respondent's environmental agencies. This led the Tribunal to express 'significant reservations' regarding whether the zone imposed by the Supreme Court was properly justified.[190] But as the decision was followed by another judgment of the Supreme Court and the final outcome of the domestic proceedings was found to be 'reasonable rather than arbitrary', the Tribunal ultimately rejected the denial of justice claim.[191]

In *Bridgestone v Panama* (2020), the review was similarly intrusive, again with respect to both findings of law and of fact. The object of the Tribunal's scrutiny in that case was a decision of the Supreme Court of Panama rendered against Claimant in a trademark dispute with its commercial rival, which underwent a minute examination – to the point that the Tribunal even admitted how '[t]he Supreme Court had neither the time nor the resources to approach its task in the same depth'.[192] Even though no denial of justice could ultimately be established,[193] the Tribunal did go as far as identifying a number of errors in the Supreme Court's treatment and appraisal of evidence. The Tribunal was of the view that the Court was 'correct' in proceeding on the premise that claimant's subsidiaries brought local proceedings without legal grounds, but 'misread the situation' with respect to the consequential effects of those proceedings.[194] The Tribunal further held that the Court 'proceeded on the false premise' with regard to the causal nexus between certain actions; that in reaching its conclusion, it attached 'undue weight' to certain evidence; and that it made 'the further error' of assuming that certain evidence was un-challenged.[195] In order to make findings to that effect, the Tribunal hence performed a *de novo review* of available evidence, substituting its views for that of the Court. The only reason why denial of justice could not be established was that, on balance, the errors identified were considered not to be of such gravity that would demonstrate incompetence or corruption of the judges to the extent necessary to amount to a denial of justice.[196]

[189] *Unglaube v Costa Rica*, [231].
[190] ibid [255].
[191] ibid [278].
[192] *Bridgestone v Panama*, [516].
[193] ibid [456]-[528].
[194] ibid [526].
[195] ibid [527].
[196] ibid [528]-[530].

An interesting instance of *de novo* review can finally be found in *Jan De Nul v Egypt* (2008), where at scrutiny was primarily the adequacy of the court's factual findings. In the circumstances of the case, a judgment of an Egyptian court was alleged to be improper and discreditable because it purportedly failed to remedy the fraud allegedly committed by the Suez Canal Authority in supplying misleading information when entering with the Claimants into a dredging contract. The Tribunal somewhat surprisingly considered that, in order to determine whether the Court committed a denial of justice, it first had to establish whether there was fraud. Specifically, the Tribunal deemed it necessary to look at the facts preceding the judgment and analyse them 'through the prism of the claim for denial of justice'.[197] What this entailed in practice was nothing else than taking on the role of an appellate court. Indeed, as part of its assessment, the Tribunal examined the rules on fraud under Egyptian law and – following a thorough examination of the material facts (the statements, and reports on record, but also direct interviews with the leading persons involved in the negotiation and performance of the contract) – eventually established that no fraud had been committed. This finding in the end obviated the need for the Tribunal to *actually* review the court's decision itself. Yet, in pursuing the analysis in the way it did, the Tribunal in fact scrutinized the material propriety of the judicial outcome.

* * *

Also with respect to full-fledged substantive reviews, practice attests to a divergence of approaches, both with respect to the scope of the review performed and the intensity of arbitral scrutiny. Yet, the problem, again, is not so much the disparity itself, but the relatively poor justification accompanying the tribunal's assessment. Looking at the tribunal's application of the reasonableness test, it is of course difficult to say that the findings of liability (and more often the lack thereof) have entirely depended on arbitrators' subjective perceptions of judicial 'propriety'. Tribunals seemed to have found their own ways to fill in the normative void resulting from indeterminate formulas of 'manifest injustice' and 'clearly improper and discreditable' judgments by purporting to ground their assessment in some objective external benchmark. But as the benchmark has never really been spelled out, the current practice does raise issues of legitimacy: for, what are the impugned domestic judgments now precisely measured against?

Troubling enough, scrutinizing decisions over a test of correctness has not led to more clarity either. Save for the few clear-cut situations involving the purported misapplication of specific statutes, the assessments mostly ended up with tribunals expressing doubts about the propriety of particular decisions, but without substantiation as to what made particular

[197] *Jan De Nul v Egypt*, [207].

errors acceptable or else not sufficiently grave to give rise to a finding of liability. Was it that arbitrators could not establish with sufficient certainty that particular judgments were really wrong? Is it then really for them to substitute the courts' findings of law and/or fact for those of their own?

Back in 2005, in commenting on early arbitral precedents, Andrea Bjorklund expressed the concern that the ill-defined standards of denial of justice were susceptible of encouraging unreasoned decision-making.[198] Looking at development of arbitral jurisprudence since then, one is inclined to conclude that those concerns have largely materialized. But with investment arbitration increasingly being used to (also) challenge adverse judicial outcomes, the time is ripe to reflect on what an appropriate approach to arbitral review should be. In the end, both investors and respondent states will be better off in knowing when exactly a particular judgment can be challenged on the ground of denial of justice.

IV. Sketching the Appropriate Parameters of Arbitral Review

International investment tribunals are neither the first nor the only type of international adjudicatory body called upon to consider whether a particular judicial decision is defective from the standpoint of international standards of administration of justice. Drawing on the practice of other international adjudicatory bodies (and particularly on the practice of human rights courts deciding on violations of the right to a fair trial), the contribution proceeds to outline a number of considerations that are relevant to identifying the most appropriate approach to reviewing the products of the domestic adjudicative process. I begin by briefly touching upon the implications of substantive review as such (A), before addressing the nature of arbitral review pursuant to the denial of justice standard (B), and conclude with the question of intensity of review and its relationship with legitimacy (C).

A. No courts of appeal? The implications of substantive review

Before setting out the parameters within which arbitral scrutiny of domestic judgments ought to operate, it is important to briefly reflect on the nature of the review performed by international investment tribunals and what this review precisely entails when it comes to acts of judicial organs.

Investment arbitration is commonly presented as a mechanism for resolving disputes between foreign investors and host states of their investment.[199] Yet, investment tribunals cannot today be understood as

[198] Bjorklund, 'Reconciling State Sovereignty', 866ff.

[199] See ICSID, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', [9]-[11], as well as LY Fortier, 'Arbitrating in the Age of Investment Treaty Disputes' (2008) 31 UNSWLJ 282, 283, speaking of

mere dispute settlers in a narrow sense. The bulk of investment disputes presently brought to investment arbitration concerns wrongs allegedly suffered on account of state organs acting in contravention with the standards of treatment to which states subscribed in their investment treaties. The disputes upon which arbitral tribunals adjudicate are thus not disputes concerning the parties' respective rights and duties under contractual instruments and the like. They are primarily disputes as to whether the conduct of state organs conformed with the prescribed standards of treatment. Like international human rights courts or the WTO Dispute Settlement Body, investment tribunals thus also exercise a form of judicial review over the acts of the states subject to their jurisdiction.[200]

It is not disputed that this review can extend to the acts of judicial organs. From the perspective of contemporary international law, which treats the state as a unitary actor on the international plane, courts are not different from other state organs.[201] Their acts and omissions are susceptible of engaging the responsibility of a state just as the conduct of the executive or the legislative branches.[202] This notwithstanding, the idea is sometimes advanced that international tribunals are not to engage in substantive review of the outcome of domestic adjudication. Paulsson in particular has suggested that 'the objective of the international adjudicator is never to conduct a substantive review.'[203] But inasmuch as judicial activity finds primarily manifestation through judicial decisions, there is no reason why the content of a judgment should lie outside the purview of an international tribunal. Human rights bodies, for example, regularly scrutinize the substance of domestic courts' decisions for their

the 'legitimate, traditional conception of [investment] arbitration as an inherently private and confidential mode of dispute resolution'.

[200] cf SW Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review' (2012) 3 JIDS 577, 592; F Ortino, 'The Investment Treaty System as Judicial Review' (2013) 24 American Review of International Arbitration 437, 446. The notion of 'judicial review' is borrowed from administrative law, where it is typically distinguished from 'merits review'. While judicial review may extend to both procedural and substantive elements, it remains limited in its scope to reviewing whether a particular measure is lawful from the standpoint of a predetermined standard, rather than determining whether the measure is also preferable, which falls under the scope of a merits review. See P Cane, 'Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals' in S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010) 426, 429.

[201] See J Crawford, *State Responsibility: The General Part* (2013), 113ff.

[202] As per art 4(1) of the ILC Articles on State Responsibility, '[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, *judicial* or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.' *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the ILC on the Work of its Fifty-third Session (2001), UN Doc A/56/10 (2001) 43 (emphasis added). The provision is considered to be reflective of customary international law. See or ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, [62].

[203] cf Paulsson, 'Denial of justice', 84.

conformity with international standards, particularly for their compliance with fair trial guarantees.[204]

In submitting to review by investment tribunals, states must be taken to have agreed that the acts of their organs can be scrutinized in all their forms and manifestations. Suggesting that the international adjudicator is not to engage in substantive review would furthermore be at odds with the idea that a denial of justice can possibly arise as a result of manifestly unjust judgments. As Douglas pertinently notes, an international tribunal 'cannot draw inferences from an injustice caused by substantive error unless it has determined that there has actually been a substantive error through an assessment of the applicable domestic law and that it is a particularly grave error.'[205] If denial of justice is conceived as a delict relating to acts or omissions concerning the domestic adjudicative process in general,[206] it must necessarily be concerned also with the ultimate product of that process: the judicial decision itself.

Much of the misgivings about substantive review appear to rest on the idea that, if international adjudicators were to scrutinize the substantive aspects of the domestic adjudicative process, they would *ipso facto* engage in something akin to supranational appellate review.[207] According to the investment tribunal in *Lion v Mexico* (2021), '[t]o determine whether a judgment was outrageous or egregious on the merits would require a tribunal to delve into the decision-making process under national law – it is trite to repeat that international tribunals cannot be and do not constitute domestic courts of appeal.'[208] But this understanding is ill-conceived; for, a review on the substance is not what automatically makes a review appellate in nature. What appellate review primarily entails is the authority to undo/reverse determinations of law and/or findings of fact, and to have them replaced by better ones.[209] This is not an authority that investment arbitrators, or even international adjudicators in general would possess. Investment tribunals do not have the power to quash the impugned judgments and substitute them with better ones. They do not even have the competence to proclaim the nullity or non-applicability of the non-conforming judgments in the domestic legal order.[210] All what

[204] See HRC, *Verlinden v Netherlands*, Comm no. 1187/2002 (31 October 2006) [7.7]; ACtHR, *Fidele Mulindahabi v Republic of Rwanda*, App no 004/2017 (26 June 2020) [65]; *Moreira Ferreira v Portugal (No 2)*, [GC] App no 19867/12 ECHR 2017, [88]-[98].

[205] Douglas, 'Denial of Justice Deconstructed', 882-83.

[206] ibid 868.

[207] cf Newcombe and Paradell, 'Law and practice', 241.

[208] *Lion v Mexico*, [217].

[209] See RB Ahdieh, 'Between Dialogue and Decree: International Review of National Courts' (2004) 79 NYU Law Review 2029, 2045. Cf art 17(13) WTO DSU, stipulating that the WTO Appellate Body 'may uphold, modify or reverse the legal findings and conclusions of the panel'; art 8.28 CETA, providing that the CETA Appellate Tribunal 'may uphold, modify or reverse the Tribunal's award based on, among other grounds, 'errors in the application or interpretation of applicable law' and 'manifest errors in the appreciation of the facts, including the appreciation of relevant domestic'.

[210] The international adjudicators' competence is limited to the international plane. See *Martini Case (Italy v Venezuela) (Award)* (3 May 1930), reproduced in (1931) 25 AJIL 554, where the Arbitral Tribunal ordered the annulment of – but not itself annulled – certain obligations of payment that were still extant under the impugned judgment.

investment can do is to order states to take steps to undo the effects of the non-conforming judicial acts,[211] or else award damages for the injuries suffered on account of wrongful judgments.[212] Unlike a typical avenue of appeal, review by investment tribunals does not therefore lead to a *novum judicum*.[213]

Not only in terms of outcome, but also in terms of focus, the review performed by investment tribunals cannot be labelled as appellate in character. The aspect of the reviewed decision that is subject to scrutiny under the denial of justice standard is different from those aspects that would ordinarily be taken into account by an instance of appeal. In order to speak of an appeal, the second decision-maker must engage in some sort of reconsideration of the first decision-maker's findings, so as to come to its own decision on the facts and/or the law.[214] The goal of an appellate review is hence to establish whether the original findings were right or wrong, i.e. correct or not.[215] Under the denial of justice standard, however, the object of scrutiny is the propriety of the domestic adjudicative process, not the substantive correctness of its outcome. Indeed, if there is agreement on something in arbitral practice, it is certainly for the proposition that investment tribunals are not to function as courts of appeal, correcting errors committed by local courts.[216]

If analogies are to be drawn at all, then one can better compare the substantive review under the denial of justice standard with the review of the validity of an arbitral award pursuant to a procedure of annulment, or with the review of judicial decisions for compliance with fair trial guarantees by international human rights bodies. The procedure of annulment, too, is well-accepted to be one different from appeal.[217] And yet, annulment does not exclude a substantive review of the arbitral

[211] See, eg, *Chevron v Ecuador (Track II)*, [9.17]. This is also the approach of the ICJ. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, [76]; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, [137].

[212] See, eg, *Dan Cake (Portugal) S.A. v Hungary*, ICSID Case No ARB/12/9 (Award, 21 November 2017); *Manchester Securities v Poland*, [500]ff.

[213] This is not to deny that awards issued by investment tribunals are ultimately capable of offering effective relief against adverse judicial outcomes, so that despite the absence of their direct effect in the domestic legal order, the outcome of arbitral review may not be different from the remedies provided by an appellate jurisdiction. But this holds true with regard to all acts that are subject to review by investment tribunals.

[214] This is also what distinguishes mechanisms of 'appeals' from those of 'review' in domestic legal systems. See JJ Jolowicz, 'Appeal and review in comparative law: Similarities, differences and purposes' (1986) 15 Melbourne University Law Review 618, 619-20.

[215] The test of correctness is the quintessential feature of appellate review. See *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)* (Judgment) [1960] ICJ Rep 192, 214; *The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)* (Final Award, 22 July 2009) [403].

[216] See *inter alia Azinian v Mexico*, [99]; *Loewen v USA*, [51], [134]; *Jan de Nul v Egypt*, [209]; *Arif v Moldova*, [416]; *Krederi v Ukraine*, [486]; *Bridgestone v Panama*, [222(ii)]; *Energoalians v Moldova*, [363].

[217] See C Giannakopoulos, 'Reconceptualizing 'Failure to State Reasons' as a Ground for Annulment under Article 52(1)(e) of the ICSID Convention' (2017) 8 Journal of International Dispute Settlement 125, 131ff.

award itself. The grounds for annulment provided under the ICSID Convention, under domestic arbitration statutes, or under general international law typically extend to certain deficiencies in the very content of the award itself, such as the fact that the award fails to state reasons.[218] What distinguishes annulment from appeal is that the object of review is not to determine the substantive correctness of the outcome, but rather the fairness and integrity of the decision-making process resulting in the award.[219]

Similar considerations apply with respect to the review of domestic judicial decisions by human rights bodies. The European Court of Human Rights (ECtHR) has consistently emphasized that it 'is not a court of appeal from the national courts and it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention'.[220] The purpose of its review is to ensure the observance of the engagements undertaken by the contracting parties to the European Convention on Human Rights (ECHR), in particular the right to fair trial guaranteed under article 6 thereof; a task which does not entail the Court acting as a body of 'fourth instance'.[221] The same can also be said with respect to other instances of review where the validity of judicial decisions is assessed from the standpoint of specified standards that are different from those applied by the original decision-maker.[222] What ultimately matters is not whether the review is in itself a substantive one, but what the object of the review actually is.

If not every review on the substance amounts to an appeal, then what does the review pursuant to the denial of justice standard precisely entail? Can this be equated to the process of review of an arbitral award pursuant to an annulment procedure? This is a question of the *nature* of review, to which we now turn.

B. Nature of review with respect to substantive denial of justice

In accordance with the traditional understanding, it is the procedural fairness of the domestic adjudicative process that ought to be of sole

[218] See, eg, art 52(1)(e), ICSID Convention; art 1065(1)(d), Netherlands Code of Civil Procedure.

[219] See G A Bermann, 'International Arbitration and Private International Law: General Course on Private International Law' (2015) 381, Recueil des cours 41, 380-81.

[220] *Ramos Nunes de Carvalho e Sá v Portugal*, [GC] App nos 55391/13, 57728/13 and 74041/13 ECHR 2018, [186]. See also *García Ruiz v Spain*, [GC] App no 30544/96 ECHR 1999, [28].

[221] See, eg, *Bochan v Ukraine (No 2)*, [GC] App no 22251/08 ECHR 2015, [61].

[222] The ICJ, for example, has maintained the view that a challenge to a decision of an international administrative tribunal (which can be brought to it in cases of an alleged failure to exercise jurisdiction or fundamental error in procedure) cannot possibly be equated with an appellate proceeding against the substance of the decision. Yet, in considering such challenges, the Court has not deemed itself bared from examining the tribunals' decisions on the merits. See *Application for Review of Judgment No. 158*, [47]-[48], [51]; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* (Advisory Opinion) [1982] ICJ Rep 325, [58], [64].

concern to the international adjudicator deciding a denial of justice claim.[223] As Paulsson claims, denial of justice 'is always procedural', with the consequence that the substance of a judgment can only be of relevance as evidence of a flawed procedure.[224] It is submitted, however, that procedural propriety is in itself a necessary, but not a sufficient condition to establishing the adequacy of the process of adjudication.

To speak of an adequate process of adjudication, the ultimate product of that process must itself also exhibit certain qualities – for, otherwise the whole device of adjudication would be a meaningless one. The point has been well-noted by Fuller in explaining the special nature of adjudication. According to Fuller, what distinguishes adjudication from other forms of social ordering (such as elections) is that it confers on the affected parties a peculiar form of participation in the decision affecting them. In the case of adjudication, participation consists of presenting proofs and reasoned arguments for a decision in their favor.[225] As a device that gives thus expression to the influence of reasoned argument in human affairs, adjudication assumes a burden of rationality not borne by any other form of social ordering. But this burden of rationality then also dictates that the ultimate product is a rational one. As Fuller explains, '[a] decision which is the product of reasoned argument must be prepared itself to meet the test of reason.'[226] For, where the opportunity to present proofs and reasoned arguments is the only mode of participation in the decision-making process – as is precisely the case in adjudication – then 'the purpose of this participation is frustrated, and the whole proceeding becomes a farce, should the decision that emerges make no pretence whatever to rationality.'[227]

In following Fuller, the substance of a judgment is therefore just as determinative of the sufficiency of the adjudicative process as it is the propriety of the procedure leading to it. In considering claims of denial of justice, the ultimate product of the domestic adjudicative process must thus be taken to be as much a proof of an adequate system of justice as is any other proof of procedural propriety. A denial of justice cannot be dismissed as soon as a judgment has been rendered by a seemingly impartial and independent court deciding a controversy with sufficient expediency and observant of fundamental rules of procedure. Courts can deliver injustice under pretense of form, just as they deny justice through unfair

[223] cf *Chevron v Ecuador (Track II)*, [8.37], confirming that 'the doctrine of denial of justice essentially addresses procedural unfairness.'

[224] Paulsson, 'Denial of justice', 7, 98.

[225] L Fuller and K Winston, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353, 364-65.

[226] ibid 366. The requirement can be said to ultimately rest on respect for human dignity; to be precise, on the idea that the law should respect the dignity of those to whom the norms are applied as beings with an active intelligence who are capable of explaining themselves and to be provided with reasons when authoritative determinations are made in the process of adjudication. See C Brettschneider, 'A Substantive Conception Of The Rule Of Law: Nonarbitrary Treatment And The Limits Of Procedure' in JE Fleming (ed), *Getting to the Rule of Law* (NYU Press 2020) 52.

[227] Fuller and Winston, 'Forms and Limits', 367.

procedures. Compliance with due process is hence a necessary, but not sufficient condition to rule out denial of justice. For, as Galligan appositely notes in relation to the fairness of procedures, 'the appearance of justice has no value in itself if the outcome was a miscarriage of justice.'[228]

Once one accepts that a decision must itself 'meet the test of reason' to be considered the product of reasoned argument, the question arises how one is to determine that this fundamental condition has been met in the case of a concrete judicial decision. This can arguably be done in two ways: one is to appraise the very reasons on which the decision is based (1); the other is to appraise the substantive outcome so as to determine whether it is a reasonable one (2). As I am about to explain, while both approaches find reflection in arbitral practice, only the former properly befits arbitral review performed by investment tribunals (3).

i. Adequacy of reasoning as the most appropriate test of propriety

One way of determining whether the burden of rationality demanded from an adjudicative process has been discharged is to concentrate on the reasoning on which the concrete decision is based.[229] This approach, which in terms of method corresponds to the 'narrow substantive review' discussed under III.B above, moves the analysis away from the egregiousness of the judicial errors involved. The scrutiny is instead directed at the attributes of the decision as such. Albeit substantive in its orientation, the review is not concerned with the merits of the impugned judicial outcome, but the existence of sufficient reasons underpinning the latter. But how is one to establish sufficiency of reasoning? Is it sufficient for the judge to merely provide *some* justification for its decision? Does the inquiry turn solely on the question whether the court responded to the evidence and arguments adduced in the proceedings? Or is there more to it?

Sufficiency of reasoning is not a question of form. As the ICJ explained in its Advisory Opinion of 12 July 1973, the right to a reasoned judgment does not entail that a statement of reasoning 'enter[s] meticulously into every claim and contention on either side'; nor does it imply that a judicial organ would be obliged 'to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted', or to follow 'any obligatory forms or techniques for drawing up judgments: a tribunal may employ direct or indirect reasoning, and state specific or merely implied conclusions, provided that the reasons on

[228] DJ Galligan, *Due Process and Fair Procedures* (OUP 1996) 72.

[229] See Paparinskis, 'International minimum standard', 216, who considers the focus on the requirement of sufficient reasoning to be the 'most persuasive approach', as the it succeeds to 'capture best the classical distinction between permissibility of de *minimis errors* and insufficiencies, and different styles of legal writing on the one hand and internally incoherent judgments failing to answer decisive questions that lead to international wrongfulness on the other hand.'

which the judgment is based are apparent.'[230] According to the Court, '[t]he question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole.'[231] These observations find resonance in the practice of other international courts, which equally accepted that the duty to give reasons varies according to the context;[232] a proposition that is generally also accepted in many domestic legal systems where supreme courts exercise control over the sufficiency of lower courts' reasoning.[233]

But while international courts have thus far refrained from developing any general principles pertaining to the evaluation of sufficiency of reasoning, what follows from their jurisprudence – and especially that of the ECtHR – is that the duty to give reasons may vary according to the seriousness and nature of the decision, as well as the complexity of the case. Greater demands thus generally apply in criminal cases than in civil cases,[234] and there is a heightened burden in situations where domestic courts apply vague and imprecise norms of domestic law.[235] The extent and details of the reasoning furthermore depend on the factual evidence adduced by the parties and the legal questions raised by the decision.[236] While the duty to state reasons does not require a detailed answer to every argument,[237] a judgment is expected to provide a reply to the arguments that are decisive for the outcome of the proceedings.[238] Much in the same way, in many domestic legal systems, the scope of the obligation to state reasons would be taken to depend on matters such as the extent of the issues raised between the litigants, the nature of the proceedings, the significance of the parties' interests involved, or the question of whether the decision is based mainly on valuations of a factual nature or equally on findings that are verifiable in cassation.[239]

Yet, sufficiency of reasoning is not only a matter of quantity, but also of quality. As per Lucy, one can possibly identify three levels of

[230] *Application for Review of Judgment No. 158*, [95].

[231] ibid.

[232] See *Ruiz Torija v Spain*, App no 18390/91 ECHR 1994, [29]; *Prosecutor v Furundžija* (Appeal Judgement) IT-95-17/1 (21 Jul 2000) [69]. On the practice of the ECtHR, see further R Aðalsteinsson, 'The Right to Adequate Judicial Reasoning' in A Eide and others (eds), *Making Peoples Heard: Essays on Human Rights in Honour of Gudmundur Alfredsson* (Brill 2011) 315.

[233] On the practice in the Netherlands, see, eg, G de Groot, 'Motiveren van rechterlijke uitspraken: een evenwichtsoefening' in G.J.M. Corstens and others (eds), *175 jaar Hoge Raad der Nederlanden: bijdragen aan de samenleving* (2014); VCA Lindijer, *De goede procesorde: een onderzoek naar de betekenis van de goede procesorde als normatief begrip in het burgerlijk procesrecht* (2006) [315]ff.

[234] *Dombo Beheer B.V v the Netherlands*, App no 14448/88 ECHR 1993, [32].

[235] *H.* v *Belgium*, App no 8950/80 ECHR 1987, [53]; *Georgiadis v Greece*, App no 21522/93 ECHR 1997, [43].

[236] *Ruiz Torija v Spain*, [29]; *Suominen v Finland*, App no 37801/97 ECHR 2003, [34].

[237] *Van de Hurk v the Netherlands*, App ao 16034/90 ECHR 1994, [61].

[238] *Moreira Ferreira v Portugal*, [84]; *Farzaliyev v Azerbaijan*, App no 29620/07 ECHR 2020, [36].

[239] See, eg, Lindijer, 'Goede procesorde', [315]ff.

rationality in the context of adjudication. The first, lowest level is that of *having* reasons for an action or decision. This implies that a judgment is a reasoned one as long as it is supported by reasons, and thus not merely a product of fiat. The second, more demanding indicator of rationality is that of having *sorting* reasons; that is, reasons that are also genuine and as such the product of some sort of evaluation. A decision is thus a reasoned one when the reasons employed are at the very least adequate. The third, most stringent version of the rationality condition implies, in turn, the *weighing* of those genuine reasons. This presupposes that a judgment is only a reasoned one when it is also based on the weightiest – i.e. most compelling – reasons in the class of genuine reasons for an action or omission.[240]

Although a domestic court's reasoning could therefore be measured against a spectrum of 'rationality', it is submitted that the presence of adequate (i.e., sorting / genuine) reasons is a *necessary*, but at the same time *sufficient* condition to be able to consider the product of adjudication as a rational one from the standpoint of international law. On the one hand, the right to a reasoned judgment cannot be understood as merely requiring that the judgment be supported by a stated process of reasoning. Such a right would be a travesty if it were sufficient that the decision addressed the plaintiff's evidence and arguments, and formally responded to the plaintiff's claims. What matters is that the domestic court *duly* examined the evidence and arguments adduced; and proof of that can only be found in reasoning that involves some degree of evaluation. Being satisfied with mere presence of reasons would otherwise fail in protecting against decisions rendered on false grounds; those that Verdross would describe as only 'apparently' based on law, but in reality an arbitrary act.[241] On the other hand, demanding that courts always advance compelling reasons for their decisions would bring the review by international adjudicators within the domain of appeal. Establishing that the court's reasoning is a compelling one entails namely determining that the judges have made the correct choices.

The presence of *adequate* reasons should accordingly provide the standard of rationality against which judgments of domestic courts ought to be tested as part of the denial of justice inquiry. This ultimately aligns with the minimum standards that other international bodies are broadly applying in assessing the sufficiency of reasoning, be it of arbitral be it of judicial decisions. In reviewing arbitral awards, ICSID Annulment Committees have thus not considered the mere presence of reasoning to be enough; what has been required is that the reasons be sufficiently 'relevant' or 'pertinent',[242] or at the very least, not contradictory or

[240] W Lucy, 'Adjudication' in JL Coleman, KE Himma and SJ Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 206, 229-33.

[241] Verdross, 'Règles générales', 385.

[242] See *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2 (Ad hoc Committee Decision on Annulment, 3

frivolous.[243] Yet, at no time has the reasoning of awards been expected to be correct.[244] Likewise, in reviewing domestic judgments for compliance with fair trial guarantees, the ECtHR has generally accorded domestic courts 'a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions'.[245] Although the Court has expected judicial reasoning to address arguments that are 'relevant' or 'potentially decisive' for the outcome of a case, it has not considered its task to extend to an examination of whether such arguments were also 'well-founded',[246] or to determining whether domestic courts' findings of law or fact on which the reasoning was based were also 'correct'.[247] Only in circumstances where the impugned judicial decision interfered with another conventional right did the Court demand that domestic courts' reasoning be sufficiently compelling. But this is because an interference with a conventional right is only permissible with respect to specific, legitimate aims defined in the European Convention.[248] Altogether, the Court's approach to the assessment of reasoning has been one founded on respect for different legal traditions. In appraising the reasoning provided by courts, the Court has deemed it necessary 'to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments.'[249]

If domestic courts can thus be counted on to dispose of controversies in a reasoned way, and to do so by way of providing *adequate* reasons, the question is then how the adequacy of those reasons can be verified. In following Raz, a reason is adequate when (1) it is a sufficient one, in that it makes the action it is a reason for intelligible, and (2) it is not defeated

May 1985) [120]; *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1 (Ad hoc Committee Decision on the Application for Annulment, 16 May 1986) [43]. Cf *Arbitral Award by the King of Spain case*, 216, rejecting the claim of insufficiency of reasoning because the award proved to deal 'in logical order and in some detail with all *relevant considerations*'; emphasis mine.

[243] *Maritime International Nominees Establishment v Republic of Guinea*, ICSID Case ARB 84/4 (Decision of the Ad hoc Annulment Committee, 22 December 1989) [5.09]; *Abyei Arbitration*, [531]; *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6 (Decision on Annulment, 28 May 2021) [167].

[244] *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No ARB/02/7 (Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007) [131]; *Perenco v Ecuador*, [164].

[245] See *Suominen v Finland*, [36]; *Kuznetsov and others v Russia*, App no 184/02 ECHR 2007, [83]; *Tatishvili v Russia*, App no 1509/02 ECHR 2007, [58]; *Seryavin and others v Ukraine*, App no 4909/04 ECHR 2011, [58]; *Tchankotadze v Georgia*, App no 15256/05 ECHR 2016, [103].

[246] See, eg, *Suominen v Finland*, [36]; *Ruiz Torija v Spain*, [30]; *Farzaliyev v Azerbaijan*, [39]; *Tsanova-Gecheva v Bulgaria*, App no 43800/12 ECHR 2015, [92]; *Vojtěchová v Slovakia*, App no 59102/08 ECHR 2012, [40].

[247] See, eg, *Deryan v Turkey*, App no 41721/04 ECHR 2015, [34]; *Hülya Ebru Demirel v Turkey*, App no 30733/08 ECHR 2018, [47].

[248] See, eg, *Paradiso and Campanelli v Italy*, [GC] App no 25358/12 ECHR 2017, [196]-[198].

[249] *Ruiz Torija v Spain*, [29]. See also *Gorou v Greece (No 2)*, [GC] App no 12686/03 ECHR 2009, [37].

by other competing reasons.[250] To be considered adequate, the reasoning therefore needs to be possible to understand (which generally requires it to be somehow logically[251] supported by the evidence and relating to the arguments adduced) and be free from inconsistencies, if not generally coherent.[252]

In determining the propriety of a judgment under the denial of justice standard, the essential elements of evaluation must therefore concentrate on potential illogicality and contradictions in the reviewed court's reasoning. These may concern the courts' appreciation of evidence and findings of fact in general,[253] but may equally extend to their interpretation of the law and the law's application to facts. Such an approach would ultimately align with that of the ECtHR in deciding violations of the right to a fair trial resulting from insufficiently reasoned judgments: the ECtHR has readily found arbitrariness in circumstances where the impugned judgments lacked any connection between the established facts, the applicable law and the outcome of the proceedings,[254] where the court's conclusions could not be reconciled with evidentiary record,[255] or else where conclusions were contradicted by uncontested findings from earlier judgments[256] or rested on contradictory evidence.[257] It would also align with the practice of other reviewing bodies which in the assessment of the adequacy of reasoning also took issue with illogicalities (in the treatment of evidence)[258] and inconsistencies (in the evidence relied upon or in the legal implications adduced therefrom).[259]

[250] J Raz, *Engaging Reason: On the Theory of Value and Action* (OUP 1999) 96-98.

[251] As per Raz, reasons themselves must be subject to logical analysis in order to be treated as reasons. J Raz, *Practical Reasons and Norms* (OUP 1975) 16-17.

[252] On inconsistency and coherence, see further N MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005) 189ff.

[253] It can be argued whether illogicality can be decided purely on the basis of the reasoning without in-depth knowledge of the facts presented to the court. In most cases, however, the relevant factual predicate will be presented to the arbitral tribunal by the respective counsel anyway. In the Italian legal system, it is for example accepted that in reviewing a judgment on grounds of illogicality and omissions in the reasoning, the *Corte di cassazione* will necessarily have some knowledge of the merits, as presented to it by counsel. See RA Fenton, 'Separating Law from Facts: The Difficulties Faced by the Italian Corte Di Cassazione in an Appeal for Illogicality of Reasoning' (2000) 49 ICLQ 709, 712.

[254] *Anđelković v Serbia*, App no 1401/08 ECHR 2013, [27].

[255] *Khamidov v Russian Federation*, App no 72118/01 ECHR 2007, [174]; *Kalkanov v Bulgaria*, App no 19612/02 ECHR 2008, [26]-[27]; *Pavlović and others v Croatia*, App no 13274/11 ECHR 2015, [46]-[49]. Compare with *Urat v Turkey*, App nos 53561/09 and 13952/11 ECHR 2018, [70], finding no violation precisely because the evidentiary record supported the court's finding.

[256] *Dulaurans v France*, App no 34553/97 ECHR 2000, [33]-[38]; *Tel v Turkey*, App no 36785/03 ECHR 2017, [74]-[76]; *Gusev v Ukraine*, App no 25531/12 ECHR 2021, [33]. See also *Bochan v Ukraine (No. 2)*, [63]-[64], finding arbitrariness where the Supreme Court grossly misrepresented the ECtHR's findings in an earlier judgment.

[257] *Ajdaric v Croatia*, App no 20883/09 ECHR 2011, [37]-[52]; *Carmel Saliba v Malta*, App no 24221/13 ECHR 2016, [69]-[79].

[258] HRC, *Kurbonov v Tajikistan* Comm no 1208/03 (16 March 2006) [6.3].

[259] See *Prosecutor v Furundžija*, [71]-[72], reviewing adequacy of reasons through the prism of the treatment of inconsistent witness statements; *Barbani Duarte et al. v Uruguay* (IACtHR, merits, reparations and costs, 13 October 2011) [183]-[184], reviewing adequacy of reasons through the prism of inconsistent findings in similar cases.

Of course, one may argue that the 'adequacy' of reasoning, in the understanding of Raz, remains a malleable standard, as the intelligibility of particular arguments depends on the adjudicators own conception of rationality.[260] Intelligibility is not determined solely by logic. Logic does not dictate the selection of particular premises, nor does it speak to the truth of the premises utilized in making an argument; it only concerns the formal validity of deductions or interferences made from those premises.[261] This explains why international adjudicators have not stopped short of extending their scrutiny to the underlying premises on which the reasoning was based.[262] The ECtHR has been readily assessing whether particular submissions (that courts purportedly failed to address) or pieces of evidence (that courts purportedly failed to assess) were 'relevant', 'important', 'significant' or 'pertinent' for the outcome of the case.[263] The ECtHR may not have been particularly transparent about the process through which this was determined (save for occasionally observing how certain conclusions followed 'as a matter of law and logic'[264]). But in its scrutiny it has ultimately always followed the applicant's pleas. The ECtHR has not considered concrete judicial decisions defective because they rested on invalid or wrong premises; it only took issue with the courts' failure to provide reasons for not considering relevant particular evidence or submissions advanced by the applicant.[265] Its scrutiny has therefore always focused on the process of reasoning as such.

ii. Reasonableness of the judicial outcome as alternative indicator of propriety

The alternative approach is to assess the propriety of the domestic adjudicative process from the perspective of the reasonableness of the judicial outcome.[266] The 'test of reason' is in this case applied to the actual, material result of the adjudicative process. Under this approach, which in

[260] On the difficulty with identifying irrationality, see further S H Bice, 'Rationality analysis in constitutional law' (1980) 65(1) Minnesota Law Review 1.

[261] See further K Sinclair, 'Legal Reasoning: In Search of an Adequate Theory of Argument' (1971) 59 California law review 821, 823-24.

[262] See, eg, the ICTY Appeals Chamber presumed that it was possible for it to establish whether evidence relied upon by the Trial Chamber was 'clearly relevant'. See, eg, *Prosecutor v Kvočka et al* (Appeal Judgment) IT-98-30/1-A (28 February 2005) [23].

[263] *Hiro Balani v Spain*, App no 18064/91 ECHR 1994, [28]; *Bochan v Ukraine (No 2)*, [84]; *Benderskiy v Ukraine*, App no 22750/02 ECHR 2007, [46]; *Antică and Company 'R' v Romania*, App no 26732/03 ECHR 2010, [36]; *Huseynli and others v Azerbaijan*, App nos 67360/11, 67964/11 and 69379/11 ECHR 2016, [123]; *Tchankotadze v Georgia*, [107]-[108]; *Vojtěchová v Slovakia*, [40]; *Hülya Ebru Demirel v Turkey*, [52]; *Mazahir Jafarov v Azerbaijan*, App no 39331/09 ECHR 2020, [47].

[264] *Hiro Balani v Spain*, [28].

[265] See, eg, *Pavlović and others v Croatia*, [45]. See also *Velted-98 AD v Bulgaria*, App no 15239/02 ECHR 2009, [48].

[266] This approach is endorsed by Douglas, 'Denial of Justice Deconstructed', 883; and by Demirkol, 'Judicial Acts', 163-166, although the latter does not draw a strict methodological distinction between the reasonableness of the outcome and the quality of the reasoning, but uses reasonableness primarily as a way for determining the propriety of the courts' factual and legal analysis, as separate elements of the adjudicative process. Cf Newcombe and Paradell, 'Law and practice', 241,

terms of method translates into the 'full-fledged substantive review' discussed under III.C above, the material aspects of the judicial decision – not its formal attributes – remain the object of the tribunal's scrutiny.

The advantage of the test of reasonableness is that it can be flexibly applied. On the one hand, it can be used to assess the propriety of the judicial outcome as a whole; on the other, it can be applied to evaluate specific elements of the decision reviewed. As suggested by Demirkol, the test can thus also be used to evaluate the factual and legal analysis conducted by the courts.[267] When used in this way, reasonableness can then provide a measure for determining whether domestic courts' determinations on points of domestic law are juridically sustainable (and thus not so egregiously wrong such that no competent judge could have reached it), as it can be used to scrutinize the courts' discretionary determinations (such as those pertaining to their exercise of discretionary powers or their findings of fact).[268] The test of reasonableness can furthermore be applied with variable intensity,[269] which means that it can be fine-tuned to the specific circumstances of each case.

But using reasonableness as a test for determining the propriety of a judicial outcome is not without challenges.[270] The very fact that there is no single test of reasonableness prompts the question of what intensity of scrutiny is actually warranted for international adjudicators to apply in reviewing domestic judgments. Pursuant to a more substance-oriented approach, in order to be considered reasonable, the reviewed decision would need to be found to pursue a legitimate objective, there would need to be a causal link between the decision and the objective, and this link would need to be a sufficient one.[271] But in the context of domestic adjudication, where the courts' role is essentially limited to the resolution of legal disputes between litigants with conflicting rights and entitlements, an assessment of whether a concrete judicial decision pursues a legitimate objective in the context of the specific dispute could only be effected from the standpoint of the domestic legal system itself and would be for the domestic court to make.

Furthermore, the identification of 'reasonable' options, within which the particular judicial outcome ought to fall in order to be considered reasonable, is far from value neutral. As Maccormick explains, what is reasonable in the particular circumstances depends upon an evaluation of

who argue that 'due process protections do not serve to guarantee that final judicial outcomes are reviewable by international tribunals based on a standard of reasonableness'.

[267] Demirkol, 'Judicial Acts', 163.

[268] In these two ways the test is also applied in the context of judicial review in common law systems. While in the United States and Canada, reasonableness is used as a standard of review for error of law on the part of the agencies, in the UK, reasonableness is primarily used for control of the exercise of agencies' discretion. See P Craig, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131, 132-33.

[269] See Wouters and Duquet, 'Reasonableness', 37-47.

[270] See generally Henckels, 'Proportionality and deference', 121-22.

[271] See O Corten, 'Reasonableness in International Law' in R Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law*, vol 8 (OUP 2012) 645-51.

the competing factors of decision, and what factors of decision are relevant is highly context dependent.[272] In domestic legal systems, the factors relevant to an assessment of reasonableness will often be provided in the applicable statute itself, or alternatively be capable of being derived from the statute's object and purpose. In the transnational context, however, such factors can be derived from a variety of sources. As Vadi observes, in the context of the international investment regime, reasonableness can be measured against the expectations of the states parties to the applicable investment treaty, the legitimate expectations of the investor, as well as against general regulatory practices.[273] The identification of the relevant comparators for assessing whether a given measure is reasonable therefore hinges on important normative choices.

As the analysis in part III.C revealed, the appraisal of whether a domestic court's judgment was 'clearly improper and discreditable' has not been occurring in a normative vacuum. Arbitrators have had their own preconceptions as to when a judgment is so egregiously wrong that no competent or honest judge could ever have made. These seem to have been informed, not only by their personal norms and values, but also their experiences with a specific legal system, which therefore provided the background on which they based their assessments. In relation to investment arbitration more generally, Peat has already noted that such comparative law methodologies have provided a convenient way to substantiate the relatively indeterminate standards applied by tribunals.[274] In truth, when it comes to the denial of justice standard, preconceived ideas as to how a state's administration of justice ought to be organized have long fed into the normative framework relied upon by international adjudicators in deciding denial of justice claims.

At the heyday of the classical discussions on denial of justice, commentators made no secret that the benchmark to which adjudicators should resort with a view to establishing the propriety of a judgment was one that was found in the practice of 'civilized states'. According to Westlake, 'manifest injustice' was a defect that was 'evident and palpable to the general consensus of the part of the world which possesses European civilisation'.[275] But in a postcolonial world order, marked by a heterogeneity of legal systems that are not only anchored in different legal traditions, but due to the gross disparities in the resources at their disposal, also

[272] MacCormick, 'Rhetoric', 173.

[273] V Vadi, *Proportionality, reasonableness and standards of review in International Investment Law and Arbitration* (Edward Elgar 2018) 150. For an example of the former, see *CME Czech Republic BV v The Czech Republic*, UNCITRAL (Partial Award, 13 September 2001) [158].

[274] See D Peat, *Comparative reasoning in international courts and tribunals* (CUP 2019) 119ff, who further demonstrates that the use of comparative law methodologies has become pervasive in many domains of international dispute settlement.

[275] J Westlake, *Chapters on the Principles of International Law* (CUP 1894) 104 (original emphasis omitted). See similarly Garner, 'International Responsibility', and Hyde, 'International law', 466, further explaining that the efficacy of the system of justice as a whole was 'always to be tested by the standard which the family of nations has fixed; and the evidence of that standard is to be found in the practice of enlightened States'.

significantly diverge in their administration of justice, such comparative law methodologies are not without problems. As Alvarez has warned, investment treaties do not assume that their treaty parties share the Western rule of law tradition, let alone seek to have states conform to that tradition.[276] Comparative law approaches must therefore not lead to privileging domestic legal systems with which arbitrators might be more familiar over others, and certainly not result in judgments being assessed in the light of well-functioning judicial systems of advanced economies.

Conscious of the danger that approaches derived from other legal orders may not be adequately contextualized and sufficiently representative, Schill – who also generally champions the use of comparative insights from public law frameworks as a way of ensuring cross-regime consistency and legitimizing arbitral jurisprudence[277] – insists on the importance of a 'methodologically rigorous, sophisticated, and critical use of comparative law'.[278] But Vadi may have a point in noting that, when using comparative law approaches in investment treaty arbitration, 'it may be difficult to eliminate cultural biases and possible hegemonic thinking.'[279] At the very least, in the context of the denial of justice standard, transparency about the (foreign) jurisprudence that served as a benchmark for the comparison and informed the assessment of reasonableness would already be an important first step in contributing towards better reasoned arbitral awards and thus improve the increasingly eroding legitimacy of investment arbitral tribunals.[280]

iii. Propriety of adjudication and international standards of administration of justice

Reasonableness has been hailed as a flexible, pragmatic and contextual standard, with the capacity to bridge the divide between the static character of treaty provisions and the dynamic character of social contexts, as well as to calibrate public and private interests.[281] While reasonableness therefore undoubtedly has an important role to play in international investment law and arbitration, it is arguably less suitable as a tool for assessing the adequacy of the domestic adjudicative process. This is not merely because of the risk of bias that is inherent in the application of reasonableness. More fundamentally, the problem lies in the very

[276] JE Alvarez, '"Beware: Boundary Crossings" – A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17 The Journal of World Investment & Trade 171, 220.

[277] SW Schill, 'International Investment Law and Comparative Public Law—an Introduction' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 24-26.

[278] SW Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' in S Besson and others (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 1095, 1109.

[279] V Vadi, 'Critical comparisons: The role of comparative law in investment treaty arbitration' (2010) 39(1) Denver Journal of International Law and Policy 67, 97.

[280] For a critique on this point, see Bjorklund, 'Reconciling State Sovereignty', 866.

[281] cf Vadi, 'Proportionality', 183ff.

orientation of a review that would be concerned with the reasonableness of the substantive outcome.

Given the nature of international investment arbitration as a form of judicial review, and that of the denial of justice standard as a benchmark for assessing the propriety of the domestic adjudicative process, the *outcome* of domestic adjudication *as such* cannot be properly said to be of concern to investment tribunals. As explained in II.A, the denial of justice standard is one that finds underpinning in the general obligation to maintain and make available to foreigners a system of justice that treats them fairly and impartially, and that generally affords adequate judicial protection to their rights. The standard is thus one concerning the *system* of adjudication, and not justice in individual cases. The nature of the tribunals' review under the standard must therefore be attuned to assessing the conformity of states' compliance with this general obligation. Though this review can and must include judicial decisions as the ultimate product of the system of adjudication, the inquiry ought to be limited to those aspects of decisions that are relevant to systemic considerations: apart from the question of procedural regularity (to the extent that irregularities may transpire from the decision itself), the requirement of sufficiency of reasoning – but no more than that.[282]

That sufficiency of reasoning, conversely, properly falls within the scope of arbitral review follows not only from the fundamental importance that reasoned argument has for the adjudicative process. As per Fuller, only an adequately reasoned judgment is proof that the judge has considered parties' evidence and arguments, and that the parties have therefore been accorded procedural justice through their participation in the adjudicative process.[283] In the view of the ICJ, it is even 'the essence of judicial decisions that they should be reasoned'.[284] But there are also broader systemic considerations that make judicial reason-giving relevant. An adequately reasoned judgment affords the parties the possibility to appeal the decision, and by extension, enables the appellate instance the possibility of reviewing it.[285] Furthermore, an adequately reasoned judgment provides the means for public scrutiny of the administration of justice, both by the judges' institutional audience (the judicial branch and other legal professionals) and the general public, which from the

[282] That there is a necessary link between the scope of review and the purpose of the reviewing procedure is clearly seen in the distinctions adopted in many domestic legal systems between the mechanism of 'appeal' and other mechanisms for reviewing lower courts' decisions, such as 'cassation' or 'review'. While 'appeal' is deemed to serve the private interests of the parties to the litigation (by entailing a full-fledged reconsideration of the case), the procedures of 'review' and 'cassation' are taken to serve the public interest in the legal order and precisely therefore are limited in their scope to reviewing defects of procedure and deficiency of reasoning (in addition to pure errors of law). See Jolowicz, 'Appeal and review', 620.

[283] cf section IV.B of this article.

[284] *Application for Review of Judgment No. 158*, [94].

[285] HRC, *Aboushanif v Norway* Comm no 1542/2007 (17 July 2008) [7.2]; ACmHPR, *Thomas Kwoyelo v Uganda* Comm no 431/12 (17 October 2018) [244]; *Hirvisaari v Finland*, App no 49684/99 ECHR 2001, [30].

perspective of the legal system, is relevant for guidance, coordination, and contestation purposes.[286] Not to mention the importance that judicial reason-giving has for the quality of the decisions themselves, given that a detailed treatment of the evidence, submissions and legal arguments is taken to increase the likelihood of a correct decision.[287] As attested to in the practice of human rights adjudication with respect to the right to a fair trial,[288] these are systemic considerations that properly fall within the purview of international adjudicatory bodies entrusted with assessing compliance with international standards pertaining to the administration of justice. If investment arbitration is to operate as a mechanism for enhancing compliance with rule of law requirements,[289] then the extension of arbitral review to the adequacy of judicial reasoning is well justified.

Last but not least, there is also a fundamental legal reason why adequacy of judicial reasoning can be of proper concern to international adjudicators. The right to a reasoned judgment is now widely considered to be an inherent part of the right to a fair trial – not only by the ICJ[290] and international criminal courts,[291] but without exception, by human rights bodies at large.[292] To the extent that the right to a fair trial is itself regarded to be a requirement of customary international law,[293] the requirement that judgements shall state the reasons on which they are based is thus one that directly derives from international law and assessing compliance with it the proper task of a competent international court or tribunal.

Defined in this way, the nature of arbitral review under the denial of justice standard differs from the sequential review method proposed by Bjorklund.[294] In accordance with her proposal, the impugned decisions would first be measured against the requirements of municipal law (and thus be reviewed for alleged errors in the application of the law), before proceeding to determine whether the applicable law – and thus also the

[286] cf *Suominen v Finland*, [37].

[287] On this, see further M Cohen, 'When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach' (2015) 72 Washington and Lee Law Review 483, 504ff.

[288] On the ECtHR specifically, see Aðalsteinsson, 'Right to Adequate Reasoning', 306.

[289] See HE Kjos, 'Domestic Courts under Scrutiny: the Rule of Law as a Standard (of Deference) in Investor-State Arbitration' in M Kanetake and PA Nollkaemper, *The rule of law at the national and international levels: contestations and deference* (Hart 2016) 357.

[290] *Application for Review of Judgment No. 158*, [92].

[291] *Prosecutor v Furundžija*, [69].

[292] See HRC, *Van Hulst v Netherlands*, Comm no 903/1999 (1 November 2004) [6.4]; *Verlinden v Netherlands*, [7.7]; ACmHPR, *Thomas Kwoyelo v Uganda*, [244], *Kenneth Good v Botswana*, Comm no 313/05 (26 May 2010) [175]; *Wetsh'okonda Koso and Others v Democratic Republic of the Congo*, Comm no 281/03 (27 May 2008) [90]; ACtHPR, *Fidele Mulindahabi v Rwanda*, [63]-[64]; IACtHR, *Apitz Barbera et al. ('First Court of Administrative Disputes') v Venezuela* (Preliminary Objection, Merits, Reparations and Costs) (5 August 2008) [78]; *Barbani Duarte et al. v Urugay*, [122], [183]-[184]; ECtHR, *Van de Hurk v the Netherlands*, [61], *Ruiz Torija v Spain*, [29], *Higgins and Others v France*, App no 134/1996/753/952 ECHR 1998, [42]; *García Ruiz v Spain*, [26], among others.

[293] See *Prosecutor v* Aleksovski (Appeal Judgement) IT-95-14/1-A (24 March 2000) [104]; *Prosecutor v Kayishema & Ruzindana* (Appeal Judgement) ICTR-95-1-A (4 December 2001) [51].

[294] Bjorklund, 'Reconciling State Sovereignty', 873-83.

legal system – itself falls short of international standards.[295] While the object of such a sequential review can also be said to concern the system of administration of justice as such, the method of review is arguably less suitable for the type of control that is to be performed by arbitral tribunals. Reviewing judgments for alleged errors in the application of domestic laws – albeit supposedly under deferential standards [296] – still carries the danger for the review to transgress into an appellate one.

C. Intensity of the scrutiny: choosing between deference or effective protection?

Controlling the adequacy of judicial reasoning (or for that matter, the reasonableness of particular judicial outcomes) ultimately raises the question of legitimacy of arbitral review.[297] In determining compliance of judicial conduct with international standards, investment tribunals engage in the exercise of public authority, which – as any exercise of authority – requires proper legitimation.[298] The latter depends on a number of factors. In the first place, on the tribunals' institutional set up and modalities of their procedures, which must conform to the basic tenets of democratic theory applicable to judicial institutions.[299] But as von Staden convincingly makes the case, the legitimacy of international arbitral tribunals also depends on the substance of their decision-making. This must be appropriately related to democratic decision-making at the national level which, in turn, demands the development of

[295] ibid. The approach builds on the earlier proposal advanced by Roth, which similarly proposed a two-step approach to determine whether there has been a denial of justice: 'The first test to be applied is, therefore, whether, according to national justice, the alien's judicial treatment was correct and lawful. Then, in the second place, it must be ascertained whether the state's judicial organization measures up to the standard instituted by international law.' A.H. Roth, *The minimum standard of international law applied to aliens* (Sijthoff 1949) 184.

[296] Bjorklund, 'Reconciling State Sovereignty', 875.

[297] The question has been raised early on, in response to the *Loewen* case, where the denial of justice standard was for the first time considered in the modern investment arbitration era. See WS Dodge, '*Loewen v United States*: Trials and Errors under NAFTA Chapter Eleven' (2002) 52 DePaul Law Review 563, 571.

[298] A von Bogdandy and I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 EJIL 7, 8.

[299] The legitimacy of the courts is considered to be founded on their commitment to previously defined legal standards as well as an individualizing judicial procedure, for only individualized decisions derive their justification from an individual claim to self-determination that thus serves as a basis for the exercise of public authority. Courts differ in that from the legislative power that derives its legitimacy from an all-inclusive, open and egalitarian decision-making process, which as such facilitates and guarantees democratic self-determination. Whilst democratic legitimacy is thus primarily an attribute of the legislative power, and individual legitimacy that of the judiciary, the two forms of legitimacy are mutually reinforcing. The legitimacy of judicial decisions hinges upon the individualizing procedural structure applying pre-determined standards, but also by the democratic approval of the law that is applied by the courts. See C Möllers, *The Three Branches: a Comparative Model of Separation of Powers* (OUP 2013) 80-109.

democratically informed standards of review that are to guide arbitrators in the exercise of their reviewing functions.[300]

When it comes to substantive denial of justice, finding an appropriately informed standard of review requires not only settling on the proper nature of arbitral review. It equally necessitates reflecting upon the *intensity* with which domestic judicial decisions ought to be assessed. As already discussed,[301] the question of intensity of the scrutiny turns essentially on the *deference* that the reviewing body grants to the reviewed body before it is prepared to 'substitute' the latter's decision with its own. Of course, the concept of 'substitution' ought not be taken literally in the transnational context, given that pronouncements of international adjudicatory bodies, at least in most cases, leave the original measure unaffected. Rather, an international court or tribunal can be said to accord deference in its assessment by either subjecting the reasons advanced to justify a particular measure to less intensive probing, or by way of exempting particular dimensions of the decisions from probing altogether. For the purposes of the present discussion, the question is primarily about how far an investment tribunal should go in re-evaluating domestic courts' assessments of evidence and related findings of fact, their interpretation of law and its application to the facts, and/or their exercise of discretionary powers in the process of assessing whether the particular judicial decision amounted to a denial of justice.[302]

In the following, I first set out some general considerations that warrant the adoption of deference in the assessment process (1), before expounding on what a deferential approach should concretely entail when reviewing a judgment pursuant to the denial of justice standard (2). I then move to explain why deference does not imply a more stringent application of the denial of justice standard (3), before ultimately concluding.

i. Deference as a general guiding principle

Insofar as deference is seldom granted categorically but rather in degrees, the intensity of the scrutiny generally operates in terms of a sliding scale.[303] In following Schill, several considerations can thereby be

[300] A von Staden, 'The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review' (2012) 10 International journal of constitutional law 1023, 1026.

[301] See section III.A of this article.

[302] This question pertains thus to the method by which the arbitrator assesses the propriety of a particular decision and must be distinguished from the question of scope and content of the standard of denial of justice itself. Finding no violation of international law because the impugned conduct does not meet the standard of liability is not an exercise of deference; it is a consequence of the content of the applicable norm. Hence, the concept of deference has therefore no role to play in *ex post facto* justifications for the arbitrator's conclusion that no breach has occurred. On this problem, see JH Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis* (Hart 2020) 117-18, 140.

[303] See JH Gerards, 'Intensity of Judicial Review in Equal Treatment Cases' (2004) 51 NILR 135, 140.

relevant to determining the appropriate degree of deference: the questions as to which institution has the better mandate to represent the relevant political will (voice), the question of who has superior knowledge or institutional capacity to exercise public authority (expertise), as well as the question as to who has the better claim to protecting individual rights (rights).[304] When it comes to arbitral review of domestic judgments, all three considerations happen to play a role, albeit in different ways.

The criterion of *voice* militates in favor of domestic courts being granted some degree of deference, on two principled grounds. First, because as a matter of transnational distribution of powers, it is domestic courts – and not the international adjudicator – that are legitimized to conclusively determine the content of domestic law as enacted by the domestic legislator through the exercise of (democratic) self-determination. And second, because adjudication itself entails a balancing process between conflicting societal interests and rights reflected in the law,[305] which as such is entitled to recognition by the international adjudicators. Conversely, the criterion of *expertise* demands that some degree of deference be accorded to domestic courts on account of their superior knowledge of the applicable domestic legislation and jurisprudence when compared to that of arbitrators sitting on arbitral panels.[306] The same criterion also calls for deference on account of the courts' wider and more direct fact-finding powers, which puts them in a better position to make factual determinations when compared international adjudicators considering the same matters years after their occurrence. Last but not least, the criterion of *rights* militates for granting deference to particular judicial determinations when these have had the objective of protecting the rights and interests of third parties affected by the conduct of the investors, such as creditors or consumers.

Applying these considerations to the denial of justice standard – a standard that is in its essence concerned with the enforcement in the host state's domestic legal order of foreigners' substantive rights in controversies with third parties – it becomes obvious that any assessment of the adequacy of reasoning (or of the reasonableness of a particular outcome) must necessarily proceed from a *deferential approach*, whereby deference is granted, not as a matter of discretion, but as a matter of principle. Having said that, the deference thus accorded is not absolute and does not imply that any particular aspect of the domestic adjudicative process

[304] Schill, 'Deference in investment treaty arbitration', 599ff.

[305] On the balancing of rights argument, see, eg, R Alexy, *A Theory of Constitutional Rights* (OUP 2002) 47-51.

[306] The very design of investment arbitration entails the resolution of disputes by bodies composed of arbitrators that, as a practical matter, do not necessarily command sufficient understanding of the applicable domestic law. Cf art 39 ICSID Convention and rule 1(3) ICSID Arbitration Rules. See further WM Reisman, 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold' (2000) 15 ICSID review 362, noting at 369 how the applicable domestic law can be one 'with which the arbitrators have no training, first-hand experience, or even basic language facility'.

be exempted from arbitral review. In the process of verifying whether the state has lived up to its obligation to provide the investor with an adequate system of justice, the international adjudicator needs to assert the authority necessary to provide a real measure of protection. In order to afford such protection, any granting of deference must necessarily be compensated with a stricter assessment of procedural propriety, as also advocated by Schill.[307] This in the end follows from the very same criterion of *rights*: it is the international adjudicator that retains ultimate authority to determine whether the impugned judicial measure is consistent with the international obligations at stake.

According deference on these grounds is not without basis in international practice. Several illustrations can already be found in the deferential strategies that international human rights bodies have developed to mitigate the conflict between their jurisprudence and domestic adjudicators. The best known in this respect is the no-fourth-instance doctrine developed by the ECtHR.[308] Pursuant to this, the Court, as a matter of principle, applies restraint in reassessing domestic courts' findings of fact[309] and determinations of domestic law.[310] But similar strategies can also be found in the practice of the Inter-American Commission and the Inter-American Court of Human Rights (IACHR and IACtHR)[311] and the Human Rights Committee (HRC).[312] Derived from the principle of subsidiarity,[313] these strategies all build on the idea that, precisely because international supervisory bodies exercise functionally a different task than an appellate jurisdiction, exercising restraint in their scrutiny of domestic court's determinations is necessary for those bodies to remain within the scope of their competences. This does not mean that this restraint is unconditional. The ECtHR is willing to accept domestic

[307] Schill, 'Deference in investment treaty arbitration', 603-604.

[308] The leading precedent is *Schenk v Switzerland*, App no 10862/84 ECHR 1988, [45]. On the doctrine and its relationship to the margin of appreciation, see M Dahlberg, '"It is not its task to act as a Court of fourth instance": the case of the ECtHR' (2014) 7 European Journal of Legal Studies 84.

[309] cf *Kemmache v France (No 3)*, App no 17621/91 ECHR 1994, [44].

[310] cf inter alia, *Ramos Nunes de Carvalho e Sá v Portugal*, [186]; *Nejdet Şahin and Perihan Şahin v Turkey*, [GC] App no 13279/05 ECHR 2011, [49]; *Tsanova-Gecheva v Bulgaria*, [91]; *Farzaliyev v Azerbaijan*, [34].

[311] See generally B Duhaime, 'Subsidiarity in the Americas' in L Gruszczynski and W Werner (eds), *Deference in international courts and tribunals: standard of review and margin of appreciation* (OUP 2014) 289-315. The IACtHR has been making explicit reference to the 'fourth instance' principle, which presupposes that it 'is not a higher court or a court of appeal to decide disagreements between the parties with regard to the scope of the evidence or the application of domestic law'. See, eg, *Case of Cabrera García and Montiel Flores v México* (Preliminary Objection, Merits, Reparations and Costs) (26 November 2010) [16]. Cf *Case of Nogueira de Carvalho et al. v Brazil* (Preliminary Objections and Merits) (28 November 2006) [80].

[312] According to the well-established stance of the HRC, it is generally for the national courts, and not for the Committee, to evaluate the facts and evidence in a particular case. See *Errol Simms v Jamaica*, Comm no 541/1993 (3 April 1995) [6.2]; *Van Hulst v The Netherlands*, [6.5]; *Kurbonov v Tajikistan*, [6.3]; *Emelysifa Jessop v New Zealand*, Comm no 1758/2008 (29 March 2011) [7.11].

[313] Dahlberg, 'Court of fourth instance', 85-89. See also *Case of Cabrera García and Montiel Flores v México*, [16].

courts' determinations 'unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair'.[314] Much in the same way, the HRC accepts judicial findings of fact on the condition that those findings are not 'arbitrary'.[315] Having said that, functional considerations are but one of the possible grounds for granting deference to domestic courts. As further shown in the practice of the human rights bodies, deference can also be granted on a more conditional basis. In the European human right system, the granting of deference also depends on the quality of the domestic adjudicative process. The ECtHR is likely to grant courts a wider margin of appreciation where these have taken into account ECtHR's own case-law in their judgments, and conversely, may narrow the margin in circumstances where domestic courts implemented ECHR standards in bad faith.[316] Similarly, in the Inter-American human rights system, the granting of deference tends to depend on the general state of the domestic judiciary. The IACHR and IACtHR have been unwilling to defer to domestic courts in situations of systemic impunity, where courts have systemically been unable to ensure judicial protection of rights.[317]

One could raise objections to transposing approaches adopted by human rights bodies to investment arbitration on the ground that developing a principled approach towards deference only makes sense in the case of permanent international institutions. In view of their sustained interactions with domestic courts, permanent institutions can afford to grant deference more often and more broadly, since nonconforming judicial conduct can eventually be resubmitted to them for reconsideration. In the context of arbitration, where the *ad hoc* nature of the dispute settlement process prevents meaningful exchanges between domestic courts and international adjudicators, there may arguably be less room for deference on principled grounds, as tribunals are also not in the position to exercise ongoing institutional supervision over domestic adjudicators and states in general. Moreover, given the retrospective orientation of the remedies typically provided by investment tribunals (where the prevalent form is the awarding of compensation for damage resulting from the wrongful act) and the conception of arbitration as a one-stop-shop dispute settlement mechanism, a principled approach to deference may not sit well with the nature of the system as such. But the concept of transnational separation of powers not only mitigates in favor of endorsing deference as a matter of principle. It in fact dictates a deferential approach if international tribunals are not to function as courts of appeal in relation to domestic judgments.

[314] *Khamidov v Russian Federation*, [170]. See also *Bochan v Ukraine (No 2)*, [61]; *Moreira Ferreira v Portugal*, [83]; *Nejdet Şahin and Perihan Şahin v Turkey*, [49]-[50].

[315] See cases cited in footnote 312.

[316] On this, see further G Ulfstein, 'Transnational constitutional aspects of the European Court of Human Rights' (2021) 10 Global Constitutionalism 151, 161-62.

[317] Duhaime, 'Subsidiarity in the Americas', 295-6.

ii. Operationalizing deference in relation to substantive denial of justice

In light of these considerations, how ought a deferential approach be operationalized then in the context of the denial of justice inquiry? For the avoidance of doubt, there is no room for suggesting that any particular aspect of a judicial decision should *by default* be exempted from arbitral review. However, bearing in mind the criteria of voice and expertise and following the practice of human rights bodies, a strong argument can be made in favor of having investment tribunals entertain – as a matter of principle – only a marginal scrutiny of domestic courts' findings of fact and determinations on points of domestic law. Such principled restraint should operate as a rebuttable presumption, subject to case-specific, due process considerations. In order to be accorded full deference, the courts' factual findings would have to be capable of being traced back to a judicial process in which the equality of arms has been respected with regard to the attendance and examination of witnesses, with the production of documents, and with the treatment of evidence in general. Equally, in order to earn acceptance by the international adjudicator, the courts' findings on points of law would have to result from a procedure where litigants have been provided a reasonable opportunity to present their case.[318] The exercise of such principled restraint could further depend on broader systemic preconditions. Greater deference should be granted to independent and impartial judicial bodies operating in systems abiding by the rule of law; where such qualities are notoriously lacking, the judgments ought to be subject to closer scrutiny.[319]

When it comes to assessing the adequacy of judicial reasoning, a principled way of according deference is further to take into account the actual adjudicatory practices of the legal order in which the court(s) under review operate. It is a well-established principle of international adjudication that, when called upon to ascertain the content of domestic legal rules, international adjudicators are to 'pay the utmost regard to the decisions of the municipal courts', or else they run the risk of applying those rules differently than how they are actually applied in the domestic legal order.[320] Building on this principle, investment tribunals must thus logically seek guidance from domestic adjudicative practices when determining whether a decision really amounts to an inexplicable departure

[318] This ultimately aligns with the broader proposition that an arbitral tribunal 'will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law': *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19 (Award, 3 July 2008) [106].

[319] Such a conditional approach to deference pursuant to the fourth instance doctrine is for example followed by the institutions in the Inter-American human rights system. Duhaime, 'Subsidiarity in the Americas', 295ff.

[320] *Brazilian Loans (France v Brazil)* (1929) PCIJ Series A No 21, 124. See further *Serbian Loans (France v Kingdom of the Serbs, Croats, and Slovenes)* (1929) PCIJ Series A No 20, 46-47; *García & Garza* case, 126 (professing the existence of 'a well-recognized general principle that the construction of national laws rests with the nation's judiciary').

from a longstanding line of precedent.[321] But prior judgments are also relevant in that they may shine light on public policies pursued by specific statutes, or conclusively establish their object and purpose, which may importantly inform the appraisal of potential illogicalities and inconsistencies in judicial reasoning pertaining to those statutes.[322] Furthermore, prior judicial practice can be important to identifying the 'competing factors of decision' which generally inform the assessment of the reasonableness of a particular judicial outcome.

While the above parameters provide the general contours within which the intensity of the scrutiny ought to be operationalized, the following two variables can be further relevant to fine-tuning the intensity of the scrutiny in individual cases. The first factor of relevance is the *extent of reasoning* provided. Where the judicial decision under review is supported by extensive reasoning, this justifies it being subjected to a less intensive scrutiny. Conversely, where a judgment is supported by reasoning that is scant or lacks elaboration, the stated reasons should also undergo more intensive probing. In fact, a more searching inquiry may in such cases be necessary to determine whether the court actually responded to proofs and reasoned arguments presented by the parties in the first place. Using the extent of available reasoning as a factor determinative of the intensity of the scrutiny may thus be guided by considerations of convenience. But to do so would also be in keeping with the international adjudicator's mandate, which is to determine compliance with the customary international law requirement that judgements shall state the reasons on which they are based.

The second variable that should play a role in fine-tuning the intensity of the scrutiny is the very *subject matter* of the impugned decision. In giving effect to the criteria of voice and expertise, it is obvious that the *nature* of the legal issues raised by the impugned decision may themselves be a reason to undertake a less or more searching inquiry. Hence, greater deference ought to be conceded in circumstances where the judgments touch on issues of public interest or public policy and generally on matters with respect to which international law leaves a large degree of discretion to domestic legal orders.[323] Conversely, a more intensive scrutiny

[321] See *Eli Lilly v Canada*, [307]-[389], where the Tribunal extensively examined Canadian jurisprudence for the purpose of establishing whether Canadian courts dramatically changed their interpretation of the utility requirement under Canadian patent law. Cf also *Alghanim v Jordan*, [432]; *Krederi v Ukraine*, [527]; *Bridgestone v Panama*, [418].

[322] cf *Dan Cake v Portugal*, [113], where the Tribunal relied on a precedent to confirm that courts had the power to require the submission of documents or information not mentioned in the applicable statute; where the Tribunal interpreted a precedent to support the conclusion that a bankruptcy court cannot refuse to convene a composition hearing on the ground that creditors' claims or objections, raised after liquidation proceedings have commenced, are pending, [136].

[323] The latter point was well noted in *Serbian Loans*, where the PCIJ considered it 'a most delicate matter' to set aside domestic judgments, especially on matters that fall largely to be determined by each legal system, such as on matters of public policy, the conception of which was largely dependent on the opinion prevailing at any given time in the particular country itself. *Serbian Loans* case, 46. Similarly, Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?'

shall be warranted in circumstances where the judgment in question gives (indirectly) effect to specific international norms, given that the interpretation and application of international rules is not a matter where deference to domestic courts is warranted.[324] Furthermore, the criterion of rights may also demand heightened scrutiny in circumstances where the impugned judicial decision has had a significant impact on the investor's position.

Independently of the nature of the issues decided, the intensity of the scrutiny may further be influenced by the *complexity* of the legal issues presented for adjudication. Since it is not for investment tribunals to settle contested points of domestic law, it is also not for them to impose too high demands on domestic courts' treatment of such contested points. Judicial decisions concerning situations where there has been no precedent or statutory rule precisely in point and where the courts have therefore disposed of the issues through the development of rules derived from general principles ought to undergo less probing assessments than decisions dealing with routine matters. Indeed, in arbitral practice thus far, tribunals have already shown considerable deference in situations where the impugned judgments raised issues of law on which the available legislation or domestic jurisprudence provided contradictory, or otherwise no immediately discernible answers.[325] But also as a matter of principle, judicial decisions in 'hard cases' should not be subject to more intensive probing than what is necessary to ascertain whether the decision is a procedurally regular one.

iii. Deferring or Diluting the Standard?

This plea for a general approach of deference must not be understood as an argument in favor of further stifling the already stringent requirements for a finding of denial of justice.[326] The high threshold associated with the denial of justice standard has already led investors seeking redress for the acts of domestic courts to increasingly resort to other standards of treatment available under investment treaties[327] – such as the prohibition of uncompensated expropriations, the obligation to provide effective means to assert claims and defend rights, or the prohibition of unfair treatment more generally – and frequently with success.[328] But these trends are not a reason for applying the denial of justice standard

(2006) 16 EJIL 907, 920, considering that the purported democratic deficit of international courts mainly supports the application of a margin of appreciation doctrine with regard to 'inward-looking' international norms that regulate domestic conditions.

[324] cf Schill, 'Deference in Investment Treaty Arbitration', 600-601.

[325] See, eg, *Arif v Moldova*, [481]; *Flughafen v Venezuela*, [687]; *Alghanim v Jordan*, [460]-[461]; *Mamidoil v Albania*, [766]-[768].

[326] See section II.C of this article.

[327] Generally on this trend, see MD Goldhaber 'The Rise of Arbitral Power Over Domestic Courts' (2013) 1 Stanford Journal of Complex Litigation 373.

[328] See, eg, *Saipem v Bangladesh*, *Chevron Corporation v Ecuador* (Contract Claims); *White Industries v India*.

any less demandingly than in the way prescribed by international law. The high threshold associated with denial of justice claims is the consequence of the nature of the international obligation in question, not the deference with which compliance with this obligation is or ought to be assessed.

One does understand the inclination of some arbitral tribunals to avoid the denial of justice standard by grounding responsibility for judicial misconduct in alternative causes of action, including by means of more expansive and less demanding interpretations of the open-ended fair and equitable treatment standard.[329] The delict of denial of justice is but one of the ways in which judicial misconduct can engage the responsibility of the state.[330] As a matter of principle, there is nothing in the law of state responsibility to suggest that judicial conduct could not violate also concrete treaty obligations, including specific standards prescribed by investment treaties.[331] The problem in practice is rather that most of those standards are not cast as concrete obligations of result, but as loosely defined standards of 'treatment'. As such, the standards have proven difficult to operationalize with respect to judicial conduct. In exercising their judicial function by speaking the law in the name of the state, courts namely 'treat' investors through recognizing, confirming, denying, or else clarifying, particularizing, and substantiating the substantive and procedural rights to which investors make claim under the applicable domestic law. As most of these standards of treatment provide little guidance on how domestic courts are to perform their judicial functions, many arbitral tribunals have in the end fallen back on the very same denial of justice standard as a means to determining whether judicial conduct amounted to a treaty violation.[332] This is not surprising since it is the denial of justice standard that provides the most fundamental normative benchmark for assessing whether an impugned judicial measure can be characterized as a normal, *bona fide* exercise of judicial functions – as opposed to, say, an act of judicial expropriation or an arbitrary judicial interference with an investment.

As Sattorova rightly cautioned about a decade ago, the proliferation of alternative causes of action with respect to conduct that would more naturally take the form of denial of justice might in the long run compromise the integrity, credibility, and sustainability of investment treaty

[329] For examples of the latter, see *OAO Tatneft v Ukraine*, [481]; *Infinito Gold Ltd. v Costa Rica*, ICSID Case No ARB/14/5 (Award, 3 June 2021) [365]-[367].

[330] Among the usual examples, one can mention courts' decisions infringing jurisdictional immunities to which foreign states and their officials are entitled under customary international law. See *Jurisdictional Immunities* case.

[331] See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), art 4(1), confirming that courts are capable of engaging the responsibility of a State in the same way as the acts of other State organs. The provision is considered to be reflective of customary international law, as per *Immunity from Legal Process*, [62].

[332] For an analysis of this practice, see further V Prislan, 'Judicial Expropriation in International Investment Law' (2021) 70 ICLQ 165, 177ff.

law.[333] In light of the broader legitimacy crisis that the investment arbitration regime is currently facing, the time is certainly ripe to reconsider the role and function of the denial of justice standard in international (investment) law. The more so given the undiminished relevance of the standard in arbitral practice and the consequences that the potentially wrong application of the standard may have, not only for states, but also for investors.[334] This reconsideration ought to begin, it is submitted, by correctly defining standard-specific parameters of arbitral review. As argued in this contribution, and contrary to what continues to be advocated in practice,[335] review under the denial of justice standard must extend to the content of judicial decisions. But the intensity of the scrutiny must necessarily also be adjusted to the nature of the international obligation in question.

According deference to domestic courts in the process of scrutinizing judgments under the denial of justice standard does not mean giving up on the principle of supremacy of international law and the objective of effective investment protection. Nor does it imply that judicial conduct be reviewed with greater circumspection than the conduct of other state organs. It is the very nature of the international legal obligation in question that mandates such deference.[336] The duty to provide investors and other foreigners a system of justice that treats them fairly and impartially and that generally affords adequate judicial protection of their rights is not an obligation prescribing substantive judicial outcomes, which in that sense could be subject of supervision by international investment tribunals.[337] Individual judicial outcomes ultimately depend on the rights with respect to which judicial protection is sought. Since it is essentially in domestic law that the claimed rights find subsistence, it is also for domestic courts to conclusively determine the existence and scope of those rights or establish in whom those rights are vested. Given that the authority of investment tribunals exists by virtue of delegation,[338] and that the terms of that delegation cannot be taken to include the authority to

[333] M Sattorova, 'Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct' (2012) 61 ICLQ 223, 244.

[334] In 2022, the arbitral award rendered in favor of the investor in the *Manchester Securities Corp v The Republic of Poland* (UNCITRAL, 7 December 2018) case was set aside by the Brussels Court of First Instance because the investment tribunal purportedly failed to correctly apply the denial of justice standard by taking on the role of a court of appeal. See *République de Pologne v Manchester Securities Corp.*, Tribunal de première instance francophone de Bruxelles, Section Civile – 2019/3390/A, 18 February 2022, 19-20.

[335] cf eg *Lion v Mexico*, [217].

[336] See *América Móvil S.A.B. de C.V. v Republic of Colombia*, ICSID Case No ARB(AF)/16/5 (Award, 7 May 2021) [418]-[423], confirming that the principle of supremacy of international law is irrelevant in circumstances where international law itself leaves it to domestic law to determine the existence and scope of particular rights.

[337] cf *Salem Case*, 1202, confirming that '[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence including all deficiencies of such jurisdiction, imperfect as it is like every other human work'.

[338] See I Venzke, 'Understanding the authority of international courts and tribunals: on delegation and discursive construction' (2013) 14 Theoretical Inquiries in Law 381.

conclusively resolve questions of domestic law, it is unavoidable that investment tribunals therefore accord some degree of deference to domestic courts. This is in the end also embodied in the now widely recognized principle that international courts and tribunals must apply domestic law as it is actually applied by domestic courts and not as international adjudicators deem it should be applied.[339]

Equally important, the duty to provide investors and other foreigners a system of justice that treats them fairly and impartially is not a duty to maintain a judicial system of a specifically defined kind. According deference to domestic courts is therefore necessary as a means for addressing the pluralism permitted by international law, by respecting national constitutional traditions and specificities of domestic legal orders.

V. Conclusion

Though not conceived as a supranational instance of appeal against judgments of domestic courts, investment arbitration has increasingly come to be used as a remedy against adverse judicial decisions. As a result, arbitral tribunals are called to assess the propriety of the courts' conduct from the standpoint of the international standard of denial of justice, acting thereby as an external instance of control over the domestic adjudicative process. However, the exercise of such control has been a complicated one, in part because the standard itself has traditionally been ill-defined. In consequence, the nature and the intensity of the review performed by arbitrators when assessing the ultimate product of adjudication – the judicial decision as such – has diverged to a considerable – and not necessarily desirable – extent. The contribution has therefore called for a more uniform approach to arbitral review.

As explained in the contribution, the final product of the domestic adjudicative process can and must be the proper object of scrutiny by arbitral tribunals. For, procedural fairness cannot be of sole concern to international adjudicators; the substance of a judicial decision must ultimately also meet the condition of rationality in order to be treated as a product of adjudication. Although there are different ways of determining whether this burden of rationality has been discharged in relation to a concrete decision, it is submitted that the task of arbitral tribunals is limited to determining whether the particular judgment is supported by adequate reasons. This goes beyond ascertaining the mere presence of

[339] See *Elettronica Sicula SpA (ELSI), United States v Italy* (Judgment) [1989] ICJ Rep 15, [62]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639, [70]; *Case of Kononov v Latvia*, App no 36376/04 (24 July 2008) [197]; *Korbely v Hungary*, (Judgment) App no 9174/02 (19 September 2008) [72]; WTO, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* WT/DS213/AB/R and Corr1 (19 December 2002) [157]. See also *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL-11-01/I/AC/R176bis (16 February 2011) [35].

reasons, but not as far as requiring that the reasons be compelling. The presence of adequate reasons is hence the necessary but also sufficient benchmark against which judgments of domestic courts ought to be tested as part of the denial of justice inquiry.

It is submitted that re-orienting the nature of arbitral review to the sufficiency of reasoning better befits the task of arbitral tribunals than pursuing inquiries into the reasonableness or correctness of particular judicial outcomes. Given the nature of the standard of denial of justice and its concern with the very system of administration of justice, substantive outcomes cannot be of proper concern to arbitral tribunals. In view of the fundamental importance that reasoned argument has for the adjudicative process itself, it is only the quality of judicial reasoning that has a bearing on systemic concerns. Any other approach to review runs the risk of transforming arbitral tribunals into courts of appeal. But what is equally important, however, is that the substantive review performed under the denial of justice standard is based on the recognition that it is essentially for domestic courts to establish how that law should be applied. This calls for the adoption of deferential standards of review. Investment tribunals cannot be oblivious about the question of the legitimacy of their adjudicatory practices and the relationship between those practices and domestic levels of decision-making.