International Arbitration

Three Salient Problems

Second Edition

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II

Denial of Justice, and Other Breaches of International Law, by Governmental Negation of Arbitration

A. The Question

The second question asked in the first edition was this: where a State refuses to arbitrate pursuant to a clause in a contract between that State and an alien, which provides that arbitration between them shall be the exclusive remedy for settlement of disputes under that contract, does such refusal constitute a denial of justice under international law? Several related questions were also asked. Is it open to the contracting State to plead inability to arbitrate under its law, or failure to exhaust local remedies, or sovereign immunity, as a valid defense to the charge of a denial of justice flowing from negation of arbitration? Is the alien entitled to seek an arbitral ruling on the question of denial of justice, or is that question one which arises only on the plane of State-to-State relations?

The first edition recognized that, unlike the question of severability of the arbitration agreement examined in the first chapter, these questions were not as commonplace in the practice of international arbitration. But they were not so rare as to make their examination rarefied. Since that first edition, the remarkable growth in international arbitration, and of the importance of its role in international commerce, has increased the salience of how an alien, or a tribunal, may respond to a State's attempts to negate arbitration. That same growth has also resulted in State attempts to negate arbitration taking a number of different forms. The question is now not only whether a State's refusal to arbitrate under a contract may constitute a denial of justice, but whether a State's attempt to negate arbitration – by, for example, improperly setting

aside a locally-made arbitral award – may constitute a compensable expropriation, a breach of fair and equitable treatment or another breach of an investment treaty.

B. The Theory

Denial of justice, as a cause of action in public international law, is now frequently pleaded by claimants in arbitrations between investors and States conducted under investment treaties entered into between States. It is generally accepted that a State's obligations under customary international law include an obligation not to deny justice to foreign nationals, and it is also generally accepted that the standard of fair and equitable treatment typically found in investment treaties encompasses the same obligation.[1]

So far as denials of justice in relation to domestic court conduct are concerned, the content of denial of justice has developed so as to channel a limited type of conduct to the level of an international delict. There are two key ways in which denial of justice does this. First, denial of justice does not arise merely upon the incorrect application of the local law in the local courts. The tribunal in *Mondev* v. *United States* instead explained that:

> In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.[2]

[1] See generally, Jan Paulsson, *Denial of Justice in International Law* (2005); Rudolf Dolzer and Christoph H. Schreuer, *Principles of International Investment Law* (2nd edition, 2012), pp. 178–182; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edition, 2017), pp. 296–308.

[2] *Mondev* v. *United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, para. 127. See also *Azinian* v. *United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1, Award, November 1, 1999, paras. 102–103: "A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way, . . . There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law."

Second, denial of justice does not arise merely upon the decision of a particular domestic court. There is rather a requirement, as a substantive element of denial of justice, that the investor makes reasonable attempts to exhaust effective local remedies.[3]

The alleged denial of justice typically concerns a State's failure to provide justice through its domestic courts, including by failing to accord foreign nationals access to its courts (what may be called domestic denials of justice). But the more particular question with which this chapter is first concerned – and a more controversial one – is whether this core concept embraces the failure of a State to afford an alien access to the *arbitral tribunal* to whose constitution that State has consented (what may be called international denials of justice).

At the time of the first edition, the most comprehensive treatment of this question had been provided by that noted scholar and practitioner, Dr. F.A. Mann. Writing in the *British Year Book of International Law* of 1967, Dr. Mann said, with respect to "Refusal of arbitration as a denial of justice," the following (and he is quoted at length because his analysis not only is germinal; it remains, still, one of the most extensive and searching published considerations of the question):

> . . . there are many circumstances in which the attitude of one party to an arbitration clause and, in particular, of the contracting State results in the impossibility of setting up or operating the arbitration tribunal. Usually this is the direct responsibility of the State; as, for instance, when the State fails, and no other person or body is authorized, to appoint an arbitrator. Or the responsibility is indirect as, for instance, when an arbitrator withdraws from the proceedings, perhaps even at the request of the State, and there is no machinery for appointing a substitute. Can such or similar lack of co-operation on the part of the respondent State, which frustrates arbitration, be considered as a denial of justice so as to permit the State

[3] Paulsson, *supra* note 1, p. 7: "[I]nternational law does not impose a duty on states to treat foreigners fairly at every step of the legal process. The duty is to create and maintain a *system of justice* which ensures that unfairness to foreigners either does not happen, *or is corrected*"; James Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, 2012), p. 620: "The existence of the rule of admissibility that the alien should first exhaust local remedies is a reflection of the special character of denial of justice claims"; *Loewen* v. *United States*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, para. 154: "No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system."

entitled to protect the interests of the contracting alien to invoke the rules of international responsibility? An affirmative answer has been given by Switzerland, the United Kingdom and France, though, not unnaturally, the opposite view has been taken by their opponents, namely Yugoslavia, Iran and Lebanon respectively ....[4]

Dr. Mann considered that, with the exception of one category of cases, an affirmative answer should be given. He explained that:

It would be wrong to fasten upon the fact that mere non-performance or breach of a contract made between a State and an alien does not necessarily constitute a tort within the meaning of the rules of State responsibility, and to conclude that the repudiation of an arbitration clause cannot, as such, be treated as a denial of justice. Whatever the position may be in regard to contractual obligations in general, the repudiation of an arbitration clause has a distinct and special character in that it involves the denial of access to the only tribunal which has jurisdiction and upon which the parties have agreed. The failure to afford access to tribunals has traditionally been treated as a peculiar and particularly grave instance of State responsibility. It is submitted, therefore, that it would be in line with the accepted tendency of international law, sound doctrine and the demands of justice to hold that a State which repudiates an arbitration clause denies justice. In the past, it is true, denial of justice in the strict and narrow sense of the term implied the failure to afford access to the tribunals of the respondent State itself. But there is no reason of logic or justice why the doctrine of denial of justice should not be so interpreted as to comprise the relatively modern case of the repudiation of an arbitration clause. The respondent State which, wilfully and as a result of its own initiative, has failed to implement an arbitration clause, can hardly allege that it has afforded justice in general or the agreed justice in particular, or complain that it is aggrieved by being held responsible for its own deliberate acts. Nor should it be argued that denial of justice presupposes the failure of the State as sovereign to provide proper access to its tribunals, while the State which simply disregards an arbitration clause acts, not as a sovereign, but in the same manner as any private person could do. This would be a somewhat conceptualist reasoning. In its practical effect the failure of a contracting State to implement an arbitration clause is tantamount to barring access to the tribunal which could, should, and is agreed to, be available. Obstruction by a State has a different quality from obstruction by a private person.[5]

[4] F.A. Mann, "State Contracts and International Arbitration," *XLII British Yearbook of International Law* (1967), pp. 1, 26–29.
[5] Ibid.

Dr. Mann went on to note that "[t]here are occasions when the failure to implement an arbitration clause results from specific legislation directed against the contracting alien." This, he explained, "is really an *a fortiori* case."[6] He considered that more difficult questions arose where the State's failure to arbitrate resulted "from general and in every respect unobjectionable legislation which it enacts."[7] He referred here to the *Losinger* case, where a Swiss firm had launched an arbitration against Yugoslavia, seated in Yugoslavia, and Yugoslavia had then introduced a general and facially nondiscriminatory law requiring all lawsuits against the State to be brought before Yugoslav courts. The sole arbitrator, surprisingly and wrongly, determined that he did not have jurisdiction to determine whether he could proceed and Switzerland ultimately espoused its national's claim before the Permanent Court of International Justice (but the claim was settled before decision). For Dr. Mann, there was no denial of justice. He explained that, in his view, "[e]ven if the umpire had not rendered a decision, but the Yugoslavian Government had kept aloof from the arbitration in reliance on the law of 1934, a denial of justice would not have occurred, for the failure to participate would have been sanctioned by a general law enacted by the *lex arbitri*."[8]

It was argued in the first edition that Dr. Mann's conclusion that there is no reason of logic or doctrine why denial of justice should not be interpreted to comprise the case of repudiation of an arbitration clause is sound, for the reasons which he so well states. But it was also argued that the principle could have been extended more widely and that Dr. Mann was wrong to contend that there is no denial of justice where the State's refusal to arbitrate is based on a general law within the *lex arbitri*. What is decisive instead, it was suggested, is not the law governing the contract or arbitration under it, but the fact that there is a contract between a State and an alien. That fact suffices to bring the resultant relationship within the sphere of protection of international law. It does not render the contract an instrument of international law in the way a treaty is such an instrument, and it does not mean that every violation of the contract is a violation of international law. But it does mean that the rights that the contract provides cannot be

[6] Ibid. [7] Ibid. [8] Ibid.

taken by sovereign act without the responsibility that international law entails. States frequently act vis-à-vis aliens in accordance with their municipal law but that of itself does not dispose of all question of their responsibility under international law. An action of a State that as applied to an alien is arbitrary or tortious is not absolved of its wrongfulness by the mere reason that the contractual relationship affected is governed by its law. The right of an alien to arbitration of disputes arising under a contract is a valuable right, at times so valuable that the alien will contract only on condition of contractual assurance of that right. That right quite generally is to an international form of arbitration, but that is not the critical point. If the alien's right to arbitration is negated by the contracting State, a wrong under international law ensues, whatever the law governing the contract, the arbitration agreement, or the arbitral process—no less than a wrong under international law ensues if a State takes the property of an alien without just compensation whether or not the right to that property derives from its municipal law.

The situation may not be as clear-cut where the State has pleaded the nullity of its obligation to arbitrate based on a restriction on the authority of the State or its agencies to agree to arbitration that existed at the time of the arbitration agreement. The question in these cases is not one of the State concluding an arbitration agreement and thereafter enacting legislation or taking measures, general or particular, nullifying the arbitration agreement; the question rather is whether an agreement to arbitrate is effective if it does not comport with prior, outstanding restrictions upon the authority of the State to arbitrate.

Sometimes in practice the State or State entity may specifically represent in the underlying contract, or even in the arbitration agreement, that it, or those signing on its behalf, have the authority to enter into the contract or the arbitration agreement. But even in the absence of such representations, a State is generally not permitted to invoke its own law in order to defeat its promise to arbitrate. As Professor Paulsson observed in his analysis of the Preliminary Award in *Benteler* v. *Belgium*, a case that involved Belgium's unsuccessful attempt to rely on a Belgian law limiting the capacity of public-law entities to conclude arbitration agreements that existed at the time the State of Belgium concluded an arbitration agreement with German private parties:

The prevailing view is that it would be contrary to fundamental principles of good faith for a State party to an international contract, having freely accepted an arbitration clause, later to invoke its own legislation as grounds for contesting the validity of its agreement to arbitrate.

This principle of good faith has been applied by international arbitrators as an imperative norm perceived without reference to any specific national law. A leading precedent is an award rendered in 1971 under the Rules of Arbitration of the International Chamber of Commerce, in which the tribunal stated that:

> "... international *ordre public* would vigorously reject the proposition that a State organ, dealing with foreigners, having openly, with knowledge and intent, concluded an arbitration clause that inspires the cocontractant's confidence, could thereafter, whether in the arbitration or in execution proceedings, invoke the nullity of its own promise."[9]

Professor Paulsson noted that the tribunal in the *Benteler* v. *Belgium* case (composed of Professor Claude Reymond, as President, and Messrs. Böckstiegel and Franchimont) recorded the following approaches used to confirm the principle that a State may not invoke its own law to contest the validity of its consent to arbitrate:

(i) Acknowledging a distinction between internal *ordre public* and a less constraining international *ordre public*, and then holding that a prohibition against the State or State entities' agreeing to arbitration is applicable only in domestic matters (the *Galakis* approach).
(ii) Applying a presumption that with respect to State or parastatal entities in international contracts, the capacity of the State or its subdivisions to conclude arbitration agreements is governed by the proper law of the contract rather than the internal law of the State.

[9] Jan Paulsson, "May a State Invoke Its Internal Law to Repudiate Consent to International Commercial Arbitration?," 2 *Arbitration International* (1986), p. 90. The Award of November 18, 1983 in *Benteler* v. *Belgium* is reproduced in English translation in 1 *Journal of International Arbitration* (1984), p. 184 and in *European Commercial Cases* (1985), p. 101, and a report is found in X *Yearbook Commercial Arbitration* (1985), p. 37. The original report in French is found in *Journal des Tribunaux* (Brussels, 1984), pp. 230–232. The quotation from an arbitral award is drawn by Professor Paulsson from ICC Case No. 1939, between an Italian company and an agency of an African State, an extract of which is found in Yves Derains, "Le statut des usages du commerce international devant les juridictions arbitrales," 1973 *Revue de l'Arbitrage*, pp. 122, 145.

(iii) Holding the prohibition of agreements to arbitrate to be contrary to international public order, in the sense that a State which has concluded an arbitration agreement would be held to act contrary to international *ordre public* if it later tried to affirm that its internal law was incompatible with the undertaking to arbitrate.

(iv) A more moderate variant of the last approach involves an analysis similar to that underlying the notion of estoppel or, as the *Benteler* Award puts it, allowing the international arbitrator to disregard the State's internal prohibition if "the circumstances of the case are such that the State would be acting *contra factum proprium* by raising it."[10]

The coexistence of these approaches, the *Benteler* tribunal inferred, indicates that "the present state of international arbitration law" is that a State may not use its national law to contest its own consent to arbitrate.[11]

It is believed that the foregoing analysis of which the *Benteler* award is an exemplar comports with the conclusion that what is a violation of international "ordre public" is in this instance a denial of justice under international law as well. But where a State relies not upon a preexisting statute to claim exemption from the obligation to arbitrate, but on legislation enacted or measures taken after the conclusion of the arbitration agreement, that is an *a fortiori case*; even if it be contended that reliance upon a preexisting statute may not constitute a denial of justice, surely invocation of an escape clause devised and applied after the entry into force of the arbitration agreement in order to evade it does constitute a denial of justice.

The same core principle was accepted in the *Elf Aquitaine Iran* v. *NIOC* Preliminary Award of 1982, where the sole arbitrator, Professor Gomard, observed that "[i]t is a recognized principle of international law that a state is bound by an arbitration clause... and cannot thereafter unilaterally set aside the access of the other party to the system envisaged by the parties in their agreement for the settlement of disputes."[12] This fundamental principle has only

[10] Paulsson, *supra* note 9, p. 96.

[11] *Benteler* v. *Belgium*, *supra* note 9, p. 190. The arbitral tribunal cited these factors as confirming the conclusion it reached on another, dispositive ground, namely, that Belgium's restriction on the authority of the State to engage in arbitration is subject to the exception of a treaty provision which allows it to resort to arbitration. The tribunal found such a treaty provision to be governing.

[12] XI *Yearbook Commercial Arbitration* (1986), pp. 98, 103.

become more readily accepted over the past three decades in a number of cases that will be discussed more fully below. As the tribunal in *Salini* v. *Ethiopia* stated: "There is a substantial body of law establishing that a state cannot rely on its own law to renege on an arbitration agreement."[13]

The conclusion that the first edition reached was thus a general one: a State commits a denial of justice whenever it refuses to arbitrate contrary to its earlier agreement to do so – whether by declaration, specific legislation, or general legislation enacted before or after the consent to arbitrate was given.

The question of whether a State that refuses to arbitrate commits a denial of justice had, at the time of the first edition of this book, attracted a measure of scholarly analysis beyond that of Dr. Mann. It was striking then that, while support for the view that such a refusal does constitute a denial of justice was substantial, there was little opinion to the contrary. More recent scholarly analysis offers instances of both support and critique of this proposition, albeit the focus of relevant analysis has shifted to the new forms of obstruction that have arisen in the context of modern investor-State arbitration.

Dr. F.V. García Amador, who wrote the following in his capacity as Special Rapporteur of the International Law Commission on State Responsibility, maintained that in the context of a contract that provides for an international type of arbitration though it does not stipulate that a particular substantive law other than the contracting State's law shall apply, "non-fulfilment of the arbitration clause would directly give rise to the international responsibility of the State":

> The mere fact that a State agrees with an alien private individual to have recourse to an international mode of settlement automatically removes the contract, at least as regards relations between the parties, from the jurisdiction of municipal law. Unlike the *Calvo Clause* which reaffirms the exclusive jurisdiction of the local authorities, agreements of this type imply a 'renunciation' by the State of the jurisdiction of the local authorities. If an arbitration clause of this type were governed by municipal law, it could be amended or even rescinded by a subsequent unilateral act of the

[13] *Salini Costruttori SPA* v. *Ethiopia*, ICC Arbitration No 1063/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction, December 7, 2001, para. 161.

State, which would be inconsistent with the essential purpose of stipulations of this type, whatever the purpose of the agreement or the character of the contracting parties. Accordingly, as the obligation in question is undeniably international in character, non-fulfilment of the arbitration clause would directly give rise to the international responsibility of the State.[14]

A Committee on Nationalization of Property of the American Branch of the International Law Association in 1957 found "an undeniable denial of justice" in the following circumstances:

Where the alien already enjoys the advantages of arbitration by the terms of his contract with the State, he is not bound to do more than exhaust the remedy arbitration provides. Should the State refuse to arbitrate, local remedies would thereby be exhausted and the diplomatic intervention of the alien's State would be in order. . . . If, as in the case of Iran, the State which purports lawfully to take the property of an alien refuses to submit its action to the adjudication of the arbitral tribunal whose competence it earlier accepted, its action constitutes an undeniable denial of justice.[15]

The American Law Institute's *Foreign Relations Law of the United States, Restatement of the Law Second*, holds:

Breach of agreement to arbitrate. If a contract between a state and an alien includes an arbitration clause, refusal of the state to submit a dispute to arbitration in compliance with the clause is a denial of procedural justice. . . .[16]

The American Law Institute's *Foreign Relations Law of the United States (Revised)*, as adopted in 1986, states that:

[A] state may be responsible for a denial of justice under international law . . . if, having committed itself to a special forum for dispute settlement, such as arbitration, it fails to honor such commitment. . . .[17]

[14] F.V. García Amador, "Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights," *Yearbook of the International Law Commission 1959*, vol. II, pp. 1, 32.

[15] *Proceedings and Committee Reports of the American Branch of the International Law Association*, 1957–1958, p. 75, notes 25, and p. 76 (reprinted in Southwestern Legal Foundation, *Selected Readings on Protection of Private Foreign Investments*, 1964, p. 37, note 25, and p. 38).

[16] American Law Institute, *Foreign Relations Law of the United States, Restatement of the Law Second*, 1965, p. 582.

[17] American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States (Revised)*, 1986, Section 712, comment *h*.

Professor Alfred Verdross of the University of Vienna similarly concluded:

[I]f . . . the defending State refuses to have recourse to arbitration, or if it delays the proceedings or refuses to execute the arbitral award, the private party may solicit the diplomatic *protection* of its government, since these acts or defaults constitute a denial of justice, which according to international law, gives the national State of the damaged party the right to intervene against the State guilty of the denial of justice.[18]

Charles de Visscher, the Belgian scholar who served as a judge of the International Court of Justice, expressed his support for the possibility of both domestic and international denials of justice in his *Theory and Reality in Public International Law:*

. . . the international responsibility of the nationalizing State is brought into play when it nationalizes a foreign enterprise in violation of an obligation freely and precisely assumed by it in an international agreement. This responsibility may also be involved, in connection with an undertaking contained in a contract under municipal law, if there is a denial of justice to the foreign concessionary through default of the ordinary courts or through a refusal to submit the dispute to any arbitral procedure that may have been substituted for internal jurisdiction.[19]

Numerous other leading authorities were cited in the first edition in support of the thesis being advanced.[20]

It was recalled by contrast that Ambassador Sompong Sucharitkul of Thailand had contended that there was:

. . . nothing sacrosanct, nothing final about arbitration, least of all the peremptory character, the impossibility of derogation from an obligation

[18] "The Status of Foreign Private Interests Stemming from Economic Development Agreements with Arbitration Clauses," printed in *Selected Readings, supra* note 15, pp. 117, 136.

[19] *Theory and Reality in International Law* (1957), translation by Percy E. Corbett, p. 194.

[20] Kenneth S. Carlston, "Concession Agreements and Nationalization," 52 *American Journal of International Law* (1958), p. 265; Prosper Weil, "Problèmes Relatifs aux Contrats Passés entre un Etat et un Particulier," 128 *Recueil des Cours* (1969), vol. III, p. 222; R.B. von Mehren and P.N. Kourides, "International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases," 25 *American Journal of International Law* (1981), p. 537; Riccardo Luzzato, "International Commercial Arbitration and the Municipal Law of States," 157 *Recueil des Cours* (1977-IV), pp. 17, 94; Hague Academy of International Law, *Colloquium on International Trade Agreements* (1969), pp. 330, 372 (Professor G. Kojanec), p. 345 (Professor George von Hecke).

to arbitrate. This would be more effective than international law, more powerful than supra-national law. It would be almost divine if once the State permits itself to submit to arbitration, it cannot allegedly derogate from this submission. However, it should be pointed out that the character of arbitration is itself voluntary, it is in itself extra-legal and conciliatory.[21]

Yet it was noted that other support had not been found in the literature for the position which Ambassador Sucharitkul may be viewed as taking that repudiation of the obligation to arbitrate contained in a contract with an alien is not a denial of justice.[22] This was by no means to suggest that there was virtual unanimity among international legal scholars in support of the thesis that a State's refusal to arbitrate is a denial of justice. The question had not been widely or profoundly addressed. But there was reason to conclude that support for the proposition was strikingly predominant among those who had considered the question.

Since the first edition, Professor Paulsson, in his leading treatment of denial of justice, clearly expressed his support for the proposition that a State's refusal to arbitrate may constitute a denial of justice.[23] Paulsson proceeds from the premise that "experience has shown, time and time again, that it is a crucial fact for the foreign victim of miscarriages of justice to achieve a neutral (i.e., international) adjudication of his grievance."[24] Proceeding from that premise, Paulsson quotes with approval from the leading decision in *Himpurna* v. *Indonesia* (discussed below, in which Paulsson himself chaired the tribunal): "it is a denial of justice for the courts of a State to prevent a foreign party from pursuing its remedies before a forum to the authority of which the State consented, and on the availability of which the foreigner relied in making investments explicitly envisaged by that State."[25]

[21] Hague Academy of International Law, *Colloquium on International Trade Agreements* (1969), p. 359.

[22] It was further noted that G. F. Amerasinghe, in *State Responsibility for Injuries to Aliens* (1967), p. 118, concluded that "refusal to make available the remedial rights afforded by the transnational system, i.e., by arbitration, would amount to a breach of international law. The local remedies are not relevant here."

[23] Paulsson, *supra* note 1, pp. 149–157. [24] Ibid., p. 149.

[25] Ibid., p. 152 (emphasis added by Paulsson, in his book). This case is discussed more fully below. See also Richard Garnett, "National Court Intervention in Arbitration as an Investment Treaty Claim," 60 *International Comparative Law Quarterly* (2011), pp. 485, 488; and, more cautiously, Berk Demirkol, *Judicial Acts and Investment Treaty Arbitration* (2018), p. 176, fn. 102.

Among those who have cast doubt on the first edition's conclusion that a State's refusal to arbitrate may constitute a denial of justice, Martins Paparinskis has questioned it on the basis, first, that an arbitral tribunal "is not an organ the conduct of which is attributable to the State for the purposes of responsibility," and, second, that "unless the State commits a wrongful act by breaching the contract by public powers . . . ,[26] its failure to participate in proceedings would *prima facie* not breach international law."[27]

Those observations are sensible from the general perspective of the law of State responsibility. But specific responses to both observations may be made.

So far as the attribution point is concerned, the proposition that a State's refusal to arbitrate may constitute a denial of justice takes aim not at the conduct of the tribunal, but at the conduct of the State in negating the arbitration. Switzerland's pleadings in the *Losinger* case, discussed in more detail below, provide a helpful illustration of this distinction. Yugoslavia had tried to shift the focus from its conduct in producing obstacles to the arbitration to which it had agreed with a Swiss company onto the arbitrator's decision in that case to reject his competence. But Switzerland, which had taken up the claim on behalf of its national before the PCIJ, made it clear that its complaint focused on Yugoslavia's legislation that, as Yugoslavia itself contended before the arbitrator, operated retrospectively so as to deprive the arbitrator of jurisdiction; this, Switzerland contended, was "an act directly perpetrated by the State which permitted it to deprive the arbitral clause of its content. There is the violation of the duty of a State to respect the rights of aliens."[28] More generally, it is well accepted that denial of justice covers a State's preventing a party from accessing a tribunal in the context of domestic denials of justice;[29] there is no reason of principle or policy why that denial of access cannot form the relevant conduct in the case of international denials of justice too.

[26] A proposition for which he quotes Stephen M. Schwebel, "On Whether a Breach by a State of a Contract with an Alien Is a Breach of International Law," in Stephen M. Schwebel (ed.), *Justice in International Law* (1994), p. 425.

[27] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2014), p. 210, fn. 267.

[28] The *Losinger & Co. Case, P.C.I.J.*, Series C, No. 78, p. 26, at p. 367 (translation supplied).

[29] See, for example, Paulsson, *supra* note 1, pp. 44–53; Ch. 6.

As for the point that a State's breach of contract does not, *ipso facto*, create a breach of international law, it is possible both to accept that general principle and to acknowledge that a State's refusal to arbitrate is a special category of breach of contract that may, in principle, be set apart from the general run of contract breaches. This point is considered in more detail below.

In addition to those critiques, it is worth noting the practical observation made by Alan Redfern in his review of the first edition of this book. His view was that a party facing a State that refuses to arbitrate would be "best advised to press ahead with the arbitration if at all possible, so as to obtain a default award, rather than pin its hopes on receiving compensation for a 'denial of justice.'"[30] It is true that, as international arbitration procedures have developed, there are now greater possibilities of moving forward with an arbitration in the absence of a respondent's participation – including, as discussed in the third chapter, before a truncated tribunal. It may even be that the tribunal's determination to avoid a denial of justice may encourage a tribunal to move forward with an arbitration notwithstanding the respondent State's refusal to participate.[31] That itself serves to remedy the denial of justice. Moreover, as some of the new cases discussed below demonstrate, denial of justice by governmental negation of arbitration has continued to arise, including in some novel contexts.

Other recent cases have placed in sharp relief the unfortunate reality that, even where possible, pressing ahead in the face of a State's refusal to arbitrate and successfully obtaining a default award may be of little value to a claimant if the respondent State, or State-owned entity, is intent on its refusal to comply with the award. This is especially so if the respondent State is able to rely on its own complaisant courts to set the award aside or defeat enforcement without cause. The facts of the landmark *Saipem* v. *Bangladesh* case lay bare the salience of this problem.[32] The backdrop to that case was an earlier Bangladesh-seated arbitration brought by an Italian company, Saipem, against a Bangladeshi State-owned entity, Petrobangla.

[30] Alan Redfern, "Book Review – International Arbitration: Three Salient Problems," 4 *Journal of International Arbitration* (1987), pp. 165, 166.
[31] See Sections C.2(i), (j), and (m), *infra*.
[32] See *Saipem* v. *Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction, March 21, 2007; Award, June 30, 2009.

During that arbitration, Petrobangla successfully applied to the Bangladeshi courts to first enjoin the arbitration and then revoke the authority of the tribunal to hear the arbitration. The arbitral tribunal nevertheless proceeded, having determined that the decisions of the Bangladeshi courts could not affect it, and it delivered an award of damages in favor of Saipem for Petrobangla's breach of contract. But Petrobangla then applied to the Bangladeshi courts to set the award aside, to which those courts replied that there was nothing to set aside because the award was "a nullity." As Petrobangla had no assets outside of Bangladesh, it seemed to have "successfully" negated the arbitration.

That was until Saipem turned toward its direct right to launch an arbitration against Bangladesh under the Italy-Bangladesh Bilateral Investment Treaty. Saipem invoked and quoted the first edition of this text: "The contractual right of an alien to arbitration of disputes arising under a contract to which it is party is a valuable right, which often is of importance to the very conclusion of the contract."[33] The investment tribunal agreed. It reasoned that "the right to arbitrate and the rights determined by [an] Award are capable in theory of being expropriated."[34] The tribunal went on to hold that those rights, as part of Saipem's overall investment in Bangladesh, had been expropriated in this case, and ordered Bangladesh to pay damages in the amount that Petrobangla owed as damages from the earlier arbitration (plus interest).

The *Saipem* tribunal thereby triggered a line of cases that has markedly expanded the options available to an alien when faced with a State's attempts to negate arbitration – while at the same time grappling with the conceptual difficulties to which such a rapid and significant development of international law has inevitably given rise. These new cases represent the most notable development in this area of law since the time of the first edition and, on the basis that understanding these cases is indispensable to any treatment of the issue of the recourse available to an alien when faced with a State's attempted negation of arbitration, they are considered in detail below.

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Before turning to consider in some detail the relevant practice, both in respect of denial of justice and other causes of action, four

[33] Ibid., Decision on Jurisdiction, *supra* note 32, para. 131.
[34] Ibid., Award, *supra* note 32, para. 122.

related issues that were examined in the first edition may be considered at this point.

The *first* related issue concerns the relevance of the general principle that a State's breach of a contract with an alien is not *ipso facto* a breach of international law. This general principle, as noted above, has been cited against the proposition that a denial of justice may arise from a State's repudiation of an arbitration agreement.

The starting point is that a contract between a State and an alien is not an instrument of international law; it therefore does not give rise to obligations under the law of treaties. On this, there is no dispute.[35] But there is considerable authority in support of the proposition that, while mere breach by a State of a contract with an alien governed by domestic law is not a violation of international law, a "non-commercial" act of a State contrary to such a contract may be. Thus in the classic *Shufeldt Claim*, the Guatemalan Legislative Assembly passed a decree that repudiated the American claimant's chicle concession, which was held to engage the international responsibility of Guatemala and render it liable for damages.[36] In more recent jurisprudence, the key question has been framed as whether the respondent State "stepped out of the contractual shoes" and, "in fact, acted in its sovereign capacity" when it committed the contractual breach in question.[37] From this perspective, then, there is nothing unprincipled about a State's repudiation of its contractual agreement to arbitrate through the exercise of sovereign capacity, for example, through the enactment of legislation preventing arbitration against the State, giving rise to international responsibility.

The point of principle becomes even clearer when one recalls that, in domestic denial of justice cases, a breach of contract for which no effective remedy is reasonably available in domestic courts could give rise to a denial of justice.[38] From this it

[35] See generally, Schwebel, *supra* note 26; more recently, see, for example, *Waste Management* v. *Mexico (No. 2)*, ICSID Case No. ARB(AF)/00/3, Award, para. 175; *Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8, Award, para. 448; *Suez Sociedad General de Aguas de Barcelona SA* v. *Argentina*, ICSID Case No. ARB/03/19, Decision on Liability, para. 153.

[36] *Shufeldt Claim (Guatemala, US)* (1930) II RIAA 1079.

[37] *Vigotop Ltd* v. *Hungary*, ICSID Case No. ARB/11/22, Award, October 1, 2014.

[38] See generally on the reasonableness qualification to the requirement to exhaust local remedies, Paulsson, *supra* note 1, pp. 112–120.

can also be contended that a State's repudiation of an arbitration agreement, for which no effective remedy is reasonably available, may give rise to a denial of justice. This line of reasoning is reflected in the American Law Institute's *Foreign Relations Law of the United States* (as revised in 1986). Section 712 provides:

Economic Injury to Nationals of Other States

A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that is (a) not for a public purpose, or (b) discriminatory, or (c) not accompanied by provision for just compensation . . .
(2) a repudiation or breach by the state of a contract with a national of another state
    (a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by other non-commercial considerations and compensatory damages are not paid or
    (b) where the foreign national is not given an adequate forum to determine his claim of breach or is not compensated for any breach determined to have occurred;
(3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

Comment h to this section provides, in relevant part:

With respect to any repudiation or breach of a contract with a foreign national, a state may be responsible for a denial of justice under international law if it denies to an alien an effective domestic forum to resolve the dispute and has not agreed to any other forum; *or if, having committed itself to a special forum for dispute settlement, such as arbitration, it fails to honor such a commitment*; or if it fails to carry out a judgment or award rendered by such domestic or special forum.

(Emphasis added.)

All of this is a reflection of the reality that the right of an alien to arbitration of disputes under a contract is a valuable right, at times so valuable that the alien will contract only on condition of contractual assurance of that right. That, too, was the view of Dr. Mann: "[w]hatever the positon may be in regard to contractual obligations in general, the repudiation of an arbitration clause has a distinct and special character in that it involves the denial of access to the

only tribunal which has jurisdiction and which upon the parties have agreed."[39]

The *second* related issue is whether an alien may properly assert a cause of action under international law like denial of justice before an arbitral tribunal constituted pursuant to a contract with a State. The question may, in practice, pose few difficulties. If the State is not in fact able to block the arbitration from proceeding altogether, then, as Redfern observed, the alien may be best advised simply to pursue the arbitration by making the same claims it would have made irrespective of the respondent State's default. Adding denial of justice as a claim may serve little practical benefit. In each of the three well-known arbitrations of *BP*,[40] *Texaco*[41] and *LIAMCO*[42] v. *Libya*, for example, wherein Libya refused to participate, none of the aliens considered it necessary to invoke denial of justice in addition to expropriation. If the alien decides to pursue a claim, however, it may be able to do so under an investment treaty which requires fair and equitable treatment and provides a means to resolve disputes in respect of that obligation.

There is also the situation where the alien, faced with a respondent State's attempt to negate the arbitration in some way, may wish to impress upon the tribunal that, were it to sustain the respondent State's refusal to arbitrate, this would give rise to a denial of justice contrary to international law. In this context tribunals have clearly rejected the proposition that, just because the applicable substantive law may be a domestic law, the arbitration should therefore be "insulated from the imperatives of international law."[43] On the contrary, the tribunal in *Construction Pioneers* v. *Ghana* explained "that there is today ample authority in international arbitral

[39] F.A. Mann, "State Contracts and International Arbitration," XLII *British Year Book of International Law* (1967), pp. 1, 26.

[40] *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic*, 53 *International Law Reports*, p. 297.

[41] *Texaco Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic*, 53 *International Law Reports*, p. 389.

[42] *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic*, 62 *International Law Reports*, p. 141.

[43] *Himpurna California Energy Ltd.* v. *Indonesia*, Interim Award and Final Award, September 26, 1999 and October 16, 1999, XXV *Yearbook Commercial Arbitration* (2000), p. 109, para. 175. *Construction Pioneers Baugeselleschaft Anstalt* v. *Government of the Republic of Ghana, Ministry of Roads and Transport*, ICC Case No. 12078/DB/EC, Partial Award, December 22, 2003, para. 131.

jurisprudence for the proposition that the existence of a contract involving a State or State party, as in the present case, is 'suffic[ient] to bring the resultant relationship [with the foreign counter party] within the sphere of protection of international law.'"[44]

The *third* related issue is whether it is open to the contracting State to plead its sovereign immunity as a valid defense to the invocation of arbitration, and, hence, to the charge of denial of justice flowing from the negation of arbitration? The answer to this question is clearly not. A State is entitled, in certain circumstances, to plead immunity from suit against it, which is maintained in the courts of another State, on the principle *par in parem non habet imperium*. But the principle that one sovereign shall not judge another without the latter's consent cannot apply to proceedings before an arbitral tribunal, which is the instrument of the sovereignty of no State; one sovereign is not sitting in judgment upon another.[45] Since sovereign immunity cannot properly be pleaded before such an arbitral tribunal, a plea of sovereign immunity provides no defense to the claim – certainly if made before such a

[44] *Construction Pioneers Baugeselleschaft Anstalt, supra* note 43, para. 131 (quoting the first edition of this book).

[45] See, in support of this analysis, the arbitral award of an ICC-named sole arbitrator, sitting in Sweden, in ICC Case No. 2321, *Solel Boneh International Ltd. (Israel) and Water Resources Development International (Israel)* v. *The Republic of Uganda and National Housing and Construction Corporation of Uganda* (1974). Uganda sought to plead sovereign immunity. The arbitrator held: "As arbitrator, I am myself no representative or organ of any State. My authority as arbitrator rests upon an agreement between the parties to the dispute and by my activities I do not, as do State judges or other State representatives, engage the responsibility of the State of Sweden. Furthermore, the courts and other authorities of Sweden can in no way interfere in my activities as arbitrator, neither direct me to do anything I do nor to direct me to abstain from doing anything which I think I should do. . . . As I do not consider that the doctrine of sovereign immunity has any application whatsoever in arbitral proceedings which are, as in Sweden, conducted independently of local courts, it is not necessary to enter upon the question of a waiver of immunity. . . ." Clunet, *Journal du Droit International* (1975), pp. 938, 940. See also the note by Yves Derains that follows, especially at p. 944. A report is also found in I *Yearbook Commercial Arbitration* (1976), pp. 133–135 and in J. Gillis Wetter, "Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals," 2 *Journal of International Arbitration* (1985), pp. 7, 9–10. For another award to similar effect which relies upon the *Solel Boneh* award, see *S.P.P. (Middle East) Limited et al. and the Arab Republic of Egypt et al.* (1983), XXII *International Legal Materials* (1983), pp. 752, 770–771, 774, 776 (annulled by the Paris Court of Appeal on another ground).

tribunal – that a State's refusal to arbitrate gives rise to a denial of justice. This is irrespective of any question of waiver of immunity, which is only relevant to the extent of any proceedings before a national court in connection with an arbitration.

The *fourth* related issue is whether it is open to the contracting State to plead failure to exhaust local remedies as a valid defense to the charge of denial of justice flowing from negation of arbitration. This, as will be seen from the study of practice below, was precisely the plea, which was the, or a, principal defense advanced by Yugoslavia in the *Losinger & Co.* case, by Iran in the *Anglo-Iranian Oil Company* case, and by Lebanon in the *Compagnie du Port de Beyrouth* case.

The International Court of Justice has stated the rule of the exhaustion of local remedies, in the context of diplomatic protection claims, in the following terms:

> The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.[46]

In the context of denial of justice, Professor Paulsson has formulated the test as being qualified by whether there is a "reasonable possibility of an effective remedy."[47]

[46] *Interhandel Case (Switzerland* v. *United States), Judgment of March 27, 1959, I.C.J. Reports 1959,* pp. 6, 27.

[47] Paulsson, *supra* note 1, p. 118. See also *Chevron* v. *Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018, para. 7.117: "In the Tribunal's view, it is well settled that a claimant asserting a claim for denial of justice committed by a State's judicial system must satisfy, whether as a matter of jurisdiction or admissibility, a requirement as to the exhaustion of local remedies or, as now better expressed, a substantive rule of judicial finality. Even the grossest misconduct by a lower court or manifest unfairness in its procedures is not by itself sufficient to amount to a denial of justice by a State, unless the judicial remedies that exist in that State either do not correct the deficiencies in the lower court's judgment (once exhausted by the foreign national) or are such that none affords to the foreign national any reasonable prospect of correcting those deficiencies in a timely, fair and effective manner."

But the rule of exhaustion of local remedies has no application to the case of a refusal by a State to arbitrate pursuant to a contractual obligation with an alien to arbitrate, for at least three reasons.

In the first place, when a State undertakes an obligation in a contract with an alien to arbitrate disputes arising under that contract, and when it subsequently repudiates that obligation, it stands in breach of an obligation "of conduct" or "of means," rather than an obligation "of result."[48] A State can obligate itself to act in a particular way; or it can oblige itself to achieve a particular result. If its obligation is no more than the latter, it is free to achieve that result by a variety of means, and, as long as it ultimately does so, no breach of an international obligation arises. The rule of exhaustion of local remedies applies to such obligations of result; and a breach of an international obligation in such cases arises only if the alien concerned has exhausted the effective local remedies available without achieving the promised result. Where, however, the State has bound itself by an obligation of conduct to act in a particular way – for example, to arbitrate disputes with an alien – then it is in no position to say that it will enable justice to be done in another way; it has bound itself to providing the specified means of arbitration and where, by its conduct, it fails to do so, violation of its obligation arises. The requirement of exhaustion of local remedies does not come into play.

This approach may be countered by the contention that, when a State contracts with an alien, it does not conclude an instrument of international law; thus it undertakes no "international" obligations but only the obligations of the contract and those provided by the governing municipal law (normally, that of the contracting State). But this critique embodies an important *non sequitur*. As already discussed above, contractual obligations must still be exercised in a way that is consistent with a State's international obligations.

In the second place, when a contract between a State and an alien provides that the exclusive remedy for settlement of disputes under that contract is arbitration, arbitration is the sole remedy,

[48] See, generally, James Crawford, *State Responsibility: The General Part* (2013), pp. 220–223.

which is to be exhausted, standing in lieu of local remedies. It was so argued by Switzerland, the United Kingdom, and France when they espoused the claims of their nationals in the *Losinger, Anglo-Iranian*, and *Compagnie du Port de Beyrouth* cases.[49] Perhaps the most emphatic of the arguments advanced was that of the United Kingdom, which maintained that, since arbitration of disputes was prescribed, "... on any view, therefore, the Company was not obliged or even permitted to have recourse to Iranian municipal courts."[50] While the issue was not passed upon by the Permanent Court of International Justice or the International Court of Justice, it has been authoritatively addressed in terms supportive of this conclusion by the following authorities.

In his award in *LIAMCO* v. *Libya*, the sole arbitrator, Dr. Sobhi Mahmassani, held as follows:

> As the arbitration clause and the procedure outlined therein are binding upon the contracting parties, and the procedure outlined therein being imperative, the Arbitral Tribunal constituted in accordance with such clause and procedure should have exclusive jurisdiction over the issues of the dispute. No other tribunal or authority, local or otherwise, has competence in the matter.
>
> The exclusive and compulsory character of the arbitration process in such a case is widely admitted in international law. It has been affirmed by international arbitral precedents, such as the *British Petroleum Arbitration* referred to above, and has also been incorporated in the Convention of 1966 on the Settlement of Investment Disputes between States and Nationals of other States. Its Article 26 reads as follows:
>
> > "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy ...."[51]

[49] See discussion in Section C.1, *infra*. The plaintiff States supplied considerable support for their position, some of which is referred to above.

[50] *Anglo-Iranian Oil Co. Case (United Kingdom* v. *Iran), Pleadings*, p. 365.

[51] *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic*, 62 *International Law Reports*, pp. 179–180. See, in respect of the relevant implications of Article 26 of the ICSID Convention and the *Losinger, Anglo-Iranian, Electricité de Beyrouth*, and *Compagnie du Port* cases, Stephen M. Schwebel and J. Gillis Wetter, "Arbitration and the Exhaustion of Local Remedies," 60 *American Journal of International Law* (1966), p. 484.

García Amador was more categoric. He concluded that where, in a contract or concession between a State and an alien, there should be recourse to international arbitration to settle any dispute which may arise thereunder:

the recourse to international jurisdiction . . . is not subject to the requirement that local remedies must be exhausted . . . for the said instruments would be deemed to contain a tacit waiver, by the State making the contract with an alien, of the right to require the exhaustion of local remedies. Furthermore, if the essential purpose of the arbitration clause in those instruments is precisely to empower the parties to present a claim before an international tribunal whenever a dispute arises, what would be the sense of requiring recourse to municipal jurisdiction? And, in strict accuracy, is it not also the essential design of such instruments that all disputes concerning their interpretation and application should be removed from local jurisdiction?[52]

In his Preliminary Award in *Elf Aquitaine Iran* v. *National Iranian Oil Company*, the sole arbitrator, Professor Gomard, provided a comprehensive response to NIOC's contention that the alien's arbitration claim was precluded by unexhausted local remedies:

The International Court of Justice has declared that "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law", *Interhandel* case (Switzerland v. United States of America) (1959) *I.C.J. Reports*, at page 27. This rule of local remedies or redress that would require ELF to present its claims to the [Iranian] Special Committee before turning to an international remedy does, however, govern only complaints made by a state in the exercise of its right of diplomatic protection of its nationals, cf. e.g. *Manual of Public International Law*, 1958, edited by *Max Sorensen*, p. 582, and not, as pointed out by *Maurice Bourquin* in an article in *The Business Lawyer*, Volume XV (1960) p. 860 et seq., to a request from a party to an agreement on arbitration to initiate arbitral proceedings under that agreement. The parties have by choosing arbitration established a procedure for settlement of disputes which excludes the national legal remedies provided for in national legislation. The established procedure also implies that each party is entitled to have disputes settled by arbitration

[52] "International responsibility. Fifth Report by Dr. F.V. García Amador, Special Rapporteur," *Yearbook of the International Law Commission 1960*, vol. II, p. 57. See also Luzzato, cited *supra* note 20, at p. 94.

without evoking diplomatic protection and thus without fulfilling conditions to be met in order for their government to exercise diplomatic protection.[53]

In the third place, it is an established principle of international judicial and arbitral practice that the requirement of exhaustion of local remedies does not apply (in a case where it otherwise would apply) where there are no local remedies to exhaust. Thus the Permanent Court of International Justice in 1939 held that: "There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief. . . ."[54] Moreover, local remedies must be exhausted only if they can be effective.[55] As discussed above, more recent doctrine and case law has framed the question as being whether there is a "reasonable possibility of an effective remedy."[56]

Where a State refuses to carry out the terms of an arbitral clause of a contract with an alien, there normally are no administrative or judicial remedies of that State that an alien could invoke which could oblige the State to arbitrate. Particularly where the State so refuses pursuant to legislation enacted subsequent to the conclusion of the contract, it would be most exceptional to find local remedies capable of overriding such legislation. If there are no effective remedies to which the alien contractor could resort to require the State to arbitrate, then, for this further reason, the rule of exhaustion of local remedies would not apply.

[53] XI *Yearbook Commercial Arbitration, supra* note 12, pp. 104–105.

[54] *The Panevezys-Saldutiskis Railway Case, P.C.I.J.*, Series A, No. 76, p. 18.

[55] As held, for example, by Dr. Algot Bagge in 1934 in the *Claim of Finnish Shipowners against Great Britain in Respect of the Use of Certain Finnish Vessels during the War*, III *U.N.R.I.A.A.*, pp. 1481, 1543. See also, for example, Paulsson, *supra* note 1, ch. 5. In his Separate Opinion in the *Norwegian Loans Case*, Judge Lauterpacht observed:

> For the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it. (*I.C.J. Reports 1957*, pp. 34, 39.)

[56] Paulsson, *supra* note 1, p. 118. See also *Chevron* v. *Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018, para. 7.117.

The question is not whether there are remedies in lieu of arbitration, which if pursued might afford the alien contractor compensation for the wrong of which he complains. There may indeed be such remedies, which in some cases might be effective, but they do not remedy the wrong at issue: that of the failure to provide the arbitral recourse for which the contract provides. In respect of that failure, recourse to local remedies is not required or, it may be argued, as it was in the *Anglo-Iranian Oil Company* case, even permitted.

C. The Practice

The relevant practice consists both of the contentions of States before international tribunals and arbitral awards. Those arbitral awards consist not just of those awards wherein denial of justice is addressed, but also recent investment treaty awards that have considered how other standards of treatment may apply in the context of States' attempts to negate arbitration.

1. Contentions of States

The origins of denial of justice as a means of confronting a State's attempt to negate arbitration can be found in the contentions of States before international tribunals.[57]

[57] The I.C.J. has recognized that the pleadings of States before *national* courts can amount to State practice (*Jurisdictional Immunities (Germany* v. *Italy), Judgment, I.C.J. Reports 2012*, para. 55), and there is no obvious reason why the same cannot apply to the pleadings of States before *international* tribunals: Maurice Mendelson, "The Formation of Customary International Law," 272 *Recueil des Cours* (1998), pp. 155, 204; Ian Brownlie, "Some Problems in the Evaluation of the Practice of States as an Element of Custom," in *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz*, vol. I (2004), pp. 313, 315: "it seems obvious that statements made by Agents and Counsel before international tribunals constitute State practice"; Schwebel, *supra* note 26, pp. 70–71; Paparinskis, *supra* note 27, Introduction to the Paperback Edition; Michael Wood, ILC Special Rapporteur on the Identification of Customary Law. "Second Report on Identification of Customary International Law" (May 22, 2014) U.N. doc. A/CN.4/672, para. 41.

(A) *THE LOSINGER & CO. CASE*

The Losinger & Co. case is the earliest of four cases before the Permanent Court of International Justice and the International Court of Justice in which the issue of a denial of justice for evasion of the arbitral remedy was argued. (The facts of this complex case most relevant to the question under discussion are summarized above.) Switzerland initially maintained that Yugoslavia, by invoking before an arbitrator a subsequently enacted law in order to vitiate a prior compromissory clause of a contract with an alien, had abused its rights;[58] violated the fundamental international legal norm of *pacta sunt servanda*;[59] and deprived Losinger of its acquired right to arbitration.[60] It sought the Court's "judgment to the effect that the Yugoslav Government cannot claim release from the terms of a clause of its contract with the *Société anonyme Losinger & Cie*, by adducing the Yugoslav law of July 19, 1934 concerning the conduct of State litigation, which came into force on October 19, 1934, and which is therefore of more recent date than that contract."[61]

Yugoslavia replied that it had breached no international obligation[62] and that, in any event, Losinger & Co. had failed to fulfil the precondition for Switzerland to advance an international claim: the exhaustion of local remedies.[63] It cited and adopted an arbitral award by Max Huber where he held that "a claim of an international character based on an alleged denial of justice can only be entertained if the judicial remedies afforded by the competent municipal courts have first been exhausted."[64] It maintained that the contract with Losinger, including the arbitration clause, was governed by Yugoslav law and that Losinger was obliged to resort to Yugoslav courts to challenge the retroactive application of Yugoslavia's 1934 law, a challenge that it contended Yugoslav courts could entertain.[65] Since the 1934 law on its face was not necessarily retroactive and since the Yugoslav courts had not upheld retroactive

[58] *The Losinger & Co. Case, P.C.I.J.*, Series C, No. 78, p. 26. [59] Ibid., pp. 32–34.
[60] Ibid., pp. 35–38. [61] Ibid., p. 9. [62] Ibid., pp. 121–129.
[63] Ibid., pp. 129–135.
[64] Ibid., pp. 130–131. (While the Objection of the Yugoslav Government did not provide the source of this quotation, it appears to be *Affaire des biens britanniques au Maroc espagnol* (1925), II U.N.R.I.A.A., p. 617.)
[65] *The Losinger & Co. Case, P.C.I.J.*, Series C, No. 78, pp. 132–135, 254, 257.

application of the 1934 law to the arbitral clause, Yugoslavia had committed no act that could be construed as a violation of international law. It had adopted a law generally debarring arbitral action against the State, and, if the arbitrator in response to it had held that his competence was suspended, that was no fault of Yugoslavia's, and no denial of justice engaging its international responsibility.[66]

The Swiss Agent, Professor Georges Sauser-Hall, responded that the arbitral remedy under the Losinger contract was exclusive and that Losinger would not have signed the contract without it. He stated that Switzerland sought from the Court the declaratory judgment that Yugoslavia's objection to the arbitrator's jurisdiction founded on retroactive application of the 1934 law was contrary to international law.[67] He observed that Yugoslavia – which before the Court maintained that the Yugoslav courts had not found the 1934 law to have or not to have retroactive effect – had claimed retroactive application before the arbitrator and had never withdrawn that claim. It was now estopped by considerations of good faith from pleading uncertainty about retroactivity when it had pleaded preclusive certainty before the arbitrator.[68] Sauser-Hall made it clear that Switzerland saw a denial of justice in Yugoslavia's undermining of the exclusive arbitral remedy for which the contract with Losinger provided by its argument to the arbitrator that the retroactive application of the 1934 law vitiated Losinger's arbitral access. "The notion of denial of justice ... particularly comprehended obstruction of access to the competent tribunals."[69] The arbitral obstructions to which Losinger had been subjected were the responsibility of the Yugoslav State; not only its legislation, which it argued to the arbitrator was "ordre public," but its administration of that legislation were subject to criticism.[70] Sauser-Hall maintained that there was no effective recourse in Yugoslav courts against the 1934 law and set out what was the precise nature of the denial of justice of which Switzerland complained, in these terms:

[66] Ibid., pp. 191–193, 199–200. [67] Ibid., p. 295. [68] Ibid., pp. 307, 317.
[69] Ibid., p. 313 (translation supplied).
[70] Ibid., pp. 313–314, 315–317, 366–367.

Losinger & Co. had sought access to the arbitral tribunal established by the contract. It sought nothing more. The Yugoslav State had the obligation to accept that jurisdiction. It had contractually submitted to it. Now, it paralyzed the jurisdictional potency of the sole competent tribunal, that of the arbitrator. The proof was indubitably produced: one need only read the arbitrator's interlocutory decision and the demands made of him by the Yugoslav representatives. That is the complaint of Switzerland: . . . Yugoslavia's having blocked access to the competent tribunal, the arbitral tribunal. . . .[71]

Sauser-Hall concluded that:

It cannot be denied that breach of an obligation to arbitrate is a flagrant violation of law; and, when that obligation had been concluded between a State and an alien, that violation constitutes a disavowal of the status guaranteed to aliens by the rules of international law . . . .[72]

Yugoslavia had endeavored to place responsibility on the shoulders of the arbitrator, but the arbitrator had responded to a plea of the Yugoslav State – a plea that was "contrary to the arbitration clause. Yugoslavia was obliged to accept arbitration; its plea was the application of a posterior law to the contract and was contrary to its provisions . . . ."[73] This was not a simple procedural defense, it was "an act directly perpetrated by the State which permitted it to deprive the arbitral clause of its content. There is the violation of the duty of a State to respect the rights of aliens."[74] Whether or not the arbitrator was right to dismiss the arbitration, the fact remains that there was a governmental decision to renege upon its arbitration agreement.

A judgment of the Court did not ensue, since the Parties settled the case and requested that it be discontinued.[75]

While Switzerland's claims of violation of international law (denominated as a denial of justice or otherwise) by Yugoslavia's objecting to the arbitrator's jurisdiction on the ground of retroactive application of the 1934 law are clear, it is equally clear that Yugoslavia did not concede any violation of international law, by denial of justice or otherwise. It is striking, however, that apparently

[71] Ibid., p. 317 (translation supplied).
[72] Ibid., p. 365 (translation supplied).
[73] Ibid., p. 366 (translation supplied).
[74] Ibid., p. 367 (translation supplied).
[75] *The Losinger & Co. Case, P.C.I.J.*, Series A/B, No. 69, Order of December 14, 1936.

nowhere did Yugoslavia contend that a definitive rupture by it of the arbitral agreement would not engage its international responsibility. Yugoslavia refrained from directly replying to this Swiss contention by arguing that the act of suspending the arbitration was the arbitrator's and that disavowal of the arbitral remedy by retroactive application of the 1934 law could not be imputed to the State of Yugoslavia until Yugoslav courts had ruled that it had such application. One might therefore deduce from the pleadings an implicit acknowledgement by Yugoslavia that definitive repudiation by it of the arbitral remedy contained in the contract would have constituted a denial of justice.

(B) *THE ANGLO-IRANIAN OIL COMPANY CASE*

In the *Anglo-Iranian Oil Company* case, the Iranian Government claimed to have annulled the concession of the company through enactment of the Iranian Oil Nationalization Act of 1 May 1951. Article 22 of the concession agreement concluded by Iran and the company in 1933 provided for arbitration of "[a]ny differences between the parties of any nature whatever. . . ."[76] In its application instituting proceedings, the United Kingdom asked the Court, *inter alia:*

(a) To declare that the Imperial Government of Iran are under a duty to submit the dispute between themselves and the Anglo-Iranian Oil Company, Limited, to arbitration under the provisions of Article 22 . . . and to accept and carry out any award issued as a result of such arbitration.
(b) Alternatively,
  (i) . . .
  (ii) To declare that Article 22 . . . continues to be legally binding on the Imperial Government of Iran and that, by denying to the Anglo-Iranian Oil Company, Limited, the exclusive legal remedy provided in Article 22 . . . the Imperial Government have committed a denial of justice contrary to international law. . . .

The refusal of the Imperial Government of Iran to have recourse to arbitration constitutes a denial of justice

45. This refusal of the Iranian Government to allow the clause of the Concession Convention providing for arbitration any effect whatever

[76] *Anglo-Iranian Oil Co. Case, Pleadings, supra* note 50, p. 31.

enhances the unlawfulness of the unilateral termination of the Convention and adds to it the element of another international delinquency, namely, denial of justice. For some such procedure of arbitration on compensation is essential if the principle of the nationalization of the oil industry in Iran is conceded. The Oil Nationalization Act of 1st May 1951 itself provides for the determination of compensation, but . . . this provision is illusory and nominal since the Iranian Parliament is itself to adjudicate upon the claims of the Company. There is no principle of law more fundamental than that a party cannot be judge in its own cause . . . It would have been possible for the Government of Iran, while insisting on its right to terminate the Convention of 1933 on account of the law nationalizing the oil industry in Iran, to leave the arbitration clause of Article 22 intact.

46. For the reasons set out in the two preceding paragraphs, the Government of the United Kingdom contends that, even if the Iranian Government was entitled to cancel unilaterally the Convention of 1933, such cancellation need not, necessarily or automatically, extend to the arbitration clause of the Convention so as to exclude the Arbitration Court (provided for in that clause) as the body to assess compensation. Reasons of legal principle, supported by precedent, and considerations of good faith require that that clause should be given effect in every possible case. The refusal of the Government of Iran to give any effect at all to the arbitration clause of the Convention and its determination to remain the sole judge in matters arising out of the unilateral cancellation of the Convention – in particular with regard to the compensation due to the Anglo-Iranian Oil Company – constitute tortious actions which engage the international responsibility of Iran.

47. There cannot in this case be any question of the responsibility of the Imperial Government of Iran being dependent upon any previous exhaustion of available local remedies, since it is an established principle of international judicial and arbitral practice that the requirement of exhaustion of local remedies does not apply in cases where there are no local remedies to exhaust. There are no local remedies under the law of Iran against a law passed by the Iranian legislature. Moreover, the legal remedies for a breach of the Convention of 1933 are the remedies provided for in Article 22 of the Convention, namely, recourse to the Arbitration Court provided for in that Article. That legal remedy the Government of Iran has repudiated expressly and repeatedly – a repudiation which in itself constitutes the international delinquency of denial of justice. Further, Iran has not only excluded arbitration as a remedy for the Company to use if the Company disputes, as it does, the legality of the expropriation. The expropriation has itself been justified in part by allegations of default or misconduct on the part of the Company, yet Iran has not called upon the Arbitration Court provided for in the Convention to examine these

allegations, although this Arbitration Court certainly had exclusive jurisdiction to pronounce upon allegations of default. Instead Iran has made herself the judge in her own cause on this issue also.[77]

It is of interest to note, given this book's origins in the Lauterpacht Lectures, that the quoted passages of the British Memorial in the *Anglo-Iranian Oil Company* case are taken virtually verbatim from a draft prepared by the then Professor Lauterpacht, who was one of the British counsel in the case, and who had been retained by the Company to prepare on its behalf the first draft of what became the British Memorial.[78] The passages quoted characterizing the Iranian Government's refusal to abide by the arbitration clause as "an international delinquency consisting in denial of justice"[79] appear in Lauterpacht's draft. He described that refusal as amounting "to a tortious action which engages the international responsibility of Iran."[80]

Iran replied that, apart from the fact that the "Iranian nation" had always considered the 1933 concession to be null and void, the concession had disappeared with the nationalization; accordingly Article 21 (providing that: "This Concession shall not be annulled . . ."),[81] and Article 22, providing for arbitration, had also become non-existent and were a "dead letter."[82] There was no denial of justice because of the overthrow of Articles 21 and 22, because the nationalization law was (allegedly) not discriminatory.[83] Moreover:

> The charge of denial of justice may only be raised in conformity with international law after the exhaustion of local remedies. To maintain that the refusal to arbitrate, pursuant to Article 22, is of itself a denial of justice is to fail to recognize that, even assuming the validity of the 1933 concession, Article 22 no longer exists and has not survived the nationalization law. Furthermore, there is no denial of justice since the impossibility of application of Article 22 of the concession has given rise to a transfer of competence to Iranian jurisdiction. The nullification of Article 22 puts an end to what in reality was a "privilege" . . .[84]

[77] Ibid., pp. 120–122.
[78] See E. Lauterpacht, editor, *International Law Being the Collected Papers of Hersch Lauterpacht*, vol. 4 (1978), p. 23.
[79] Ibid., p. 50. See also, p. 74. [80] Ibid., p. 52.
[81] *Anglo-Iranian Oil Co. Case, Pleadings, supra* note 50, p. 31.
[82] Ibid., p. 288 (translation supplied). [83] Ibid., p. 290.
[84] Ibid., p. 291 (translation supplied).

By a vote of nine to five, the International Court of Justice decided that it lacked jurisdiction in the case and thus it did not render judgment on the merits.[85] The pleadings in the *Anglo-Iranian Oil Company* case nevertheless constitute a classic confrontation of the question of denial of justice in circumstances that continue to have contemporary reverberations. Iran's refusal to arbitrate was pointedly denominated a denial of justice by the United Kingdom and was one of the principal counts[86] on which it advanced its case. Iran denied that it had committed a denial of justice, but its contentions were not convincing. Its claim that its arbitral obligations disappeared with the concession contract conflict with the rule of severability discussed in the first chapter. Its claim that there was no denial of justice because of the presence of local, Iranian, remedies was misconceived. Those remedies of appeal to a committee of the Majlis related to compensatory elements of the merits, not to requiring arbitration in accordance with the terms of the concession contract. Iran's reliance on such an appeal to respond to the claim of denial of justice did not meet the point, namely, that for a State to refuse the exclusive remedy that it had bound itself by a contract with an alien to accord is to deny justice by the very act of refusing that remedy.

Only one Judge of the Court dealt with the question of denial of justice, Judge Levi Carneiro. In his wide-ranging opinion that dissented on declining jurisdiction, Judge Levi Carneiro agreed with the British contention that the refusal of Iran to set up the arbitration tribunal provided for in the concession contract "constitutes a denial of justice on the part of the Iranian Government." He saw "in this a grave violation of international law."[87]

(c) *Electricité de Beyrouth Company case*

In the *Electricité de Beyrouth Company* case, differences arose in 1953 between the Lebanese Government and the French concessionaire, turning on a level of charges for electricity. The Company requested arbitration pursuant to a clause of its concession, which provided that:

[85] *Anglo-Iranian Oil Co. Case (Jurisdiction), Judgment of July 22, 1952, I.C.J. Reports 1952*, p. 93.
[86] Ibid. [87] Ibid., pp. 164–166. See also p. 171.

. . . disputes which arise between the concessionaire and the Government concerning the execution or interpretation of the clauses of this concession shall be brought before the competent administrative jurisdiction, unless the concessionaire makes use of the right which it nevertheless reserves to submit the dispute to an arbitral tribunal composed of three arbitrators, one named by the Government, the other by the concessionaire, and the third by the two arbitrators, or, failing their agreement, by the vice president of the Conseil d'Etat of the French Republic.[88]

The Lebanese Government did not positively respond to the demand for arbitration,[89] even though the Company proposed that the third arbitrator be appointed by the President of Lebanon, a proposal which apparently was accepted.[90] Rather, the Government sequestered the concessionary enterprises. The Company thereupon reiterated its demand for arbitration, chose its arbitrator, and expressed the hope that the Government would not place the Company "devant un véritable déni de justice."[91] This demand for arbitration was disregarded. After diplomatic representations which did not produce a satisfactory result, France instituted proceedings before the International Court of Justice.

The French Government maintained, among other contentions, that:

By refusing arbitration, the Lebanese Government was in breach of . . . the Memorandum of Conditions and consequently of the Franco-Lebanese Treaty of January 24, 1948; this denial of justice would, moreover, by itself have constituted a wrongful act under international law, even if the Treaty had not existed. The refusal of arbitration by the Lebanese Government. . . thus constitutes at one and the same time a violation of a treaty and a denial of justice in the sense in which this term is used in the law relating to international responsibility.[92]

The case was settled by agreement between the French and Lebanese Governments after submission of the French Application and

[88] *Electricité de Beyrouth Company Case (France* v. *Lebanon), Pleadings*, p. 5; translation supplied.
[89] Ibid., p. 187. [90] Ibid., pp. 191, 192. [91] Ibid., p. 58.
[92] Ibid. See also the French Application Instituting Proceedings, ibid., p. 14, where, referring *inter alia* to "the denial of justice involved in the Lebanese Government's refusal to accept arbitration. . . ," France asked that "the rules of international law that are applicable to the situation of its national . . . should be respected" and also asked "for adequate reparation for the failure to observe these rules."

Memorial, and before the Lebanese Government had put in a Counter-Memorial.[93] Thus there is no reply by Lebanon to the charge by the French Government of commission of a denial of justice. The explanation advanced by Lebanon for failure to arbitrate was through diplomatic channels, and it did not treat the claim of denial of justice.[94]

(D) *CASE CONCERNING THE COMPAGNIE DU PORT, DES QUAIS ET DES ENTREPÔTS DE BEYROUTH AND THE SOCIÉTÉ RADIO-ORIENT*

The Compagnie du Port in this dispute was a French concessionaire in a position like that in which the company in the *Electricité de Beyrouth Company* case found itself. It possessed certain tax immunities which the Lebanese Government was claimed to have infringed. Confronted with what it saw as a unilateral modification of its concession agreement, the company sought arbitration, invoking an arbitral clause whose terms were the same as those in the prior case.

The Lebanese Government gave no positive reply. France accordingly brought proceedings in the International Court of Justice. The French Application made it clear that its action against Lebanon was based on two causes: first, the imposition of taxes on the concessionaire from which it was exempt; second, in refusing recourse to arbitration.[95] On the second point, the French Memorial argued that there resulted a denial of justice, in these terms:

> 2. Since 1952, the Compagnie du Port, des Quais et des Entrepôts de Beyrouth has been requesting the Lebanese Government to settle outstanding disputes by the method open to it by its concessionary instruments. The Lebanese Government refuses and by so doing is guilty of a denial of justice involving its international responsibility.

[93] *Electricité de Beyrouth Company Case, Order of July 29, 1954, I.C.J. Reports 1954*, p. 107.

[94] *Electricité de Beyrouth Company Case, Pleadings*, *supra* note 88, p. 48.

[95] *Case Concerning the Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient (France* v. *Lebanon), Pleadings*, pp. 6–7. The French Application sought, *inter alia*, a declaration of the international responsibility of the Lebanese Government and a judgment that that Government was under an obligation to make good the damage suffered by the Company as a result of measures which prevented it from operating according to the rules which Lebanon was under an obligation to observe (ibid., pp. 9–10).

According to M. Charles de Visscher[96] . . . denial of justice may be defined as "any failure in the organization or exercise of the jurisdictional function involving an omission on the part of the State to discharge its international duty of according the judicial protection to foreigners." In the case of the Compagnie du Port de Beyrouth the denial of justice is seen in its simplest form: a denial pure and simple. The Compagnie du Port de Beyrouth has not been allowed to assert its rights before the judge to whom it was entitled by its contract to apply, the provisions of which contract had been guaranteed by the Franco-Lebanese Monetary Agreement of 1948. That denial of justice constitutes an unlawful international act . . . it violates . . . the obligation incumbent upon Lebanon to enable every foreigner to assert his rights effectively . . . The Lebanese Government cannot maintain that it was not required to ensure to the Company the remedy it had itself accepted against measures taken by the legislative authorities. When a State has granted a concession to a foreigner or has concluded with him a contract, it is bound to furnish him with the domestic remedies calculated to secure fulfilment of the contract, even against decisions by the higher authorities of the State. The Compagnie du Port, . . . had an available remedy against the acts of those authorities. Access to that remedy was refused to it.

For the Lebanese Government expressly refused arbitration . . . deciding the question in its own favour and refusing to allow its claims to be checked by the arbitrator whose jurisdiction it had recognized beforehand. Accordingly, the Government of the French Republic considers that, by the mere fact of not having between 1952 and 1959 replied to repeated requests of the Company to have recourse to arbitration, and later by its formal refusal, the Lebanese Government is guilty of a denial of justice.[97]

In its Preliminary Objections, Lebanon replied, *inter alia*, that it had not refused to go to arbitration;[98] that, if there had been a refusal, it would not have been an act within the ambit of Lebanese submission to the jurisdiction of the International Court of Justice;[99] and that the Company had failed to exhaust local remedies. It extensively developed this third defense contending that, in Lebanon, there is recourse in a case in which one of the contracting parties refuses to go to arbitration.[100] Lebanon nowhere challenged

[96] Citing his lectures in the *Recueil des Cours*, 1935, vol. II, p. 390.
[97] *Case Concerning the Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient, Pleadings*, *supra* note 95, pp. 39–40; translation supplied.
[98] Ibid., pp. 63–64. [99] Ibid., pp. 60–61. [100] Ibid., pp. 67–70.

directly the French contention that a refusal to arbitrate pursuant to the arbitration clause of the concession was a denial of justice under international law.

The Observations and Conclusions of the French Government on the foregoing Lebanese Preliminary Exceptions included the following analysis on local remedies:

> The Lebanese Government invokes the rule of the exhaustion of local remedies and claims that the French Government's request is inadmissible because it is premature.
>
> If we understand the reasoning of the Lebanese Government, it means that, following constant refusal of arbitration by that Government, . . . the Compagnie du Port . . . should have 'exhausted' local remedies which we are told exist and are effective in the matter. Thus the Compagnie du Port, failing to obtain arbitration, should have sued the Lebanese State in the civil courts . . .
>
> Now what does [the compromissory clause] really mean? Here, as in the *Losinger* case, . . .is a State which has concluded a contract with a foreign concessionary company for the carrying out of important public works. The Losinger Company had had compulsory arbitration inserted as a term in its contract; the Compagnie du Port, too, reserved the right to choose between judicial proceedings and arbitration. The Lebanese Government accepted and appears still to accept the 1925 text, and therefore the principle of that choice. That being so, it is strange that, because the Company requested the arbitration to which it had an indisputable *right*, the Lebanese Government should claim . . .that 'instead of pursuing the remedies available to it under Lebanese law, the Compagnie du Port chose, following its usual custom, to refuse to submit to the law.' The Court will appreciate this curious attitude towards a company which was only making use of rights specifically acknowledged in its favour by the Lebanese Government.
>
> The Company had *reserved* to itself the right to submit to arbitration certain disputes of its own choosing. This betrayed no distrust of Lebanese jurisdiction. The Company, however, was able by arbitration to secure a speedy and entirely impartial decision, since the arbitration commission was to be composed of persons whose selection offered every possible safeguard.
>
> The possibility of arbitration, common in questions of important works, was a basic feature of the contract; it had been agreed to by the Lebanese State and still is.
>
> If the Company opted for arbitration in virtue of the right abovementioned, the result of that option was to withdraw finally from all Lebanese courts the dispute for which the option was exercised. By recognizing the

Company's right to that option, the Lebanese Government undertook in advance not to require the Company to apply to its courts. Otherwise, there was no option, no right was 'reserved' to the Company, since its remedy would, in every case, lie with the Lebanese court. No interpretation which makes a treaty clause useless or absurd can be upheld. As Mr. Sauser Hall, Agent for the Swiss Government, said in the *Losinger* case . . .'it is in the nature of every arbitration clause to withdraw a dispute from the jurisdiction of the ordinary courts; otherwise the insertion of an arbitration clause would have no meaning.'[101] From the moment that the Compagnie du Port has, even on a single occasion, requested arbitration concerning no matter what dispute, it has met the conditions required in order that the local remedies rule cannot be urged against it.

But, before all else, it must be repeated that, once the Company had opted for arbitration, the dispute could at no time, and under no pretext, be denied the way of arbitration and compulsorily submitted to the ordinary courts. The question, therefore, is not whether it is theoretically possible under Lebanese law for a State signing an arbitration clause to be obliged by a judicial decision to have recourse to arbitration against its will.

The effect of recourse to arbitration, which the Company had reserved to itself as a possibility was, as stated above, to withdraw the existing dispute from the jurisdiction of the Lebanese courts. It would be a modification of the Company's contractual rights to claim that, by way of an action for non-execution of the arbitration clause, the Lebanese courts could have been seised of disputes which the Company had not intended to submit to them.

Lastly, the Government of the French Republic would remind the Court that no State can plead that local remedies have not been exhausted when it has itself, in breach of its treaty obligations, prevented the foreigner who complains of loss from asserting his rights before the jurisdiction available to him. The Permanent Court stated in its Judgment No. 9.[102] . . .: "It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation *or has not had recourse to some means of redress*, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, *or from having recourse to the tribunal which would have been open to him*."

The Lebanese Government prevented the Compagnie du Port from having recourse to the arbiters.

3. In order that an assertion by the Lebanese Government may not go unanswered, the Government of the French Republic must add that

[101] *The Losinger & Co. Case, P.C.I.J.*, Series C, No. 78, p. 269.
[102] *Case Concerning the Factory at Chorzów, P.C.I.J.*, Series A, No. 9, p. 31.

recourse to the Lebanese courts would not, in its opinion, have been effective . . . .[103]

The case was settled before the Court gave judgment.[104] But not only are the positions in the case of the States concerned significant; the fact that Lebanon pleaded local remedies, but did not argue that a denial of justice would not arise if those remedies did not oblige it to arbitrate, perhaps suggests its acquiescence in the French claim that a definitive refusal to arbitrate would be tantamount to a denial of justice.

(E) UNITED STATES CLAIMS OF LIBYAN DENIALS OF JUSTICE

In response to the decrees of Libya affecting interests of the companies which later were at issue in the Texaco[105] and LIAMCO[106] arbitrations, the United States Embassy in Tripoli, on September 14, 1973, delivered a note of protest to Libya which contained this passage:

> The concession agreements governing the operations of the oil companies specifically provide that: 'The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.' They further provide for arbitration of disputes not otherwise settled. Accordingly, failing further negotiations between the parties on the basis of respect for their contractual rights, the proper remedy for the current disputes between the companies and the Libyan Government is clearly arbitration. The United States Government understands that the companies in question have requested arbitration; it expects that the Government of the Libyan Arab Republic will respond positively to their request since failure to do so would constitute a denial of justice and an additional breach of international law.[107]

[103] As cited in *Case Concerning the Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient, Pleadings*, *supra* note 95, at pp. 87–96; translation supplied.

[104] *Case Concerning the Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient (France* v. *Lebanon), Order of 31 August 1960, I.C.J. Reports 1960*, p. 186.

[105] *Texaco Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic*, 53 *International Law Reports*, p. 389.

[106] *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic*, 62 *International Law Reports*, p. 141.

[107] Department of State, *Digest of United States Practice in International Law, 1975* (1976), p. 490.

Libya, in the event, did not respond to the requests for arbitration, but the American companies were able to proceed with those arbitrations notwithstanding Libya's default.

On April 18, 1979, awards having been handed down in the those arbitrations, the US government restated its position on denial of justice in a note to the *Tribunal de grande instance, Paris*, in support of LIAMCO's attempt to obtain an exequatur of the LIAMCO award in France. The note stated in part:

> It is the position of the United States Government that contracts validly concluded between foreign governments and nationals of other states should be performed by the parties to those contracts in accordance with their terms. . . . Where the breach of such a contract by a foreign government is arbitrary or tortious or gives rise to a denial of justice, a violation of international law ensues. . . . [T]he failure of a government to respect a contract with an alien to arbitrate disputes arising under that contract constitutes a denial of justice under international law.[108]

The *Tribunal de grande instance* granted an exequatur.

It is of interest to recall that the arbitral clauses at issue in these cases provided for appointment of a sole arbitrator by the President of the International Court of Justice in case a party failed to appoint its arbitrator. In the event, sole arbitrators were so appointed. Nevertheless, the United States took the position that a failure by Libya to "respond positively" to the companies' demands for arbitration – its failure "to respect a contract with an alien to arbitrate disputes" – would "constitute a denial of justice." For the reasons explained at the outset of this chapter, it is believed that this broad concept of denial of justice (which is reflected as well in the *Turriff* v. *Sudan* case to which we next turn) is correct.

2. *Arbitral Awards: Negation of Arbitration as Denial of Justice*

The position that refusal by a State to afford the arbitral remedy for which its contract with an alien provides constitutes a denial of justice finds support in a number of arbitral awards which appear to bear on the question.

[108] Diplomatic note 139 of the United States Embassy in Paris, quoted in R.B. von Mehren and P.N. Kourides, *supra* note 20, pp. 487–488, note 44.

(a) *Turriff Construction (Sudan) Limited* v. *The Sudan*

An arbitral tribunal, applying the Permanent Court of Arbitration's Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One is a State, rendered an arbitral award in 1970 in a case between Turriff Construction (Sudan) Ltd., a British company, and the Government of the Republic of the Sudan, which concerned a construction contract which the Company claimed the Government had wrongfully repudiated. The Government and the Company agreed to submit the case to arbitration at The Hague. The arbitration agreement provided that the Tribunal would be the judge of its competence and could issue an award notwithstanding any absence of one of the parties.[109] After the proceedings were well advanced, the Sudanese Government withdrew, on the claim that a non-commercial consideration beyond the competence of the Tribunal had come to light. The Tribunal held:

> The position is clear. The Government made a deliberate choice. Instead of admitting the contract and fighting the claim on its merits it decided to advance as the first line of defence that the contract was void from the beginning or voidable and avoided and that it would be against good conscience to enforce it against it. Until the 8th May it was willing and indeed anxious to have these matters debated before and decided by the Tribunal. It extended the Submission to enable this to happen. At a very late stage it had a change of opinion and decided that it did not want these matters debated. The Tribunal accordingly concluded that no good reason for withdrawal or absence had been shown. They also concluded that, the withdrawal not being justified, it would have been a denial of justice had they refused to exercise the power to proceed in the absence of the Government. It would have been a denial even if no charge of fraud had been made. The charge having been made and no justification for absence having been shown to the Tribunal, they considered it imperative to proceed and give Turriff the opportunity of clearing itself of such charge and proving their claims against the Government if they could.[110]

This seems to be a holding by an international arbitral tribunal that, where a Government without good cause withdraws from an arbitral

[109] The award is unpublished, but an extensive report of the case by one of the arbitrators, L. Erades, "The Sudan Arbitration," 17 *Nederlands Tijdschrift voor International Recht* (1970), p. 200, contains substantial passages of the award.

[110] Ibid., p. 218.

proceeding to which it is bound, the arbitral tribunal itself would be a party to, or at least would have permitted, "a denial of justice" if it declined to proceed in the absence of the Government. Whether the Tribunal referred to a denial of justice in a technical sense, as that term is customarily used in international law – that is, in this case, to a denial of justice by the Government of the Sudan – is not clear. Perhaps it used the term in another sense, simply to mean that a failure to proceed would be an injustice.[111] Yet the award is open to the construction that to give effect to Sudan's attempt to frustrate the arbitral process would give rise to a denial of justice. The *Turriff* award, however summary on this point, thus arguably is authority for the position that, if a State by its unjustified absence from arbitral proceedings causes an international arbitral tribunal not to proceed, a denial of justice under international law results.

(B) *THE DELAGOA BAY RAILWAY CASE*

The *Delagoa Bay Railway* arbitration of 1900 between the United States and Great Britain, as claimants, and Portugal, as defendant, has been described in the first chapter. The concession for whose annulment compensation was sought provided that all questions which might arise between the concessionaire and the Portuguese Government concerning the execution of the contract were to be submitted to arbitration. But when a dispute arose over a time limit laid down by the Government during which the concessionaire was required to extend the railway line, the Government rescinded the contract and seized the line, at that time not being prepared to go to arbitration with the Company. The arbitrators, who were three Swiss jurists named by the President of the Swiss Federal Council, held that Portugal committed a wrong by going beyond the bounds of the concession contract in either not affording more time to extend the railway line "or, failing that, requesting a decision on this point by arbitrators as foreseen by . . . the contract."[112] While on this point the Tribunal's award is terse, it accordingly seems to support

[111] That was the interpretation given, for example, by Alan Redfern in his review of the first edition of this book, *supra* note 30, pp. 166, 167.
[112] La Fontaine, *Pasicrisie Internationale* (1902), p. 401.

the position that failure by a State to carry out an undertaking in a contract with an alien to submit disputes arising thereunder to arbitration is an unlawful act in international law, that is, in this context, a denial of justice.

That in substance is the conclusion reached by Professor Gillian White in her book, *Nationalisation of Foreign Property*, where she maintains:

Breach of arbitration provisions

For there is considerable authority in support of the proposition that the cancellation of a concession in breach of an undertaking to submit the matter to arbitration is an unlawful act entitling the alien's national State to intervene. It constitutes a wrong in itself and quite distinct from the question of compensation.

. . .

The celebrated case of the *Delagoa Bay Railroad* also illustrates this principle. A concession for the construction of a railway was granted by the Portuguese Government to an American national. The construction proceeded in accordance with the agreed plans until the Government requested an extension of nine kilometres to be laid in eight months. This proved to be impossible, and at the expiration of the eight month period, the Government annulled the concession and seized the railway. . . . The action . . . was in breach of Article 53 which provided that all questions which might arise between the Company . . . and the Government touching the execution of the contract were to be submitted to arbitration. The United States took up the claim presented by the concessionaire's widow, and the British Government intervened on behalf of the British company which held the majority of the stock of the Portuguese operating company. The case finally went to arbitration on the issue of the amount of compensation, Portugal having admitted her liability, but the arbitrators' statement of the reasons for their award is illuminating. Compensation was assessed on the basis of reparation for injury done unlawfully, which basis was selected from three possibilities for the reason that the decree rescinding the concession and the act of taking possession of the railway went beyond the bounds of the concession. It was stated that there should have been either an additional agreement as to the time for laying the final section, or the matter should have been referred to arbitration under Article 53.[113]

[113] *Nationalisation of Foreign Property* (1961), pp. 169–171.

(c) *THE CASE OF BEALE, NOBLES AND GARRISON*

This case turned upon Venezuela's disavowal of contracts for the establishment of a steamship line and a colonization scheme. Of this case, Professor White writes:

The State's liability for cancellation in these circumstances has been based on denial of justice, understood in the broad sense of an unjustified, arbitrary act causing injury to the rights of an alien. In the case of *Beale, Nobles and Garrison* the United States/Venezuelan Commission found that the contracts suffered from an initial invalidity because of lack of authority of the Government agent concerned; but that if they had been valid and the concessionaires had requested a reference to arbitration in accordance with the contracts and had met with the refusal of the Venezuelan Government, "then a question might have arisen whether there was not such a denial of justice on the part of that government as would have warranted the interposition of the good offices of the United States on behalf of the injured parties." The arbitration clause in this contract covered doubts, differences, difficulties or misunderstandings of any class or nature arising from or having connection with the contract. The Commission stated that if language had any meaning, the attempt to revoke was clearly a "difficulty" of the sort contemplated by the clause.[114]

The passages in question in the original report merit quotation:

But, passing this, it is further to be observed that the clause in both of the contracts providing for arbitration at Caracas clearly shows that neither of them, on any pretext, was ever to be made cause for an international claim. It is true that it has been urged in answer to this, that both contracts were struck down by the decrees annulling them, and that the arbitral clause fell with them. But that argument is more specious than real. It is conceded, of course, that one party to a contract cannot break it at his pleasure and without the consent of the other, but when both parties agree, as in this case, that any doubts, differences, difficulties, or misunderstandings of any class or nature whatever that may arise from, or have any connection with, or in any manner relate to the contract shall be referred to arbitration, and one of the parties declares that he is not bound by the contract and attempts to annul it, then the attempt to revoke, of necessity, if language has any meaning, being a "difficulty" relative to the contract, must be one of the questions agreed to be submitted. If these contracts had been good and valid in other respects, and the Messrs. Beales and Nobles had demanded that the "difficulty"

[114] Ibid., p. 171.

growing out of their annulment should be referred to arbitration as provided, and the government at Caracas had refused its assent to the submission, then a question might have arisen whether there was not such a denial of justice on the part of that government as would have warranted the interposition of the good offices of the United States on behalf of the injured parties. No such demand appears to have been made, but the case was submitted to the old commission under the convention of 1866, and was decided by the umpire upon the assumption just stated, that the decrees annulled the provision as to arbitration, and thus produced the very result of converting into cause for an international claim a difficulty relating to the contract which by its terms expressed in the most solemn manner was never to be made such on any pretext whatever. A distinction was made in argument between a reference of differences or misunderstandings arising out of the construction of the contracts, and a difficulty as to the existence of the contract itself, it being admitted that a controversy of the first kind was legitimate matter for arbitration, but the second was not, or rather could not be made so, because when the contract was annulled there was no longer any provision for arbitration. But that assumes the right to annul without making the revocation a subject of arbitral decision, and such assumption cannot be made without the further assumption that a difficulty *relative* to the contract does not and was not intended to include a question as to whether there was such a contract. The case seems to us too clear for doubt, and on this ground alone, if there was no other, we should reject the claim.[115]

Since the contracts in question were found in this award between the United States and Venezuela to be invalid, the quoted passage would seem to be *obiter dicta*. But it is of interest both in its statement about a denial of justice and the "specious" claim that annulment of a contract containing an arbitration clause vitiates the arbitral obligation.

(D) *NORTH AND SOUTH AMERICAN CONSTRUCTION CO.* V. *CHILE*

A Kentucky corporation, the North and South American Construction Company, in 1888 entered into a contract with the Government of Chile for the building of railroad lines. The Chilean Government abrogated the contract in 1890. The Company complained, demanding damages. The case was referred to a United States-Chilean Claims Commission. There the Chilean Government

[115] J.B. Moore, IV *International Arbitrations*, pp. 3562–3563.

demurred to the claimant's memorial on the grounds appearing in the passage about to be quoted. The Commission's majority delivered this opinion:

The legal relations between the Government of Chile on the one hand, and the North and South American Construction Company on the other hand, have been regulated by articles 18 . . . and 49 of the general conditions for the construction of railways . . . which are as follows:

"ARTICLE 18. The contractor or contractors will be considered for the ends of the contract as Chilean citizens. In consequence they renounce the protection which they might ask of their respective governments, or which these might officiously lend them in support of their pretensions."

"ARTICLE 49. The difficulties or disputes of any nature which may arise in the interpretation and extension of the contract will be decided summarily and without other appeal by the arbitrating arbitrators named, one by the ministry of industry and public works, another by the Supreme Court of Justice, and the third by the contractor."

This contract obtained the sanction of a law in Chile by an act of the two houses of the Chilean Congress and has been signed by the President of the Republic of Chile.

. . . We are of the opinion that these articles when construed together mean the same thing; they mean that all questions arising out of the contract itself, such as the proper construction to be placed on any of its provisions, the amount of payment due, the annihilation of the contract in the case provided for by the contract itself, shall be decided summarily and without appeal by the tribunal of arbitrators, . . . In regard to all these purposes of the contract, the contractor agrees to be considered as a Chilean citizen and to be treated in all respects as a Chilean citizen who might enter into a similar contract for similar purposes. To this extent, and to this extent only, has the claimant agreed to renounce the protection which as a citizen of the United States it had a right to demand from its own government.

It is further to be asserted that the different provisions aforesaid must be considered as being in co-relation, giving to the memorialist, in lieu of its agreement to be considered for the ends of the contracts as a Chilean citizen and of its renunciation of the protection of its government, the assurance that "the difficulties or disagreements of every nature which may arise in the interpretation or execution of the contract will be decided summarily and without appeal by three arbitrating arbitrators." This last provision must be looked upon as one of the considerations of the contract; it should have the effect to exempt the memorialist from the jurisdiction of the regular courts of Chile and to subject it to the competence and to the decision of the tribunal of arbitration . . . .

This tribunal of arbitration would have been competent, . . . to decide the question of the taking possession of the company's property by the Chilean Government, . . .

By the decree of September 11, 1891, suppressing the tribunal of arbitration . . . the rights of the memorialist . . . have been suppressed without having been since re-established. It is not to be doubted that in view of the suppression of one of the principal considerations of the contract, concerning jurisdiction by the Chilean Government, the memorialist cannot be further considered bound by the corresponding obligation concerning jurisdiction, according to which it renounces the protection of its government; seeing that by renouncing this protection for the ends of the contract it has placed itself under the protection of that tribunal of arbitration provided for . . . .

By the suppression of this tribunal of arbitration the memorialist has recovered its entire right to invoke or accept the mediation or protection of the Government of the United States.

Finally, it is to be noted that the first article of the convention of Santiago, of August 7, 1892, provides that all claims on the part of corporations, companies, or private individual citizens of the United States upon the Government of Chile . . . shall be referred to this arbitration commission; . . . that the memorialist is a company, which . . . has neither relinquished nor lost its quality of American citizenship. . . . It is further undeniable that a wrong has been done to the memorialist by the suppression of that court of arbitration which had been competent to decide about the taking possession of the property and the bonds of the claimant. . . .

The demurrer, therefore, should be overruled and the respondent government required to answer.[116]

This international arbitral award appears to support these conclusions:

(i) abrogation by a State of a contract providing for the exclusive settlement of disputes by arbitration does not nullify the obligation to arbitrate;
(ii) such an arbitral clause withdraws the dispute from the local courts and local remedies need not be exhausted;
(iii) of most immediate interest, ". . . a wrong has been done . . . by the suppression of that court of arbitration which had been competent to decide about the taking of possession of the

[116] Ibid., vol. III, pp. 2318–2322.

property and the bonds of the claimant" – i.e., an international wrong tantamount to a denial of justice. That is in substance the interpretation which the late Professor D.P. O'Connell placed on the case:

> To take the extreme example of unilateral abrogation of the contract by the State itself, as occurred in the *North and South American Construction Co.* case, where Chile suppressed the body which under the terms of the contract was to arbitrate differences; this is itself an international wrong . . . and hence a claim will lie.[117]

(E) *SOCIÉTÉ DES GRANDS TRAVAUX DE MARSEILLE* V. *PEOPLE'S REPUBLIC OF BANGLADESH AND BANGLADESH INDUSTRIAL DEVELOPMENT CORPORATION*

The East Pakistan Industrial Development Corporation (EPIDC), a corporation wholly owned by the Pakistan Government, in 1965 concluded a contract with a French company, *Société des Grands Travaux de Marseille* (SGTM), for construction of a gas pipeline in East Pakistan, which became, in 1971, the People's Republic of Bangladesh. The contract provided for arbitration in Geneva under the Rules of the International Chamber of Commerce. The contract declared Pakistani law to govern the contract.

In 1969, SGTM brought a claim under the contract and invoked arbitration. The parties jointly agreed upon a sole arbitrator (Mr. Andrew Martin, Q.C.), and agreed that the arbitration would take place in Geneva under its arbitration law. In accordance with ICC procedure, terms of reference submitted by the arbitrator so stating were signed by the parties on 7 May 1972.

Two days later, the President of Bangladesh issued Order No. 39, which provided for the immediate establishment of the Bangladesh Industrial Development Corporation (BIDC), and established its identity with EPIDC, transferring to BIDC the shares, board, officers, and assets of EPIDC, and its debts and liabilities "unless the Bangladesh Government otherwise directed."[118] Order No. 39 decreed that:

[117] D.P. O'Connell, *International Law* (1970), vol. II, p. 1064.

[118] The arbitral award in ICC Case No. 1803 (1972), in *Société des Grands Travaux de Marseilles (France)* v. *East Pakistan Industrial Development Corporation*, is published in part in V *Yearbook Commercial Arbitration* (1980), pp. 177–185. The quotation is found at p. 178.

All arbitration proceedings to which, immediately before the commencement of this Order, the East Pakistan Development Corporation was a party shall be deemed to have abated and no award or decision made or given in such proceedings shall have any effect or be binding on, or enforceable against, the East Pakistan Development Corporation or the Bangladesh Industrial Development Corporation, and all power or authority to act on behalf of the East Pakistan Development Corporation in any such proceedings shall be deemed to be revoked and cancelled with effect from the 26th day of March, 1971, and any provision in the contract or agreement providing for the settlement by arbitration of the disputes in respect of which such proceedings were instituted, shall be deemed to be of no legal effect …..[119]

By subsequent decrees, the President of Bangladesh dissolved EPIDC, and issued a Disputed Debts Order, providing that any contractual debt of the "erstwhile" EPIDC shall be deemed not to have been incurred if such debt or contract "was the subject matter of any dispute."[120] Days before the arbitral hearings, still another order was decreed, in turn dissolving BIDC, vesting its assets in the Bangladesh Government, and providing that any representations made by creditors of BIDC or any predecessor in title shall be considered by the Government which shall have the power to pay *ex gratia* compensation.[121]

In condemning the Bangladeshi Government's dissolution of a Bangladeshi corporation in order to vitiate an arbitration in progress, and Bangladesh's vesting of the corporation's assets but not its liabilities in the Government, the arbitrator held that both the public order of Switzerland, the place of arbitration, and international law, were violated on more than one count. The violations of international law assigned were extraterritorial extensions of the jurisdiction of Bangladesh to affect an arbitration in progress in Switzerland; and a taking of the assets of the Bangladesh corporation on terms, which, as they affected the interests of its French creditor, were discriminatory and confiscatory. The arbitrator did not expressly hold that the action of Bangladesh in repudiating arbitration constituted a denial of justice, nor did he speak in more general terms of a violation of State responsibility. There is no indication in the arbitrator's award that counsel for the plaintiff presented argument to the arbitrator in this vein.

[119] Ibid. [120] Ibid., p. 179. [121] Ibid.

In annulment proceedings, the Swiss Federal Tribunal approached the case, as did the Geneva court from which appeal was made, in terms of Swiss "ordre public." It held that the actions of Bangladesh, not being directed against citizens of Switzerland, did not offend Swiss public order. As for considerations of international public order, the Swiss Federal Tribunal held:

International Public Order

The appellant has relied on, in addition to Swiss public order, 'ordre public international,' which would also preclude the application of the Orders of Bangladesh in the present case. This notion seems never to have been used by the Federal Supreme Court. . . . It concerns rather a formula proposed by certain authors, who do not, however, give it a precise and unambiguous meaning. It cannot be ascertained how this 'ordre public international' would limit the application of foreign law more, or in another manner, than Swiss public order does. Since the appellant does not give any indication in this respect, this question cannot be examined in more detail.[122]

Professor Lalive is sharp in his criticism of that holding:

As for international public order – truly international – the judgment reveals the perplexity of the judges . . . who admit to not seeing "how this international public order would limit the application of foreign law more, or in another manner, than Swiss public order does." Without entering into details, it suffices to indicate that, in this case and in the *Losinger* case, the unilateral repudiation of an arbitral obligation is illicit in international law, and is a deliberate violation of the principle of good faith, and it would have been perfectly possible in this case to consider that there had been a violation of "international public order" and consequently to renounce posing any question whatever of territorial attachment.[123]

It is plain, from the tenor of this passage, his invocation of the *Losinger* case at greater length elsewhere in his critique, and his attack on Swiss courts in this case for their "ratification of what one must denominate as a denial of justice,"[124] that Professor Lalive saw

[122] V *Yearbook Commercial Arbitration* (1980), pp. 217, 220.

[123] Pierre Lalive, "Droit International Privé," XXXIV *Annuaire suisse de droit international* (1978), p. 400.

[124] Pierre Lalive, "Arbitrage international et ordre public suisse, une surprenante décision du Tribunal fédéral: l'arrêt SGTM/Bangladesh," 97 *Revue du droit suisse* (1978), at p. 549 (translation supplied). See also p. 533, where Lalive reads the arbitrator's award in this case as in accord with the position taken by

what the Swiss Federal Tribunal most decidedly did not see: that the actions of Bangladesh constituted a denial of justice under international law. The fact remains that this case, as Swiss courts treated it, weighs – if only inferentially – against and not in support of construing a repudiation of an arbitration agreement with an alien as a denial of justice. That conclusion may be mitigated somewhat by the impression, which the judgment of the Swiss Federal Tribunal gives, that the argument of denial of justice was not made to, or, if made to, was not sufficiently understood by it.

(F) *FRAMATOME ET AL.* V. *ATOMIC ENERGY ORGANIZATION OF IRAN*

In the *Framatome* case,[125] the Atomic Energy Organization of Iran (a public corporation) had concluded with a foreign company, Framatome, and others, a contract governed by Iranian law containing an arbitration clause. After several months during which the contract was performed by both parties, a dispute arose, and the Atomic Energy Organization terminated the contract. Framatome initiated arbitration, appointing an arbitrator. The Atomic Energy Organization, while contesting the validity of the arbitration clause, also appointed an arbitrator while reserving its rights. It maintained that the contract was not valid, that it had been irregularly applied, and

the Swiss Government in the *Losinger & Co. Case* to the effect that a State's unilateral repudiation of an arbitral agreement is contrary to public international law and to Swiss public policy. See also pp. 540, 541–542, 546–547.

For his part, Professor Karl-Heinz Böckstiegel has written:

> . . .when a state makes use of its powers of controlling a corporation and legislating to change its legal form to evade obligations of that state controlled corporation in a contract and an arbitration clause, this must be considered an abuse of rights. An example is the case Société des Grands Travaux de Marseille . . .the arbitration award . . .holding the defendants severally liable seems convincing, while the decision of the Swiss Federal Tribunal . . .with a contrary result is most objectionable as has been pointed out by Pierre Lalive. ("The Legal Rules Applicable in International Commercial Arbitration Involving States or State-Controlled Enterprises," in ICC, *60 Years of ICC Arbitration* (1984), p. 138.)

[125] As noted above, the award was initially published under the title *Company Z and Others (Republic of Xanadu)* v. *State Organization ABC (Republic of Utopia)*, VIII *Yearbook Commercial Arbitration* (1983), p. 94. The quotations are essentially drawn from that report. The award was published under its true name and in its original French in Clunet, *Journal du Droit International*, (1984), p. 58, prefaced by an analysis by Oppetit. The arbitrators were Professor Pierre Lalive, Professor Berthold Goldman, and Professor Jacques Robert.

that the dispute could not, under the law of Iran, be submitted to international arbitration. Among the grounds it advanced to challenge the validity of the arbitration clause and the Tribunal's jurisdiction was that, subsequent to the conclusion of the contract containing the arbitral clause, a new Constitution of Iran had been adopted by the Islamic Republic of Iran; and that, since the contract was governed by the law of Iran, it was governed by Iranian law as amended and adopted under that Constitution, with the result that that law could and did nullify the undertaking to arbitrate. On the question of whether the parties wished "to submit their contractual relations, and in particular the validity of the undertaking to arbitrate, to Iranian law, purely and simply, or to Iranian law 'in its evolution,' in other words including future legislative or constitutional provisions which could nullify or paralyze the undertaking to arbitrate," the Tribunal held:

> Such a demonstration [of the latter thesis] has not been made, or even attempted, and this is not by chance. Such an interpretation of the choice of law clause would not only be contrary to the principle of interpretation, generally recognized and constantly applied by international case law, known as the principle of effectiveness, giving a worthwhile meaning to the terms used; as noted for example by the Permanent Court of International Justice in the case concerning acquisition of Polish nationality, an interpretation which would deprive the treaty (or the contract) of a large part of its practical value cannot be accepted. As this particular case concerns contractual undertakings between a private party and a foreign State or foreign public organization, such a joint intention of the parties cannot be supposed in the absence of express and unequivocal indications: it cannot be accepted that the parties wished or simply accepted that the validity and effectiveness of a contractual clause as fundamental as an arbitration clause should be subject to a sort of condition entirely within the power of one party, the occurrence of which would depend solely on the will of the State of which the public organization party to the said contract and to the undertaking to arbitrate is an instrumentality.
>
> It is superfluous to add that a general principle, universally recognized nowadays in both inter-State relations and international private relations (whether this principle is considered as international public policy, as appertaining to international commercial usages or to recognized principles of public international law and the law of international arbitration or *lex mercatoria*) would in any case prohibit the Iranian State – even if it had the intention, which is not the case – to repudiate the undertaking to arbitrate which it made itself or which a public organization such as the

Atomic Energy Organization would have made previously. The position of contemporary positive law of international relations is well summed up by Judge Jiménez de Aréchaga, who wrote (in a study in *Mélanges Gidel*, 1961, p. 367 et seq.) that a Government bound by an arbitration clause – and the observation is equally true for undertakings made directly as for those made by the intermediary of a public organization, as in this case – "cannot validly free itself of this obligation by an act of its own will, such as for example a change in its internal law or by unilateral termination of the contract."

The above observations may seem marginal, as it has not been shown that the Iranian authorities had the intention to apply the new Constitution to free themselves of undertakings to arbitrate previously concluded by the State of Iran itself or by its public organizations. These observations are, however, pertinent to the extent that they can throw light upon the true meaning of the Article of the Constitution. Indeed, where doubt arises concerning the exact scope of this text, as when doubt arises on the scope of any act of a State, *there is always a presumption that the State in question wished to act in conformity with the principles or rules of public international law, and not in breach of them.* This generally recognized principle of interpretation confirms, if indeed this were necessary, the conclusion already reached by the Arbitral Tribunal, according to which the Article of the new Constitution quoted *cannot* be invoked in the present case to put in question the validity of the undertaking to arbitrate, provided that the undertaking was validly made beforehand.[126]

Since Iran had not definitively renounced its arbitral obligations but submitted its challenge of their viability to arbitration, it may be said that the quoted passage is *obiter dicta*. It is nevertheless of high interest in more than one respect. It runs counter to the argument of Dr. Mann recounted at the outset of this chapter that, if the *lex arbitri* is that of the litigant State, that State may lawfully and retroactively extinguish its arbitral obligations by enactment of a general law affecting actions against the State. Such a law was very much in point in this case, but the Tribunal held to the contrary of Dr. Mann's thesis, and did so, it is believed, on persuasive grounds. Moreover, the award squarely states that a repudiation by a State of an undertaking to arbitrate which it or its public corporation had made with an alien would conflict with recognized principles of public international law and with the law of international arbitration. It does not expressly refer to the resultant denial of justice, but

[126] VIII *Yearbook Commercial Arbitration* (1983), pp. 108–109.

the award can reasonably be read as so meaning. That conclusion is reinforced by the award's affirmation of "the fundamental principle of the binding force of undertakings freely concluded (*pacta sunt servanda*) which applies both to the contract in dispute and the inter-State agreements concluded"[127] by Iran. Finally, the award is significant in another respect as well, in its reference to the presumption that a State must be presumed to wish to act in conformity with international law. That important presumption is applied below.

(G) *ELF AQUITAINE IRAN* V. *NATIONAL IRANIAN OIL COMPANY*

Professor Gomard's Preliminary Award of 1982 in the *Elf Aquitaine* case was introduced in the first chapter. In his award, the sole arbitrator recounted that NIOC challenged the admissibility of the arbitration proceedings on the ground that the Special Committee established pursuant to Iran's Single Article Act of 1980 had declared the 1966 petroleum agreement in question to be null and void *ab initio*. Accordingly, in NIOC's view, arbitration based on a clause of that agreement was not possible. The award records NIOC's reservation maintaining that "NIOC's appearance at the meeting in Copenhagen was in no way to be construed as an acceptance of the arbitration proceedings":[128] NIOC maintained that Iran was entitled to nullify NIOC's obligation to arbitrate, by means of a holding of a governmental committee established pursuant to a law enacted years after the agreement containing the arbitration clause was concluded, ratified by Iran, and implemented – a committee holding that the agreement was void *ab initio*.

Among the grounds on which the sole arbitrator rejected the foregoing position of NIOC was that a State "is bound by its obligations under international agreements or concessions,"[129] in accordance with the principle of *pacta sunt servanda*. He supported this holding with references to the *Lena Goldfields* case[130] and *Saudi*

[127] Ibid., p. 114.
[128] XI *Yearbook Commercial Arbitration, supra* note 12, p. 98. (See also Philippe Fouchard, "L'Arbitrage *Elf Aquitaine Iran* c. *National Iranian Oil Company*: Une Nouvelle Contribution au Droit International de l'Arbitrage," *Revue de l'Arbitrage* (1994), p. 333.)
[129] XI *Yearbook Commercial Arbitration, supra* note 12, p. 101.
[130] Ch. I, *supra* note 50.

Arabia v. *Aramco*.[131] Thus, on this ground as well as that of the principle of the autonomy of the arbitration clause, the sole arbitrator concluded that "the arbitration clause binds the parties and is operative unimpaired by the allegation by NIOC that the Agreement as a whole is null and void *ab initio*."[132] He further affirmed "the principle of international law that provides that States are bound by arbitral clauses in their international contracts . . ." and held that that principle comprises contracts made not only by the State itself but by a company controlled by the State (as he found NIOC to be).[133] He affirmed "the obligation under international law to respect agreements on arbitration,"[134] and repeated that: "It is a recognized principle of international law that a state is bound by an arbitration clause contained in an agreement entered into by the state itself or by a company owned by the state and cannot thereafter unilaterally set aside the access of the other party to the system envisaged by the parties in their agreement for the settlement of disputes."[135] Professor Gomard invoked the conclusion of Judge Jiménez de Aréchaga that: "The existing precedents demonstrate . . . that a government bound by an arbitration clause cannot validly free itself of this obligation by an act of its own will such as, for example, by changing its internal law, or by a unilateral cancellation of the contract or of the concession."[136] The sole arbitrator quoted Professor Prosper Weil's conclusion that:

> . . . the State cannot modify unilaterally the mechanism established for the settlement of disputes in a direct way by dictating through its authority a change in the arbitration clauses, or in an indirect way through refusing to accept the arbitral procedure as it is provided in the contract, or by putting obstacles in the way of its operation; by such actions, the State would be committing an unlawful act. Furthermore, it would be less acceptable for a State to revoke the contract in its entirety in order to

[131] 27 *International Law Reports* (1963), p. 117. Professor Gomard also referred to the analyses of Professor Prosper Weil, "Problèmes Relatifs aux Contrats Passés entre un Etat et un Particulier," 128 *Recueil des Cours* (1969-III), p. 101, and "Les clauses de stabilisation ou d'intangibilité insérées dans les accords de développement économique," in *Mélanges offerts à Charles Rousseau*, (1974), p. 301.

[132] XI *Yearbook Commercial Arbitration, supra* note 12, p. 103. [133] Ibid.

[134] Ibid., p. 104. [135] Ibid.

[136] The quotation, drawn from "L'arbitrage entre les Etats and les Sociétés Privées Etrangères," *Mélanges en l'Honneur de Gilbert Gidel* (1961), pp. 367, 375, is found in 96 *International Law Reports* (1994), pp. 275–276.

claim that the arbitration clause has become inoperative and thus to evade its effect by such a device.[137]

The sole arbitrator also quoted Ahmed Sadek El-Kosheri's conclusion that: "The State . . . is bound to respect all contractual commitments, above all the arbitration clause . . ." and cited Dr. El-Kosheri's adoption of the holding of the *Aramco* award that: "'No one may derogate from his own grant' is a legal maxim which is universally accepted . . . it applies to all legal relationships, whether in private law or in public law."[138]

These holdings and quotations by Professor Gomard are, it is believed, eminently sound. While they do not in terms declare that a State's repudiation of its arbitral obligations under a contract with an alien constitutes a denial of justice, Professor Gomard held that a State "is bound by its obligations under international agreements or concessions" in accordance with the principle of *pacta sunt servanda*, a conclusion that he specifically applies to the arbitral obligation. Moreover, he affirms "the principle of international law" that "States are bound by arbitral clauses in their international contracts," and adopts the conclusion that a State which repudiates the arbitral procedure prescribed in a contract with an alien commits "an unlawful act." Thus repudiation of that binding arbitral provision is in breach of international law; such a repudiation, of itself, is an independent violation of international law, tantamount, it is submitted, to a denial of justice.

(h) an unpublished and unnamed award

That exceptionally experienced and distinguished international arbitrator, Claude Reymond, in 1985 revealed that an unpublished arbitral award held that, for a State to refuse to participate in an arbitration arising out of an arbitral clause to which it has subscribed constitutes a case of "déni de justice entrainant sa responsabilité internationale."[139] The unpublished and unnamed

[137] 96 *International Law Reports*, *supra* note 136, p. 276. The reference is to the former study of Professor Weil referred to in note 131, *supra*.

[138] 96 *International Law Reports*, *supra* note 136, pp. 276–277. The reference is to Dr. El-Kosheri's lectures, "Le régime juridique créé par les accords de participation dans le domaine pétrolier," 147 *Recueil des Cours* (1975-IV), p. 221.

[139] Claude Reymond, "Souveraineté de l'Etat et Participation à l'Arbitrage," *Revue de l'Arbitrage* (1985), pp. 517, 523.

award thus directly sustains the thesis advanced in this chapter that such a refusal by a State gives rise to a denial of justice under international law.

(i) *HIMPURNA* v. *INDONESIA; PATUHA* v. *INDONESIA*

These two landmark arbitrations together represent one of the most well-known instances of a respondent State attempting to derail an arbitration.[140] They proceeded in parallel and produced materially identical awards, and so the following discussion will for the sake of simplicity refer only to *Himpurna* v. *Indonesia*.[141] This arbitration, brought by Himpurna California Energy Ltd (Bermuda), a Bermuda-incorporated subsidiary of a US company, against the Republic of Indonesia, arose in connection with another arbitration that Himpurna had brought against the Indonesian State Electricity Corporation, PT. (Persero) Perusahaan Listruik Negara (*PLN*). Himpurna brought its arbitration against PLN under long-term contracts for the sale and purchase of electricity generated by Himpurna in Java and which PLN had committed to purchase in defined quantities for a period of thirty years and, critically, in US dollars. That obligation to purchase electricity in US dollars became especially onerous to PLN in the wake of the Asian financial crisis and the collapse of the Indonesian currency, and PLN stopped purchasing the electricity from Himpurna. The tribunal, seated in Jakarta and operating under the 1976 UNCITRAL Rules and Indonesian law, held that this was a breach of contract – rejecting PLN's defenses, including hardship – and awarded Himpurna US$390 million in damages.

The arbitration that Himpurna brought against Indonesia was based on a letter sent by Indonesia's Minister of Finance to Himpurna (before the arbitration against PLN) in which the Minister stated that, as long as Himpurna's material obligations under the

[140] These arbitrations were previously discussed in Stephen M. Schwebel, "Injunction of International Arbitral Proceedings and Truncation of the Tribunal," 18–4 *Mealey's International Arbitration Report* (2003), p. 33. Further aspects of these arbitrations concerning the kidnapping of an arbitrator, and the resulting truncated tribunal, are discussed in the third chapter.

[141] *Himpurna California Energy Ltd.* v. *Indonesia*, UNCITRAL, Interim Award and Final Award, September 26, 1999 and October 16, 1999, XXV *Yearbook Commercial Arbitration* (2000), p. 109.

energy sale contracts were fulfilled, the Government of the Republic of Indonesia "will cause Pertamina and PLN ... to honor and perform their obligations as due in the [energy sale contract]." The letter also provided for arbitration under the UNCITRAL Rules in Jakarta, but it did not prescribe the applicable law. Following the conclusion of Himpurna's arbitration against PLN, Himpurna proceeded with its arbitration under the Minister's letter, claiming that Indonesia was liable for the award rendered in Himpurna's favor, which PLN had not paid.

The tribunal comprised Professor Jan Paulsson as chair, Mr Albert de Fina of Australia and Professor Pryatna Abdurrasyid of Indonesia. Himpurna and Indonesia signed Terms of Appointment, and Himpurna filed its Statement of Claim. But then both Himpurna and Indonesia, as well as PLN, found themselves subject to proceedings before the Jakarta Central District Court. The claimant in those proceedings was Pertamina, an Indonesia State-owned energy company that was not a party to Himpurna's arbitration against Indonesia, but that nonetheless sought a declaration that the Minister's letter did not create enforceable rights, together with an injunction restraining Himpurna and Indonesia from participating in the arbitration until the court had decided the matter. The Jakarta court granted that injunction, which it clarified was subject to a fine of US$1 million per day in the event of breach.

The injunction was a strange one in several respects. Compounding the obscurity of Pertamina's interest in the arbitration and the striking *per diem* penalty, no statutory authority for the Indonesian court's power to make such an anti-suit injunction was ever provided to the tribunal, nor any example of such an injunction ever having been made before by an Indonesian court. Such was the evident novelty of the injunction that some of its details, including when it would become binding, were communicated *ex parte* to one of the parties, Indonesia. But there was little doubt as to the seriousness of the injunction's implications. On top of the fine, Indonesia itself had reserved before the Jakarta court its right to apply, in the event of Himpurna's breach of any injunction, for an order declaring contempt of court and even imprisonment (although of whom, exactly, it was unclear). More broadly, the proceedings before the Jakarta court appeared to represent a naked attempt by the respondent State in an arbitration to unilaterally rely on the

conduct of a State-owned corporation and its own courts in order to derail a pending arbitration.

The procedural skirmishes between the parties – and between Indonesia and the tribunal – were many and are recorded at length in the report of the tribunal's awards. They culminated, as will be described more fully in the next chapter, in what Professor Pryatna would later refer to as his kidnapping by Indonesian officials on his way to the hearing in The Hague, following which he ceased to participate in the arbitration.[142] But the key points for this chapter emerge from the tribunal's interim order determining that the arbitration should proceed notwithstanding the Jakarta court's injunction and Indonesia's decision not to participate in the arbitration on that basis. Article 28(2) of the UNCITRAL Rules permitted the tribunal to continue with proceedings unless the defaulting party could show "sufficient cause" for its failure to appear at the hearing. The tribunal held that Indonesia could not show such cause.

The tribunal first approached the matter from the premise that Indonesia had contractually agreed to take part in arbitration under the Minister's letter and by signing the Terms of Appointment. The question was therefore whether there was any contractual basis on which Indonesia could plead that it was no longer bound by that contractual commitment. There was not. In particular, the tribunal held that Indonesia had not established that it was powerless to prevent State-owned Pertamina from instituting and maintaining this action, and so any plea of *force majeure*, which would require at the very least that the impediment be beyond the invoking party's control, was unavailable.

But the tribunal also found, on "an alternative basis," that Indonesia's conduct constituted "a violation of international law."[143] The tribunal rejected the notion that the arbitration was "insulated from the imperatives of international law,"[144] observing that international law was itself a part of Indonesian law and that allowing a State to "paralyse" the arbitral process by relying on its own court decision would amount to an "evisceration of the arbitral

[142] The tribunal having decided to hold the hearing in The Hague rather than Jakarta in accordance with Article 16 of the UNCITRAL Rules.
[143] Interim Award, *supra* note 141, paras. 150, 152. [144] Ibid., para. 175.

process."[145] The tribunal in this context quoted a passage from the writings of F.V. García Amador, as quoted in the first edition of this book:

> The mere fact that a State agrees with an alien private individual to have recourse to an international mode of settlement automatically removes the contract, at least as regards relations between the parties, from the jurisdiction of municipal law . . . [A]greements of this type imply a "renunciation" by the State of the jurisdiction of the local authorities. If an arbitration clause of this type were governed by municipal law, it could be amended or even rescinded by a subsequent unilateral act of the State, which would be inconsistent with the essential purpose of stipulations of this type, whatever the purpose of the agreement or the character of the contracting parties. Accordingly, as the obligation in question is undeniably international in character, non-fulfillment of the arbitration clause would directly give rise to the international responsibility of the State.[146]

The tribunal, in the face of the opinion of Indonesia's expert that "[i]t is in the highest degree offensive to the Indonesian court to seek to identify the court as one with the State,"[147] had little trouble responding by reference to basic principles of State responsibility. It thus adopted the holding of the Iran-United States Claims Tribunal, sitting in plenary session (with a full bench of nine judges), that "[i]t is a well-settled principle of international law that any international wrongful act of the judiciary of a state is attributable to that state."[148] The tribunal then went on to describe the internationally wrongful act in question:

> it is a denial of justice for the courts of a State to prevent a foreign party from pursuing its remedies before a forum to the authority of which the State consented, and on the availability of which the foreigner relied in making investments explicitly envisaged by that State. . . . [A] state is responsible for the actions of its courts, and one of the areas of state liability in this connection is precisely that of denial of justice.[149]

[145] Ibid., paras. 177–178.
[146] Ibid., para. 179 (quoting F.V. García Amador, *Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights*, 1959).
[147] Ibid., para. 173.
[148] Ibid., para. 172 (quoting *Islamic Republic of Iran* v. *United States of America*, Award No. 586-A27-FT of 5 June 1998).
[149] Ibid., at para. 184.

The tribunal held that the Jakarta Court's exercise of its "purported injunctive powers," for which no statutory authority had been provided, amounted to a denial of justice.[150] The tribunal accordingly held that Indonesia was in default under the Terms of Appointment of the tribunal to which it had agreed, and that Indonesia had failed to show sufficient cause for such failure.[151]

In its final award, produced just several weeks later, the (truncated) Tribunal held that the Minister's letter was binding under Indonesian law, Indonesia was obliged under that letter to cause PLN to pay the sum for which it was liable following the first arbitration, and, given PLN's failure to pay that sum, Indonesia was now liable to pay that sum.

The holding of the *Himpurna* tribunal that a State commits a denial of justice under international law when its courts lend themselves to interdiction and frustration of international arbitral processes is a significant addition to the existing practice. But it is not only that. The more concrete effect of the case is as a demonstration that denial of justice may not only furnish a cause of action in a proceeding subsequent to a negated arbitration, as was the case with much of the practice considered in the first edition of the book. Denial of justice may also provide the inspiration and legal basis for the tribunal to prevent that negation from happening in the first place.

(j) *Salini Costruttori SPA* v. *Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewage Authority (Ethiopia)*

This case involved a similar attempt by a respondent State to rely on an injunction issued by its courts in order to halt a locally-seated arbitration – and a similarly strong response from the tribunal.[152] The arbitration was based on an arbitration agreement contained

[150] Ibid., para. 187. The tribunal noted, as a further ground for proceeding with the arbitration, that the injunction was not even directed at the tribunal, and therefore could not constrain it, but rather had been directed solely at the parties (at paras. 189–197).

[151] Ibid., para. 198.

[152] *Salini Costruttori SPA* v. *Ethiopia*, ICC Arbitration No 1063/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction, December 7, 2001.

in a contract between Salini, an Italian company, and the Addis Ababa Water and Sewage Authority,[153] relating to a project for the construction of water treatment facilities in Ethiopia. The arbitration agreement provided for arbitration (although the parties disputed whether it provided for arbitration under the ICC Rules or rules in the Ethiopian Civil Code), seated in Ethiopia, and with Ethiopian law as the applicable substantive law. Salini commenced arbitration following various disagreements with Ethiopia concerning the performance of the contract and a tribunal was constituted with Professor Emmanuel Gaillard as chair, together with Professor Piero Bernadini and Dr. Nael Bunni.

Following extensive communications between the parties and the tribunal concerning the place of the hearing, the tribunal decided for reasons of convenience that this should be Paris rather than Addis Ababa, as Ethiopia had requested. Ethiopia then applied to the ICC Court for the disqualification of all three arbitrators on several grounds, including by "improperly" and "abusively" deciding to hold the hearing in Paris. The tribunal itself responded that the parties had agreed in the Terms of Reference to the possibility of holding hearings other than in Ethiopia, and there was no basis for any allegation of bias arising from this ordinary procedural decision. The ICC Court rejected Ethiopia's challenge, a decision that was final according to the ICC Rules. Yet Ethiopia then launched an "appeal" against the ICC Court's decision with the Ethiopian Supreme Court, which in turn issued an injunction against the tribunal restraining it from proceeding with the arbitration pending resolution of the appeal. Ethiopia also commenced an action in the Federal First Instance Court of Ethiopia requesting a declaration that the arbitral tribunal did not have jurisdiction. That court issued another injunction in an attempt to prevent the tribunal from proceeding with the arbitration.

Ethiopia further warned that a court could attach the property of, or even sentence for contempt of court, any person who breached that injunction. Ethiopia later clarified that threat: "the arbitrators

[153] There was a dispute between the parties as to whether the proper respondent was the Addis Ababa Water and Sewage Authority, or the Federal Democratic Republic of Ethiopia, but the parties ultimately agreed that the tribunal did not need to address this issue, which could be addressed at the enforcement stage instead (see ibid., para. 116). The respondent is referred to herein as "Ethiopia" for convenience.

would be in contempt of court and would then be unwilling to travel to Ethiopia, preventing them from fulfilling their functions under the ICC Rules and necessitating their replacement."[154] Ethiopia extended that threat to Salini in the event that its representatives attended the hearing that the tribunal had scheduled to hear the parties' submissions on how the tribunal should respond to the Ethiopian injunctions. That hearing went ahead, in Salini's presence and Ethiopia's absence, and Salini later noted to the tribunal that it understood contempt proceedings had indeed been initiated in Ethiopia against its representatives who attended the hearing.

The tribunal held that it would not suspend the arbitration because of the Ethiopian injunctions. The tribunal explained that an arbitration agreement is not "anchored exclusively in the legal order of the seat of the arbitration," but is instead "validated by a range of international sources and norms extending beyond the domestic seat itself."[155] Those sources included the obligation of a State under Article II(1) of the New York Convention to recognize arbitration agreements and which, despite the Convention not having been ratified by Ethiopia, existed as a matter of Ethiopian law anyway. The tribunal acknowledged that proceeding with the arbitration did create some risk for the enforceability of the award given that Ethiopia's courts, as the courts of the seat, had the power to set aside the tribunal's award. But the tribunal responded that other considerations, including the duty it owed to the parties and the imperative of avoiding a denial of justice, took priority:[156]

> This [duty to render an enforceable award] does not mean, however, that the arbitral tribunal should simply abdicate to the courts of the seat the tribunal's own judgment about what is fair and right in the arbitral proceedings. In the event that the arbitral tribunal considers that to follow a decision of a court would conflict fundamentally with the tribunal's understanding of its duty to the parties, derived from the parties' arbitration agreement, the tribunal must follow its own judgment, even if that requires non-compliance with a court order.
>
> To conclude otherwise would entail a denial of justice and fairness to the parties and conflict with the legitimate expectations they created by entering into an arbitration agreement. It would allow the courts of the seat to convert an international arbitration agreement into a dead letter,

[154] Ibid., para. 81. [155] Ibid., para. 129. [156] Ibid., paras. 142–143.

with intolerable consequences for the practice of international arbitration more generally.[157]

The tribunal fortified its position by referring to a number of classic precedents for the proposition that a State, having agreed to arbitration, could not then invoke its own law to renege on that arbitration agreement.[158] The tribunal recognized that, although this was widely established in situations where the State had relied on its own law as a basis to withdraw from arbitration, there were fewer cases where the State had relied on its own courts as a basis to withdraw from an arbitration. But it had no doubt that the principle was the same. The tribunal recognized that, as a matter of public international law, the courts of a State were an organ of the State, whether or not they may in fact act independently of other organs of a State.[159] "The Respondent," the tribunal explained, "should not be permitted to renege upon an agreement to submit disputes to international arbitration by the device of resorting illegitimately to its own courts, just as it should not be permitted to do so by resorting to its own law."[160] The tribunal, having refused to suspend the arbitration, proceeded to reject Ethiopia's jurisdictional objections, leaving the merits to be determined at a later date. The case settled instead.[161]

The tribunal's reasoning is a firm affirmation of general principle and a confirmation of its application to a respondent State's reliance on its own courts in an attempt to derail an arbitration, although determining the dividing line between "legitimate" and "illegitimate resorts" by a respondent State to its own courts may

[157] The tribunal cited, in this connection, the decision of a distinguished tribunal chaired by Jiménez de Aréchaga in ICC Case No. 4695, where the tribunal, confronted with the argument that the arbitration agreement was invalid under the law of the country of the respondent company, held that "if the tribunal finds, as it does, that it has jurisdiction, it cannot fail to exercise it. Otherwise, it would be concurring in a failure to exercise jurisdiction and could even be accused of a denial of justice."

[158] Referring, for example, to the *Framatome* and *Elf Aquitaine* cases already discussed in this chapter.

[159] *Salini*, *supra* note 152, paras. 165–176. [160] Ibid., para. 174.

[161] R. Mohtashami, "In Defense of Injunctions Issued by the Courts of the Place of Arbitration: A Brief Reply to Professor Bachand's Commentary on *Salini Costruttori S.p.A.* v. *Ethiopia*," 20-5 *Mealey's International Arbitration Report* (2005), p. 21.

present difficulties in some cases.[162] Those difficulties could be mitigated by focusing more closely on the traditional elements of denial of justice. Eric Schwartz, who appeared as counsel for Ethiopia in this case, made precisely this point in some reflections offered after the tribunal's award.[163] Schwartz recognized that, "[i]n modern international law, a State denies justice no less when it refuses or fails to arbitrate with a foreign national when it is legally bound to do so, or when it, whether by executive, legislative or judicial action, frustrates or endeavors to frustrate international arbitral processes in which it is bound to participate."[164] Based on a summary of several classic authorities on denial of justice, Schwartz went on to explain that "the denial must ordinarily be 'manifest' or 'flagrant.' It must be 'clearly improper and discreditable' insofar as it is 'arbitrary' and 'shocks, or at least surprises, a sense of judicial propriety.'"[165] From this, Schwartz considered that "[i]t can be argued that an international arbitral tribunal would, for its part, consecrate a denial of justice, contrary to the legitimate expectations of the parties when entering into their arbitration agreement, if, without being constrained to do so, it were to acquiesce in a judicial order that failed to comport with minimum international standards."[166] The test, according to Schwarz, is that "[i]t is not the blocking of an arbitration that in and of itself constitutes a 'denial of justice,' but rather the blocking of an arbitration in a manner that is manifestly arbitrary and improper."[167] Whether such manifest arbitrariness and impropriety exists in any case would depend, as in all denial of justice cases, on a close examination of the facts.

(K) *NIOC* V. *ISRAEL*

This exceptional case warrants mention, if only as an interesting illustration of the variety of circumstances in which denial of justice

[162] Ibid. (offering a critical view of the tribunal's reasoning, albeit from the perspective of respondent's counsel). See similarly, both in terms of view and perspective, E. Schwartz, "Do International Arbitrators Have a Duty to Obey the Orders of Courts at the Place of Arbitration? Reflections on the Role of the Lex Loci Arbitri in the Light of a Recent ICC Award," in *Liber Amicorum in Honour of Robert Briner* (2005), p. 795.
[163] Schwartz, *supra* note 162, p. 795.
[164] Ibid., p. 810 (quoting Schwebel, *supra* note 140, p. 38). [165] Ibid.
[166] Ibid. [167] Ibid., p. 811.

may arise in the context of a State's attempts to negate arbitration.[168] In 1968, at a time when relations between Iran and Israel were less tense than they would become following Iran's 1979 revolution, the National Iranian Oil Company (NIOC) entered into a contract with Israel for the construction of an oil pipeline running across Israeli territory from the Mediterranean port of Ashkelon to the Red Sea port of Eilat. This was part of a wider project to transport Iranian oil through Israel on its way to European customers. A dispute later arose and in 1994 NIOC commenced arbitration under the contract's arbitration agreement. The contract provided for *ad hoc* arbitration, without providing for a seat.

NIOC nominated its arbitrator, but Israel refused to do the same. This was more problematic than it typically is given the relevant wording of the arbitration agreement:

> Each Party shall appoint one arbitrator. If such arbitrators fail to settle the dispute by mutual agreement or to agree upon a Third Arbitrator, the President of the International Chamber of Commerce in Paris shall be requested to appoint such Third Arbitrator.[169]

Unlike with respect to the appointment of the Third Arbitrator, this arbitration clause did not provide any mechanism for the appointment of a party-nominated arbitrator in the event of a party's failure to make a nomination (and did not identify any institutional rules, which might have provided an answer). NIOC turned to the French courts for assistance. In 1995 it first requested the President of the *Tribunal de grande instance, Paris* to appoint an arbitrator, as it was entitled to do under Article 1493 of the New Code of Civil Procedure in cases where France is the seat of the arbitration, or French procedural law is otherwise applicable. But neither of those two conditions existed and so the French judge refused. The French judge also noted that Israeli law provided a mechanism to appoint an arbitrator upon a party's default and so there could be no "denial of justice."

[168] 2002 *Revue de l'Arbitrage* 427; aff 'd *Cour de cassation*, February 1, 2005, Gazette du Palais, April 27–28, 2005 at p. 34. See also, for an English translation of the decision of the *Cour de cassation*, XXX *Yearbook Commercial Arbitration* (2005), p. 125.

[169] Quoted in *State X* v. *Company Z, Judgment of the Swiss Federal Tribunal*, Case No. 4A_146/2012, January 10, 2013 (concerning Israel's challenge to a Partial Award of the tribunal dealing with certain arguments as to its composition).

Following the continued failure to resolve the dispute, in 1999 NIOC returned to the *Tribunal de grande instance* with the submission that relief from the Israeli courts was not possible because the Israeli courts, considering Iran an "enemy state," would not follow the usual procedure. But the French judge maintained his rejection of NIOC's application and held that, even if there were a sufficient link to France, there would still be no denial of justice because the judge was not satisfied that it was impossible for NIOC to seek relief from either an Israeli court (since the prior judicial refusal to hear Iranian parties might be overturned) or an Iranian court. But NIOC successfully reversed that decision on appeal to the Paris Court of Appeal. The Court held that there would be a denial of justice because it assumed that effective relief could not be obtained in Israel or Iran. Notwithstanding the defective arbitration agreement that the parties had made, the Court held that "the right for a party to an arbitration agreement to have its claims submitted to an arbitral tribunal is a rule of public policy." Most expansively, the Court held that, even though the arbitration was not seated in France and French procedural law was not applicable, the French courts could act in order to prevent a denial of justice abroad if there were a sufficient link to France – which it held to exist because of the arbitration agreement's reference to the ICC, which was a French legal entity with its headquarters in Paris.[170] The *Cour de cassation* upheld the Court of Appeal's decision on appeal in 2005.

It must first be observed that the case was decided on the basis of French law. Professor Paulsson describes the French law providing for the court to intervene in cases of denial of justice as a "singular use of the expression; it does not denote breach of a duty on the part of any court or indeed legal order, but rather commands the French judge to step in if no one else will."[171] Yet the case remains instructive as a matter of public international law because, as Paulsson explains, the decision of the Court of Appeal could have been justified by virtue of denial of justice as a delict under international law. "The denial of justice in *NIOC* v. *Israel*," he explains, "did not require inaction of the Israeli courts; it was consummated when the

[170] See the amended French Code of Civil Procedure, Article 1505(4), which now expressly provides for this possibility.

[171] Paulsson, *supra* note 1, p. 12, fn. 7.

government refused to name an arbitrator."[172] Paulsson further explains that:

> This was a denial of justice not because all parties have a right to the implementation of their arbitration agreement, but because the government had made a promise to a foreign party that the justice it would vouchsafe was that of arbitration. The failure to respect this promise . . . is an international delict. Applying international law as a part of French law, the French courts (assuming once more that they had jurisdiction) would be entitled to find that there had been a denial of justice.[173]

The tribunal, once constituted, decided that the seat of the arbitration would be Geneva.[174] The ultimate outcome of the arbitration is unclear.

(l) BANK OF AMERICA, OPIC CLAIM DETERMINATION

This case was not an arbitration, but rather a determination by the United States' Overseas Private Investment Corporation (OPIC) in response to Bank of America's claim for loss arising out of its role in what OPIC described as "one of the world's largest power projects."[175]

The project involved several major US companies (Bechtel, Enron, and General Electric) investing in an Indian-incorporated company, Dabhol Power Company (DPC), for the purposes of developing, constructing and operating a power plant and associated facilities in India. Bank of America provided financing for this project. DPC had entered into a Power Purchase Agreement (PPA) with the Maharashtra State Electricity Board (MSEB), which was owned by the Indian State of Maharashtra. Both the Government of Maharashtra (GOM) and the Government of India (GOI) agreed in separate contracts to guarantee MSEB's obligations under the PPA, while the GOM entered into further obligations in State Support Agreements. MSEB defaulted on its purchase obligations under the PPA and rescinded it, and the GOM and GOI refused to pay under the guarantees. Each of the PPA, the State Support Agreements and the two guarantees provided for arbitration in

[172] Ibid., p. 157. [173] Ibid.
[174] *State X* v. *Company Z, Judgment of the Swiss Federal Tribunal*, *supra* note 169.
[175] Bank of America, OPIC Claim Determination, September 30, 2003, para. 6.

London under the UNCITRAL Arbitral Rules, although the PPA and GOI guarantee provided for Indian law as the applicable substantive law, while the State Support Agreements and GOM guarantee provided for English law. DPC commenced separate arbitrations under the PPA (against MSEB), the State Support Agreements (against GOM), and the GOM and GOI guarantees.

MSEB responded by bringing an action to the Maharashtra Electricity Regulatory Commission (MERC), seeking, among other things, a declaration that MSEB had validly rescinded the PPA and an injunction restraining DPC from pursuing arbitration against MSEB. MERC granted that injunction and determined that only it, and not any arbitral tribunal, had jurisdiction in respect of disputes arising out of the PPA. DPC unsuccessfully appealed this to the Bombay High Court, which held that it was for MERC to determine its own jurisdiction, but DPC then successfully appealed to the Indian Supreme Court, from which it obtained a decision ordering the Bombay High Court to determine whether MERC had properly exercised its jurisdiction. On remand, the Bombay High Court held that MERC was correct to determine that it had jurisdiction over the disputes, a decision that DPC again appealed to the Supreme Court. Injunctions were also granted by the Bombay High Court restraining DPC from pursuing arbitration under the GOM guarantee and by the Delhi High Court restraining DPC from pursuing arbitration under the GOI guarantee.

OPIC, for the purposes of determining whether Bank of America had a recoverable claim under its insurance contract with OPIC, considered whether the frustration of DPC's arbitration rights by GOI, GOM, and the Indian courts constituted a violation of international law. OPIC, acting when the second appeal to the Indian Supreme Court was still pending, held that the conduct of the Indian entities amounted to a denial of justice contrary to international law. It noted that the Restatement of Foreign Relations (Third), § 712, comment h provided that "a state may be responsible for a denial of justice under international law if … having committed itself to a special forum for dispute settlement, such as arbitration, it fails to honor such commitment."[176] OPIC also noted the US Diplomatic Note made in connection with the Libyan expropriations:

[176] Ibid., para. 73.

It is the position of the United States Government that contracts validly concluded between foreign governments and nationals of other states should be performed by the parties to those contracts in accordance with their terms . . . . Where the breach of such a contract by a foreign government is arbitrary or tortious or gives rise to a denial of justice, a violation of international law ensues . . . . [and] the failure of a government to respect a contract with an alien to arbitration of disputes arising under that contract constitutes a denial of justice under international law.[177]

OPIC concluded that:

There is abundant evidence in this case that Indian foreign governing authorities (i) have denied DPC access to international arbitration of its disputes with MSEB, the GOM and the GOI, (ii) have obstructed DPC's efforts to appeal denial of those arbitration rights, and (iii) have failed to honor their own commitments regarding access to international arbitration. OPIC concurs with the Insured that the actions of these authorities in committing to international arbitration and then failing to honor that commitment constitute a denial of justice that satisfies the Section 4.01 requirement of a violation of international law.[178]

OPIC clarified that DPC had "made all reasonable efforts to pursue its rights through the local courts," including by litigating its rights before MERC, challenging MERC's decision before the Bombay High Court, and twice appealing to the Supreme Court of India. In those circumstances Bank of America was "not required to prove that DPC has exhausted *all* local remedies."[179]

It is also worth noting that, in related proceedings brought by Bechtel and others before an arbitral tribunal operating under the Rules of the American Arbitration Association, the tribunal held that the Indian courts and MERC, MSEB, and other Indian entities had "enjoined and otherwise taken away Claimants' international arbitration remedies . . . in violation of established principles of international law, in disregard of India's commitments under the UN Convention as well as the Indian Arbitration Act."[180] The tribunal accordingly held that Bechtel and others were able to recover under an insurance policy covering expropriation.

[177] Ibid., para. 74. [178] Ibid., para. 75.
[179] Ibid., paras. 76–77 (emphasis added).
[180] *Bechtel Enterprises International (Bermuda) Ltd et al.* v. *Overseas Private Investment Corporation*, Award, September 3, 2003, 16 *World Trade and Arbitration Materials* (2004), p. 417.

(M) *CONSTRUCTION PIONEERS* V. *GHANA*

This arbitration arose out of a contract between Construction Pioneers, a Liechtenstein-incorporated company, and Ghana's Ministry of Roads and Transport for the construction of a road in Ghana.[181] The contract was governed by Ghanaian law and contained an arbitration agreement providing for ICC arbitration seated in Ghana. Disputes arose under the contract, Construction Pioneers commenced arbitration, and the Ministry, after participating in the early stages of that arbitration (albeit objecting to the tribunal's jurisdiction), applied to the High Court of Justice of Accra to revoke the authority of the tribunal. This was on the basis that the arbitration concerned matters of criminal fraud that were within the exclusive jurisdiction of the Ghanaian courts. The Ghanaian court granted that application, and also made an order that the arbitration agreement itself ceased having effect in its entirety, following which the Ministry no longer participated in the arbitration.

A majority of the tribunal, including Eric Schwartz as presiding arbitrator, nevertheless confirmed that it should continue with the arbitration. It emphasized its "duty," notwithstanding the applicability of Ghanaian arbitration law as *lex arbitri*, "to ensure that the parties' arbitration agreement is not improperly subverted" and, thus, consecrate a "'denial of justice,' as that principle is understood in international law."[182] The majority, in this connection, explained "that there is today ample authority in international arbitral jurisprudence for the proposition that the existence of a contract involving a State or State party, as in the present case, is [quoting the first edition of this book] 'suffic[ient] to bring the resultant relationship [with the foreign counter party] within the sphere of protection of international law.'"[183] Even though the contract had specified the application of Ghanaian law, the majority cited the *Himpurna* tribunal for the proposition that the dispute could not be "insulated from the imperatives of international law" – which, the

[181] *Construction Pioneers Baugeselleschaft Anstalt* v. *Government of the Republic of Ghana, Ministry of Roads and Transport*, ICC Case No. 12078/DB/EC, Partial Award, December 22, 2003.

[182] Ibid., para. 130. [183] Ibid., para. 131.

tribunal also added, formed part of Ghanaian common law in any event.[184]

The relevant obligations of international law included, the majority continued, the obligation to recognize arbitration agreements under Article II of the New York Convention, an obligation that should itself be applied in a way that comports with international law, including the obligation not to deny justice. The majority then recalled that:

> . . . a State denies justice when its courts are closed to foreign nationals or render judgments against foreign nationals that are arbitrary. In modern international law, a State denies justice no less when it refuses or fails to arbitrate with a foreign national when it is legally bound to do so, or when it, whether by executive, legislative or judicial action, frustrates or endeavors to frustrate international arbitral processes in which it is bound to participate.[185]

The majority appeared to consider that both kinds of denial of justice – a potential domestic denial of justice by virtue of the Ghanaian court's treatment of Construction Pioneers in the domestic proceedings *and* a potential international denial of justice if the tribunal permitted those courts to negate the arbitration – were implicated by the facts here. The tribunal explained that "[a]n international arbitral tribunal, such as the present one, may itself,

[184] Compare, for example, the reasoning of the tribunal in *Duke Energy* v. *Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, para. 396:

> The Claimants argue that it is widely accepted under international law that a State which refuses to respect its promise to arbitrate with a foreign party commits a denial of justice. Doing so, it fails to recognize that Ecuador's promise related to a domestic arbitration with a local company. The arbitration had its seat in the country, was governed by the local arbitration law, and conducted under local institutional rules. The alleged ground for nullity arose under the law governing the arbitration. This situation differs from that in which a State agrees to international arbitration with a foreign party and then raises a defense of lack of jurisdiction arising from an incapacity under its own law while the arbitration agreement is valid under the law governing the arbitration.

That reasoning could pose problems to a foreign investor who operates in a host State by way of a locally-incorporated company (and may be required by the host State to so operate). The reasoning appears inconsistent with other authorities, including *Construction Pioneers* v. *Ghana*, to the extent that it suggests the application of the local law as the law governing the arbitration should be determinative.

[185] Quoting from Schwebel, *supra* note 140, p. 38.

thus, consecrate a denial of justice by recognizing and giving effect to a State court decision purporting to revoke its authority where that decision does not comport with international standards."[186] The tribunal proceeded to hold that the Ghanaian court's decision purporting to revoke the tribunal's authority did not comport with international standards, and the Ministry's application to the court was itself improper, because they were both made without regard to the actual claims within the tribunal's jurisdiction, none of which concerned the issues of fraud that the Ministry and the Ghanaian court said were within the exclusive jurisdiction of the Ghanaian courts. The Ghanaian court's failure even to consider this fact rendered its judgment "completely arbitrary"[187] and its failure to explain how the arbitration agreement could cease having effect in its entirety was "manifestly arbitrary."[188] The tribunal accordingly proceeded with the arbitration and went on to deliver several awards on the merits.[189]

(N) *WASTE MANAGEMENT* V. *MEXICO*

This arbitration brought under NAFTA's Chapter Eleven and the Rules of the ICSID Additional Facility arose out of a concession contract entered into between a US company's Mexican subsidiary and the Mexican City of Acapulco for the provision of certain waste disposal services.[190] The claimant investor, as Professor Paulsson has described, "sought to extend" the case law described above by contending "that a denial of justice arises where the government simply makes it burdensome (not impossible) to use the arbitral mechanism."[191]

That attempt failed. The investor, before launching its ICSID arbitration, had launched arbitration in Mexico under the arbitration agreement in its concession contract, which provided for arbitration under the Rules of Mexico's National Chamber of Commerce (CANACO). The City of Acapulco objected to the tribunal's jurisdiction and, after CANACO had requested the parties to pay

[186] *Construction Pioneers Baugeselleschaft Anstalt*, *supra* note 43, para. 135.
[187] Ibid., paras. 140–141. [188] Ibid., para. 143.
[189] As well as its Partial Award of December 22, 2003, the tribunal delivered an Interim Award of August 3, 2004 and a Final Award of October 2, 2006.
[190] *Waste Management* v. *Mexico (No 2)*, ICSID Case No. ARB(AF)/00/3.
[191] Paulsson, *supra* note 1, p. 153.

advances of costs, the City refused to pay its half share. The total sum requested was significant (about US$550,000) and the investor refused to pay the full sum itself. The arbitration was therefore discontinued. The investor instead launched ICSID arbitration alleging a number of breaches of international law, including denial of justice arising from the events before the CANACO tribunal. The ICSID tribunal declined to see any denial of justice in those events. It summarized that CANACO, itself not a State organ, "apparently behaved in a proper and impartial way," concluding that "the discontinuance of the arbitration, a decision made by the Claimant on financial grounds, did not implicate the Respondent in any internationally wrongful act." In response to the investor's argument that the "litigation strategy adopted by the City itself amounted to a denial of justice," the tribunal reasoned that "a litigant cannot commit a denial of justice unless its improper strategies are endorsed and acted on by the court, or unless the law gives it some extraordinary privilege which leads to a lack of due process. There is no evidence of either circumstance in the present case."[192]

(o) *SWISSBOURGH* v. *LESOTHO*

This arbitration, which involved a rare finding of State responsibility for a denial of justice based on a State's negation of arbitration, reveals the ongoing relevance of this form of denial of justice, albeit in a rather unexpected case. The underlying award remains confidential, but some of its aspects can be discerned from the decisions of the Singaporean courts in set-aside proceedings.

The arbitration arose out of a dispute between several Lesothoan and South African investors on the one hand, and Lesotho on the other hand. The dispute concerned mining leases granted to one of the investors that had been revoked by Lesotho following the decision to implement a major infrastructure project, the Lesotho Highlands Water Project, which necessitated the flooding of the land for which the licenses were granted.

[192] See Professor Paulsson approving the tribunal's reasoning and explaining that "there is no absolute international duty to finance arbitral proceedings," but noting that some arbitral rules provide for certain solutions of which a claimant facing a recalcitrant respondent may avail itself (ibid., p. 154).

In 2009, the investors, having failed to obtain redress in the Lesotho courts, launched a case against Lesotho under the dispute settlement provisions contained in the Southern African Development Community (SADC) Treaty – a treaty entered into by the fifteen member States of the SADC. That treaty provided for a judicial body charged with hearing disputes under the SADC Treaty. The investors claimed before the SADC Tribunal that Lesotho had expropriated their property but then, in 2010 – before the investors' claim could be decided – the member States of the SADC unanimously decided to suspend the operation of the SADC Tribunal following complaints about its operation by Zimbabwe in the wake of an unrelated case brought against it. The member States later dissolved the SADC Tribunal.

The shuttering of the SADC Tribunal during the investors' case against Lesotho prompted them in 2012 to launch arbitration against Lesotho under the arbitration agreement contained in another SADC instrument, the SADC's Finance and Investment Protocol (FIP). That arbitration was governed by the UNCITRAL Rules, administered by the Permanent Court of Arbitration and seated in Singapore. The investors contended that Lesotho's role in shuttering the SADC Tribunal without providing any alternative means for their claim to be heard, produced, among other breaches, a denial of justice contrary to the FIP's provision that "investments and investors shall enjoy fair and equitable treatment in the territory of any State Party."[193]

A majority of that tribunal (David Williams and Doak Bishop; Judge Petrus Nienaber dissenting) dismissed a range of jurisdictional objections (while upholding others in respect of certain claimants), and upheld the denial of justice claim and several other claims.[194] As the remedy for Lesotho's breaches, the tribunal directed the investors and Lesotho to constitute a new tribunal in order for the investors' original expropriation claim to be heard. Although the tribunal's reasoning on denial of justice is not

[193] The Singapore Court of Appeal summarized the essence of the investors' claim as alleging the "wrongful act of interfering with and displacing the means provided and existing at that time for vindicating grievances before the SADC Tribunal by shuttering that avenue" (*Swissbourgh Diamond Mines (Pty) Ltd* v. *Kingdom of Lesotho* [2018] SGCA 81, para. 4).

[194] *Kingdom of Lesotho* v. *Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195, paras. 45(d) and 147(b).

available, the tribunal apparently accepted that a State may be responsible for a denial of justice where it frustrates an international arbitral process – or, in this case, a binding dispute settlement process under the SADC Treaty – in which it has agreed to participate.

Lesotho thereafter successfully applied to the Singapore High Court for the setting aside of the award on the ground that the award dealt with a dispute not contemplated by and not falling within the terms of the submission to arbitration.[195] This decision was upheld by the Court of Appeal with somewhat different reasoning.[196] But neither court disturbed the tribunal's reasoning on the merits of the arbitration, including its reasoning on denial of justice.[197]

3. *Arbitral Awards: Negation of Arbitration as Other Breaches of International Law*

The burgeoning case law of arbitral tribunals adjudicating disputes between investors and States under bilateral investment treaties continues to illustrate the range of possibilities for how aliens and arbitral tribunals may respond to a respondent State's attempts to negate arbitration.[198] It is in this context that arbitral tribunals have

[195] Within the meaning of Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration, as incorporated into Singaporean law (*Kingdom of Lesotho* v. *Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195).

[196] *Swissbourgh Diamond Mines*, *supra* note 193.

[197] The Court of Appeal did consider that the investors' failure to exhaust local remedies also constituted a ground depriving the arbitral tribunal of jurisdiction (ibid., paras. 205–224), however this was on the basis of a specific provision in the FIP that required the exhaustion of local remedies before claims thereunder could be pursued – rather than as a substantive element of a denial of justice claim.

[198] It may also be noted for completeness that the European Court of Human Rights may provide a remedy in certain circumstances. In *Stran Greek Refineries* v. *Greece* (1994) 19 EHRR 293 (discussed in Chapter 1), Greece had passed a law terminating the contract, and the Greek Parliament "clarified" that this included the termination of the arbitration agreement, while proceedings were pending before the Greek courts for the enforcement of an arbitral award under that arbitration agreement. The Court held that the award was a "possession" under Article 1 of Protocol 1 of the European Convention on Human Rights, and that "[b]y choosing to intervene at that stage of the proceedings in the Court of Cassation by a law which invoked the termination of the contract in question in order to declare void the arbitration clause and to annul the arbitration award of 27 February 1984, the legislature upset, to the detriment of the applicants, the

developed a line of authority whereby a party's right to arbitrate, as well as an arbitral award, may be considered important elements of a protected investment under a BIT, the expropriation or other mistreatment of which investment may trigger international responsibility.[199]

(A) *SAIPEM* V. *BANGLADESH*

This landmark case arose out of a contract between an Italian company, Saipem, and a Bangladeshi State-owned entity, the Bangladesh Oil Gas and Mineral Corporation (Petrobangla), for the construction of a gas pipeline in Bangladesh.[200] The contract was governed by Bangladeshi law and it provided for arbitration in Bangladesh under the ICC Rules. A dispute arose between the parties that was submitted to arbitration. During the pendency of that arbitration, Petrobangla, having received several adverse procedural decisions from the tribunal, successfully applied to the Bangladeshi courts to first injunct the arbitration and then revoke the authority of the tribunal to hear the arbitration. The arbitral tribunal, the Bangladeshi courts stated with little elaboration, had

balance that must be struck between the protection of the right of property and the requirements of public interest" (ibid., para. 74). Greece had therefore breached Article 1 of Protocol 1. In *Kin-Stib and Majkic* v. *Serbia* (Application No. 12312/05), Judgment, April 20, 2010, the European Court of Human Rights also held that a claim arising out of an arbitral award could be a "possession" within the meaning of Article 1 of Protocol 1 "if it is sufficiently established to be enforceable" (ibid., para. 83) and that, by failing "to make use of all available legal means at its disposal in order to enforce a binding arbitration award" (ibid., para. 83), Serbia had breached that obligation.

199 See generally Luca Radicati di Brozolo and Loretta Malintoppi, "Unlawful Interference with International Arbitration by National Courts of the Seat in the Aftermath of *Saipem* v. *Bangladesh*," in Miguel Angel Fernandez-Ballesteros and David Arias (eds), *Liber Amicorum Bernado Cremades* (2010), p. 993; Michael Reisman and Heide Iravani, "The Changing Relation of National Courts and International Commercial Arbitration," 21 *American Review of International Arbitration* (2010), p. 5; José Alvarez, "Crossing the 'Public/Private' Divide: Saipem v. Bangladesh and Other Crossover Cases," in Albert Jan van den Berg (ed.), *International Arbitration: The Coming of a New Age?* (2013), p. 400; Gabrielle Kaufmann-Kohler, "Commercial Arbitration Before International Courts and Tribunals – Reviewing Abusive Conduct of Domestic Courts," 29 *Arbitration International* (2013), p. 153; and Berk Demirkol, *Judicial Acts and Investment Treaty Arbitration* (2018), ch. 6.

200 *Saipem* v. *Bangladesh*, Decision on Jurisdiction, *supra* note 32; ibid., Award, *supra* note 32.

acted with "manifest disregard" for the law and created the "likelihood of miscarriage of justice." The arbitral tribunal nevertheless proceeded and it delivered an award of damages in favor of Saipem for Petrobangla's breach of contract. Petrobangla applied to the Bangladeshi courts to set the award aside and the High Court Division of the Supreme Court of Bangladesh held that there was nothing to set aside because the award was "a nullity" – "a non-existent award can neither be set aside nor can it be enforced," the Court concluded. Saipem did not appeal that decision.

Saipem instead commenced its second attempt at international arbitration, this time under the Italy-Bangladesh bilateral investment treaty and before a tribunal constituted under the ICSID Convention. According to Saipem, its claim concerned:

> the expropriation by Bangladesh of (i) its right to arbitration of its disputes with Petrobangla; (ii) the right to payment of the amounts due under the Contract as ascertained in the ICC Award; (iii) the rights arising under the ICC Award, including the right to obtain its recognition and enforcement in Bangladesh and abroad; and therefore (iv) the residual value of its investment in Bangladesh at the time of the ICC Award, consisting of its credits under the Contract.[201]

The tribunal upheld Saipem's claim. It first held at the jurisdictional stage that Saipem had made an "investment" within the meaning of the ICSID Convention.[202] For this purpose, though, the tribunal explained that it was not considering either the right to arbitrate or the award as itself a protected investment; rather, the tribunal explained that what was relevant was "the entire or overall operation," of which the right to arbitrate and the award were parts.[203] Saipem had no difficulty also satisfying the broad

[201] Ibid., Award, *supra* note 32, para. 102.

[202] Article 25(1) of the Convention provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment." The *Saipem* tribunal applied (at para. 99) what it referred to as the "Salini test," according to which "the notion of investment implies the presence of the following elements: (a) a contribution of money or other assets of economic value, (b) a certain duration, (c) an element of risk, and (d) a contribution to the host State's development" (drawing from *Salini* v. *Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52).

[203] *Saipem* v. *Bangladesh*, Decision on Jurisdiction, *supra* note 32, para. 110. See also the further explanation of Gabrielle Kaufmann-Kohler (who chaired the *Saipem* tribunal), *supra* note 199, pp. 166–167: "An investment is an allocation of resources made in cash, in kind, or in labour, entailing a certain duration and

definition of an "investment" under the BIT, which included "any kind of property."[204]

The tribunal then proceeded on the merits to hold that, consistent with its comprehensive view of Saipem's investment, "the allegedly expropriated property is Saipem's residual contractual rights under the investment as crystallized in the ICC Award."[205] The tribunal held that the Bangladeshi court's treatment of the award as "a nullity" was "tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award."[206] Bangladesh was therefore liable to pay compensation, which the tribunal determined to be the value of the ICC award (plus interest).

The award may be viewed as a reflection of international law's ability to develop solutions to address a State's unwarranted negatation of international arbitration. State courts had exercised their supervisory jurisdiction so as to derail an arbitration involving a local State entity, and the tribunal applied international law in a way that corrected what it found to be an evident injustice. But this is not to say that the award is without difficulties. Perhaps the

participation in the risks associated with the economic operation. Even where BITs have broad definitions covering 'any kind of asset' followed by an enumerative list, it is difficult to see how an arbitration agreement or an arbitral award could be an investment. Cases have rather held that the investment comprises of the contribution made in the course of the underlying transaction that gave rise to the dispute and to the award."

[204] *Saipem* v. *Bangladesh*, Decision on Jurisdiction, *supra* note 32, paras. 121–122. The tribunal, in the context of determining whether the right to arbitrate was capable of constituting expropriation, had regard to the proposition made in Stephen M. Schwebel, "Anti-Suit Injunctions in International Arbitration – An Overview," in E. Gaillard (ed.), *Anti-suit Injunctions in International Arbitration* (2005), p. 5, that "[t]he contractual right of an alien to arbitration of disputes arising under a contract to which it is party is a valuable right, which often is of importance to the very conclusion of the contract," and that any "[v]itiation of that right" through court interference "attracts the international responsibility of the State of which the issuing court is an organ." The tribunal did not express a view on the correctness or otherwise of that proposition in its jurisdictional decision, but it did recall in its subsequent award that "the right to arbitrate and the rights determined by the Award are capable in theory of being expropriated" (ibid., para. 122).

[205] *Saipem* v. *Bangladesh*, Award, *supra* note 32, para. 128.

[206] Ibid., para. 129. The tribunal accepted that, because of the possibility of enforcing an arbitral award abroad under the New York Convention, the Bangladeshi court's declaration of the award as a nullity may not necessarily involve the substantial deprivation of the investment that is required for there to be an expropriation. In this case, though, it was not disputed that the only assets of Petrobangla against which Saipem could enforce the award were in Bangladesh (ibid., para. 130).

greatest question arises from the tribunal's explanation that whether the taking amounted to an expropriation turned on a further finding that the actions of the Bangladeshi courts were "illegal" (the tribunal itself placed this term within quotation marks).[207] That is a novel requirement, as expropriation cases in international law typically do not require proof of the taking's illegality. The tribunal acknowledged this point, but considered that "given the very peculiar circumstances of the present interference, the Tribunal agrees with the parties that the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts' intervention is tantamount to an expropriation."[208] "If this were true," the tribunal continued, "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."[209]

In this case, the tribunal emphasized that it "did not find the slightest trace of error or wrongdoing" in the ICC tribunal's decisions, which the Bangladeshi courts clearly construed with "manifest disregard" for the law and created a "likelihood of miscarriage of justice."[210] The tribunal concluded that "the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process."[211] This idea of "abuse of right" became the foundation for the tribunal's distinction between those takings that could or could not amount to an expropriation in this context, albeit the tribunal cited just one authority for its proposition that "[i]t is generally acknowledged in international law that a State exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights."[212] The tribunal also held that

[207] Ibid., paras. 133–134. [208] Ibid., para. 133. [209] Ibid., para. 133.
[210] Ibid., para. 155. [211] Ibid., para. 159.
[212] Ibid., para. 160, citing Alexandre Kiss, "Abuse of Rights," in R Bernhadt (ed.), *Encyclopedia of Public International Law*, vol. 1, p. 5. Abuse of rights is in truth rather more controversial. Hersch Lauterpacht, in discussing the International Court of Justice's treatment of the principle, warned that:

> These are but modest beginnings of a doctrine which is full of potentialities and which places a considerable power, not devoid of a legislative character, in the hands of a judicial tribunal. There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which . . . must be wielded with studied restraint. (*The Development of International Law by the International Court* (1958), p. 164.)

See also, for similar caution, Crawford, *supra* note 3, pp. 562–563.

Bangladesh had, through the actions of its courts, breached its international law obligation to recognize arbitration agreements under Article II(1) of the New York Convention, although it is not clear if the tribunal considered that this alone would have amounted to the "illegality" necessary for an expropriation to arise.[213] The tribunal further held that local remedies did not have to be exhausted for an expropriation, even one committed through judicial acts. But it also held that, even if local remedies did have to be exhausted, this requirement would have been met given that all reasonable remedies, in its view, had been exhausted.[214]

The conceptual awkwardness of adding an additional "illegality" requirement to certain kinds of expropriation cases but not others, and the further challenges of determining the benchmark against which that "illegality" should be assessed, raise the question of whether this kind of case may more appropriately be determined on the basis of denial of justice, rather than expropriation. The BIT in this case, notably, did not contain an obligation to provide fair and equitable treatment, which provides some explanation for the tribunal's attempts to refashion the law of expropriation to the particular facts of this case.[215]

(B) *ATA* v. *JORDAN*

Subsequent cases have developed the ideas set down in *Saipem* in different ways. The tribunal in *ATA* v. *Jordan*[216] placed particular weight on the importance of the right to arbitrate when holding that the purported extinguishment of an arbitration agreement by Jordan's highest court breached the obligation to provide fair and equitable treatment. ATA, a Turkish company, had entered into a contract with a Jordanian State-owned company, APC, for

[213] *Saipem* v. *Bangladesh*, Award, *supra* note 32, para. 167 (citing Schwebel, *supra* note 204, p. 5 for the proposition that that "a decision to revoke the arbitrators' authority can amount to a violation of Article II of the New York Convention whenever it de facto 'prevents or immobilizes the arbitration that seeks to implement that [arbitration] agreement' thus completely frustrating if not the wording at least the spirit of the Convention").

[214] Ibid., paras. 181–183.

[215] As Saipem pleaded before the tribunal: "Article 9.1 of the BIT does not confer to your Tribunal jurisdiction over a claim based on denial of justice, and restricts your jurisdiction to a claim for expropriation. This is why we did not bring a claim on the ground of denial of justice before you" (ibid., para. 121).

[216] *ATA* v. *Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010.

construction works near the Dead Sea, with any arbitration in Jordan. APC commenced arbitration against ATA after a dispute arose under that contract. ATA successfully defended the suit and obtained an award of damages by way of a counterclaim. But the Jordanian Court of Appeal set that award aside. The Court of Cassation upheld that decision and added that the arbitration agreement was itself extinguished, pursuant to a curious provision of the Jordanian Arbitration Law stating that "[t]he final decision nullifying the award results in extinguishing the arbitration agreement" (a provision that had been enacted into Jordanian law after ATA and APC had entered into their arbitration agreement). APC then brought a new suit against ATA, this time before the Jordanian courts.

ATA launched ICSID arbitration against Jordan under the Turkey-Jordan BIT. A number of ATA's claims, including those based on the Jordanian courts' annulment of the award, were held to be indistinguishable from the dispute preceding that award and which arose before the BIT entered into force. These claims were therefore outside of the tribunal's temporal jurisdiction.[217] But the tribunal did hold that the review of the extinguishment of the arbitration agreement by the Court of Cassation was within its jurisdictional ambit.[218] The tribunal considered that the right to arbitrate constituted a separate "investment" within the meaning of that term as defined in the BIT, which covered "claims to [. . .] any other rights to legitimate performance having financial value related to an investment." "The right to arbitration," the tribunal explained, "could hardly be considered as something other than a 'right [. . .] to legitimate performance having financial value related to an investment.'"[219] The *ATA* tribunal, by contrast with the *Saipem* tribunal, did not consider that the investor had to satisfy any additional definition of "investment" under the ICSID Convention.[220]

On the merits, the tribunal held that Jordan's extinguishment of the investor's right to arbitration breached the BIT. The tribunal, strangely, did not set out clearly which of the BIT's obligations it considered had been breached, nor what test it was applying in

[217] Ibid., paras. 94–115. [218] Ibid., paras. 116–120. [219] Ibid., para. 117.
[220] The tribunal instead reasoned that the BIT's definition of "investment" was conclusive on the basis that "[t]he ICSID Convention leaves the definition of the term investment open to the parties, allowing them to determine its scope and application pursuant to mutual agreement in the relevant BIT" (ibid., para. 111).

order to determine whether an obligation had been breached.[221] But the tribunal emphasized that, "in concluding the Arbitration Agreement, the parties agreed and expected to preclude the submission of potential disputes under the Contract to the Jordanian State courts, where Jordan would have been both litigant and judge." "Thus," the tribunal reasoned, "it was vital to provide for arbitration as the neutral mechanism for the settlement of disputes."[222] The tribunal added that Jordan's retrospective application of its law to extinguish the parties' arbitration agreement also breached its obligation to recognize arbitration agreements under Article II(1) of the New York Convention.[223] The tribunal declared that the appropriate remedy for Jordan's breach of the BIT was "a restoration of the Claimant's right to arbitration." The tribunal accordingly ordered that the Jordanian court proceedings be terminated and that ATA was entitled to pursue a fresh arbitration against APC under its original arbitration agreement with APC.[224]

(c) *White Industries* v. *India*

The range of options that may be available to an investor when faced with a State's frustration of its arbitration rights is underscored by the award in *White Industries* v. *India*.[225] This case arose in the wake of the Indian courts' delay of more than nine years in enforcing an award obtained by an Australian company against the State-owned Coal India in a Paris-seated ICC arbitration, including in dealing with Coal India's application to the Indian courts to have the award set aside (notwithstanding that India was not the seat of arbitration). The tribunal first upheld its jurisdiction on the basis of what it described as "the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes

[221] The relevant standard may have been fair and equitable treatment, as incorporated into the Turkey-Jordan BIT by way of a most-favored nation provision in that BIT (see ibid., para. 125, fn. 16).
[222] Ibid., para. 126.
[223] Ibid., para. 128 (the tribunal noted that "[i]t is arguable (but the Tribunal takes no position on the point) that the extinguishment rule might be deemed to be prospectively compatible with Article II insofar as parties electing Jordan as the venue for an arbitration or electing Jordanian law as the law of the arbitration had notice of the rule and accepted it").
[224] Ibid., paras. 131–132.
[225] *White Industries Australia Ltd* v. *India*, UNCITRAL, Final Award, November 30, 2011.

concerning 'investments' made by 'investors' under BITs represent a continuation or transformation of the original investment."[226]

The tribunal held on the merits that the delay before the Indian courts did not amount to an expropriation of that investment given that the status of the award was still pending before the Indian courts and so there could not yet be a taking.[227] Nor was the delay enough to give rise to a denial of justice or other breach of fair and equitable treatment, including because the reality of the "seriously overstretched judiciary" in India could not be ignored and the investor should reasonably have expected some delay.[228] But the tribunal did hold that the delay in dealing with Coal India's set-aside application breached India's separate obligation to "provide effective means of asserting claims and enforcing rights" (as incorporated into the Australia-India BIT from the Kuwait-India BIT through the former's most-favored nation provision), which the tribunal considered imposed a more onerous obligation on India compared to denial of justice.[229] As a remedy for that breach, the tribunal, after rejecting India's arguments that the award was not enforceable in India, considered that the investor was entitled to recover what was owing to it under the unenforced award.[230]

(D) OTHER INVESTMENT TREATY CASES

Not all treaty claims based on domestic courts' treatment of arbitral awards have succeeded. Some tribunals have taken a more restrictive approach when considering the jurisdictional threshold of a protected investment. In *Romak* v. *Uzbekistan*,[231] a Swiss company obtained an arbitral award in a London-seated arbitration against an Uzbek State-owned company that had refused to pay under a contract for the sale and purchase of grain. The Uzbek courts refused to enforce that award. Romak commenced arbitration under the Switzerland-Uzbekistan BIT and the UNCITRAL Rules claiming that this refusal amounted to an expropriation of its investment. But the tribunal declined jurisdiction. It held that the award could not be separated from the underlying transaction and, in this case, the underlying transaction was not a qualifying investment. Although the BIT

[226] Ibid., para. 7.6.8. [227] Ibid., para. 12.3.6. [228] Ibid., paras. 10.3–10.4.
[229] Ibid., para. 11.4. [230] Ibid., paras. 14.1–14.3.
[231] *Romak* v. *Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, November 26, 2009.

included a "claim to money" within its definition of an "investment," the tribunal also regarded what it considered to be the intrinsic meaning of an "investment," and the object and purpose of the BIT. From that perspective, the tribunal held that a one-off commercial transaction, as opposed to the commitment of funds or assets over a period of time and entailing some risk, did not amount to an "investment."[232]

In a similar vein, the tribunal in *GEA Group Aktiengesellschaft* v. *Ukraine*[233] rejected, on jurisdictional grounds, a German investor's claim of expropriation based on the Ukrainian courts' refusal to enforce an ICC award obtained by the investor against a Ukrainian state-owned entity in a Vienna-seated arbitration. The tribunal first held that the award was not itself a protected investment within the meaning of the BIT and that, even if the award determined the rights and obligations arising out of an "investment," the award was still "analytically distinct."[234] That award itself provided "no contribution to, or relevant economic activity within, Ukraine," as required by the definition of investment contained in that BIT.[235] But the tribunal also held that, in any event, the Ukrainian courts' decisions could not amount to an expropriation. This was because compared to the *Saipem* case, which the *GEA* tribunal described had turned on the "particularly egregious nature of the acts of the Bangladeshi courts," there was nothing discriminatory or otherwise egregious about the Ukrainian court decisions.[236]

Other tribunals, grappling in particular with the standard of review to apply when determining whether a domestic court's treatment of an arbitral award will amount to an international wrong, have adopted a relatively deferential approach toward reviewing the treatment of arbitral awards by domestic courts. In *Frontier Petroleum* v. *Czech Republic*,[237] the tribunal rejected the Canadian investor's claim for a breach of the fair and equitable treatment standard under the Canada-Czech Republic BIT based on the Czech courts' failure to recognise and enforce an arbitral award made in Sweden. That award was made in favor of the Canadian investor against a privately owned Czech company in connection with a failed joint venture between the two. Although the tribunal granted the

[232] Ibid., paras. 157–232.
[233] *GEA Group Aktiengesselschaft* v. *Ukraine*, ICSID Case No. ARB/08/16, Award, March 31, 2011.
[234] Ibid., para. 162. [235] Ibid. [236] Ibid., paras. 234–236.
[237] *Frontier Petroleum Services* v. *Czech Republic*, UNCITRAL, Final Award, November 12, 2010.

Canadian investor a secured lien over the assets of the Czech entity and the joint venture company, the Czech courts had refused to recognise and enforce the award based on the public policy exception in the New York Convention, which they held was engaged by virtue of the award conflicting with certain mandatory rules of Czech bankruptcy law. The tribunal upheld jurisdiction over the claim on the basis that "by refusing to recognise and enforce the Final Award in its entirety, [the Czech Republic] could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment."[238]

The tribunal then, echoing the approach of the *Saipem* tribunal albeit considering the issue from the perspective of the BIT's obligation of fair and equitable treatment rather than expropriation, explained that it "must ask whether the Czech courts' refusal amounts to an abuse of rights contrary to the international principle of good faith."[239] In other words, the tribunal continued, it had to determine whether "the interpretation given by the Czech courts to the public policy exception in Article V(2)(b) of the *New York Convention* [was] made in an arbitrary or discriminatory manner or did it otherwise amount to a breach of the fair and equitable treatment standard."[240] The tribunal accepted that "States enjoy a certain margin of appreciation in determining what their own conception of international public policy is."[241] The test was therefore: "was the decision by the Czech courts *reasonably tenable* and made in *good faith*?"[242] The tribunal held that it was.[243]

In *Anglia Auto Accessories* v. *Czech Republic*[244] the Czech Republic also successfully defended a claim of expropriation based on the non-enforcement of an arbitral award that the investor had obtained against its Czech business partner in the Czech Republic. The tribunal accepted that the investor's protected investment included, under the wording of the United Kingdom-Czech Republic BIT, its entitlement to money under the award.[245] But the tribunal held that there was no substantial deprivation of the value of the allegedly expropriated property because the investor had already recovered more than three-quarters of the value of the award.[246]

[238] Ibid., para. 231. [239] Ibid., para. 525. [240] Ibid. [241] Ibid., para. 527.
[242] Ibid. [243] Ibid., paras. 529–530.
[244] *Anglia Auto Accessories* v. *Czech Republic*, SCC Case No. V2014/181, Final Award, March 10, 2017.
[245] Ibid., paras. 149–154. [246] Ibid., paras. 292–303.

Finally, in *Gavazzi* v. *Romania*[247] the Italian investors had obtained an award against a Romanian State-owned entity in a Romanian-seated arbitration, which was subsequently annulled by the Romanian courts on grounds of public policy. The investors brought ICSID arbitration against Romania under the Italy-Romania BIT alleging (alongside other claims) that the annulment of that award breached the BIT's obligation to "provide effective means of asserting claims and enforcing rights" and not to "impair the right of access to its Courts of Justice." A majority of the tribunal first held, on jurisdiction, that "an award which compensates for an investment made in the host State is a claim to money covered by the BIT" and would also more generally be part of the "overall investment" to the extent that a stricter definition of "investment" under the ICSID Convention needed to be satisfied.[248] On the merits, and citing the *Frontier Petroleum* award albeit considering the issue from the perspective of the "effective means" standard rather than fair and equitable treatment, the *Gavazzi* tribunal explained that the test for whether there was a breach of the treaty's "effective means" standard was whether the Romanian courts' annulment of the award "amounts to an abuse of rights contrary to the international principle of good faith, i.e., did they interpret and apply Article V(2)(b) of the New York Convention in a discriminatory manner?"[249] The tribunal very briefly explained that it found no such proof of any abuse in view of the discretion it considered should be afforded to a domestic court "to interpret and apply this notion [of public policy] to protect essential principles of the Romanian legal order as they perceived it."[250]

D. Conclusion

The most recent cases discussed immediately above, although arising in the context of bilateral investment treaties and engaging a range of different standards of treatment (expropriation, fair and equitable treatment, and effective means[251]), represent a modern

[247] *Gavazzi* v. *Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, April 21, 2015.
[248] Ibid., para. 120. [249] Ibid., para. 261. [250] Ibid., para. 263.
[251] The tribunal in *SGS* v. *Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, October 6, 2003, also considered the possibility that a governmental negation of arbitration could amount to a breach of an umbrella clause (para. 172):

development of the classic practice concerning denial of justice by governmental negation of arbitration.

It may indeed be that these cases would be more appropriately determined as denial of justice cases. The *Saipem* tribunal's focus on expropriation rather than denial of justice may have been guided by the fact that this case was being determined under a treaty that did not itself provide an obligation of fair and equitable treatment (and therefore protection against denial of justice). That subsequent cases have echoed the *Saipem* tribunal's focus on "abuse of right," even when determining the claims from the perspective of other standards of treatment like fair and equitable treatment and effective means, demonstrates the common links between these cases. Moreover the focus on "abuse of right," and synonymous or related considerations like "arbitrariness" or "egregiousness," are themselves of a piece with classic criteria for finding a denial of justice.

The practice since the time of the first edition of this book underscores that governmental negation of arbitration can arise in a number of forms, including not just through a State's conduct during the course of an arbitration itself, but also in the context of the important roles that State courts have when it comes to supervising local arbitrations, and recognizing and enforcing foreign arbitral awards. Arbitral tribunals have in turn demonstrated an appreciation of the need to balance truly abusive conduct on the part of a State's organs in seeking to derail an arbitration or undermine an arbitral award against the recognition of the important role performed by State courts.

> . . . we do not preclude the possibility that under exceptional circumstances, a violation of certain provisions of a State contract with an investor of another State might constitute violation of a treaty provision (like Article 11 of the BIT) enjoining a Contracting Party constantly to guarantee the observance of contracts with investors of another Contracting Party. For instance, if a Contracting Party were to take action that materially impedes the ability of an investor to prosecute its claims before an international arbitration tribunal (having previously agreed to such arbitration in a contract with the investor), or were to refuse to go to such arbitration at all and leave the investor only the option of going before the ordinary courts of the Contracting Party (which actions need not amount to "denial of justice"), that Contracting Party may arguably be regarded as having failed "constantly [to] guarantee the observance of [its] commitments" within the meaning of Article 11 of the Swiss-Pakistan BIT.