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JUDICIAL EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW

VID PRISLAN* 

Abstract This article examines the notion of judicial takings in international law and its reflection in the practice of investment tribunals. It takes stock of the already significant body of arbitral jurisprudence dealing with expropriation claims grounded in, or relating to, the acts or omissions of courts, with a view to developing a coherent theory of judicial expropriations. It is suggested that, due to the courts' specific role in the determination of the underlying proprietary rights that are the very object of international legal protection, judicial measures warrant different conceptual treatment from measures by other State organs. Traditional approaches to expropriation analysis do not take this sufficiently into account and therefore do not provide adequate tools for distinguishing legitimate judicial measures from undue interferences with investors' rights. It is argued that a *sui generis* approach is hence needed: where proprietary rights are primarily affected by the impugned judicial action, it is first necessary to determine whether such action is itself wrongful under international law, for only then can it be treated as an act of expropriation. However, the proper analytical approach will ultimately depend on the circumstances of each case and traditional approaches, such as the sole effects doctrine, may still be appropriate where the judicial injury actually flows from wrongful legislative or executive conduct.

Keywords: public international law, judicial takings, expropriation by judiciary, State responsibility for judicial conduct, denial of justice, judicial finality.

I. INTRODUCTION

Imagine the following hypotheticals. A foreign investor obtains a shareholding interest in a former State-owned enterprise pursuant to a share purchase agreement concluded with a State. The agreement is later terminated by a

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court, on the grounds that the investor failed to make the investments in the enterprise stipulated in the agreement. As a result of the judgment, the shares are transferred back to the State. Or consider a foreign investor who secures a lease from a State enterprise to operate a duty-free store on terms of exclusivity. The lease is subsequently invalidated by the courts because the agreement should have been subject to a tender procedure and the investor is evicted. In both cases, the investors have lost their contractual rights and thus the benefits of their investments.¹ Considering that such contractual rights may attract the protection of international investment agreements (IIAs),² the question may well be asked: can the decisions of courts in such cases be taken to have deprived the respective investors of their investments, giving rise to expropriation claims actionable under the applicable agreements?

The problem of ‘judicial expropriations’—as one might characterise the taking of contractual and other proprietary rights by judicial organs—has not attracted much scholarly attention³ or been the subject of extensive consideration in arbitral practice. This may be because treaty clauses prohibiting unlawful expropriation have primarily been concerned with the protection of property rights against governmental abuse of legislative or executive powers—not against judicial abuse.⁴ In international law, a separate delict—namely, denial of justice—has traditionally dealt with instances of judicial misconduct.⁵ Yet, from the perspective of contemporary international law, there is nothing to suggest that taking of property could not be the result of judicial action. As a matter of substantive law, no distinction is generally made regarding the State organ to which an interference with

¹ The scenarios just sketched are not entirely hypothetical ones. Somewhat similar situations have namely given rise to arbitrations in *Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia (Award)* (ICSID Case No ARB/09/16, 6 July 2012) and *Mr. Franck Charles Arif v Republic of Moldova (Award)* (ICSID Case No ARB/11/23, 8 April 2013), respectively.

² See eg art 1(c) and (e), Italy–Bangladesh BIT (1990); art 1139(h) NAFTA (1994); or art 1(6)(c) and (f) ECT (1994). On the protection of contractual rights, see further Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2005) 184–5.

³ A few exceptions include A Mourre, ‘Expropriation by Courts: Is It Expropriation or Denial of Justice?’ in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2011); M Sattorova, ‘Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct’ (2012) 61 ICLQ 223; and HG Gharavi, ‘Discord over Judicial Expropriation’ (2018) 33 ICSIDRev 349.

⁴ *OAO Taftneft v Ukraine (Award on the Merits)* (UNCITRAL, 29 July 2014) [459]. So uncommon has the incidence of judicial expropriations apparently been that the MIGA Convention (1985) narrows its definition of expropriations to ‘any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment’—judicial actions or omissions being thus formally excluded. Convention Establishing the Multilateral Investment Guarantee Agency, 11 November 1985, entered into force on 12 December 1988, 24 ILM 1598 (1985), art 11(ii). As some have argued, the issue may be an empirical one: in practice, most claims of expropriation are simply based on conduct by the political branches of the government. See KJ Vandeveld, *Bilateral Investment Treaties* (2010) 306.

⁵ See generally J Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005).

investors' property is attributable. The provisions prohibiting uncompensated expropriations commonly found in contemporary investment treaties invariably focus on the act of taking—ie the expropriation or the measure having such an effect—and so seem to cover breaches by domestic courts themselves.⁶ Furthermore, from the standpoint of the law of State responsibility, courts are capable of engaging the responsibility of a State in the same way as the acts of other State organs.⁷ Despite this, investment tribunals have generally been reluctant to take a clear position on whether—or at least under what circumstances—a judicial measure can qualify as a compensable expropriation.⁸

This article therefore examines the notion of judicial takings in international law and its reflection in the practice of investment tribunals. Whilst the notion itself remains a contested one,⁹ it will be seen that there is already a significant body of arbitral jurisprudence dealing with expropriation claims relating to the acts or omissions of the judiciary. This article takes stock of this material, seeking to develop a coherent theory of judicial expropriations. It is argued that, in the context of expropriation analysis, judicial measures warrant different conceptual treatment than measures taken by other State organs which adversely affect investors' property. This is not because domestic courts have to be judged more carefully than other organs, but because courts, as part of their judicial function, determine the very object that will attract the protection of international law: the underlying proprietary right. This fact is not adequately taken into account in traditional approaches to expropriation analysis, which do not provide adequate tools for distinguishing legitimate judicial measures from undue interferences with investors' rights. The article therefore suggests that a *sui generis* approach is needed: when judicial action affects proprietary rights, such action must itself be found to be defective from the standpoint of international law in order for it to be treated as an act of expropriation. Proving that the judicial act was defective in that sense becomes a necessary prerequisite of judicial expropriation claims.

⁶ See generally UNCTAD, *Expropriation: A Sequel* (2012) 14ff.

⁷ cf art 4(1), Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), considered to be reflective of customary international law, as per *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep 62, [62].

⁸ See eg *Eli Lilly and Company v The Government of Canada (Final Award)* (ICSID Case No UNCT/14/2, 16 March 2017) [221], where a NAFTA Tribunal cautiously observed how it was 'possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110' but only '[a]s a matter of broad proposition'.

⁹ The US and Mexico recently expressed strong opposition to the very idea of judicial expropriations. See, respectively, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v Republic of Peru (Written Submission of United States of America pursuant to Article 10.20.2 of the TPA)* (ICSID Case No UNCT/18/2, 21 June 2019) [28]–[29]; and *PACC Offshore Services Holdings v United Mexican States (Counter-Memorial of Mexico)* (ICSID Case No UNCT/18/5, 21 August 2019) [589]–[604].

Section II defines judicial expropriation and explains the advantage of using such a notion in expropriation analysis. Section III highlights the inadequacy of conventional conceptual approaches to the determination of judicial takings. The article then sets out in section IV the default approach to determining whether an act of expropriation is attributable to judicial conduct and in Section V considers the nature of the standard applicable to judicial expropriation claims. Section VI concludes.

II. WHAT IS JUDICIAL EXPROPRIATION?

What is judicial expropriation? For current purposes, it concerns the taking of property by the judiciary, primarily through judicial decisions, as opposed to takings by the executive or legislature. But when can one really say that an investor has been deprived of property *due to* the actions of a court?

The taking of property rights might not always be attributable to the conduct of the judiciary. For example, if the laws applied by the courts are themselves contrary to international law (such as, presumably, in the case of a statute providing for large-scale expropriation of foreign property without compensation), the resulting wrong stems from the failure of the legislature to enact laws that are compatible with a State's international obligations, not from the judiciary *per se*. The same can be said of cases where domestic courts merely uphold the legitimacy of an interference by executive organs, such as the occupation of an investor's premises by the police. In such situations it is the actions of the executive organ which constitute the violation, even if the investor is deprived of their proprietary rights as a *result* of a measure adopted by a judicial organ. To properly speak of a judicial expropriation, the actual *source* or *cause* of the deprivation must lie in the wrongful conduct of the judicial organs themselves. The resulting wrong must therefore arise from a failure in the adjudicative process for which the judicial organ bears primary responsibility.

Why does proper classification matter? In practical terms, a judicial act may have the same negative consequences for a foreign investor as adverse measures taken by other State organs. The result of terminating a contract by means of a judicial decision is generally the same as its being terminated by the act of an administrative authority: either way, the contractual rights in question cease to exist under the applicable domestic law. Furthermore, it is irrelevant for the purpose of State responsibility whether the internationally wrongful act is attributable to a judge or to another State organ.¹⁰ These practical

¹⁰ cf *Différend concernant l'interprétation de l'article 79, par. 6, lettre C, du Traité de Paix (Biens italiens en Tunisie — Échange de lettres du 2 février 1951), Decision No 196* (7 December 1955), XIII UNRIAA 422, at 438, where the Franco-Italian Conciliation Commission saw no difference between the possibility that 'the French courts ordered the liquidations, in accordance with French domestic law but in violation of the Treaty, and France is responsible for the legislative act violating its international obligations' and that 'the French courts ordered the

considerations notwithstanding, the category of judicial expropriations is of more than taxonomical interest.

It may well be that from the perspective of contemporary international law, which treats the State as a unitary actor, courts are no different from other State organs.¹¹ On the domestic plane, however, courts do carry out specific functions which are distinct from those performed by other organs: they interpret and apply the law in the name of the State. In most legal systems, the judicial branch is tasked with providing authoritative interpretations of the law enacted by the legislature. In common law systems, courts even have the power to make law.¹² These and other constitutional variations notwithstanding, it is the courts that conclusively determine what the law is. Indeed, the idea that courts speak (*dictio*) the law (*ius*) is, after all, inherent in the very notion of its having ‘jurisdiction’.¹³ Arguably, it is the courts’ role in the process of determining the law that triggers problems in expropriation analysis.

While it is international law that protects investors from unlawful expropriation of property rights, it is the host States’ law—not international law—that determines what those proprietary rights actually are.¹⁴ This point is rarely recognised in academic or practitioner debate concerning the international law of expropriation.¹⁵ As Judge Higgins famously observed, ‘it is as if we international lawyers say: property has been defined for us by municipal legal systems; and in any event, we know property when we see it’.¹⁶ Yet, the question of the underlying proprietary rights is central to the discussion of judicial expropriations: when courts determine the existence and scope of particular rights, or establish in whom these rights might be vested, they indirectly define the object of international legal protection. This is at its clearest in the second of the two hypothetical scenarios described in the introduction: if a contract is invalidated retrospectively, it follows that the investor’s contractual rights lacked substance under the applicable domestic law and so never benefited from the protection of international law at all.

liquidations in violation of French domestic law and the Treaty and France is responsible for the judicial act violating its international obligations’.

¹¹ See J Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 113ff.

¹² See A Lincoln, ‘The Relation of Judicial Decisions to the Law’ (1907) 21 HarvLRev 120, 126.

¹³ See also Chief Justice Marshall’s observation in *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803) at 177, that it is ‘the province and duty of the judicial department to say what the law is’.

¹⁴ See eg *Panevezys-Saldutiskis Railway (Judgment)* PCIJ ser A/B, No 76 (28 February 1938) 18 (noting that ‘the property rights and the contractual rights of individuals depend in every State on municipal law’). Generally on this issue, see C Staker, ‘Public International Law and *lex situs* Rule in Property Conflicts and Foreign Expropriations’ (1987) 58 BYBIL 151; and Z Douglas, ‘Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 BYBIL 152.

¹⁵ For an exception, see JH Herz, ‘Expropriation of Foreign Property’ (1941) 35 AJIL 243, 243–6.

¹⁶ R Higgins, ‘The Taking of Property by the State: Recent Developments in International Law’ (1982-III) 176 *Recueil des cours* 259, 268.

One may, of course, question whether judgments affecting investors' proprietary rights really are different from regulatory measures emanating from other State organs. Precedents from the nineteenth and twentieth century remind us that investors' concessionary and contractual rights have often been taken away through the promulgation of legislative or executive instruments, including cases in which rights were declared non-existent under domestic law, sometimes with retroactive effect.¹⁷ Yet what arguably distinguishes such legislative or executive acts from judicial measures is their underlying intention. While the former generally do not hide their intention to change the content of the applicable domestic law, judicial measures are not intended to change the law at all. Quite the contrary, they aim to determine the law applicable to the particular circumstances of the case at the given point in time. In being case-specific and based on pre-existing sources of law,¹⁸ judicial decisions therefore significantly differ from the general rule-making activity by legislative (or executive) organs. Indeed, in many systems, what is declared to be law by the legislative branch may not necessarily be recognised as such by the judiciary.

Therefore, the main challenge in the context of judicial expropriations lies in distinguishing between legitimate judicial determinations and abusive judicial interferences with investors' rights. Consider a court annulling a concession that was obtained through fraud or terminating a contract on account of an investor's default. In such cases, it would be counterintuitive to uphold an expropriation claim on the basis of judicial intervention since such intervention would be justified. On the other hand, it is equally clear that expropriatory conduct should not be cloaked with a veneer of legitimacy simply because it is the result of a judicial process. As States remain, ultimately, in charge of their judiciaries, there is always the possibility that domestic judicial procedures are manipulated in order to avoid international responsibility. The discussion on judicial expropriation is thus primarily about judicial conduct that falls outside the scope of the normal exercise of adjudicative powers.

This results in significant challenges for international adjudicators. When it comes to identifying rules of domestic law and determining their content, the expertise of domestic courts will generally be superior to that of international courts or tribunals. In the particular context of investment arbitration, where the consideration of disputes by non-national arbitrators is central, the domestic courts' claim to epistemic superiority is that much stronger. Arbitrators are not chosen for their particular knowledge of domestic law. Indeed, their detachment from the host State is often a prerequisite for their

¹⁷ See eg *Shufeldt Claim (Guatemala/USA)* (Award) (2 UNRIIA 1079, 24 July 1930); or *Amoco Int'l Finance Corp. v Iran* (1987) 15 Iran-USCTR 189.

¹⁸ See on this R Beck, 'Transtemporal Separation of Powers in the Law of Precedent' (2012) *Notre Dame L Rev* 1405, 1414.

appointment.¹⁹ As a result, investment tribunals are not well placed to simply set aside pronouncements of domestic courts. International adjudicatory bodies applying rules derived from the domestic legal order are obliged to interpret and apply those rules as they would be applied within the domestic legal order.²⁰ This may require investment tribunals to accord proper deference to relevant domestic judicial decisions, or else they risk wrongly applying domestic law.²¹ This is not to deny that, in exercising their mandate, investment tribunals are generally entitled—and are increasingly called upon—to review the propriety of the conduct of a domestic court from the perspective of international standards. However, such powers of review do not imply that they can act as courts of appeal, in the sense that they can determine that domestic courts have erred in denying recognition to an investor's putative proprietary right.

Against this backdrop, the added value of the notion of judicial expropriation is essentially twofold. First, it usefully demarcates those specific instances where the international adjudicators' task is to determine whether a taking of proprietary rights results from a potential abuse of the adjudicative process. As the following section will show, this task arguably requires a different analytical approach than those traditionally pursued in expropriation analysis. Secondly, it also helps determine when an inquiry into the propriety of the adjudicative process will actually be required. Where alleged deficiencies in the substantive determination of a court forms the very object of the expropriation claim, the international body deciding on such claim will need to establish whether the impugned judicial conduct constituted an unwarranted exercise of adjudicative powers. The notion of judicial expropriation is, therefore, not only of taxonomical interest; it determines the proper scope of an international tribunal's inquiry.²²

III. THE INADEQUACY OF CURRENT APPROACHES TO EXPROPRIATION ANALYSIS

Following the development of international rules pertaining to the protection of foreign property, international courts and tribunals have come to devise specific tests for determining whether a taking of property has occurred. From the outset,

¹⁹ See eg art 38 of the ICSID Convention, stipulating, as a default rule, that '[t]he majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute'.

²⁰ See *Brazilian Loans (France v Brazil)* (1929) PCIJ Series A No 21, at 124 (noting that '[o]nce the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.').

²¹ See further *Brazilian Loans* (n 20) 124; and *Serbian Loans (France v Kingdom of the Serbs, Croats, and Slovenes)* (1929) PCIJ ser A No 20, at 46–7.

²² See further H Urbánek, 'Das völkerrechtsverletzende nationale Urteil' (1958–59) 9 *ÖZöR* 213, 226, suggesting that a judgment that merely confirms an internationally wrongful act of another organ is irrelevant from the perspective of international law

the qualification of a measure as an act of expropriation has been always considered a matter to be determined by international law, not the applicable domestic law of the interfering State. A distinction has generally been drawn between direct expropriations, which involve the mandatory legal transfer of the title to property and/or its outright physical seizure, and indirect expropriations, which comprise measures that have an effect equivalent to a formal taking.²³ No particular differentiation has, however, been made with regard to the organ to which the taking was attributable. As a result, the tests used by international adjudicators to determine the occurrence of either forms of expropriation do not adequately take into account the special character of judicial functions. In particular, the traditional tests fail to provide appropriate guidance for distinguishing legitimate judicial determinations of underlying property rights from undue interferences with the investor's property.

A. Direct Judicial Expropriations

Direct takings have usually been considered so obvious that no special test was considered necessary to determine their occurrence.²⁴ But this only holds true for the 'typical case'—ubiquitous by the middle of the twentieth century— involving large-scale takings of property as a matter of national economic policies, often implemented on an industry- or economy-wide basis, and mostly accomplished by means of legislative or administrative measures.²⁵ This 'typical case' did not encompass situations where title to proprietary interests is directly interfered with through judicial measures, as in the case of court judgments nullifying or terminating contractual rights. Although it was recognised in both scholarship and practice that such situations demanded different conceptual treatment than takings by the political branches of government,²⁶ a distinct analytical approach was never developed. Rather, direct judicial interference with proprietary rights was commonly dealt with through the lens of denial of justice.²⁷

International adjudicatory bodies have, however, gradually developed specific approaches to dealing with instances of concrete, individualised

²³ See generally UNCTAD (n 6) 5–12.

²⁴ See eg R Dolzer, 'Indirect Expropriation of Alien Property,' (1986) 1 ICSIDRev 41, at 41, who considered direct takings to raise 'no special legal problems'.

²⁵ The problems raised by these wide-ranging transfers of title have primarily concerned the legal consequences of such acts under international law, rather than the threshold question as to when a transfer or extinction of title can properly be considered to amount to an expropriation in the first place.

²⁶ See eg JES Fawcett, 'Some Foreign Effects of Nationalization of Property' (1950) 27 BYBIL 355, at 356 (expressly excluding from his analysis of acts of nationalisation instances of 'seizure of property as a judicial penalty'); or PCIJ, *Certain German Interests in Polish Upper Silesia (Merits)*, Series A, No 7, at 22 (excluding from the scope of expropriations generally prohibited by international law instances of 'judicial liquidation and similar measures').

²⁷ See further M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) 54–63.

takings of property. These evolved in response to problems arising out of contracts directly entered into between foreign investors and States, and specifically to the question of whether compensation was due in the event of their premature termination. It was generally recognised that in such situations the taking away or destruction of contractual rights was ‘as much a wrong [...] as the taking away or destruction of tangible property’.²⁸ But it was also accepted that, insofar as contracts are creatures of domestic law, they can also be terminated by domestic law.²⁹

Different approaches therefore emerged to determining when the abrogation of a contract amounted to an expropriation of contractual rights. One such approach is to consider arbitrary terminations to be expropriatory in nature, in the sense that they are not the result of the exercise of a contractual right.³⁰ Another is to consider the contractual right to be taken when the State refuses to submit the validity of the contract’s termination to judicial (or arbitral) determination.³¹ The most prevalent approach, however, is to treat as expropriatory those terminations resulting from the exercise of sovereign powers—such as when the State attempts to evade its contractual obligations through the adoption of legislation, or by taking executive action not normally available to an ordinary contracting party. Such terminations are distinct from terminations in pursuit of a contractual right.³²

The same approach could be taken in instances of alleged judicial expropriations. After all, the challenge in both situations is to distinguish normal application of the governing law from its misapplication. But this would not be without difficulties. The administration of justice is, by definition, in the domain of the sovereign and the termination of a contract by a court does not automatically amount to sovereign interference with an investor’s contractual rights. As noted by the Tribunal in *Swisslion v Macedonia* (2012), if a judicial termination of a contract automatically amounted to an expropriation of contractual rights, ‘a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State’s being found to be in

²⁸ *Rudloff Case* (1903), Interlocutory, IX UNRIAA 244, 250. The principle was later endorsed in *Norwegian Shipowners’ Claims* (1922), Award, I UNRIAA 307, 334; and *Certain German Interests* (n 26) 44.

²⁹ See eg *International Fisheries Company (U.S.A.) v United Mexican States* (1931), IV UNRIAA 691, at 700; and more generally, RY Jennings, ‘State Contracts in International Law’ (1961) 37 BYBIL 156.

³⁰ See eg *Claim of the Salvador Commercial Company (‘El Triunfo Company’)* (8 May 1902), XV UNRIAA 467, 478.

³¹ See on this SM Schwebel, ‘On Whether the Breach by a State of a Contract with an Alien Is a Breach of International Law’ in *Justice in International Law* (Cambridge University Press 1994).

³² Arguably, even where a contract is terminated on contractual grounds, this may not necessarily exclude liability, for such termination must not entail an abuse of the contractual right. Thus, a fictitious or malicious exercise of the right to terminate may be equally treated as expropriatory in character, as per *Vigotop Limited v Hungary (Award)* (ICSID Case No ARB/11/22, 1 October 2014) [330].

breach of its international obligations'.³³ The distinction between sovereign/non-sovereign conduct therefore appears to be an inappropriate means of distinguishing undue judicial interferences from the 'normal' exercise of a court's adjudicative functions.

B. Indirect Judicial Expropriations

The approaches developed to deal with so-called indirect expropriations are equally ill-suited to deal with judicial expropriations. An indirect expropriation takes place whenever an investor has been permanently deprived of the use, benefit, management or enjoyment of a substantial part of its investment—save where such deprivation results from the legitimate and bona fide exercise of a State's police powers.³⁴ Though straightforward in theory, this two-prong rule provides little normative guidance for determining whether deprivations resulting from judicial acts were justified.

According to the first prong of the rule, any State measure that neutralises or destroys an investment's economic value can in principle be treated as expropriatory in nature, provided that the measure is not merely ephemeral.³⁵ To establish whether an indirect taking has occurred, it is not the form or intent of a State measure that matters, but its effects on the investment. The problem with this approach—commonly referred to as the 'sole effects' doctrine³⁶—is that any judicial measure which results in the cancellation of a proprietary right could be equated to a substantial deprivation of the right in question, regardless of whether the measure was justified. This problem has been recognised in arbitral practice. In *Saipem v Bangladesh* (2009), the Tribunal had no doubt that, as a matter of fact, the setting aside by Bangladeshi courts of a commercial award had substantially deprived the investor of its rights under the award.³⁷ But as a matter of law, the Tribunal was hesitant to accept that such actions automatically amounted to an expropriation, because 'if this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds'.³⁸

³³ *Swisslion* (n 1) [314].

³⁴ On this conventional approach, see generally A Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 ICSIDRev 1.

³⁵ For the leading precedents, see eg *Tippetts, Abbott, McCarthy, Stratton v TAMS-Affa Consulting Engineers of Iran et al.*, 6 Iran-USCTR 219, 225–6; or *Metalclad Corporation v The United Mexican States (Award)* (ICSID Case No ARB(AF)/97/1, 30 August 2000) [103].

³⁶ R Dolzer, 'Indirect Expropriations: New Developments?' (2002) BYBIL 79.

³⁷ In that case, the commercial award was not an investment itself; the object of expropriation, instead, were the Claimant's residual contractual rights under the investment as crystallised in the commercial award. See *Saipem S.p.A. v The People's Republic of Bangladesh (Decision on Jurisdiction and Recommendation on Provisional Measures)* (ICSID Case No ARB/05/07, 21 March 2007) [125]–[128].

³⁸ *Saipem S.p.A. v The People's Republic of Bangladesh (Award)* (ICSID Case No ARB/05/07, 30 June 2009) [133].

The restrictive exception which is provided for by the second prong of the general rule—the ‘police powers’ doctrine—is also of little assistance. In contrast with the sole effects doctrine, the police powers exception presupposes that significant economic losses, and even a complete deprivation of property, would not amount to an expropriation if this resulted from the application of a bona fide non-discriminatory regulation within the police powers of the State.³⁹ The exact contours of those powers remain undefined, but they are generally considered to concern matters such as the maintenance of public order and morality, protection of human health and the environment, as well as general taxation.⁴⁰

Unlike the sole effects doctrine, the police powers exception depends upon the nature and purpose of the impugned measure. Yet, this too generates problems.⁴¹ In the context of judicial measures, it could mean that judgments would have to be examined to determine whether they pursued a legitimate regulatory objective. However, these do not help distinguish the ‘normal’ exercise of the judicial function from improper interferences with proprietary rights. For example, it may be quite clear that a judicial forfeiture of property resulting from a criminal trial constitutes a valid exercise of police powers.⁴² But what if the impugned judicial measure has no direct link to the maintenance of public order, health, or morality? What if the measure is not undertaken with a view to protecting essential public interests? Of course, one could treat the very exercise of judicial functions as part of a State’s policing powers. However, this might imply that judicial decisions could never amount to a wrongful taking of property; a conclusion which is difficult to accept.

IV. TOWARDS A DEFAULT APPROACH TO DETERMINING JUDICIAL EXPROPRIATION?

Investment tribunals have responded to the limitations of traditional analytical approaches by developing a distinctive, *sui generis* approach to judicial expropriation. In current arbitral practice, there is growing support for the proposition that judicial decisions can only be treated as unjustified deprivations of proprietary rights when the decisions themselves are found to be defective from the perspective of international standards. The ‘propriety’ of the judicial outcome has thus become determinative of whether the impugned measure would be accepted as an instance of the normal, *bona fide*

³⁹ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Award)* (ICSID Case No ARB/10/7, 8 July 2017) [290]ff.

⁴⁰ In principle, the police powers may be taken to include all measures undertaken with a view to protecting essential public interests from certain types of harm. See further Newcombe (n 34) 26.

⁴¹ As it does also with respect of regulatory action in general. For a criticism of the doctrine in this respect, see eg JF Williams, ‘International Law and the Property of Aliens’ (1928) 9 BYBIL 1, 24–8.

⁴² cf American Law Institute, Restatement (Third) Foreign Relations of the United States (1987) vol 1, [712].

exercise of the judicial function, or else a judicial taking. As a result, assessing such propriety has turned into an additional element of the expropriation inquiry.

A caveat must immediately be added. This *sui generis* approach has only been applied in cases where the injury originated *primarily* or *essentially* in the conduct of the judiciary.⁴³ Conversely, where it was obvious that the judicial deprivation resulted from the conduct of legislative or executive organs, tribunals did not find it necessary to decide separately on the propriety of judicial conduct,⁴⁴ treated the question of propriety as immaterial,⁴⁵ or even upheld an expropriation claim despite the lack of any wrongdoing on the part of the courts.⁴⁶ Likewise, in circumstances where the impugned judicial conduct formed part of a composite wrongful act comprised of a series of acts or omissions attributable to different State organs, tribunals refrained from separately reviewing the propriety of such conduct,⁴⁷ or even upheld expropriation claims in the absence of any judicial misconduct.⁴⁸ In other words, when tribunals have found particular judgments to form part of a series of acts or omissions adversely affecting an investment, they have tended to follow the traditional, ‘sole effects’ approach when determining whether there has been an expropriation.⁴⁹

This approach is, arguably, not novel. The 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens suggested that an uncompensated taking of an alien’s property was not wrongful ‘provided [...] it is not the result of [denial of justice]’.⁵⁰ Still, the idea that in order to

⁴³ Some tribunals actually referred to the element of causation to justify the adoption of a particular analytical approach. See eg *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia (Award)* (ICSID Case No ARB/12/39, 25 July 2018) [924].

⁴⁴ See *AMCO Corporation and others v Republic of Indonesia (Award)* (ICSID Case No ARB/81/1, 20 November 1984) [151]. The Tribunal noted that the courts ‘merely took into account’ the wrongful revocation of Claimant’s investment license by Indonesia’s Foreign Investment Board.

⁴⁵ See *Feldman v Mexico (Award)* (ICSID Case No ARB(AF)/99/1, 16 December 2002) [138]–[141].

⁴⁶ See *Rumeli AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan (Award)* (ICSID Case No ARB/05/16, 29 July 2008) [619], [705]–[715]; cf [612]–[615].

⁴⁷ See eg *Sistem Mühendislik v Kyrgyz Republic (Award)* (ICSID Case No ARB(AF)/06/01, 9 September 2009) [117]–[118] and cf [121]–[128]. See also *RosInvest Co UK Ltd v The Russian Federation (Final Award)* (SCC Case No V079/2005, 12 September 2010) [603]–[633] in conjunction with [498], [525], [552], [568], [575], [581] and [612]; *Quasar de Valores v Russia (Award)* (SCC No 24/2007, 20 July 2012) [141], and *Veteran Petroleum v Russia (Final Award)* (UNCITRAL PCA Case No AA 226, 18 July 2014) [755]–[760] and [1575]–[1580].

⁴⁸ See *Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v Democratic Republic of the Congo (Award)* (ICSID Case No ARB/10/4, 7 February 2014) [466] [501]–[505]. See also *OAO Tatneft* (n 4) [462], advancing the general proposition that ‘[t]o the extent that a judicial decision forms an integral part of a chain of acts that, taken together, might qualify as a composite act and result in a wrong inflicted on the affected individual, such acts can justify a finding of liability [...] even if each of such acts individually might not be sufficient for that finding of wrongful conduct’.

⁴⁹ Indeed, the language in some of the existing awards suggest the application of the ‘sole effects’ doctrine. See eg *Sistem* (n 47) [118]; or *Rumeli* (n 46) [116].

⁵⁰ Art 10(5)(b), Draft Convention on the International Responsibility of States for Injuries to Aliens, reproduced in (1961) 55 AJIL 548, 562.

be expropriatory a judgment has to be contrary to international standards does not sit well with prevailing approaches to expropriation analysis. Not only does it depart from the sole effects doctrine, but it is also at variance with the general arbitral practice that the legality of a measure is not relevant to the question of whether the measure amounted to an expropriation.⁵¹ It is not surprising that reservations have been expressed to this approach.⁵²

In the *Saipem* case, the Tribunal still claimed that determining the ‘unlawful character’ of the impugned judicial actions was ‘a necessary condition’ for the expropriation claim ‘due to the particular circumstances of this dispute and to the manner in which the parties have pleaded their case’.⁵³ Today, however, arbitral practice suggests that evidence of wrongful conduct on the part of the courts is required in order to establish a judicial expropriation claim.⁵⁴ Thus the Tribunal in *Krederi v Ukraine* (2018) considered it ‘necessary to ascertain whether an additional element of procedural illegality or denial of justice was present’, for ‘[o]nly then may a judicial decision be qualified as a measure constituting or amounting to expropriation’.⁵⁵ The requirement is also confirmed by the reasoning of investment tribunals when upholding and— even more frequently—rejecting judicial expropriation claims.⁵⁶

As might be expected, the standard most frequently drawn on in order to appraise the propriety of impugned judicial conduct is that of denial of justice. Somewhat less frequently, tribunals have assessed propriety by reference to other, more specific, treaty obligations. Exceptionally, some tribunals have used applicable domestic law standards, but this is not without problems. Each of these will be explored in turn.

A. Judicial Expropriation Based upon Denial of Justice

Investment tribunals most commonly rely on the standard of denial of justice (or a standard substantively equivalent) when determining whether a judicial

⁵¹ See eg *Tecmed v The United Mexican States (Final Award)* (ICSID Case No ARB(AF)/00/2, 29 May 2003) [120]; *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Award)* (ICSID Case No ARB/03/23, 11 June 2012) [907].

⁵² See particularly B Demirkol, *Judicial Acts and Investment Treaty Arbitration* (Cambridge University Press 2018) 54; but cf at 51 where the author admits that an unlawful expropriation by the judiciary will ‘typically’ occur in the event of a ‘judicial process amounting to a denial of justice’ or ‘another breach of international law’.

⁵³ *Saipem* (n 38) [134]. The tribunal also emphasised that its analysis ‘should not be understood as a departure from the “sole effects doctrine”’ (ibid).

⁵⁴ In some cases, this requirement is endorsed implicitly. See *Oil Fields Of Texas, Inc. v Iran et al.* (1982) 1 Iran-USCTR 347, [41]–[43]. The fact that it was impossible for the claimant to challenge the impugned court order in Iran, and that there was no evidence that claimant had even been summoned to appear before the competent court or had been served any document played a role in the Tribunal’s finding that the order amounted to an expropriation.

⁵⁵ *Krederi Ltd. v Ukraine (Award)* (ICSID Case No ARB/14/17, 2 July 2018) [713].

⁵⁶ The proposition finds support also in cases not otherwise predicated on judicial conduct. See eg *Azinian, Davitian and Baca v The United Mexican States (Award)* (ICSID Case No ARB(AF)/97/2, 1 November 1999) [97]–[101].

measure amounts to expropriation. This is unsurprising given that the standard—applied in the context of investment arbitration either as part of the minimum standard of treatment under customary international law, or as an element of the fair and equitable treatment standard—still provides the most fundamental normative benchmark for assessing the propriety of judicial conduct.

Conceptually, the prohibition of denial of justice derives from the fundamental obligation of States under customary international law to maintain and make available to foreigners a system of justice that adequately protects their rights.⁵⁷ This is not an obligation which imposes defined, substantive outcomes, but one which requires that foreigners be accorded procedural justice when seeking to assert their substantive rights through domestic judicial processes.⁵⁸ This presupposes that the propriety of that process be determined by reference to the standards provided by international law. These standards include the right to an independent and impartial court established by law, the right to have a case heard and determined within a reasonable time, the right to a reasonable opportunity to present a case, the right to equality of arms, and the right to a reasoned decision.⁵⁹ Properly conceived, cases of denial of justice are simply cases in which judicial organs fail to adhere to international standards.⁶⁰

In the context of judicial expropriation claims, these generally accepted standards provide a way of establishing whether a particular judicial determination has gone beyond the ‘normal’ exercise of adjudicative functions. Investment tribunals readily resort to them, particularly where the proprietary rights affected were merely *incorporeal*: for example, where contractual rights were annulled, terminated, or failed to be enforced, where intellectual property rights were invalidated, or where shareholding rights were affected by court-initiated bankruptcy proceedings. In such situations, the arbitral tribunals’ reasoning was essentially the same: where there was no evidence that the investor ‘had not been afforded fair treatment, or otherwise faced a denial of justice by, or at the hands of’ the courts;⁶¹ where the

⁵⁷ See Paulsson (n 5) 7–8; and *Loewen Group, Inc and Raymond L Loewen v United States of America (Award)* (ICSID Case No ARB(AF)/98/3, 26 June 2003) [129].

⁵⁸ On this understanding, see Z Douglas, ‘International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed’ (2014) 63 ICLQ 867.

⁵⁹ cf ICJ, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion of 12 July 1973, [1973] ICJ Rep 166, [92].

⁶⁰ One must note that denial of justice remains a contested standard, with tribunals disagreeing on its exact content and scope of application. cf *Arif* (n 1) [433]–[442]; *OAO Taneft* (n 4) [481]; or *Eli Lilly* (n 8) [218]–[226]. Although some of these disagreements have extended to discussions on judicial takings, the problem seems often to be one of labelling and needs not be revisited in the context of the present inquiry. See eg *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan (Award)* (ICSID Case No ARB/13/1, 22 August 2017) [550]–[555], where the test of arbitrariness that was ultimately applied was not materially different from the test of arbitrariness typically applied in the context of a denial of justice inquiry.

⁶¹ *Ares International SrL and MetalGeo SrL v Georgia (Award)* (ICSID Case No ARB/05/23, 26 February 2008) [8.3.5]–[8.3.9]. In the circumstances of that case, Claimants’ contractual rights under a share-purchase agreement were annulled by decision of a Georgian court, with the

impugned judicial decisions ‘were not arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking due process’;⁶² where it could not be established that there was ‘collusion between the courts and the investor’s competitors’, or that the courts had ‘acted in denial of justice in any way’ or not applied domestic law ‘legitimately and in good faith’;⁶³ where it was not shown that the courts’ actions were in any way ‘egregious’ or ‘amounted to anything other’ than the application of the relevant domestic law;⁶⁴ where there was no ‘arbitrary, discriminatory and unreasonable’ conduct or ‘sweeping refusal to act’ on the part of the courts;⁶⁵ where there was no ‘dramatic’ change in domestic courts’ case-law and this case-law was not ‘arbitrary and discriminatory’ in nature;⁶⁶ or simply where there was no finding of denial of justice,⁶⁷ there simply was no taking of a protected investment. Conversely, where the impugned judgment failed to live up to prescribed international standards—such as where the judgment had been found to be ‘arbitrary and irrational’, as it was the case in *Karkey v Pakistan* (2017)—the judicial outcome was treated as an unwarranted interference with contractual rights that amounted to an expropriation.⁶⁸

Much the same reasoning was applied in cases where judicial decisions interfered with title to *tangible* property. In *Garanti Koza v Turkmenistan*, the seizure of the Claimant’s factory and equipment by Turkmen courts was

consequence that Claimants’ shareholding interests in a local production plant were also extinguished.

⁶² *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan (Award)* (ICSID Case No ARB/07/14, 22 June 2010), [431]–[432]. In the circumstances of that case, an assignment agreement through which Claimant obtained an oil exploration licence was invalidated by Kazakh courts.

⁶³ *Arif* (n 1) [415]. In the circumstances of that case, Claimant’s concession contract relating to the building and management of a duty-free store network and a related lease agreement were annulled by a string of decisions of Moldovan courts.

⁶⁴ *GEA Group Aktiengesellschaft v Ukraine (Award)* (ICSID Case No ARB/08/16, 31 March 2011) [236]. In the circumstances of that case, Claimant alleged the Ukrainian courts’ refusal to recognise its commercial award was tantamount to an expropriation. While the Tribunal already rejected the claim because the award was not found to constitute a protected investment, it also observed the claim would have failed in the absence of anything improper on the part of the courts.

⁶⁵ *Anglia Auto Accessories Ltd v Czech Republic (Final Award)* (SCC Case No V 2014/181, 10 March 2017) [291]–[303]. In the circumstances of that case, Claimant contended it had been deprived of its contractual right to damages under a commercial award as a result of alleged inactivity by Czech courts in the process of its enforcement.

⁶⁶ *Eli Lilly* (n 8) [386]–[389] and [416]–[442]. In the circumstances of that case, Claimant contended that the invalidation by the Canadian judiciary of two of its drug patents amounted to an act of expropriation.

⁶⁷ See *Swisslion* (n 1) [265]–[275] and [312], where a share purchase agreement through which the Claimant acquired shareholding interests in a Macedonia-based food producer was terminated by decisions of Macedonian courts; or *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro (Award)* (ICSID Case No ARB(AF)/12/8, 4 May 2016) [370], where claimants alleged that courts had committed an expropriation when they dismissed a reorganisation plan for the business and placed their company into bankruptcy.

⁶⁸ *Karkey* (n 60) [551]–[562] and [645]–[649]. In the circumstances of that case, Claimant’s contracts for the provision of electrical power by means of barge-mounted power plants were declared void by Pakistan’s Supreme Court.

not found to be an act of expropriation because the courts' actions flowed, as a matter of normal legal process under Turkmen law, from the investor's default under the construction contract.⁶⁹ The Tribunal explained that '[a] seizure of property by a court as the result of normal domestic legal process does not amount to an expropriation under international law unless there was an element of serious and fundamental impropriety about the legal process.'⁷⁰ Similarly, in *Krederi v Ukraine*, the judicial action leading to the withdrawal of Claimant's property rights in certain land plots was not found to constitute an expropriation, since the challenged judicial conduct was not tainted by breaches of due process. According to the Tribunal, ascertaining the propriety of the conduct was necessary '[i]n order to avoid a situation whereby any title annulment would constitute indirect expropriation or a measure tantamount to expropriation'.⁷¹

Sometimes, the same reasoning has been extended to cases where the actual taking was effected by another State organ which executed the impugned judgment. In *Liman Caspian v Kazakhstan*, a Ministerial order transferring a licence to a third-party was not classified as expropriation, as it only executed a court decision invalidating a previous licence transfer. According to the Tribunal, a governmental authority 'cannot be reproached for acting in accordance with a decision taken by the state's own courts' where such court decisions 'are irreproachable and have to be accepted from the perspective of international law'.⁷²

Finally, the practice of evaluating expropriation claims through the prism of denial of justice has occasionally been adopted where the impugned measures did not directly impinge on the concrete proprietary rights constituting a protected investment, but where the judgments adversely affected the value of the investment. In *Loewen v USA*, for example, the claimants alleged that the verdict rendered against the company by a local court (coupled with it being denied the right to appeal to the verdict and, allegedly, being coerced into a settlement) amounted to an expropriation. But the claim was categorically rejected on the ground that it could 'only' succeed if the claimant established a denial of justice.⁷³

The propensity towards appraising the propriety of judicial actions through the lens of the denial of justice standard is conceptually sound. If the investor suffers a denial of justice when its substantive rights are denied as a result of a judicial process that fails to conform with international minimum standards, then it also makes sense to say that, if those substantive rights are proprietary

⁶⁹ *Garanti Koza LLP v Turkmenistan (Award)* (ICSID Case No ARB/11/20, 19 December 2016) [364]–[366].

⁷⁰ *ibid* [365]. The principle was already espoused earlier in *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt (Award)* (ICSID Case No ARB/99/6, 12 April 2002) [139], where the view was taken that 'normally, a seizure and auction ordered by the national courts do not qualify as a taking'.

⁷² *Liman* (n 62) [433]–[434].

⁷¹ *Krederi* (n 55) [713].

⁷³ *Loewen* (n 57) [141].

in character, their denial in effect amounts to a deprivation. The notion of 'deprivation' carries with it the idea of denial of rights on improper grounds. This, however, raises questions concerning the difference between a claim of judicial expropriation and one of denial of justice. In particular, one wonders whether the standard applied to determining a judicial expropriation claim is an autonomous standard that is substantively the equivalent of a denial of justice standard, or whether the two standards are so interrelated that the finding of a denial of justice must be treated as a necessary prerequisite of a judicial expropriation claim? These questions will be further considered in section V.

B. Judicial Expropriation Based upon Other Violations of International Law

Denial of justice is of course not the only standard against which judicial conduct can be assessed and in some cases investment tribunals have been willing to consider compliance with other, more specific, treaty obligations as an indicator of propriety.⁷⁴ Under customary international law, States have a general duty to provide an adequate system for the administration of justice. Treaty law may, however, mean that there are more specific obligations concerning the treatment of foreigners that are to be respected. The failure to observe such obligations could then provide an alternative means for determining whether the adjudicative process has been defective. Two types of obligations seem to be of particular relevance in the context of expropriation: those concerning specific procedures and those prescribing specific judicial outcomes.

As regards the former, relatively few treaty obligations require procedural safeguards which go beyond those of the international minimum standard. The treaty guarantees of a right to a fair trial, such as those enshrined in Article 6 of the 1950 European Convention on Human Rights, Article 14 of the 1966 International Covenant on Civil and Political Rights, or Article 8 of the 1969 Inter-American Convention on Human Rights are taken to reflect the minimum standard, not to supplement it.⁷⁵ However, there are some treaty obligations that are conceivably applicable to judicial procedures involving substantive determinations of investors' property rights which appear to impose more onerous procedural requirements, such as the provisions on consular notification under Article 36 of the Vienna Convention on Consular Relations (VCCR) and the related right of consular officers to arrange legal representation for nationals detained and/or arrested in a foreign country.⁷⁶ Where, for example, a foreign investor forfeits his property as a result of criminal proceedings during which legal representation

⁷⁴ cf *Karkey* (n 60) [550].

⁷⁵ See *Paparinskis* (n 27) 54–63.

⁷⁶ Vienna Convention on Consular Relations, 24 April 1963, entered into force on 19 March 1967, 500 UNTS 95.

could not be arranged through a consular officer, the substantive judicial outcome can be considered flawed and as amounting to an unwarranted deprivation of proprietary rights.⁷⁷ Other examples are to be found in conventions on mutual cooperation in criminal matters, particularly those provisions concerning confiscation of property or the proceeds of crime, as in the case of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁷⁸ or the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.⁷⁹ Whilst violations of such provisions will not usually be solely due to judicial conduct, some could be construed as imposing requirements that would have to be respected by the courts in effecting a seizure of a foreign investor's property.

More examples can be found of conventional provisions which require particular substantive outcomes. The concern here is not with treaty stipulations which expressly proscribe the seizure of particular categories of foreign property and which are commonly found in peace treaties or similar instruments.⁸⁰ Such provisions are *lex specialis* with respect to the general prohibition against uncompensated expropriations under customary international law, and non-compliance is by definition an expropriation.⁸¹ What is of more interest are the various conventions for the harmonisation of private international law, many of which directly or indirectly regulate matters of relevance to title to proprietary rights or interests. Examples include the 1980 UN Convention on Contracts for the International Sale of Goods, which could be relevant where a contract governed by it had the characteristics of an investment,⁸² or the 1988 UNIDROIT Convention on

⁷⁷ As the ICJ noted in the *Jadhav* case, it is not the ultimate judgment that is regarded a violation of the VCCR in such cases, but the procedural impropriety preceding it. According to the Court, however, a proper remedy for such a violation is effective review and reconsideration of the judgment. The Court therefore considers the judicial outcome to be potentially faulty as well. *Jadhav (India v Pakistan)* (Merits) [2019] ICJ Rep 418 [136]–[137].

⁷⁸ 19 December 1988, entered into force on 11 November 1990, 28 ILM 493 (1989) art 5.

⁷⁹ 8 November 1990, entered into force on 1 September 1993, ETS No. 141, arts 13–16.

⁸⁰ One such example are the provisions of arts 6 to 22 of the 1922 Geneva Convention on Polish Upper Silesia, which prohibited the taking of certain categories of property even against the payment of compensation, and which formed the basis for the claims in the *Certain German Interests* case (n 26); and *Factory At Chorzów (Germany v Poland)* (Merits) PCIJ Series A No 17. Another example are the provisions of art 79 of the 1947 Treaty of Peace with Italy, which stipulate the property belonging to Italy or to Italian nationals that may and may not be seized by the Allied and Associated Powers. In *Decision No. 196* (n 10) at 438, France was held responsible for the judicial liquidations of certain Italian property in Tunisia in contravention of those provisions.

⁸¹ See *Factory At Chorzów* (n 80) 46.

⁸² 11 April 1980, entered into force on 1 January 1988, 1489 UNTS 3. In most cases, simple contracts of sale do not satisfy the characteristics of an investment, as the latter is deemed to require a contribution in money or other assets, a certain duration, and an element of risk. However, according to art 3(1) of the Convention, also contracts 'for the supply of goods to be manufactured or produced' are to be considered sales. Depending on their scope and duration, such contracts may more easily meet the criteria of an investment and qualify for protection under a treaty.

International Financial Leasing, which could be relevant where a financial lease arrangement governed by it forms the basis of a protected investment.⁸³

Where domestic courts fail to (properly) apply specific choice-of-law rules prescribed by these conventions, this could conceivably indicate that a substantive determination of an investor's proprietary rights was flawed and thus amounted to a deprivation of those rights. Other such potential conventions are those governing the recognition and enforcement of foreign judgments or awards, such as the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,⁸⁴ or the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁸⁵ Non-observance of specific obligations under these conventions may also amount to a deprivation of the investor's proprietary rights by judicial act. This may be the case where an investor's property is improperly attached in enforcement proceedings, or where a foreign judgment or award that comprises an investor's proprietary interest fails to properly obtain recognition.

In the practice of investment tribunals, the latter type of obligation has provided the relevant yardstick for determining the propriety of judicial conduct in the context of judicial expropriation claims. The leading precedent in this respect is the award in *Saipem v Bangladesh*. There, the interference on the part of Bangladeshi courts with a local arbitration was found to have expropriated the claimant's contractual rights under the commercial award. This was not because those courts generally denied justice to the investor. Rather, it was because the courts, by revoking the authority of the local arbitral tribunal and by subsequently annulling the commercial award, directly violated Article 2 of the 1958 Convention; a provision demanding recognition of arbitration agreements.⁸⁶ The subsequent award in *ATA Construction v Jordan* adhered to the same logic. The Jordanian courts annulled a local commercial award previously rendered in favour of the investor, and at the same time extinguished the underlying contractual arbitration clause. In doing so, they failed to respect claimant's rights under Article 2 of the 1958 Convention, and thereby 'deprived' it of a valuable asset in violation of the investment protections set out in the applicable BIT.⁸⁷ This

⁸³ 28 May 1988, entered into force on 1 May 1995, 2321 UNTS 195. Some investment treaties contain specific stipulations governing financial lease arrangements. See eg art 1(1)(f) of the 1992 Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments, which defines investments as comprising 'goods, which on the basis of a financial lease are placed at the disposal of a lessee in the territory of the Contracting Party in accordance with the latter's laws and regulations'.

⁸⁴ 1 February 1970, entered into force on 20 August 1979, 1144 UNTS 249.

⁸⁵ 10 June 1958, entered into force on 7 June 1959, 330 UNTS 3.

⁸⁶ *Saipem* (n 38) [145]–[173].

⁸⁷ *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan (Award)* (ICSID Case No ARB/08/2, 18 May 2010) [121]–[132]. NB: The Tribunal refrained from specifying which treaty standard had actually been breached. The use of the term 'deprivation', however, suggests that the result of the domestic courts' decisions was deemed equivalent to an expropriation.

was so despite the fact that the impugned judicial acts were not considered sufficiently grave to sustain a denial of justice claim.⁸⁸

For a claimant, basing expropriation claims on violations of obligations other than the prohibition of denial of justice has several advantages. First, it obviates the need to satisfy the high threshold normally required for establishing a denial of justice. Secondly, it arguably allows a claimant to avoid the need to have exhausted local remedies. However, invoking the violation of obligations arising under treaties other than the applicable investment treaty raises an important jurisdictional question: are investment tribunals actually empowered pronounce on such violations? This is considered in section V.B below.

C. Judicial Expropriation Based upon Violations of Domestic Law

Must judicial conduct be assessed with reference to the standards of domestic or of international law when determining whether a judicial act amounts to an expropriation? The practice of international courts and tribunals provides little guidance on whether the *domestic* illegality of a particular judicial measure can serve as an indication in this respect.

The conformity of a measure with domestic law has not generally been considered a relevant factor for establishing expropriation.⁸⁹ On the contrary, the fact that a court has reviewed and affirmed the legality of a measure usually has no bearing on whether that measure amounts to a taking.⁹⁰ But it is equally true that, on occasion, the fact that a measure had already been found to be invalid or illegal under the applicable law has been used as an indication of its expropriatory character.⁹¹ It could therefore be argued that a judicial decision extinguishing proprietary rights which does not have a basis in the applicable law equates to an act of expropriation: in the final analysis, the investor has been deprived of their property as a result of a wrong occasioned by an incorrect judgment, and the fact that this wrong is a domestic, rather than an internationally wrongful act should play no role in the ultimate assessment.

Investment tribunals have expressed opposing views on this question. In *Liman*, the Tribunal emphasised that the impugned judicial decisions, having been found not to amount to a denial of justice, could not give rise to an expropriation ‘even if they might have been incorrect as a matter of Kazakh law’.⁹² In *Saipem*, in contrast, the Tribunal did consider whether the court’s

⁸⁸ *ibid* [123].

⁸⁹ See references in (n 51) above.

⁹⁰ See eg *AMCO* (n 44) [177]; or *Quasar de Valores* (n 47) [94].

⁹¹ See eg *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger (Award)* (ICSID Case No ARB/11/11, 15 July 2013) [125]–[126], where the expropriation claim was upheld on the ground that the denunciation of Claimant’s concession contract was annulled by the Supreme Court of Niger and that therefore there was ‘in any case no legal basis which could justify the requisitions of assets, materials and personnel’ of the Claimant’s subsidiary.

⁹² *Liman Caspian* (n 62) [431]–[432].

intervention in the local arbitration could have been illegal simply on account of the courts lacking jurisdiction under the Bangladeshi Arbitration Act (although on the facts of the case the unlawful character of the intervention could not be established on those grounds).⁹³ Similarly, the Tribunal in *Al-Bahloul v Tajikistan* considered whether the impugned decisions resulted from the application of Tajik law but ultimately rejected the expropriation claim after having found that the court-ordered dissolution of claimant's business ventures was not 'manifestly in contradiction with the Tajik legislation'.⁹⁴ Conversely, in *CCL v Kazakhstan*, a court-ordered termination of a concession contract was found to amount to an expropriation because the termination did not follow the terms of the contractual bargain.⁹⁵

The problem with this approach is that it has the effect of placing international tribunals into the shoes of appellate courts. Yet, as often emphasised by tribunals themselves, it is not their role to exercise appellate review.⁹⁶ Since the final word on the meaning of domestic law generally rests with the national judiciary, it is not for international adjudicatory bodies to determine whether that law has been correctly applied by domestic courts. Furthermore, as adjudicatory bodies composed of arbitrators not necessarily familiar with the applicable domestic law, investment tribunals may also lack the expertise to determine whether a judgment was correctly decided as a matter of that law. This is illustrated by the *CCL* case, in which the Tribunal failed to examine whether the termination of the contract could have been valid as a matter of the applicable Kazakh law, despite the fact that such termination was purportedly provided for by the Civil Code of Kazakhstan in the event of a material breach.⁹⁷ In this respect, the *Saipem* Tribunal adopted a sounder approach when it simply refused to conclusively determine the issue of domestic legality as it was not sufficiently briefed on the matter.⁹⁸

To avoid these difficulties, some investment tribunals have resorted to certain general principles of law, such as the prohibition of abuse of rights or proportionality. In the *Saipem* case, the Tribunal grounded its finding concerning the inadequacy of judicial conduct on the fact that the courts had unjustifiably exercised their supervisory jurisdiction over the arbitration process and thereby abused their rights.⁹⁹ The Tribunal in *İçkale İnşaat v Turkmenistan* examined whether a Turkmenistan's Supreme Court judgment was 'excessive and as such expropriatory'.¹⁰⁰ The question was whether the impugned court order—by preventing all of the claimant's machinery and

⁹³ *Saipem* (n 38) [139]–[144].

⁹⁴ *Al-Bahloul v Tajikistan (Partial Award on Jurisdiction and Liability)* (SCC Case No V 064/2008, 2 September 2009) [284].

⁹⁵ *CCL v Republic of Kazakhstan (Final Award)* (SCC Case 122/2001, 1 January 2004) 165, 174–5.

⁹⁶ See eg *RosInvest* (n 47) [280] and [603]; *Arif* (n 1) [416].

⁹⁷ *CCL* (n 95) 159.

⁹⁸ *Saipem* (n 38) [143]–[144].

⁹⁹ *Saipem* (n 38) [149]–[161].

¹⁰⁰ *İçkale İnşaat Limited Şirketi v Turkmenistan (Award)* (ICSID Case No ARB/10/24, 8 March 2016), [375].

equipment being removed from Turkmenistan—had gone beyond what was necessary to recover contractual penalties.¹⁰¹ On the facts of that case, the expropriation claim failed because the judicial measure was not found to be excessive. The case nevertheless suggests that the principle of proportionality could, perhaps, play a role in establishing the propriety of an impugned judicial act.

Indeed, having resort to general principles of law has been rather commonplace in expropriation analysis. In situations other than those involving judicial conduct, disproportionality has been taken to indicate the expropriatory nature of regulatory measures.¹⁰² Similarly, the principle of good faith/abuse of rights has been used to establish whether the termination of a contract on contractual grounds was an act of expropriation.¹⁰³ But it might be wondered whether these general principles of law really provide any added value when the task involves appraising the propriety of judicial conduct. In arbitral practice, instances of abuse of judicial powers¹⁰⁴ or the disproportionality of judgments¹⁰⁵ are already taken into account in the application of the denial of justice standard. The question, furthermore, concerns the basis for applying such general principles. While the *İçkale* Tribunal failed to identify the source of the standard it was applying, the *Saipem* Tribunal made it quite clear that the prohibition of abuse of rights was grounded in international law, not in the law of the Respondent State.¹⁰⁶ The question, then, is whether such general principles—when not applied as part of the applicable domestic law—provide solutions in situations where the tribunal's jurisdiction is limited to expropriation claims, since one may then equally apply other standards prescribed by international law in order to determine the propriety of judicial conduct.¹⁰⁷

¹⁰¹ *ibid* [371]–[75].

¹⁰² See eg *Teemed* (n 51) [122]; *Azurix Corp v The Argentine Republic (Award)* (ICSID Case No ARB/01/12, 14 July 2006) [311]–[312]; *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic (Decision on Liability)* (ICSID Case No ARB/02/1, 3 October 2006) [195]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic (Award)* (ICSID Case No ARB/97/3, 20 August 2007) [7.4.26]; *Quasar de Valores* (n 47) [116]–[121]; and perhaps most notably *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador (Award)* (ICSID Case No ARB/06/11, 5 October 2012) [455].¹⁰³ See the discussion on *Vigotop* (n 32).

¹⁰⁴ Most notably, see *Dan Cake v Hungary (Decision on Jurisdiction and Liability)* (ICSID Case No ARB/12/9, 24 August 2015), upholding a claim of denial of justice in circumstances where the domestic court unjustifiably refused to convene a composition hearing in the context of liquidation proceedings. cf also *Limited Liability Company AMTO v Ukraine (Final Award)* (SCC Case No 080/2005, 26 March 2008), [84].

¹⁰⁵ See eg *Loewen* (n 57) [113], where the fact that the verdict rendered against Claimant in suit brought by a local competitor appeared to be 'grossly disproportionate' to the damage suffered by the plaintiff was treated as evidence demonstrating the failure on the part of the US Judge to accord Claimant the process that it was due under international law.¹⁰⁶ *Saipem* (n 38) [161].

¹⁰⁷ Interestingly, the *İçkale* Tribunal saw no problem in applying the principle of proportionality, despite expressing reservations about its capacity to review the impugned judicial conduct from the perspective of denial of justice standards. See *İçkale İnşaat* (n 100) [355].

V. AN AUTONOMOUS STANDARD FOR JUDICIAL EXPROPRIATION?

The practice of assessing the propriety of impugned judicial conduct against the benchmarks of the denial of justice standard (and against the background of other States' obligations) ultimately raises the question of the precise relationship between such benchmarks and the content of the international law obligation proscribing uncompensated takings of foreign property. It is argued that one needs to resort to such benchmarks because the expropriation provisions typically found in investment treaties do not provide sufficient normative guidance for determining whether a judicial act amounts to a disguised expropriation.

A. *One and the Same Standard?*

Treaty obligations prohibiting uncompensated expropriations are one of the main obligations found in investment treaties. In some treaties, they are the only provisions which are actionable through the applicable dispute settlement mechanism. In practice, they have rightly been interpreted as operating independently from other standards of treatment, so that a finding of expropriation does not depend on there being violations of other standards prescribed by the treaty.¹⁰⁸ In themselves, however, such provisions provide little guidance for determining whether an expropriation has occurred.¹⁰⁹ In general, they only set out conditions that must be complied with for an expropriation of foreign property to be lawful. These conditions are, commonly, that the expropriation be undertaken for a public purpose, in a non-discriminatory way, in accordance with due process of law, and pursuant to the payment of adequate compensation.¹¹⁰

Amongst these, the requirement of due process of law is capable of being engaged as a result of judicial misconduct. This presupposes that the investor will have a reasonable opportunity to have their case reviewed by a judicial or another independent authority, through an unbiased and fair procedure.¹¹¹ Court procedures failing to meet this requirement could therefore engage the responsibility of the State under the expropriation clause, independently of the possibility that the same faulty procedures could also engage its responsibility through denial of justice under the fair and equitable treatment

¹⁰⁸ See eg *Fireman's Fund Insurance Company v The United Mexican States (Award)* (ICSID Case No. ARB(AF)/02/1, 17 July 2006), [208]; or *Vigotop* (n 32) [310].

¹⁰⁹ Some treaties of more recent origin contain annexes with shared understandings on the factors that ought to be taken into account in determining whether an expropriation occurred. See eg EU–Canada Comprehensive and Economic Trade Agreement (CETA), 14 September 2016, Ch 8, Annex 8-A. But these annexes essentially codify the police powers exception to the sole effects doctrine.

¹¹⁰ See UNCTAD (n 6) 27–57.

¹¹¹ On this, see in particular *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary (Award)* (ICSID Case No ARB/03/16, 2 October 2006) [435].

standard. In this sense, there is an obvious normative overlap between treaty guarantees.¹¹² But this overlap is of little relevance to establishing whether a judicial taking occurred: whilst conditioning the lawfulness of an expropriation, the requirement of due process of law does not have a bearing on the *existence* of an expropriation as such.¹¹³

Given the lack of normative guidance in the expropriation provisions, it is not surprising that other criteria have been used to determine whether an expropriation has taken place. For example, evidence of discrimination has typically served as an indication that a measure is expropriatory in nature.¹¹⁴ In the same way, evidence of impropriety in the adjudicative process could be taken to indicate that a judicial measure amounts to a taking. But how would this work in practice?

The element of (non)discrimination is now considered to form part of the expropriation standard itself. Could the prohibition of denial of justice (or a normatively similar obligation) be considered to form another element of that same standard?¹¹⁵ This, perhaps, is what the Tribunal in *RosInvest v Russia* had in mind when it noted that the ‘obligation provided for in Article 5(1) IPPA [i.e. the expropriation clause] for measures which might be considered expropriatory implies that there is also no discrimination or taking without compensation by denial of justice’.¹¹⁶ Attractive as this may seem, this does not really explain the necessity of resorting to benchmarks provided under other treaty obligations as a means of appraising the propriety of judicial conduct. If conduct proscribed by the denial of justice standard was already prohibited under the expropriation clause, then the *Saipem* and *ATA* Tribunals had no reason to resort to the 1958 New York Convention to come to the conclusion that the impugned judicial conduct was improper.

If the standard for expropriation does not contain a standard that is normatively similar (or even equivalent) to the denial of justice standard, it is

¹¹² In some treaties, the conditions for a lawful expropriation are expressly brought in a relationship with other treaty obligations. For example, art 1110(1)(c) NAFTA prohibits expropriatory measures ‘except [...] in accordance with due process of law and Article 1105(1) [demanding treatment in accordance with the minimum standard]’; emphasis added. Interpreting that provision, the Tribunal in *Eli Lilly* (n 8) [417], deemed the relationship between the two provisions to be ‘engaged most acutely in circumstances in which the allegations at issue go to acts of the judiciary, inter alia, for the reason that an alleged breach of the minimum standard of treatment requirement of Article 1105(1) informs an alleged breach of Article 1110(1)’.

¹¹³ Some tribunals have failed to properly recognise this distinction. See *Middle East Cement* (n 70) [139].

¹¹⁴ Indeed, discriminatory treatment is deemed to be one of the factors distinguishing a compensable expropriation from a non-compensable regulation by a host State. See eg *Methanex Corporation v United States of America (Final Award of the Tribunal on Jurisdiction and Merits)* (UNCITRAL, 3 August 2005), PtIV, ChD, [7]; *Tecmed* (n 51) [122]; or *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Award)* (ICSID Case No ARB/10/7, 8 July 2016) [305].

¹¹⁵ See Gharavi (n 3) 356–7, for the suggestion that ‘that some of the elements of the denial of justice standard are necessarily somewhat similar to the components of the judicial expropriation’.

¹¹⁶ *RosInvest* (n 47) [273].

more suitable to treat the condition of impropriety of judicial conduct as a *necessary predicate* of judicial expropriation claims. This is, indeed, how some tribunals have considered this condition to operate.¹¹⁷ The idea of ‘predicate’ is therefore not unusual. In much the same way, for example, a finding of non-observance of contractual obligations constitutes the necessary precondition for a claim based on umbrella clauses.¹¹⁸

There are several possible ways of explaining why such a precondition is necessary to establish a judicial expropriation claim. One is to consider the issue of propriety relevant to determining whether the impugned judicial measure is *expropriatory in character*. This type of reasoning is implicit in statements such as those made in *Middle Eastern Cement, Ares, Garanti Koza*, or *Krederi* to the effect that court decisions do not ‘qualify’ as a taking as long as they are taken in accordance with the due process of law.¹¹⁹ It is also implicit in observations, such as those made in *Swisslion*, that a court’s proper termination of a contract ‘cannot be equated to an expropriation of contractual rights simply because the investor’s rights have been terminated’,¹²⁰ or those made in *MNSS*, that a court decision ‘cannot be considered a direct expropriation unless a denial of justice is found’.¹²¹

Another way is to consider the issue of propriety as being relevant to ascertaining the *validity of a proprietary interest* that is the subject of an alleged taking. As noted by the Tribunal in *Azinian v Mexico*, ‘if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law’—a complaint which essentially required proving that Mexican courts committed a denial of justice—‘there is by definition no contract to be expropriated’.¹²² The Tribunal in *Arif* adopted the same reasoning when holding that there can be no ‘deprivation of invalid rights’, and thus no wrongful taking resulting from ‘the legitimate application’ of the State’s legal system declaring the invalidity of the rights at stake.¹²³ The question of propriety is, then, simply relevant to confirming the validity of the adjudicative process through which the proprietary rights in question have been declared non-existent under the applicable domestic law.

¹¹⁷ See *Ely Lilly* (n 8) [226], treating judicial impropriety as ‘the factual predicate’ that would be necessary to sustain the case of a breach of the expropriation provisions in art 1110 NAFTA; or *Krederi* (n 55) [713], referring to the necessity ‘to ascertain whether an additional element of procedural illegality or denial of justice was present’. See also *Loewen Group, Inc. and Raymond L. Loewen v United States of America (Opinion of Sir Ian Sinclair (on merits of the claims under NAFTA Arts. 1102))* (ICSID Case No ARB(AF)/98/3, 9 May 2001) [105], suggesting that the expropriation claim under art 1110 NAFTA was ‘a claim which is consequential’ to the claims based on conduct in violation of art 1102 and 1105 NAFTA, including the denial of justice claim.

¹¹⁸ See eg *SGS Société Générale de Surveillance SA v Republic of the Philippines (Decision on Objections to Jurisdiction)* (ICSID Case No ARB/02/6, 29 January 2004) [174].

¹¹⁹ *Middle East Cement* (n 70) [139]; *Ares* (n 62) [8.3.7]; *Garanti Koza* (n 69) [365]; and *Krederi* (n 55) [713].

¹²¹ *MNSS* (n 67) [370]; emphasis added.

¹²³ *Arif* (n 1) [417].

¹²⁰ *Swisslion* (n 1) [314]; emphasis added.

¹²² *Azinian* (n 56) [100].

Finally, the question of propriety can also be seen as a precondition for a judicial determination to be treated as effective on the international plane. For example, in *Karkey v Pakistan*, the Tribunal questioned whether it had to accept that the claimant had no rights under the relevant contract *ab initio* in circumstances where that contract had been annulled by Pakistan's Supreme Court. The Tribunal held that since the annulment was arbitrary and irrational, this was unacceptable from an international law perspective and so could be 'disregarded'.¹²⁴ But since the annulment was ineffective, the respondent had no basis for denying the claimant their rights under the contract. The judicial annulment was therefore found to constitute an act of expropriation, as it had the effect of depriving the investor of the use and enjoyment of their contractual rights.¹²⁵ Though unusual in the context of expropriation claims, the reasoning in *Karkey* corresponds with the more general practice of international adjudicatory bodies that have generally been disinclined to give effect on the international plane to determinations by domestic courts which are tainted by denial of justice or which are otherwise found to be inadequate from the perspective of international standards.¹²⁶

In the end, the question of propriety can best be treated as being relevant in determining whether a court's substantive determination should be accepted as *conclusive*: that is, conclusive of whether the investor possessed a proprietary right capable of attracting protection (a situation tribunals face in cases concerning judicial annulment of contractual rights),¹²⁷ or conclusive of whether the investor's rights have been validly terminated as a matter of the law (a situation tribunals face in cases concerning the judicial termination of contractual rights).

Given the role propriety plays in the context of judicial expropriation, and the importance of the denial of justice standard in establishing this, one might then wonder whether a finding of expropriation resulting from a miscarriage of justice is, in effect, any different from a finding of denial of justice. Is a

¹²⁴ *Karkey* (n 60) [550]–[552].

¹²⁵ *ibid* [647]–[649].

¹²⁶ For early examples, see eg F Wharton, A digest of the international law of the United States, vol 2 (1886), sec 238, p 671; or *Dissenting Opinion of Commissioner Nielsen in Teodoro García and MA Garza (United Mexican States) v United States of America* (IV UNRIAA 119, 3 December 1926) 126. The standpoint was broadly endorsed by investment tribunals. See eg *Feldman* (n 45) [140]; *Helnan International Hotels A/S v Arab Republic of Egypt (Award)* (ICSID Case No ARB/05/19, 3 July 2008) [106]; *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Company v Grenada (Award)* (ICSID Case No ARB/10/6, 10 December 2010) [7.1.11], [7.1.14]; or *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (Decision on Track 1B)* (UNCITRAL, PCA Case No 2009-23, 12 March 2015) [140]–[142].

¹²⁷ It is worth noting that in the context of the US judicial takings debate (see n 130–132), the question of whether the proprietary rights allegedly taken were conclusively established was likewise considered an element that was to guide the Supreme Court's inquiry. According to Justice Scalia (n 132, at 2602, 2608), a judicial taking was thus considered to occur when 'once an established right of private property' is declared as non-existent by a court. However, in his view, a property right 'is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court'.

judicial taking not merely a particular form of denial of justice—where the substantive rights which are denied through a judicial process failing to conform to international minimum standards just happens to be proprietary in character—and should be treated as such?¹²⁸ This dilemma does not only arise under international law. Similar questions have also arisen in discussions concerning judicial takings under US law, and the Supreme Court has not yet developed a clear view.¹²⁹ In an important decision in 2010, a majority of the Supreme Court took the view that State courts do not have an unfettered power to alter or remove established property rights.¹³⁰ However, that same majority was divided on the standards by which claims of judicial takings were to be examined. While some of the justices considered that the yardstick to be used was the Due Process Clause of the US Constitution,¹³¹ others supported the application of the Takings Clause.¹³²

Whilst in the US context this question is largely of theoretical interest, in the context of investment arbitration the distinction between the denial of justice and the expropriation standards has practical consequences: if the expropriation standard is just a particular category of the denial of justice standard, it is important to know whether the condition of finality, which is generally accepted to be necessary for a denial of justice claim,¹³³ must also be satisfied in order to establish a judicial expropriation claim. To date, tribunals have considered that the condition does *not* to apply to such claims, reflecting the different legal natures of the two standards.¹³⁴

¹²⁸ See also Moure (n 3) at 67, similarly expressing doubts about this differentiation. For further criticism, see Douglas (n 59) 893ff.

¹²⁹ For a discussion of the problem, see D Wagner, 'A Proposed Approach to Judicial Takings' (2012) 73 *OhioStLJ* 177.

¹³⁰ *Stop the Beach Renourishment, Inc. v Florida Department of Environmental Protection et al.*, 130 S. Ct. 2592 (2010) (No. 08-1151) at 2611–13.

¹³¹ See Opinion of Justice Kennedy (joined by Justice Sotomayor), *ibid* holding (at 2614) that '[i]f a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause', and arguing (at 2615) that '[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause'.

¹³² See Opinion of Justice Scalia (joined by Justices Roberts, Alito, and Thomas) *ibid* holding (at 2601) that 'the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. [...] If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.'

¹³³ *Loewen* (n 57) [142]–[154], [158]–[159].

¹³⁴ See *Saipem* (n 38) [181], 'tending' to consider that exhaustion of local remedies did not constitute a substantive requirement of a judicial expropriation claim; and *Arif* (n 1) [347], observing that 'as a matter of principle [...] court decisions can engage a State's responsibility, including for unlawful expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made)'.

Understanding impropriety to be a precondition provides a useful way of making sense of the tribunals' jurisprudence. In the context of judicial takings, the applicability of the requirement of judicial finality depends on the circumstances of the case. Where claimants seek to prove they have been deprived of their property as a result of a miscarriage of justice, they will have to exhaust local remedies—not because the obligation prohibiting uncompensated expropriations requires this, but because it is necessary to do so before there can be a denial of justice. Conversely, exhaustion of local remedies will not be required where the deprivation of property is said to have resulted from a failure to respect conventional obligations which grant the investor specific substantive rights. In such cases, the misapplication of the international legal obligation is generally sufficient to establish that the judicial outcome is defective.

B. Competence to Review Judicial Conduct under Other Standards

Once it is accepted that determining the propriety of judicial conduct is a necessary precondition for considering any claim of judicial expropriation, another problem arises: the tribunal may formally lack competence to determine whether an impugned judgment is in accordance with international standards. Like other international adjudicatory bodies, investment tribunals are not tribunals of general jurisdiction. They are creatures of the parties' consent, which provides the basis for, but at the same time sets the limits to, their adjudicatory powers. Some treaties grant tribunals jurisdiction over all disputes concerning an investment. Others limit their jurisdiction to disputes concerning violations of the treaty, whilst others again may only extend to claims concerning a treaty's expropriation clause. The problem of competence is not only relevant to the question of whether a tribunal may review judicial conduct against standards which are not set out in the investment treaty itself. It also arises in relation to the question of whether a tribunal can apply the denial of justice standard where the claimant has not actually challenged the judicial conduct on that basis.

Arbitral jurisprudence appears somewhat inconclusive. In most judicial expropriation cases, the question has not really arisen. As the impugned judicial conduct had been contested on the basis of different treaty standards, the tribunals had already made formal pronouncements with respect to the propriety of that conduct. Nevertheless, a handful of awards provide some limited guidance. On the face of it, the award in *İçkale* suggests that where jurisdiction under a treaty is limited to expropriation claims, the impugned judicial conduct cannot be assessed by reference to other treaty standards.¹³⁵

¹³⁵ *İçkale İnşaat* (n 100) [355], noting that 'to the extent that the Claimant alleges that the proceedings before the Arbitration Court amounted to denial of justice, [...] its jurisdiction under the Treaty does not extend to claims for breach of the FET standard'.

This is arguably the reason why the Tribunal in that case preferred to assess the relevant judgments against the backdrop of the principle of proportionality. The situation in that case was, however, rather unusual as the applicable investment treaty did not even contain the FET obligation which would normally form the jurisdictional basis for it considering whether there had been a denial of justice. In contrast, the award in *Karkey* suggests that where jurisdiction is not limited to expropriation claims, tribunals may review the impugned judicial conduct by reference to other standards prescribed by the treaty, even if violations of those other standards have not been pleaded. The *Karkey* Tribunal found the impugned judgment to be arbitrary and irrational, and so defective from an international law perspective, without finding it necessary to make formal pronouncements on the additional claims based on the FET standard.¹³⁶ Taken together, these two awards suggest that, at least where a tribunal otherwise has jurisdiction to make a finding that the impugned judicial conduct amounts to a denial of justice, the tribunal may also review the propriety of such conduct for the purposes of establishing a judicial expropriation claim. Support for such an approach can also be found in cases where the expropriation claim was not grounded in judicial conduct. In *Azinian*, for example, the Tribunal considered *proprio motu* the propriety of judicial conduct as part of the inquiry as to whether the termination of the contract effected by the administration amounted to an expropriation of contractual rights, despite the conduct of the courts as such not having been questioned by the claimants.¹³⁷

Do similar considerations apply where obligations arising under instruments other than the jurisdiction-conferring treaty are being used as benchmarks of judicial propriety? Following *Helnan*, the Tribunal in *Karkey* considered that deficiencies amounting to a denial of justice were ‘only one of the possible breaches of international law to be taken into consideration’.¹³⁸ This suggests that the Tribunal thought it enjoyed broad competence with respect to the grounds on which it could review the impugned judicial action. This understanding was, apparently, also shared by the Tribunals in the *Saipem* and *ATA* cases, neither of which expressed any doubts concerning their jurisdiction to assess the conformity of the domestic courts’ conduct in the light of the respondent States’ obligations under the 1958 New York Convention. This was particularly striking in the *Saipem* award, as the Tribunal’s jurisdiction was restricted to expropriation claims, which was why the Claimant did not present its case on the basis of denial of justice.¹³⁹

Arguably, there may be fewer concerns where jurisdiction derives from a broadly formulated dispute settlement clause which permits the adjudication of any or all disputes concerning an investment. However, in such cases some investment tribunals have considered themselves unable to make

¹³⁶ *Karkey* (n 60) [657].

¹³⁹ *Saipem* (n 38) [121].

¹³⁷ *Azinian* (n 56) [97]–[101].

¹³⁸ *Karkey* (n 60) [550].

findings regarding expropriation claims on the basis of violations of the 1958 New York Convention.¹⁴⁰ One solution to this jurisdictional problem might be to consider that an investment tribunal is only taking such other obligations ‘into account’ rather than making a determination on the basis of them.¹⁴¹ This seems to be the approach followed in *ATA*, where the Tribunal did not conclude that the domestic court had ‘violated’ the 1958 Convention, but merely set out what was expected of courts under the 1958 Convention.¹⁴² Another solution would be to take such obligations into account as part of ‘any relevant rules of international law applicable in the relations between the parties’ (Article 31(3)(c) VCLT) when interpreting the expropriation clause in the applicable BIT. This was the approach taken by the ICJ in the *Jadhav* case, where it was willing to consider a State’s obligations under the fair trial provisions in Article 14 of the International Covenant on Civil and Political Rights for the purpose of interpreting the procedural provisions of the Vienna Convention on Consular Relations, even though its jurisdiction was limited to claims under the latter.¹⁴³

VI. CONCLUSION

Building on the already significant and ever-growing body of arbitral jurisprudence, this article has sought to develop a coherent theory of judicial expropriation. The article builds on the premise that, since it is uncontested that domestic courts are capable of engaging the responsibility of a State as a result of judicial conduct which is not in conformity with that State’s international obligations, an expropriation claim can be based on the improper conduct of a court. But as the article has demonstrated, the difficulty lies in distinguishing between legitimate judicial action and improper interferences with investors’ rights. Due to the nature of judicial measures, which operate at the level of the underlying proprietary right that is the object of international law’s protection, the question whether a judicial

¹⁴⁰ See eg *Kaliningrad Region v Lithuania (Final Award)* (ICC, 28 January 2009), where the claim for expropriation arising out of the Lithuanian courts’ enforcement of a commercial award was reportedly rejected due to the alleged lack of competence to review the conformity of the host State’s conduct with obligations under the 1958 New York Convention.

¹⁴¹ An analogy can be made here to the idea advanced by the ICSID Annulment Committee in *Vivendi* that ‘it is one thing to exercise contractual jurisdiction [...] and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law’. *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Decision on Annulment)* (ICSID Case No ARB/97/3, 3 July 2002) [105]. In fact, there were cases where concrete obligations under other treaties were considered in deciding on whether a violation of investment treaty standard has occurred. See especially *Hesham T M Al Warraq v Republic of Indonesia (Award)* (UNCITRAL, 15 December 2014) [556]–[621], where obligations pertaining to the fair trial obligation under art 14 ICCPR were used as a measure to determining whether Respondent had violated the fair and equitable treatment standard. The Tribunal specifically held that Claimant failed to receive ‘fair and equitable treatment as enshrined in the ICCPR’. *ibid* [621].

¹⁴³ *Jadhav* (n 77) [135].

¹⁴² *Ata* (n 87) [124], [128].

measure amounts to an expropriation cannot be determined by means of the 'sole effects' doctrine, which only looks at the effect of the measure on the property allegedly expropriated. Distinctions based on the sovereign nature of particular acts also fail to provide a basis on which to make such determinations.

The article suggests that in order to be treated as an act of expropriation, an impugned judicial measure must be wrongful as a matter of international law. Although the standard most commonly applied when determining whether there has been such wrongfulness is denial of justice, this is not the only possible benchmark for reviewing the propriety of judicial conduct. Wrongfulness can equally be established by reference to other international obligations, conventional or otherwise, that ought to have been respected. The requirement of wrongfulness is subject to the caveat that the domestic legislation applied by the courts is not itself contrary to international law, that the judicial action does not hinge upon the wrongful act of some other State organ, or that it does not form part of a series of acts which are wrongful when taken together.

The article also suggest that this 'default' approach to judicial expropriation—which as such requires separate proof of wrongfulness of the impugned judicial measure—ought to apply where the expropriation claim is based upon injuries which originate *primarily* or *essentially* in the conduct of the judiciary. In contrast, where the basis of the claim lies in the actions of the legislative or executive organs of the State, tribunals do not need to consider the propriety of judicial conduct, but can determine whether there has been an expropriation on the basis of the traditional 'sole effects' doctrine.

Finally, where a finding of wrongfulness is based on denial of justice, there must also be judicial finality. This may not be the case where wrongfulness can be established by reference to other international obligations, the breach of which are not contingent on judicial finality.