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Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?

by STEPHEN FIETTA* & JAMES UPCHER**

ABSTRACT

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards forms the foundation of the modern system of international commercial arbitration. However, it contains no dispute resolution procedure of its own that a wronged party might use to enforce its rights under an arbitration agreement or award. It is generally left to State parties, and particularly domestic courts, to interpret and apply the Convention's provisions competently and in good faith. This can give rise to politicisation and frustration for contractual parties in the pursuit of their international arbitration rights. A series of recent decisions – by investment arbitration tribunals and regional human rights courts – suggests that public international law has a substantial role to play in the protection of international commercial arbitration rights against interference by States and, in particular, their domestic courts. Those decisions demonstrate that international courts and tribunals are increasingly stepping in to ensure the recognition and enforcement of commercial arbitration rights. In doing so, those international courts and tribunals are resorting to principles and remedies that are well-established under public international law. This article analyses and compares a number of recent judgments and awards addressing the relationship between public international law and international commercial arbitration. It examines the approaches taken by some notable recent investment arbitration awards to the protection of commercial arbitration rights under investment treaties. The article also examines the expanding jurisprudence of the European Court of Human Rights in connection with the recognition and enforcement of commercial arbitration awards. The article concludes by observing that the recent jurisprudence demonstrates a growing symbiotic relationship between public international law and international commercial arbitration rights.

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I. INTRODUCTION

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') forms the foundation of the modern system of international commercial arbitration. However, it contains no dispute resolution procedure of its own that a wronged party might use to enforce its rights under an arbitration agreement or award. It is generally left to State parties, and particularly the domestic courts of State parties, to interpret and apply the Convention's provisions competently and in good faith. Sometimes, this can require foreign corporations to rely upon a State's domestic courts to recognize and enforce an arbitral agreement or award against the economic or other interests of that State. The potential for politicization and frustration for contractual parties in the pursuit of their international arbitration rights is clear in such situations.

A series of recent decisions – by investment arbitration tribunals and, to a lesser extent, regional human rights courts – suggests that public international law has a substantial role to play in the protection of international commercial arbitration rights against interference by States and, in particular, their domestic courts. Those decisions demonstrate that international courts and tribunals are increasingly acting as ultimate guardians for the recognition and enforcement of commercial arbitration rights, including under the New York Convention, ready to step in to ensure compliance with that Convention as and when State parties or their domestic courts fail in their task. In doing so, those international courts and tribunals are resorting to principles and remedies that are well-established under public international law.

This article analyses and compares a number of recent judgments and awards addressing the relationship between public international law and international commercial arbitration rights. First, it identifies the basic public international law principles that have provided the foundations for the recent interventionism of international courts and tribunals in this area. Second, it examines the approaches taken by some notable recent investment treaty arbitration awards to the protection of commercial arbitration rights under investment treaties. Third, the article examines the expanding jurisprudence of another public international law forum, the European Court of Human Rights (the 'European Court' or 'the Court'), in connection with the recognition and enforcement of commercial arbitration awards. Fourth, it identifies and analyses four central themes arising out of the recent decisions of investment arbitration tribunals and the European Court in this context. Finally, the article concludes by observing that the recent jurisprudence demonstrates a growing symbiotic relationship between public international law and international commercial arbitration rights.

II. THE PUBLIC INTERNATIONAL LAW FRAMEWORK FOR THE PROTECTION OF COMMERCIAL ARBITRATION

The recent jurisprudence about the interplay between international commercial arbitration rights and public international law does not constitute a revolutionary development, whether in the fields of investment protection or human rights protection. That jurisprudence – like so much of international law – has been of an incremental character, relying for its legitimacy on a broad and well-established framework of rules and principles. Thus, as explained in this section, there is nothing new in the classification of contractual rights as ‘property’ for the purposes of public international law, the responsibility of the State for the culpable acts and omissions of its domestic courts or the existence of binding rules under the New York Convention requiring States to recognize and enforce arbitral agreements and awards. However, the way in which these (and other) basic principles have combined so as to provide effective protection of contractual arbitration rights in a variety of situations has opened the eyes of many to the potential for public international law to provide relief to those facing frustration in the commercial arbitration process, whether at the hands of interfering local courts or obstreperous State or State-owned counterparties.

(a) *The Use of Public International Law to Protect Intangible Property Rights*

It is trite that, as a matter of principle, the standards of protection of alien property that have developed in customary and treaty-based international law cover both intangible and tangible property. A more difficult question is what, precisely, the term ‘intangible property’ covers. The relative paucity of attention to this issue is striking, and highlights the continued salience of Higgins’ complaint (thirty years ago) of ‘the almost total absence of any analysis of conceptual aspects of property’ in international law scholarship.¹ It is an open question in international investment law whether the concept of an ‘investment’ – a term that is notoriously undefined in the ICSID Convention, but that is often phrased in capacious terms in bilateral investment treaties – extends to cover contractual, *in personam*, rights in addition to, or as components of, rights *in rem*.

There is a reason for caution, since the protections that public international law has afforded to *in personam* rights are said by some commentators to be exceptionally limited.² It is clear there is a distinction between the protection of contractual rights that memorialize rights *in rem* and the protection of contractual rights *per se*. It is uncontroversial that public international law has long protected

¹ Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 *Recueil des Cours* 267, 268 (1982).

² Ian Brownlie, *Principles of Public International Law* 548 (7th ed., Oxford University Press, 2008). As Zachary Douglas has argued:

International law . . . has a set of substantive obligations that address the state’s interference with property rights. Conversely, it has no system of contract law capable of answering even the most basic questions that

the former.³ The *Rudloff Case*, decided in 1903, is often highlighted as an early example of international law's extension of diplomatic protection to contractual rights. In that decision, the US Commissioner of the US-Venezuela Mixed Claims Commission stated that '[t]he taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property'.⁴ Yet, it was the rights 'acquired, transmitted, and defined' by the contract that were protected, not the individual provisions of the contract itself; the Commission emphasized that the claimant 'possessed, in virtue of his contract, valuable property rights'.⁵

Similarly, in the *Norwegian Shipowners' Claims* arbitration of 1922, an arbitral tribunal held that rights protected by contract were 'property' that was capable of expropriation.⁶ Although cited in support of the view that breach of contract could amount to an international wrong, the decision again clearly concerned the property rights protected in the contract rather than the provisions of the contract itself.

More recently, the Iran-US Claims Tribunal has understood *in personam* rights to be capable of protection *per se*, regardless of whether they constitute intangible property.⁷ In *Phillips Petroleum Co v. Islamic Republic of Iran*, in another oft-cited passage, the Tribunal noted that:

expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case.⁸

The Tribunal in *Amoco International Finance Corporation v. Islamic Republic of Iran* explicitly contemplated that *in personam* rights – contractual rights unconnected to underlying property rights – were capable of expropriation. The Tribunal stated that expropriation could 'extend to any right which can be the object of a commercial transaction'.⁹

The approach of the Iran-US Claims Tribunal has been followed by many investment treaty arbitration tribunals. In *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, for example, the Tribunal stated that the protection against illegal expropriation applied not only to rights *in rem*; it found that 'there is

arise within a contractual relationship, such as the circumstances when a party may rescind the contract on the basis of its counterparty's breach. (Zachary Douglas, *The International Law of Investment Claims* 207 (Cambridge University Press, 2009).

³ Brownlie, *supra* n. 2 at 548.

⁴ *Rudloff Case* (Interlocutory), (1959) IX RIAA 244, at p. 250 (Commissioner Bainbridge).

⁵ *Rudloff Case* (Merits), (1959) IX RIAA 255, at p. 259.

⁶ *Norwegian Shipowners' Claims* (1948) I RIAA 309, at p. 334.

⁷ See generally George H. Aldrich *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 Am. J. Intl. L. 585 (1994).

⁸ *Phillips Petroleum Co Iran v. Islamic Republic of Iran, the National Iranian Oil Co* (1989) 21 Iran-US-CTR 79, at para. 76.

⁹ *Amoco International Finance Corporation v. Islamic Republic of Iran* (1987) 15 Iran-US CTR 189 at para. 108.

considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore.¹⁰ In *Eureko B. V. v. Republic of Poland*, the Tribunal accepted that corporate governance rights could constitute an investment under the Netherlands-Poland bilateral investment treaty, and found that ‘the deprivation of contractual rights may be expropriatory in substance or in effect’.¹¹ Summing up the modern position, in *Bayinder Insaat Turizm Ticaret Ve Sanayi A. S. v. Islamic Republic of Pakistan*, the Tribunal noted that ‘[i]t is not disputed that expropriation is not limited to *in rem* rights and may extend to contractual rights’.¹²

It is thus clear that intangible property is capable of protection by investment treaty arbitration tribunals.¹³ There is also a notable trend towards the explicit recognition that contractual rights themselves are capable of constituting an ‘investment’, and are protected against expropriation without compensation, regardless of their characterization as intangible property.

In parallel with these developments in diplomatic protection and international investment law, international human rights bodies have developed separate means by which to protect intangible property. Amongst the regional mechanisms that have been established to protect human rights, European Court has been described as the most important due to its membership, its long history, its extensive case law and its strong record of enforcement.¹⁴

Article 1 of Protocol 1 to the European Convention on Human Rights (the ‘ECHR’) provides, in pertinent part, that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.¹⁵

The European Court has commented that, in effect, Article 1 of Protocol 1 guarantees the right to property. It stated in 1979 that:

¹⁰ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 164.

¹¹ *Eureko B. V. v. Republic of Poland*, *Ad Hoc* Arbitration, Partial Award, 19 Aug. 2005, para. 241.

¹² *Bayinder Insaat Turizm Ticaret Ve Sanayi A. S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 Nov. 2005, para. 255.

¹³ *Mondev International Limited v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award, 11 Oct. 2002, para. 98; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007, para. 267.

¹⁴ Christian Tomuschat, *Human Rights: Between Idealism and Realism* 239 (2d ed., Oxford University Press, 2008).

¹⁵ Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, (opened for signature 20 March 1952, entered into force 18 May 1954) CETS No 9. Equivalent protections appear in other leading human rights instruments: see, for example, American Convention on Human Rights (adopted 22 Nov. 1969, entered into force 18 Jul. 1978) 1144 UNTS 143, Art. 21; African Charter on Human and Peoples’ Rights (adopted 27 Jun. 1981, entered into force 21 Oct. 1986) 1520 UNTS 217, Art. 14; Universal Declaration of Human Rights, UNGA Res 217 (III) (1948), Art. 17.

[b]y recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property. This is the clear impression left by the words ‘possessions’ and ‘use of property’ (in French: ‘biens,’ ‘propriété,’ ‘usage des biens’) . . .¹⁶

Notably, the ECHR contains no general definition of ‘possessions’ or of ‘property’. The European Court has nevertheless interpreted these terms broadly. It has determined that possessions and property can extend to include intangible property and, indeed, everything that has an economic value.¹⁷ In *Gasus Dosier-und Fördertechnik GmbH v. Netherlands* the European Court held that the meaning of ‘possessions’ has:

an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as ‘property rights’ and thus as ‘possessions’ for the purposes of this provision.¹⁸

This has included intangible rights, such as shareholders’ rights and contractual rights.¹⁹ In *Kopecký v. Slovakia*, the European Court found that legal claims, as well as legitimate expectations of a property right, are sufficient to constitute ‘possessions’ for the purposes of the ECHR.²⁰

As explained below, on the basis of these principles the European Court has had no difficulty in concluding that arbitration awards constitute ‘possessions’ capable of protection against State interference under Article 1 of Protocol 1.

(b) State Responsibility for the Acts of Judicial Authorities

Public international law has long accepted that the acts of a State’s judiciary are attributable to that State for the purposes of engaging State responsibility.²¹ It matters not whether the judiciary is independent of other governmental organs; there is no need for governmental or other interference in order for the wrongful conduct of the judiciary to be attributable to the State.²²

The attribution of judicial conduct to the State is now reflected in Article 4 (1) of the International Law Commission’s Articles on State Responsibility:

¹⁶ *Marckx v. Belgium*, 13 Jun. 1979, ECHR, Series A, No. 31, para. 63.

¹⁷ Clare Ovey & Robin C. A. White, *Jacobs & White: The European Convention on Human Rights* 350 (4th ed., Oxford University Press, 2006).

¹⁸ *Gasus Dosier-und Fördertechnik GmbH v. Netherlands*, (app no. 15375/89), 23 Feb. 1995, ECHR, Series A, No. 306-B, para. 53.

¹⁹ *Lithgow v. United Kingdom*, (app. no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81), 8 Jul. 1986, ECHR Series A, No. 102, paras. 45–46; *Mellacher v. Austria*, (app no. 10522/83; 11011/84; 11070/84), 19 Dec. 1989, ECHR, Series A, No. 169, para. 43.

²⁰ *Kopecký v. Slovakia*, (app no 44912/98), 7 Jan. 2003, ECHR 2004-IX, para. 25.

²¹ See, by way of example, *Claims of Rosa Gelbtrunk and the ‘Salvador Commercial Company’ et al* (1902) XXV RIAA 455 at p. 477; *Jurisdiction of the Courts of Danzig*, Advisory Opinion of 3 Mar. 1928, PCIJ, Series B, No. 15 at pp. 26–27; *Ambatielos Case (Greece v. United Kingdom)*, Judgment of 19 May 1953, (1953) ICJ Rep 10 at p. 22; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, Advisory Opinion of 29 Apr. 1999, (1999) ICJ Rep 62 at para. 62.

²² Christopher Greenwood *State Responsibility for the Decisions of National Courts*, in *Issues of State Responsibility before International Judicial Institutions* 55, 57 (Malgosia Fitzmaurice & Dan Sarooshi eds., Hart, 2004).

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.²³

The actions of judicial authorities will engage State responsibility in certain clearly-defined circumstances. The doctrine of denial of justice provides that a State is internationally responsible if it administers its system of justice to aliens in an unfair, arbitrary or discriminatory manner.²⁴ While not limited to judicial acts – executive or legislative conduct can also result in a denial of justice – the doctrine has most commonly been concerned with the quality of a State’s judicial system.²⁵ Several decisions of investment treaty arbitration tribunals have emphasized the high threshold of misconduct necessary to establish a denial of justice.²⁶

Importantly, however, denial of justice is not the only means by which the conduct of judicial organs can engage State responsibility at international law. It is established that the acts of the judiciary may, under certain circumstances, amount to an expropriation of property. By 1986, the Iran-US Claims Tribunal observed that:

It is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the State of that court.²⁷

More recently, the investment treaty arbitration tribunal in *Rumeli Telekom v. Republic of Kazakhstan* endorsed this statement in finding that a series of Kazakh court decisions constituted part of a ‘creeping’ expropriation.²⁸ Another recent investment arbitration tribunal stated that it was an ‘uncontroversial point’ that ‘a State is responsible for an expropriation effected by any of its organs, including its judiciary’.²⁹

While it is therefore firmly established that domestic court decisions can, in principle, engage the responsibility of the State, it is clear that public international

²³ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/10, Art. 4(1) (ILC Articles on State Responsibility).

²⁴ On denial of justice generally, see Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005).

²⁵ *Robert E. Brown (United States) v. Great Britain* (1923) VI RIAA 120 at p. 129.

²⁶ *Loewen Group Inc & Raymond L Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award of 26 Jun. 2003, 7 ICSID Rep 442, para. 132; *Mondev v. United States*, *supra* n. 13 at paras. 126–127; *Jan de Nul NV & Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 Nov. 2008, para. 192; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, Partial Award on the Merits, 30 Mar. 2010, para. 244.

²⁷ *Oil Field of Texas, Inc v. The Government of the Islamic Republic of Iran* (1986) 12 Iran-US CTR 308 at pp. 318–319.

²⁸ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 Jul. 2008, para. 702. Unlike a claim for denial of justice, judicial expropriation does not, strictly speaking, require the exhaustion of local remedies. In practice, however, a successful claim for judicial expropriation, in order to demonstrate a ‘taking’, will implicate the decisions of superior courts.

²⁹ *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 Jul. 2012, para. 310.

law does not provide ‘rights of appeal’ against such decisions. International courts and tribunals have traditionally been reluctant to scrutinize the decisions of domestic courts against the standards of domestic law applicable in those *fora*.³⁰ Indeed, it is questionable whether a concept of ‘substantive’, as opposed to ‘procedural’, denial of justice even exists at customary international law.³¹

In practice, the prevailing attitude is one of deference by international courts and tribunals to municipal judicial decisions, particularly where there is any indication that the claim before the international forum is akin to an appeal against a decision of the domestic court. As the Tribunal noted in *Azinian v. Mexico*, ‘[t]he possibility of holding a State internationally liable for judicial decisions does not...entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction.’³²

As will be seen below, international courts and tribunals, which invariably have no appellate function, must therefore tread carefully in seeking to defend commercial arbitration rights from interference by domestic courts or other State authorities. Only where such interference constitutes a violation of a definable and applicable obligation of international law will the international court or tribunal have competence to reprimand the responsible State and impose an appropriate remedy in order to uphold the arbitral process.

(c) *The New York Convention*

The New York Convention has been described as ‘by far the most significant contemporary legislative instrument relating to international commercial arbitration.’³³ It is undoubtedly the foundation on which the modern system of international commercial arbitration has been constructed. Within the confines of the present article, only a brief reminder of its broad protections and guiding principles is necessary. However, as commented further below, the New York Convention has, in a number of recent investment arbitration awards protecting the commercial arbitration process, provided the substantive legal obligations necessary to establish a violation of public international law by national courts or other State authorities.³⁴

The New York Convention demands that contracting States refrain from certain behaviour within their domestic jurisdictions by requiring the national courts of those contracting States to defer to valid arbitration agreements and to recognize valid arbitral awards.

³⁰ See *Case concerning Elettronica Sicula S p A (ELSI) (United States of America v. Italy)*, Judgment, (1989) ICJ Rep 15 at para. 124.

³¹ See Paulsson, *supra* n. 24 at p. 81–84.

³² *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, (NAFTA), Award, 1 Nov. 1999, para. 99.

³³ Gary B. Born, *International Commercial Arbitration* vol. 1, 92 (Kluwer, 2009).

³⁴ See William W. Park, *Arbitration of International Business Disputes* pt. II-D-5 (2d ed., Oxford University Press, 2012).

Article II (1) of the New York Convention establishes the basic rule for the recognition of arbitration agreements:

Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.³⁵

Article II (3) requires the courts of contracting States to refer parties to international arbitration agreements to arbitration unless they find ‘that the said agreement is null and void, inoperative or incapable of being performed’.³⁶ Contracting parties, including their courts, are required to recognize the arbitration agreement in the absence of grounds for non-recognition. It has been noted that Article II of the New York Convention establishes a ‘pro-arbitration legal regime’ that aims to ensure the ‘validity and enforceability of the material terms of those international arbitration agreements which are subject to the Convention’.³⁷

As an essential complement to Article II relating to the recognition of arbitration agreements, Articles III to VI provide for the recognition and enforcement of arbitral awards. Article III sets out the general principle that each contracting State to the Convention shall recognize arbitration awards as binding. Article IV sets out the procedural conditions for the recognition and enforcement of an arbitration award. Article V sets out the grounds on which a party can contest an arbitration award.³⁸

With this basic public international law framework in mind, this article now turns to examine a series of recent decisions of investment treaty arbitration tribunals that have analysed the interplay between public international law and the recognition and enforcement of commercial arbitration agreements and awards.

III. RECENT TRENDS IN THE PROTECTION OF COMMERCIAL ARBITRATION AGREEMENTS AND THE ENFORCEMENT OF COMMERCIAL ARBITRAL AWARDS IN INVESTMENT TREATY ARBITRATION

Six recent investment arbitration awards (four of them under the ICSID Convention, two under the UNCITRAL Rules) have highlighted the range of circumstances in which public international law in general, and investment treaties

³⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (concluded 10 Jun. 1958, entered into force 7 Jun. 1958) 330 UNTS 3 (New York Convention), Art. II (1).

³⁶ *Ibid.*, at Art. II (3).

³⁷ Born *supra* n. 33 at pp. 204–205.

³⁸ New York Convention, Art. V. The grounds are incapacity; lack of notice, award out with the scope of the agreement to arbitrate, composition of the tribunal not in accordance with the agreement or the *lex loci arbitri*, award has been set aside, subject of the dispute is not arbitrable under the law of the enforcing State and public policy.

in particular, can be used to protect commercial arbitration agreements and awards. Certain of those cases have also proved to illustrate the limitations of public international law remedies in this context. Whilst, at first glance, there is some inconsistency in certain of the awards concerned, closer examination reveals a notable consistency in the application of basic international law principles and remedies to the facts of each case. Each will be addressed in turn.

(a) *Desert Line Projects LLC v. Yemen (2008)*

The claimant, Desert Lines Projects (DLP), an Omani company, entered into a series of contracts with the government of Yemen to build roads. A dispute arose regarding certain outstanding payments, and the claimant and the government agreed to refer those disputes to ad hoc arbitration in Yemen. In August 2004, an arbitral award found in favour of DLP. Yemen sought to have the award annulled in the Yemeni courts. In October 2004, Yemen communicated to DLP a proposal for a settlement on terms far less favourable to DLP than those in the award. Exposed to various incidents of State-sponsored hostility and intimidation, DLP signed the settlement agreement. Later, claiming various breaches of the bilateral investment treaty (BIT) between Yemen and Oman, DLP rescinded the settlement agreement and commenced arbitration at the International Centre for Settlement for Investment Disputes (ICSID).

In a strongly-worded award, the ICSID Tribunal, composed of three eminent commercial arbitrators (Pierre Tercier, Jan Paulsson and Ahmed El-Kosheri), found that DLP had been forced to sign the settlement agreement under duress by Yemen, and that Yemen's conduct amounted to a violation of the fair and equitable treatment standard under the BIT. In doing so, the Tribunal remarked upon the sanctity of the commercial arbitration process and mounted a robust defence of that process against Yemen's illicit interference. The Tribunal observed that:

As a matter of essence, arbitral proceedings have a final and binding character. Both parties choose arbitrators whom they trust. In consequence, they waive the right to challenge the arbitral tribunal's decision, except for extraordinary circumstances. It is therefore contrary to the spirit of arbitration to constrain a party to negotiate in order to obtain a reduction of the amount effectively owed, when an arbitral tribunal has issued a definitive award.³⁹

The Tribunal found that the settlement agreement procured by duress was without legal effect as a matter of public international law. It ordered the Yemeni arbitral award to be reinstated. In parallel, it awarded Yemen to pay DLP damages equivalent to the value of the underlying arbitral award. Moreover, Yemen was restrained from seeking annulment of the underlying award; since Yemen had sought to pressure DLP to accept the settlement agreement, it was estopped as a

³⁹ *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 Feb. 2008, para. 177.

matter of international law from seeking to achieve similar results by resuming its pursuit of the award's annulment.⁴⁰

The principal remedies ordered by the Tribunal represented a straightforward application of the duty to make full reparation at international law, in the form of *restitutio in integrum*. Restitution – i.e., the reestablishment of the situation prevailing before Yemen's internationally wrongful actions – required that the underlying arbitral award be reinstated, implemented in its entirety, and fully respected by both Parties.⁴¹

(b) *Saipem S. p. A. v. Bangladesh (2009)*

DLPs conclusions were relatively uncontroversial as a matter of public international law: in engaging in egregious conduct towards DLP as a means to undermine its arbitral award, Yemen had violated its obligation under the BIT to accord fair and equitable treatment to DLP as an Omani investor. *Saipem S. p. A. v. Bangladesh*, by contrast, concerned more subtle interference by the State with the arbitral process; namely, by way of the judicial expropriation of a contractual arbitration award. It therefore raised more difficult questions concerning the nature of the underlying 'investment' and the conditions necessary for a finding of judicial expropriation.

In 1990, Saipem S. p. A. (Saipem) and the Bangladesh Oil Gas and Mineral Corporation (Petrobangla), a Bangladeshi State entity, entered into a contract for the construction of a pipeline to carry gas and condensate to the north-east of Bangladesh. The project was delayed and a dispute arose between the parties with respect to Petrobangla's failure to pay certain additional costs. Saipem referred the dispute to contractual ICC arbitration in Dhaka.

Petrobangla took a series of measures designed to disrupt the arbitration process. Following a number of adverse decisions by the ICC tribunal, Petrobangla sought, and was granted, a stay of arbitration by the Bangladeshi courts. It also filed an action seeking the revocation of the authority of the ICC tribunal. In April 2000, the First Court of the Subordinate Judge of Dhaka issued a decision revoking the authority of the ICC tribunal. The ICC tribunal, meanwhile, decided to resume proceedings on the grounds that the revocation of its authority was ill-founded. In May 2003, it issued an arbitration award in favour of Saipem. In July 2003, Petrobangla applied to the Supreme Court of Bangladesh to set aside the ICC award. In 2004, the Supreme Court held that the award was 'non-existent' and 'devoid of any legal foundation'.

Saipem filed a request for arbitration at ICSID under the Italy-Bangladesh BIT. Saipem claimed that Bangladesh, through its courts, had extinguished Saipem's right to arbitrate its dispute with Petrobangla and its right to payment of the amounts payable pursuant to the ICC award.

⁴⁰ *Ibid.*, at para. 208.

⁴¹ *Ibid.*, at para. 195, para. 205. In addition to restitution, the Tribunal required payment of moral damages by way of compensation in respect of certain acts of physical harassment undertaken by Yemen.

In its decision on jurisdiction, the Tribunal was faced with the question whether Saipem's right to arbitrate, and the ICC arbitration award itself, were capable of constituting an 'investment' under the BIT and Article 25 of the ICSID Convention.⁴² The Tribunal was 'not prepared to accept' that the ICC award by itself could constitute an investment under Article 25 of the ICSID Convention.⁴³ The Tribunal found, however, that the rights arising out of the ICC award arose indirectly from the investment. The Tribunal accepted that it could, in determining whether Saipem had a qualifying 'investment', examine the 'entire operation', which included, *inter alia*, the arbitration proceedings.⁴⁴ Applying this test, the Tribunal determined that Saipem had in fact made an investment within the meaning of Article 25.⁴⁵ Further, in considering 'all the elements of the operation', and not merely the ICC award, the Tribunal determined that the dispute arose 'directly out of the overall investment'.⁴⁶

The Tribunal later returned to this issue in its Award. In determining whether an expropriation had occurred, the Tribunal considered whether the ICC award could constitute 'property' capable of being 'taken' by Bangladesh.⁴⁷ The Tribunal found that Saipem's residual contractual rights under its investment, as crystallized in the ICC award, could constitute property.⁴⁸ The actions of the Bangladeshi courts constituted a taking as those actions had the effect of 'substantially depriving Saipem of the benefit of the ICC Award'.⁴⁹

The Tribunal found that, in order to constitute a violation of the BIT, it was also necessary that there was some 'illegality' in Bangladesh's conduct.⁵⁰ The Tribunal concluded that this requirement was met on the facts. First, the standard exercised by the Bangladeshi courts for revocation of the ICC tribunal's authority amounted to a violation of the national court's supervisory jurisdiction. Indeed, the Tribunal found that the 'standard for revocation [of the authority of the ICC arbitral tribunal] used by the Bangladeshi courts and the manner in which the judge applied that standard to the facts' amounted to an 'abuse of right' at international

⁴² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 Oct. 1966) 575 UNTS 159.

⁴³ *Saipem S. p. A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 Mar. 2007, para. 113.

⁴⁴ *Ibid.*, at para. 110.

⁴⁵ *Ibid.*, at para. 111.

⁴⁶ *Ibid.*, at para. 114.

⁴⁷ *Saipem S. p. A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 Jun. 2009, para. 126.

⁴⁸ *Ibid.*, at para. 128.

⁴⁹ *Ibid.*, at paras. 129–130. The tribunal noted that, since Petrobangla possessed no assets outside Bangladesh, there was no realistic basis for enforcing the award outside Bangladesh.

⁵⁰ The tribunal emphasized that the condition of illegality:

should not be understood as a departure from the 'sole effects doctrine'. It is due to the particular circumstances of this dispute and to the manner in which the parties have pleaded their case, both being in agreement that the unlawful character of the actions was a necessary condition. (*Ibid.*, at para. 134).

law.⁵¹ Second, the Tribunal found illegality since the actions of the Bangladeshi courts had amounted to a violation of Bangladesh's treaty obligations under Article II of the New York Convention:

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.⁵²

This was the first investment treaty award in which a violation of a BIT by the host State, in the form of its domestic courts, was established explicitly by reference to the New York Convention. The fact that Bangladesh had frustrated Saipem's contractual arbitration rights in violation of the New York Convention was a critical factor in the ICSID Tribunal's finding of expropriation.

Turning to remedies, in light of the unlawful nature of Bangladesh's expropriatory acts, the Tribunal resolved to apply the customary international law standard of full reparation. The Tribunal observed that, given the abusive way in which the Bangladeshi courts had exercised their supervisory jurisdiction over the arbitral process, the prospect of another ICC arbitration was 'unrealistic'.⁵³ Restitution was, in the circumstances, therefore impracticable. In those circumstances, the Tribunal determined that the appropriate remedy was an order requiring payment of compensation, and that such compensation should equate to the amount awarded in the ICC arbitration award. The Tribunal noted that: 'the expropriation of the right to arbitrate the dispute in Bangladesh under the ICC Arbitration Rules corresponds to the value of the award rendered without the undue intervention of the court of Bangladesh'.⁵⁴

As in *DLP*, the Tribunal thus undertook a straightforward application of the duty to make full reparation for the injury caused by Bangladesh's unlawful act; namely, its judicial expropriation of Saipem's ICC award. In ordering Bangladesh to pay compensation equating to the amount of the underlying ICC award, the Tribunal sought to put the claimant party in the position it would have been in but for Bangladesh's violations of the BIT.

(c) *ATA Construction, Industrial and Trading Company v. Jordan (2010)*

ATA Construction, Industrial and Trading Company v. Jordan arose out of an underlying contractual dispute between a Turkish construction company, ATA, and a Jordanian company, APC, in connection with the construction (and subsequent collapse) of a dike on the Dead Sea. APC commenced arbitral proceedings against ATA pursuant to their contract, blaming ATA for the collapse and claiming

⁵¹ *Ibid.*, at para. 159.

⁵² *Ibid.*, at para. 167 (citing Stephen M. Schwebel *Anti-Suit Injunctions in International Arbitration: An Overview* in *Anti-Suit Injunctions in International Arbitration* IAI ser. Intl. Arb., no. 2, 3–4 (Emmanuel Gaillard ed., Juris Publg. 2004).

⁵³ *Ibid.*, at para. 169.

⁵⁴ *Ibid.*, at para. 204.

damages. ATA submitted a counterclaim against APC. In 2003, the arbitration award dismissed APC's claim and upheld ATA's counterclaim, and awarded ATA nearly US Dollars (USD) 6 million in damages.

APC sought the annulment of the contractual arbitration award in the Jordanian courts. The annulment was granted by a lower court and was confirmed by the Jordanian Court of Cassation in 2007. According to a new Jordanian law (which, importantly, pre-dated the arbitration agreement between ATA and APC), the annulment of the award resulted in the automatic extinguishment of the arbitration agreement between ATA and APC. Following the extinguishment of the arbitration agreement, APC commenced an action in the Jordanian courts reasserting its original damages claims – the very same claims that had been dismissed in the arbitration – against ATA. Convinced that it would not receive a fair or impartial hearing before the Jordanian courts against its Jordanian adversary, ATA commenced ICSID arbitration against Jordan. In the ICSID arbitration, ATA argued that the annulment by the Jordanian courts of the contractual arbitration award, and the resultant extinguishment of the arbitration agreement between ATA and APC, violated the Turkey-Jordan BIT.

The ICSID Tribunal held that it lacked jurisdiction *rationae temporis* over ATA's claims in respect of the Jordanian courts' annulment of the arbitral award because the original contractual dispute, which the Tribunal found was 'indistinguishable' from the annulment proceeding, had arisen before entry into force of the Turkey-Jordan BIT.⁵⁵ However, the Tribunal held that it did have jurisdiction over Jordan's extinguishment of ATA's 'right to arbitrate'. This was because the right to arbitrate constituted a 'distinct investment' under the BIT.⁵⁶

The Tribunal concluded that the extinguishment of ATA's right to arbitrate, by virtue of the retroactive application of a law that had post-dated the arbitration agreement between ATA and APC, had violated 'both the letter and the spirit' of the Turkey-Jordan BIT.⁵⁷ The extinguishment also violated Jordan's duty to recognize arbitration agreements under Article II of the New York Convention. Article II would have required the Jordanian courts to refuse to apply retroactively the rule contained in the new Jordanian arbitration law.⁵⁸

The Tribunal held that the appropriate remedy in the circumstances was the reinstatement of the right to arbitrate between ATA and APC.⁵⁹ As in *DLP* and *Saipem*, this outcome represented a straightforward application of the public international law duty to make full reparation for unlawful acts. In contrast to *Saipem*, however, restitution and not compensation was the appropriate remedy because the referral of the underlying dispute to a fresh arbitration proceeding was

⁵⁵ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, para. 103, 115.

⁵⁶ *Ibid.*, at para. 117.

⁵⁷ *Ibid.*, at para. 125.

⁵⁸ *Ibid.*, at para. 128.

⁵⁹ *Ibid.*, at para. 131.

a reasonable prospect: both APC and Jordan had indicated a willingness to re-submit the underlying commercial dispute to a new commercial arbitration.⁶⁰ Unlike in *Saipem*, there had been no ‘abuse of rights’ by the domestic courts, and the only culpable ‘taking’ had been of an arbitration agreement, not an arbitration award.

In *DLP*, *Saipem* and *ATA*, the claimant parties successfully resorted to investment treaty arbitration and associated public international law remedies in order to protect their contractual arbitration rights (whether in the form of an arbitration agreement or an arbitration award) from illegitimate State interference. By contrast, the following two cases show some of the limits of public international law protection of contractual arbitration rights. In particular, they highlight the deference shown by investment arbitration tribunals to certain decisions of domestic courts refusing to recognize or enforce contractual arbitration awards.

(d) *Frontier Petroleum Services Ltd v. Czech Republic (2010)*

Frontier Petroleum Services (Frontier Petroleum) invested in an aircraft production business in the Czech Republic. It agreed to finance the acquisition of the assets of LET, a State-owned aircraft manufacturing company, which were to be transferred to a joint venture project company. A dispute arose concerning the transfer of the assets. Frontier Petroleum referred the dispute to arbitration in Stockholm pursuant to a clause in the applicable shareholders’ agreement. The Stockholm tribunal ruled in Frontier Petroleum’s favour, but not before the respondents in the arbitration were declared bankrupt in the Czech Republic. Frontier Petroleum later sought recognition and enforcement of the Stockholm award in the Czech Republic against the bankrupt respondents. The Czech courts refused to enforce the award, citing Article V(2)(b) (public policy) of the New York Convention, on the basis that such enforcement would be inconsistent with the Czech Republic’s laws requiring equality of creditors in bankruptcy proceedings and the equitable and orderly distribution of assets.

Frontier Petroleum initiated arbitration against the Czech Republic under the UNCITRAL Rules, claiming numerous breaches of the Canada-Czech Republic BIT. The Tribunal rejected the Czech Republic’s argument that the Tribunal had no power to review the Czech courts’ conception of public policy under the New York Convention.⁶¹ Rather, the Tribunal considered that it was competent to consider:

... whether the refusal of the Czech courts to recognise and enforce the Final Award in full violates Article III(1) of the BIT [i.e., the obligation to accord fair and equitable treatment and provide full protection and security]. In order to answer this question, the Tribunal must ask whether the Czech courts’ refusal amounts to an abuse of rights contrary to the international principle of good faith, i.e. was the interpretation given by the Czech courts to the public policy

⁶⁰ *Ibid.*, at para. 131.

⁶¹ *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Award, 12 Nov. 2010, para. 525.

exception in Article V(2)(b) of the New York Convention made in an arbitrary or discriminatory manner or did it otherwise amount to a breach of the fair and equitable treatment standard.⁶²

The Tribunal therefore determined that it was competent to review the Czech courts' interpretation of the New York Convention. Yet this power of review was not unfettered. Indeed, echoing international human rights jurisprudence, the Tribunal remarked that States have a 'margin of appreciation' in determining their own conception of international public policy.⁶³

The Tribunal concluded that the Czech Republic had not breached its treaty obligations on the facts because its courts' conception of public policy under the New York Convention was 'reasonably tenable'.⁶⁴ The Tribunal reached this conclusion with reference to jurisprudence of the French and German courts about public policy in comparable circumstances.⁶⁵ There was no evidence that the Czech courts had acted in an arbitrary, discriminatory or bad faith manner that would rise to the level of a breach of the treaty.⁶⁶ The circumstances were therefore markedly different than the situation confronting the tribunal in *Saipem*.

(e) *GEA Group Aktiengesellschaft v. Ukraine (2011)*

In *GEA v. Ukraine*, a commercial dispute had arisen in connection with outstanding payments under a fuel conversion contract between GEA's corporate predecessor and a Ukrainian state-owned entity, Oriana. Those parties reached a repayment agreement pursuant to which any outstanding issues would be referred to ICC arbitration in Vienna. The ICC tribunal subsequently issued an award largely in favour of GEA's predecessor, which then requested recognition and enforcement of the ICC award in the Ukrainian courts (since Oriana's only assets were located in Ukraine). The Ukrainian courts refused the request on the basis that the repayment agreement had not been validly executed according to Ukrainian law.

GEA filed a request for ICSID arbitration, alleging violations of the Germany-Ukraine BIT. The ICSID Tribunal devoted considerable attention to the question of whether GEA and its predecessors had an 'investment' in Ukraine for the purposes of the BIT and Article 25 of the ICSID Convention.⁶⁷ It concluded that, while the original fuel conversion contract constituted an investment, the repayment agreement did not; it merely established a means for repayment of a debt.⁶⁸ Nor could the ICC award itself constitute an investment since (in contrast to *Saipem*, for example) it had provided for the disposition of rights and obligations

⁶² *Ibid.*, at para. 525.

⁶³ *Ibid.*, at para. 527.

⁶⁴ *Ibid.*, at para. 529.

⁶⁵ *Ibid.*, at para. 528.

⁶⁶ *Ibid.*, at para. 528.

⁶⁷ For an analysis of the Tribunal's approach to the meaning of investment, see Joshua Fellenbaum, *GEA v. Ukraine and the Battle of Treaty Interpretation Principles Over the Salini Test*, 27 *Arb. Intl.* 249 (2011).

⁶⁸ *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 Mar. 2011, para. 153; para. 157.

arising out of agreements that themselves were not ‘investments’.⁶⁹ The Tribunal found that the ICC award ‘involve[d] no contribution to, or relevant economic activity within, Ukraine such as to fall – *itself* – within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention.’⁷⁰

Even if the ICC award had constituted an investment, the Tribunal observed that the claim for expropriation under the BIT would still have failed. This was because GEA had failed to demonstrate that the Ukrainian courts’ refusal to recognize and enforce the ICC award was arbitrary or discriminatory; instead, the Ukrainian courts had simply reached a conclusion that was different to that which GEA had hoped for.⁷¹ The Tribunal observed that, unlike in the *Saipem* case, there was ‘no evidence that the actions taken by the Ukrainian courts were ‘egregious’ in any way; that they amounted to anything other than the application of Ukrainian law; or that they were somehow deliberately taken to thwart GEA’s ability to recover on the ICC Award.’⁷² Further, in relation to the fair and equitable treatment standard under the BIT, the Tribunal observed that the Ukrainian courts had simply ‘heard [GEA’s] arguments and rejected them’;⁷³ accordingly, there was no evidence that the Ukrainian courts had ‘failed to administer due process’ or ‘deprived’ GEA of a ‘fair procedure’.⁷⁴ In the circumstances, the local courts’ refusal to recognize and enforce the ICC award could not possibly violate the BIT.

Although the jurisdictional aspects of the *GEA* award are open to debate, the ICSID Tribunal’s observations about the lack of any treaty violation on the merits were based upon a reasonable deference to the domestic courts on issues regulated by domestic law and because there was no compelling evidence of misconduct in the Ukrainian courts’ application of Ukrainian law to the facts of the case.

(f) *White Industries Australia Ltd v. The Republic of India (2011)*

The final case to be reviewed reflects a notable return to the broad approach to the protection of commercial arbitration rights outlined in *Saipem*. White Industries (White), an Australian firm, entered into a supply agreement with Coal India Ltd (Coal India) for the development of a coal mine. A dispute arose under the contract, and White initiated ICC arbitration pursuant to that contract. The ICC award required Coal India to pay White contractual damages in the amount of Australian Dollars (AUD) 4.08 million. Coal India applied to the High Court in Calcutta to have the ICC award set aside, while White challenged Coal India’s application to set aside the award and applied to have the award enforced against Coal India in the Indian courts. After almost eight years of delay and frustration in its Indian enforcement efforts, White filed a notice of arbitration under the

⁶⁹ *Ibid.*, at para. 161–162.

⁷⁰ *Ibid.*, at para. 162 (emphasis in original).

⁷¹ *Ibid.*, at para. 236.

⁷² *Ibid.*, at para. 236.

⁷³ *Ibid.*, at para. 315.

⁷⁴ *Ibid.*, at para. 322.

UNCITRAL rules, alleging a number of violations by India (through its domestic courts) of the Australia-India BIT.

The UNCITRAL Tribunal rejected India's argument that White's rights under the supply agreement with its contractual counterparty, Coal India, were incapable of constituting an 'investment' under the BIT because they were *in personam* rather than *in rem* rights.⁷⁵ The Tribunal noted that it was 'generally well established that rights arising from contracts may amount to investments for the purposes of many BITs'.⁷⁶ The Tribunal stated that the ICC award should be viewed, as in *Saipem*, as a crystallization of the parties' rights and obligations under the underlying agreement. In doing so, the Tribunal criticized the approach taken by the ICSID tribunal in the *GEA* case as representing:

... an incorrect departure from the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning 'investments' made by 'investors' under BITs represent a continuation or transformation of the original investment.⁷⁷

The Tribunal concluded that White's rights under the ICC award constituted part of its original investment in India, as those rights constituted a crystallization of rights under the supply agreement.⁷⁸

The Tribunal proceeded to examine White's claims of violations of the BIT. As explained below, whilst ultimately rejecting the majority of White's claims under the treaty, the Tribunal did identify one novel basis of violation of White's treaty rights, as a result of which India was required to pay White compensation equating to the amount payable under the ICC award, plus interest and costs.

In relation to the fair and equitable treatment standard under the BIT, White argued that it had possessed 'legitimate expectations' that: (i) India would apply the New York Convention properly and in accordance with international standards;⁷⁹ and (ii) that India would permit White to enforce the award in the Indian courts in a fair and timely manner.⁸⁰ The Tribunal rejected both these arguments. It observed that White knew, or ought to have known, of the Indian courts' propensity to entertain set-aside applications in relation to foreign awards based on its domestic legislation; and it should similarly have known of the overburdened docket of Indian courts.⁸¹ In other words, White should have known about the risks associated with the enforcement of arbitral awards in India, and thus could not reasonably hold any 'legitimate expectation' to prompt recognition and enforcement of its ICC award such as to form the basis of a violation of the treaty.

⁷⁵ *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Award, 30 Nov. 2011, paragraph 7.3.8.

⁷⁶ *Ibid.*, at para. 7.4.1.

⁷⁷ *Ibid.*, at para. 7.6.8.

⁷⁸ *Ibid.*, at para. 7.6.10.

⁷⁹ India signed the New York Convention on 10 Jun. 1958 and ratified it on 13 Jul. 1960.

⁸⁰ *White Industries v. India*, supra n. 75 at para. 10.3.1.

⁸¹ *Ibid.*, at para. 10.3.12; para. 10.3.15.

White also argued that it had suffered a ‘denial of justice’ at the hands of the Indian courts, due to the Indian courts’ exercise of jurisdiction in asserting the power to set aside the award and the Indian courts’ delay in dealing with the enforcement of the award.⁸² White contended that the standard for denial of justice should, in this context, be conditioned and informed by international obligations entered into by India, including the New York Convention. In signing the New York Convention, White argued, India had accepted that the New York Convention contains the minimum standards to be applied by its courts for the enforcement of commercial arbitration awards.⁸³ The Tribunal noted that ‘[f]rom the perspective of a tribunal applying international law, White cannot properly be criticized for seeking to be treated by India’s courts in accordance with what it reasonably believed were India’s New York Convention obligations’.⁸⁴ However, on the facts, the Tribunal concluded that, while the delays encountered in the Indian courts had been ‘regrettable’, there was no evidence that the Indian courts had acted in bad faith and, accordingly, their conduct did not amount to a denial of justice at international law.⁸⁵

The Tribunal also dismissed White’s claim that its investment had been expropriated. While the Tribunal appeared prepared to accept that its contract rights arising from the investment, as contained in the ICC award, were capable in principle of being expropriated, it found on the facts that the award had not been expropriated. This was because there had not yet been a ‘taking’; neither the set-aside application nor the claim for enforcement had yet been fully determined by the Indian courts.⁸⁶

Notwithstanding these findings, the Tribunal concluded that India had, through its courts, failed in its obligation to ‘provide effective means of asserting claims and enforcing rights with respect to investments’.⁸⁷ Specifically, India had violated the BIT by failing to provide White with ‘effective means’ of challenging the Calcutta High Court’s jurisdiction to entertain Coal India’s application to set aside the ICC award.⁸⁸ The Tribunal noted that White had ‘done everything that could reasonably be expected of it’ in an attempt to have its challenge decided in a timely manner, but those efforts had been frustrated by the culpable conduct of the Indian courts.

Notably, in determining the relief to which White was entitled as a result of India’s treaty violation, the Tribunal – with the parties’ consent – examined at some length whether the ICC award was in fact enforceable in India. This was because India contended that White was not entitled to full compensation, since it

⁸² *Ibid.*, at para. 10.4.1.

⁸³ *Ibid.*, at para. 4.3.6.

⁸⁴ *Ibid.*, at para. 10.4.15.

⁸⁵ *Ibid.*, at paras. 10.4.22–10.4.23.

⁸⁶ *Ibid.*, at para. 12.3.6.

⁸⁷ The tribunal imported this obligation from the India-Kuwait BIT by virtue of the most-favoured-nation provision in the India-Australia BIT.

⁸⁸ *White Industries v. India*, *supra* n. 75 at para. 11.4.19. White failed in a separate claim under this head related to delays in enforcing its ICC award. This was because White did not demonstrate that an available domestic appeal right in respect of that delay would have been ‘ineffective or futile’.

had not demonstrated that Coal India's set-aside application and motion to resist enforcement had no prospects of success.⁸⁹ After a detailed examination of the question, the Tribunal concluded that the ICC award was valid and enforceable in India.⁹⁰ The Tribunal observed that 'had India not failed to provide White with "effective means" of asserting its claims, the Indian courts ought by now to have determined the Award to be enforceable in India.'⁹¹ Therefore, the Tribunal concluded that, in applying the principle of full reparation at international law, India must pay White compensation in the amount payable under the ICC award, as well as interest and costs.⁹²

IV. THE PROTECTION OF COMMERCIAL ARBITRATION RIGHTS IN EUROPEAN HUMAN RIGHTS LAW

In parallel with the developments in international investment law described above, recent years have witnessed significant advancement of international human rights law as an alternative means for the protection of international commercial arbitration rights and, in particular, the recognition and enforcement of international commercial arbitration awards.

Specifically, a number of decisions of the European Court have determined that arbitration awards constitute forms of 'property' for the purposes of Article 1 of Protocol 1 to the ECHR. Accordingly, arbitration awards qualify for protection before the Court from interference by ECHR signatory States, including their domestic courts.

Article 1 of Protocol 1 has been understood by the European Court to contain three distinct rules. The first, contained in the first sentence of the first paragraph, states the general principle concerning enjoyment of property. The second rule, contained in the second sentence of the first paragraph, concerns the deprivation of possessions (essentially expropriation) and subjects lawful deprivation to certain conditions. The third rule, stated in the second paragraph, states that contracting States are entitled to control the use of property in accordance with the general interest.⁹³ The Court has elsewhere made the point that these three rules are not to be viewed as distinct, in the sense of being unconnected. Instead, the second and third rules must be viewed in light of the general principle contained in the first rule, which sets out the 'fundamental right to property'.⁹⁴ That general principle is subject to the test of proportionality, meaning that a fair balance must be struck

⁸⁹ *Ibid.*, at para. 14.2.1.

⁹⁰ *Ibid.*, at para. 14.2.66.

⁹¹ *Ibid.*, at para. 14.3.4.

⁹² *Ibid.*, at para. 14.3.5.

⁹³ *Sporrong & Lönnroth v. Sweden*, 23 Sep. 1982, 52 ECHR Series A, no. 52 at para. 61.

⁹⁴ *James v. United Kingdom*, 21 Feb. 1986, ECHR, Series A, no. 98 at para. 37; *Lithgow v. United Kingdom*, 8 Jul. 1986, ECHR, Series A, no. 102 at para. 106.

‘between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights’.⁹⁵

To be lawful under Article 1 of Protocol 1, the taking of a possession – which, as already noted, can encompass intangible as well as tangible property – must satisfy certain conditions. As set out in the second sentence of the first paragraph of Article 1 of Protocol 1, any deprivation of a possession must occur in the ‘public interest’, subject to the conditions provided for by law and by the general principles of international law.

First, any taking of a possession must be in the ‘public interest.’ The meaning of ‘public interest’ is not defined in the ECHR and has been interpreted expansively. State parties are provided with a wide margin of appreciation in relation to the phrase since ‘[t]he Court has recognised that it is for national authorities to make the initial assessment of the existence of a problem of public concern warranting measures that result in a deprivation of property.’⁹⁶

Second, any taking of a possession must be subject to the ‘conditions provided by law’. This phrase has been described by the European Court as referring not only to national law – such that the conditions for expropriation must be contained in national law – but to certain conditions inherent in the concept of the rule of law itself, such as fairness and precision.⁹⁷

Third, any taking of a possession must be in accordance with ‘the general principles of international law’. The European Court has held that a deprivation must comply with the ‘general principles of international law’ only when a State takes property from aliens; it does not apply to a deprivation of the property of a State’s nationals.⁹⁸ This is because the inclusion of the reference to ‘general principles of international law’ in Article 1 of Protocol 1 is understood to serve two purposes. First, it enables non-nationals to have recourse to the ECHR to enforce their rights on the basis of international law. Second, it ensures the protection of the position of non-nationals following the entry into force of Article 1 of Protocol 1 and prevents any diminution of their rights.⁹⁹

One of the principal consequences of reference to ‘the general principles of international law’ in Article 1 of Protocol 1 relates to compensation. On its face, Article 1 of Protocol 1 does not refer to compensation as being payable by the State upon an expropriation of tangible or intangible property. The reference to the ‘general principles of international law’ was the result of compromise between those States that wanted Article 1 to guarantee compensation, and those States that resisted the concept.¹⁰⁰ The ‘general principles of international law’ require

⁹⁵ *Sporrong & Lönnroth v. Sweden*, *supra* n. 93 at para. 69.

⁹⁶ Hélène Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for ‘Regulatory Expropriations’ of the Property of Foreign Investors* 11 N.Y.U. Envtl. L.J. 148,158 (2002).

⁹⁷ *Lithgow v. United Kingdom*, *supra* n. 94 at para. 110.

⁹⁸ *James v. United Kingdom*, *supra* n. 94 at para. 59.

⁹⁹ *Lithgow v. United Kingdom*, *supra* n. 94 at para. 115.

¹⁰⁰ Ruiz Fabri, *supra* n. 96 at p. 151.

the payment of prompt, adequate and effective compensation by States for the expropriation of property of foreign nationals.¹⁰¹

The requirement of compensation under the ECHR will also be conditioned by the requirement of 'proportionality', which has been applied widely by the European Court in its jurisprudence. The Court has held that, in most circumstances, only compensation in an amount 'reasonably related' to the value of the property will meet the requirement of proportionality.¹⁰² A deprivation of property without accompanying compensation would almost inevitably fail to meet the requirement of proportionality under the ECHR.¹⁰³

With these general principles in mind, this article now turns to examine the principal cases that have highlighted the protection of commercial arbitration rights that is afforded by Article 1 of Protocol 1 to the ECHR.

(a) *Stran Greek Refineries and Stratis Andreadis v. Greece (1994)*

Stran Greek Refineries and Stratis Andreadis v. Greece, decided in 1994, was the first case where the Court considered in detail the relationship between international commercial arbitration rights and Article 1 of Protocol 1 to the ECHR. Mr Andreadis, through his company, Stran Greek Refineries (Stran), entered into a contract with Greece for the construction of an oil refinery. The contract was concluded in 1972, when Greece was governed by a military junta. Following the end of military rule, a new Greek government passed legislation purporting to terminate contracts that had been entered into by the junta. Stran objected and claimed that compensation was payable for the deprivation by the Greek government of its contractual rights. The dispute proceeded through the Greek courts and then to arbitration in a Greek arbitration court. An arbitral award found largely in favour of Stran.

The government applied to the Greek courts to set aside the arbitration award. The Athens Court of First Instance, and subsequently the Athens Court of Appeal, rejected the government's set aside application. The government then mounted an appeal to the Greek Court of Cassation. Before the appeal could be heard, the government passed new legislation which rendered unenforceable any arbitral award adjudicating claims arising from junta-era contracts. The Court of Cassation found that this legislation was not unconstitutional. It remitted the case to the First Division court, which found the arbitration award to be void and unenforceable.

Stran and Mr Andreadis claimed a violation of Article 6(1) (the right to a fair trial) of the ECHR and Article 1 of Protocol 1. The European Court found that the Greek legislature's intervention in the pending judicial proceedings constituted a violation of Article 6(1).¹⁰⁴ It then turned to examine the Article 1 of Protocol 1 complaint. First, it considered whether there existed a 'possession' within the

¹⁰¹ *Ibid.*, at 162–163.

¹⁰² *James v. United Kingdom*, *supra* n. 94 at para. 54.

¹⁰³ *Sporrong & Lönnroth v. Sweden* *supra* n. 95 at para. 69, para. 73; *James v. United Kingdom*, *supra* n. 94 at para. 54.

¹⁰⁴ *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 Dec. 1994, ECHR Series A, No. 301-B, para. 50.

meaning of Article 1 of Protocol 1. It held that the test was whether the arbitration award 'had given rise to a debt...that was sufficiently established to be enforceable'.¹⁰⁵ The European Court found that, at the time the new law was passed that purported to render unenforceable arbitration awards handed down in connection with junta-era contracts, the arbitration award had 'conferred on the applicants a right in the sums awarded'.¹⁰⁶ This was because 'the award was final and binding; it did not require any further enforcement measure and no ordinary or special appeal lay against it'.¹⁰⁷ There was, therefore, a 'possession' within the meaning of Article 1 of Protocol 1.

The European Court found it significant that, at the time of the alleged taking, there was no possibility of annulment because the two lower court decisions had issued binding judgments that annulment was not possible.¹⁰⁸ There was therefore no practical possibility that the award could be annulled. Had annulment still been available as a remedy in the Greek courts, the award may therefore not have been sufficiently established to fall within the meaning of a 'possession' under Article 1 of Protocol 1. Subsequent decisions have confirmed this position.¹⁰⁹

The Court moved on to consider whether there had been an interference with the applicants' qualifying 'possession'. The Court determined that Greece's actions did constitute a 'deprivation'. It found that the new legislation and the Court of Cassation's judgment rendered it impossible for the applicants to enforce the arbitral award with final effect.¹¹⁰ It was:

impossible for the applicants to secure enforcement of an arbitration award having final effect and under which the State was required to pay them specified sums in respect of expenditure that they had incurred in seeking to fulfil their contractual obligations or even for them to take further action to recover the sums in question through the courts.¹¹¹

Finally, the Court considered whether the interference was justified, i.e., whether it satisfied the test of proportionality under the ECHR. The Court weighed whether a fair balance had been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The Court did 'not doubt' that it was necessary for Greece to terminate contracts it considered prejudicial to its interests.¹¹² Citing the famous *Shufeldt Claim (Guatemala, USA)*,¹¹³ the Court noted that any State has the sovereign power as a matter of international law to amend or terminate a contract concluded with a private individual, provided that compensation is paid to the affected

¹⁰⁵ *Ibid.*, at para. 59.

¹⁰⁶ *Ibid.*, at para. 62.

¹⁰⁷ *Ibid.*, at para. 61.

¹⁰⁸ *Ibid.*, at para. 62.

¹⁰⁹ *Prodan v. Moldova* (app no. 49806/99), 18 May 2004, ECHR, 2004-III, para. 59; *Užkurėlienė and Others v. Lithuania* (app. no. 62988/00), 7 Apr. 2005, para. 39.

¹¹⁰ *Stran Greek Refineries v. Greece*, *supra* n. 104 at para. 67.

¹¹¹ *Ibid.*, at para. 67.

¹¹² *Ibid.*, at para. 72.

¹¹³ (1930) II UN RIAA 1079.

individual.¹¹⁴ Yet termination of a contract would not affect ‘certain essential clauses of the contract, such as the arbitration clause’, since that would permit one party to evade jurisdiction when provision had been made specifically for arbitration.¹¹⁵

The Court noted that the Greek legal system recognizes arbitration clauses as autonomous. Greece was under an obligation to pay the sums awarded against it at the conclusion of the arbitration, yet it did not do so.¹¹⁶ Moreover, by its legislative interference in the judicial proceedings, the government upset the balance to be struck between the protection of the right of property and the requirements of the public interest.¹¹⁷ There had therefore been a violation of Article 1 of Protocol 1.

The applicants argued that ‘just satisfaction’ (as mandated by Article 41 of the ECHR following any finding of violation by the Court) required payment by Greece, in full, of the amount of the arbitration award. Greece argued that the applicants were not entitled to any compensation because they could obtain satisfaction through the domestic remedies available. In a rare judgment awarding substantial compensation for breach of human rights under the ECHR, the Court ordered Greece to pay to the applicants the full amount contained in the arbitration award, plus interest.¹¹⁸

As described in the paragraphs that follow, the *Stran Greek* case has been followed in a series of more recent cases before the European Court in order to secure protection of commercial arbitration awards against the interference of State bodies, including domestic courts.

(b) *Regent Company v. Ukraine (2008)*

In December 1998, COM s.r.o. (COM), a company incorporated in the Czech Republic, instituted commercial arbitration proceedings against Oriana, a Ukrainian State-owned company, at the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine. The subsequent arbitration award ordered Oriana to pay COM USD 2,466,906 in compensation.

In 1999, COM took steps to enforce its commercial arbitration award. It lodged an application with a regional arbitration court in Ukraine, seeking a decision that COM was a creditor of Oriana. The regional arbitration court rejected COM’s application and a subsequent effort to initiate bankruptcy proceedings against Oriana. Similarly unsuccessful were the efforts by the local Ukrainian bailiffs’ service to collect the debts owing under the arbitration award. Between 1999 and 2003, Oriana resisted numerous attempts by the bailiffs to attach its assets and to enforce the award, including through court proceedings.

¹¹⁴ *Stran Greek Refineries v. Greece*, *supra* n. 104 at para. 72.

¹¹⁵ *Ibid.*, at para. 72.

¹¹⁶ *Ibid.*, at para. 73.

¹¹⁷ *Ibid.*, at para. 74.

¹¹⁸ *Ibid.*, at paras. 81–82.

In 2003, COM transferred the debt contained in the arbitration award to the applicant, Regent Engineering International Limited (Regent). In 2004, Regent was registered as Oriana's creditor in respect of the debt due under the arbitration award. However, in 2005 the Ukrainian bailiffs' service was ordered by a regional commercial court to discontinue the enforcement proceedings and to transfer the writs of enforcement to Oriana's property administrator.

With the enforcement proceedings dragging on, Regent applied to the European Court, claiming a breach by Ukraine of Article 6(1) of, and Article 1 of Protocol 1 to, the ECHR. The European Court rejected Ukraine's preliminary objection that Article 6(1) was not applicable to arbitration proceedings.¹¹⁹ It found, moreover, that Ukraine had not advanced compelling reasons for the delay in enforcement, and that that delay constituted a violation of Article 6(1).¹²⁰

The applicant claimed that Ukraine's failure to ensure that the arbitration award was enforced within a reasonable time constituted a breach of Article 1 of Protocol 1. The Court found, in line with previous jurisprudence, that a claim to money could constitute a possession if it was sufficiently established to be enforceable.¹²¹ The assignment of the debt owed under the arbitral award was evidence of the existence of a 'possession' within the meaning of Article 1.¹²² Further, it was clear from the domestic court proceedings that the applicant was a creditor in the enforcement proceedings and, as such, possessed an enforceable and established possession.¹²³ The Court concluded that there had been a violation of Article 1 of Protocol 1.¹²⁴

The Court held that Regent was entitled to recover the amount of the arbitration award and that, were the Ukrainian government to pay the outstanding debt, it would constitute full and final settlement of the claim for pecuniary damage.¹²⁵ The Court rejected Regent's claim for USD 10,000,000 for non-pecuniary damage and lost income, holding that the finding of violations of Article 6(1) and Article 1 of Protocol 1 constituted 'just satisfaction' under Article 41 of the ECHR.¹²⁶ The result was that the Court ordered Regent to pay the amount outstanding under the arbitration award, plus interest.

(c) *Kin-Stib and Majkić v. Serbia (2010)*

A recent case to consider the protection of arbitration awards under the ECHR is *Kin-Stib and Majkić v. Serbia*. In 1989, Kin-Stib, a company incorporated in the Democratic Republic of Congo, concluded a joint venture agreement with a Yugoslav State-owned company, Generalexport, for the establishment and operation of a casino. By 1993, the casino had closed due to financial difficulties,

¹¹⁹ *Case of Regent Company v. Ukraine* (app. no. 773/03), 3 Apr. 2008, para. 56.

¹²⁰ *Ibid.*, at para. 60.

¹²¹ *Ibid.*, at para. 61.

¹²² *Ibid.*, at para. 61.

¹²³ *Ibid.*, at para. 61.

¹²⁴ *Ibid.*, at para. 62.

¹²⁵ *Ibid.*, at para. 66.

¹²⁶ *Ibid.*, at para. 67.

and a number of disputes arose between the contracting parties. In 1995, Kin-Stib brought arbitration proceedings before the Foreign Trade Arbitration Court of the Yugoslav Chamber of Commerce (the 'Arbitration Court') against Generalexport claiming repossession of the casino and damages for breach of contract. The Arbitration Court ruled that Generalexport was required: (a) to pay Kin-Stib compensation in the amount of USD 1,999,992, plus 6% interest, due to the failure to permit Kin-Stib to operate the casino between 1 April 1995 and 31 March 1996; (b) to permit Kin-Stib to retake possession of the casino; and (c) to permit Kin-Stib to manage the casino's operations for five years after it reopened. On 7 June 1996, the commercial court in Belgrade ordered the enforcement of the award in its entirety.

By 1998, Generalexport had complied with requirement: (a) of the arbitration award and had paid to Kin-Stib the required amount of compensation. However, it had not complied with the second or third requirements of the award. The Commercial Court in Belgrade fined Generalexport's successor companies, Generalexport and International CG, on a number of occasions for their failure to comply with an order granting repossession of the casino by Kin-Stib. In October 2006, the Commercial Court terminated the enforcement proceedings because it had issued the maximum statutory amount of fines permitted under Serbian legislation. Subsequent appeals by Kin-Stib were rejected. Eventually, on 10 March 2008, the Commercial Court noted that the national privatization agency had ordered the restructuring of Generalexport and International CG and stayed the enforcement proceedings until this restructuring had concluded.

Kin-Stib separately commenced two compensation proceedings, to obtain compensation for Kin-Stib's inability to operate the casino after 30 March 1996. The Commercial Court issued separate orders requiring Generalexport and International CG to pay compensation related to the periods 1 April 1996 to 31 May 1998 and 1 June 1998 to 1 April 2001. Attempts to enforce both these orders failed.

The Applicants (Kin-Stib and its controller) complained of a violation of Article 6(1) and Article 1 of Protocol 1 of the ECHR on the basis of the partial non-enforcement of the arbitration award. The Respondent claimed that it had done everything within its power to enforce the arbitration award. The European Court reiterated that a claim to money could constitute a 'possession' within the meaning of Article 1 of Protocol 1.¹²⁷ The Court decided that the claim established in the arbitration award 'undisputedly' amounted to a 'possession' within the meaning of Article 1 of Protocol 1.¹²⁸ First, the Serbian Commercial Court had ordered the enforcement of the award in its entirety. Second, compensation had been paid to Kin-Stib pursuant to that order. Third, in an attempt to secure enforcement of the award, the Commercial Court had imposed the maximum amount of fines legally possible. Fourth, further efforts to enforce the award thereafter had not been

¹²⁷ *Case of Kin-Stib and Majkic v. Serbia* (app no. 12312/05), 20 Apr. 2010, para. 83.

¹²⁸ *Ibid.*, at para. 84.

possible because the legal means open to the Applicants had been exhausted. Fifth, further enforcement efforts had been stayed.¹²⁹ The European Court stated that:

it is the State's responsibility to make use of all available legal means at its disposal in order to enforce a binding arbitration award providing it contains a sufficiently established claim amounting to a possession.¹³⁰

Noting the long delays of the Serbian courts in enforcing the arbitration award, the European Court found that the Serbian authorities had 'clearly not taken the necessary measures to fully enforce the arbitration award in question and have not provided any convincing reasons for that failure'.¹³¹ There had therefore been a violation of Article 1 of Protocol 1. In light of this finding, the Court found it unnecessary to examine the Article 6(1) complaint.¹³²

The question of damages was complicated by the myriad court proceedings launched during the dispute.

The European Court accepted that the applicants had suffered non-pecuniary damage and awarded them USD 8,000 each. It then turned to the outstanding obligations owing under the arbitration award, namely the failure of Generalexport to permit Kin-Stib to retake possession of the casino and to manage its operation for five years. The Court considered that restitution was impracticable because the enforcement of the obligation to accord repossession was no longer possible or would interfere with the rights of third parties (since the hotel in question had subsequently been sold). The European Court noted that the two compensation judgments decided by the Commercial Court had, however, awarded Kin-Stib compensation for lost earnings between 1 April 1996 and 1 April 2001. The European Court considered that those judgments did not disclose any arbitrariness, and that it was not best placed to assess the amount of damages to be awarded. Finally, the Court noted that Generalexport and International CG were socially owned companies and, pursuant to national legislation, the State was responsible for honouring their debts established by way of a final court judgment.¹³³

Accordingly, the Court ordered that Serbia pay the applicants the sums that had been awarded in the final, domestic compensation judgments.¹³⁴ The effective result was that the European Court, while not able to enforce the specific terms of the underlying arbitration award, awarded compensation (in an amount determined in the domestic courts) for Serbia's failure to comply with that arbitration award in full, plus non-pecuniary damages.

¹²⁹ *Ibid.*, at para. 84.

¹³⁰ *Ibid.*, at para. 83.

¹³¹ *Ibid.*, at para. 85.

¹³² *Ibid.*, at para. 86.

¹³³ *Ibid.*, at para. 96.

¹³⁴ *Ibid.*, at para. 97.

V. THE PROTECTIONS COMPARED

The recent jurisprudence of international investment tribunals under BITs and the European Court under the ECHR demonstrates that public international law is ready and able to step in to protect international commercial arbitration rights where domestic courts or other authorities have failed in their legal duties to uphold the international arbitral process. A comparison between the approach taken by investment arbitration tribunals, on the one hand, and the European Court, on the other, reveals a number of common characteristics, but also some substantial differences between the two systems. Four particular themes are examined in turn below.

(a) *An International Court of Appeal for the Recognition and Enforcement of Arbitral Awards?*

Many public international law courts and tribunals have long shown resistance towards becoming akin to a forum of appeal. Investment arbitration tribunals and the European Court have been no exception. Thus, for example, investment arbitration tribunals have emphasized in the context of ‘denial of justice’ claims that their role is not to act as courts of appeal against the decisions of domestic courts in the application of domestic law.¹³⁵ Meanwhile, at the European Court, the so-called ‘fourth instance’ doctrine mandates that any attempt to appeal against the decisions of domestic courts in the application of domestic law constitutes a ground of inadmissibility under the ECHR.¹³⁶

This reluctance has also manifested itself in connection with attempts to use investment arbitration tribunals under BITs as a means to challenge the decisions of domestic courts in connection with commercial arbitration awards. Some tribunals have resisted including such awards within the definition of ‘investment’ so as to prevent investment arbitration becoming a forum of appeal against domestic decisions refusing recognition or enforcement. Thus, an UNCITRAL tribunal noted in the award in *Romak S.A. (Switzerland) v The Republic of Uzbekistan*, that a ‘mechanical application’ of the broad definition of ‘investment’ contained in the applicable BIT (which included ‘claims to money’) would create:

a new instance of review of State court decisions concerning the enforcement of arbitral awards. Under the scenario advocated by Romak, any award rendered in favour of a national of a Contracting Party (even one rendered in a purely commercial arbitration procedure) would be considered a ‘claim to money’ . . . The refusal or failure of the host State’s courts to enforce such an award would therefore arguably provide sufficient grounds for a *de novo* review – under a different

¹³⁵ *Azinian v. Mexico*, *supra* n. 32 at para. 99; *Jan de Nul v. Egypt*, *supra* n. 32 at para. 209; *Mondev v. United States*, *supra* n. 32 at para. 127.

¹³⁶ *Edwards v. the United Kingdom*, 16 Dec. 1992, ECHR, Series A, no. 247-B, para. 34; *Doorson v. the Netherlands*, 26 Mar. 1996, *Reports of Judgments and Decisions* 1996-II, para. 67; *Van Mechelen and Others v. the Netherlands*, 23 Apr. 1997, *Reports of Judgments and Decisions* 1997-III, para. 50.

international instrument and on grounds different from those that would normally apply – of the State courts’ decision not to enforce an award.¹³⁷

The tribunal observed that the consequences of accepting such a broad definition of investment would be ‘untenable’ as a matter of public international law.¹³⁸

Some recent academic commentary has criticized the perceived use of investment treaties as a mechanism for the review of national courts’ compliance with the New York Convention, particularly in the context of the *Saipem* award.¹³⁹ However, investment arbitration tribunals have emphasized repeatedly that investment treaties must not be allowed to become a means of appeal against the annulment of commercial arbitration awards by domestic courts. The standard of review exercised by those tribunals indicates that a level of deference will be afforded to national courts when they refuse recognition or enforcement of commercial arbitration awards. The three recent cases in which treaty violations were most clearly established (*DLP*, *Saipem* and *ATA*) stand out for the egregiousness of the respondent States’ interference with the claimants’ arbitration rights. In each case, the investor claimants were the victims of State conduct that had fatally undermined the arbitral process. The tribunals concerned were thus able to conclude that the respondents’ interference in each case fell below basic standards of treatment required by public international law. *White Industries*, however, was a case where the State had failed to afford an investor ‘effective means’ to enforce its arbitral rights, due to chronic flaws in the national judicial system as a whole.¹⁴⁰ In none of these cases, did the investment arbitration tribunal act simply as a forum of appeal against the domestic courts. Something more was required in order to engage the responsibility of the State as a matter of public international law.

Indeed, in *Frontier Petroleum*, the tribunal confirmed that States must enjoy a certain ‘margin of appreciation’ in determining their own conception of ‘public policy’ under Article V of the New York Convention.¹⁴¹ Only if the approach taken by the domestic court in the application of Article V was not ‘plausible’ or

¹³⁷ *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, Award, 26 November 2009, para. 186.

¹³⁸ *Ibid.*, at para. 188. While the tribunal rejected the view that an arbitration award could constitute a free-standing investment under the BIT, it did not discuss whether the award could be viewed as a crystallization of rights in an underlying investment. Given that the contract containing the arbitration clause was also, on the facts, found not to constitute an investment, the issue did not arise for consideration in that case. Notably, however, the tribunal in *GEA* referred to *Romak* in its consideration of whether the claimant possessed an investment in Ukraine: *GEA v. Ukraine*, *supra* n. 68 at para. 141.

¹³⁹ See Ruth Teitelbaum, *Case Report on Saipem v. Bangladesh*, 26 *Arb. Intl.* 313 (2010); W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 *Am. Rev. Intl. Arb.* 5 (2011); Pedro J. Martinez-Fraga, *Adam, How about a Second Bite at the Apple? Revisiting the Need for Uniformity in the Application of Res Judicata to International Commercial and Treaty-Based Arbitration*, in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2011* 142, 174–176 (Brill, 2012).

¹⁴⁰ See, for example, *White Industries v. India*, *supra* n. 75 at para. 10.3.12.

¹⁴¹ *Frontier Petroleum v. Czech Republic*, *supra* n. 61 at para. 525.

‘reasonably tenable’ would the tribunal intervene and find a violation of international law.¹⁴²

The threshold that must be reached before an investment treaty arbitration tribunal will intervene to protect commercial arbitration rights is therefore a high one. The recent jurisprudence described in this article indicates that State interference with commercial arbitration rights will constitute a breach of a BIT only when it is particularly egregious, amounting to an abuse of rights, or when it amounts to a neutralization of the arbitral process as a whole (such as by extinguishing an arbitration agreement, as in *Saipem* and *ATA*).¹⁴³ As *Frontier Petroleum* shows, particular deference will be shown to domestic courts’ assessment of ‘public policy’ for the purposes of Article V of the New York Convention.

Nevertheless, the determination of whether a national court has extinguished an arbitration agreement in violation of Article II of the New York Convention (so as to constitute an expropriation), or transgressed any ‘reasonably tenable’ or ‘plausible’ interpretation of ‘public policy’ under Article V of the New York Convention (so as to constitute a failure to accord fair and equitable treatment), is manifestly a lower threshold than that applicable to a traditional claim for ‘denial of justice’. An expropriation claim is distinct from a claim of denial of justice and, as *Saipem* and *ATA* show, may succeed in any situation where the respondent or its national courts have completely frustrated the arbitral process. In *Frontier Petroleum*, however, the respondent argued that the claimant’s challenge to the Czech courts’ interpretation of Article V of the New York Convention amounted effectively to a denial of justice claim.¹⁴⁴ The Tribunal did not accept that categorization. It found instead that the relevant question, for the purposes of compliance with the fair and equitable treatment standard, was whether the domestic court’s application of the New York Convention was ‘reasonably tenable’.¹⁴⁵

(b) *The Protection of Arbitration Agreements and Arbitration Awards: Contrasting Focus in Recent Investment Arbitration and ECHR Jurisprudence*

It is clear that, as a matter of principle, an arbitration agreement is capable of protection under both the ECHR and investment treaties. It is an asset of inherent economic value that is capable of constituting both a ‘possession’ within the meaning of Article 1 of Protocol 1 and an ‘investment’ for the purposes of BITs and the ICSID Convention. Thus, in *ATA*, the ICSID Tribunal observed that ‘the right to arbitration is a distinct investment within the meaning of the BIT’.¹⁴⁶

Nevertheless, the recent jurisprudence demonstrates that investment arbitration tribunals tend to be more focused than the European Court upon the protection of arbitration agreements, and of the integrity of the arbitration process generally.

¹⁴² *Ibid.*, at para. 527.

¹⁴³ On abuse of rights generally, see G. D. S. Taylor, *The Content of the Rule against Abuse of Rights in International Law*, 46 *Brit. Y.B. Intl. L.* 323 (1972–1973).

¹⁴⁴ *Frontier Petroleum v. Czech Republic*, *supra* n. 61 at para. 487.

¹⁴⁵ *Ibid.*, at para. 525, para. 527.

¹⁴⁶ *ATA v. Jordan*, *supra* n. 55 at para. 117.

This is perhaps because investment arbitration tribunals tend to be more cognisant of the arbitral process as a whole, and sensitive to interferences with it, than judges in the European Court. A number of the recent investment arbitration awards reviewed above have shown that investment treaty arbitrators are ready to step in to protect commercial arbitration agreements from interference and cancellation by host States and their domestic courts. Where the commercial arbitration agreement forms part of an ‘overall operation’ that constitutes an ‘investment’ for the purposes of the ICSID Convention, as in *Saipem* (in the form of a pipeline project) and *ATA* (in the form of a dam construction project), the taking of that agreement by the State may constitute an expropriation for the purposes of the applicable BIT.

By contrast, the European Court appears to have been more comfortable in affording protection to commercial arbitration awards. Indeed, the Court has had less difficulty than a number of investment treaty arbitration tribunals in concluding that an arbitration award constitutes an enforceable property right. It is clear that an arbitration award can constitute a ‘possession’ for the purposes of Article 1 of Protocol 1, so long as it is sufficiently established to be enforceable. According to the now canonical statement in *Stran Greek*, an arbitration award is ‘sufficiently established’ if there is no longer any possibility of annulment.¹⁴⁷

Investment arbitration tribunals have been more cautious and, perhaps, inconsistent with regard to the direct protection of commercial arbitration awards under investment treaties. It appears clear that an arbitration award, in isolation, does not constitute an ‘investment’ for the purposes of the ICSID Convention. The ICSID Tribunal in *Saipem* rejected the argument that the ICC Award at issue in that case was itself an ‘investment’. Similarly, the ICSID Tribunal in *GEA* observed that ‘the ICC Award – *in and of itself* – cannot constitute an “investment”’.¹⁴⁸ The *GEA* Tribunal went on to observe, in comments that were obiter dicta, that:

the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. The two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT or Article 25 of the ICSID Convention.¹⁴⁹

Nevertheless, despite the views expressed by the *GEA* Tribunal, the prevailing view in the recent jurisprudence appears to be that an arbitration award can form part of an ‘investment’, capable of expropriation by domestic courts, when viewed holistically. Thus, in *Saipem*, the ICSID Tribunal concluded that Saipem’s residual contractual rights in its underlying investment in Bangladesh, as crystallized in the ICC Award, could constitute property, and that the actions of the Bangladeshi

¹⁴⁷ *Stran Greek Refineries v. Greece*, *supra* n. 104 at para. 62; *Kin-Stib v. Serbia*, *supra* n. 127 at para. 28, para. 83. The principle that an arbitral award constitutes a ‘possession’ for the purposes of Art. 1 of Protocol 1 has also been accepted in English domestic law. See *AIG Capital Partners, Inc & Anor v. The Republic of Kazakhstan* [2006] 1 WLR 1420 at para. 95.

¹⁴⁸ *GEA v. Ukraine*, *supra* n. 68 at para. 161 (emphasis in original).

¹⁴⁹ *Ibid.*, at para. 162.

courts had expropriated that property in violation of the BIT.¹⁵⁰ Similarly, in *ATA* the ICSID Tribunal commented, by way of obiter dicta and with reference to *Saipem*, that the underlying commercial arbitration award could ‘be part of an “entire operation” that qualifies as an investment’.¹⁵¹

The *GEA* Tribunal criticized the *Saipem* Tribunal as having made ‘statements that are difficult to reconcile’ on this issue.¹⁵² Yet, it would appear that *GEA* represents the exception to the developing line of jurisprudence. Indeed, as described above, the Tribunal in *White Industries* explicitly criticized the *GEA* Tribunal’s approach as constituting an ‘incorrect departure from the developing jurisprudence on the treatment of arbitral awards’ under BITs.¹⁵³

(c) *The New York Convention*

An area of clear contrast as between investment arbitration tribunals and the European Court relates to the role of the New York Convention. As described above, several recent investment arbitration tribunals have shown no hesitation in looking to the New York Convention when assessing whether or not an interference with the commercial arbitration process amounts to a treaty violation. A number of the world’s leading investment treaty arbitrators have a solid grounding in international commercial arbitration – indeed, many spent the formative years of their careers working primarily as counsel in international commercial arbitrations. Such individuals are well-equipped to determine whether, and if so to what extent, the conduct of domestic courts violates the basic principles of the New York Convention or an abuse of the international commercial arbitration process, such as to amount to a judicial expropriation or a violation of the fair and equitable treatment standard.

In contrast, the European Court does not tend to view the protection of arbitral rights under Article 1 of Protocol 1 through the lens of the New York Convention. Indeed, the arbitration awards considered by the Court in cases like *Stran Greek*, *Regent* and *Kin-Stib* have generally been domestic in nature and thus not protected by the New York Convention. To date, the Court has not addressed the New York Convention in any detail in its jurisprudence. This may in part be due to the fact that the counsel and (more importantly) judges engaged in proceedings before the Court rarely have any grounding in international commercial arbitration, or any substantial experience applying the New York Convention. However, there is no reason in principle why an arbitrary extinguishment of an arbitration agreement or award in violation of the New York Convention, or an untenable or implausible application of the public policy exception in Article V(2)(b), should not amount to an unlawful deprivation for the purposes of Article 1 of Protocol 1. Thus, the

¹⁵⁰ *Saipem v. Bangladesh*, *supra* n. 47 at paras. 128–130.

¹⁵¹ *ATA v. Jordan*, *supra* n. 55 at para. 115.

¹⁵² *GEA v. Ukraine*, *supra* n. 68 at para. 163.

¹⁵³ *White Industries v. India*, *supra* n. 75 at para. 7.6.8.

interaction of Article 1 of Protocol 1 and the New York Convention awaits further judicial consideration.¹⁵⁴

(d) Remedies

Another area of apparent difference in approach between investment treaty arbitration tribunals and the European Court concerns remedies. In finding BIT violations relating to the mistreatment of commercial arbitration rights, investment arbitration tribunals have generally relied on a relatively straightforward application of the duty to make full reparation for internationally wrongful acts, as reflected at Article 31 of the ILC Articles on State Responsibility.¹⁵⁵ The precise remedy required has varied with the circumstances. The remedies granted in the cases of *DLP*, *Saipem*, *ATA* and *White Industries* ranged from reinstatement of the underlying arbitration award (in *DLP*), to a self-standing award of damages under the BIT calculated with reference to the amount of the underlying arbitration award (as in *DLP*, *Saipem* and *White Industries*), to a reinstatement of an underlying commercial agreement to arbitrate (as in *ATA*).

DLP exemplifies a relatively straightforward (if ‘belt-and-braces’) application of the duty to make restitution, as set out in the *Chorzów Factory* case.¹⁵⁶ After all, the obvious result of the illegality of the settlement agreement that had been procured by duress was the reinstatement of the underlying commercial arbitration award. The tribunal chose to accompany that reinstatement with a parallel award of damages under the BIT representing the value of the underlying award.

The *ATA* award also represented a straightforward application of the duty to make restitution. This was because the obvious remedy for the Jordanian courts’ illegal extinguishment of the claimant’s arbitration agreement was the reinstatement of that agreement, and thus of the claimant’s right to arbitrate.

In *Saipem*, restitution would most obviously have again resulted in reinstatement of the claimant’s arbitration agreement. But in that case, the Tribunal found that the prospect of a fresh arbitration taking place in Bangladesh, subject to the oversight of the Bangladeshi courts, was ‘unrealistic’, given the egregious nature of their interferences with the ICC arbitration process. In other words, to use the

¹⁵⁴ One case at the European Court that did touch upon the New York Convention was *Sedelmayer v. Germany*. In that case, which arose out of an infamous investment dispute between a German national and Russia, the applicant, Franz Sedelmayer, sought to enforce a Sweden Chamber of Commerce award that had found breaches of the USSR-Germany BIT and awarded compensation to Sedelmayer. In 2001, a Berlin regional court determined that the SCC award was enforceable, relying on the New York Convention. Sedelmayer initiated execution proceedings in Germany, but those proceedings were unsuccessful. Sedelmayer claimed at the European Court Germany’s non-execution of the award violated, *inter alia*, Art. 1 of Protocol 1, in part because its conduct in doing so was incompatible with the New York Convention. The European Court concluded that there had been no violation of Art. 1 of Protocol 1 because the German courts had not determined that the arbitral award was invalid or could not be enforced in Germany; they had instead determined that certain sovereign assets belonging to the Russian Federation were immune from execution. The Court thus held that the application was manifestly ill-founded. See *Sedelmayer v. Germany* (app nos. 30190/06 and 30216/06), Decision on Admissibility, 10 Nov. 2009.

¹⁵⁵ ILC Articles on State Responsibility, *supra* n. 23 at Art. 31.

¹⁵⁶ *Case Concerning The Factory at Chorzów (Claim for Indemnity) (Merits)*, (1928) PCIJ Series A No 17, p.47.

language of Article 35 of the ILC Articles, restitution was ‘materially impossible’.¹⁵⁷ Consequently, the Tribunal instead ordered Bangladesh to pay damages equating to the value of the underlying ICC award.

In *ATA*, by contrast, the Tribunal reinstated the right to arbitrate because there was evidence positively demonstrating that Jordan would be prepared to comply with any subsequent commercial award. Unlike *Saipem*, no abuse of rights or egregious violation of the claimant’s rights by the domestic courts had been established, and the Tribunal considered that there was no evidence that the respondent would abuse its supervisory jurisdiction over any renewed arbitration process.

In *White Industries*, the Tribunal again invoked the *Chorzów Factory* standard, but then proceeded to award compensation in the amount of the claimant’s ICC award. It did so on the basis that had the Indian courts provided the claimant with ‘effective means’ of enforcing its rights under the ICC award, they would have concluded ‘that Coal India had not established that the Award ought to be set aside or not enforced’.¹⁵⁸

Remedies under the ECHR, in the cases under review, have also been reasonably predictable, if somewhat less flexible. All have ordered compensation in the amount of the arbitration award that has been taken, or in an amount reasonably related to the arbitration award. Article 41 of the ECHR provides that in the event of a violation of the Convention ‘just satisfaction’ must be provided to the applicant.¹⁵⁹ The relationship between Article 41 and general public international law principles of restitution and compensation has historically been an area of some uncertainty. In early ECHR jurisprudence, Article 41 was interpreted as excluding restitution.¹⁶⁰ Apart from declaratory judgments, the European Court frequently rejected requests for other forms of non-monetary relief.¹⁶¹

More recently, the European Court has recognized its ability to order restitutionary relief as a matter of international law. In *Papamichalopoulos v. Greece*, the Court noted that, when it determined a breach of the ECHR, the respondent State was under an obligation ‘to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach’.¹⁶² Most of the instances where the Court has ordered restitution have involved the interference with property rights. However, while it is clearly within the Court’s power to order the reinstatement of an arbitration agreement or arbitration award, no such remedy has to date been ordered by the Court.

¹⁵⁷ ILC Articles on State Responsibility, *supra* n. 23 at Art. 35.

¹⁵⁸ *White Industries v. India*, *supra* n. 75 at paras. 14.3.3–14.3.6.

¹⁵⁹ ECHR, Art. 41.

¹⁶⁰ *Tomuschat*, *supra* n. 14 at p. 252.

¹⁶¹ *Gillow v. United Kingdom*, (Article 50), 14 Sep. 1987, ECHR, Series A, No. 124-C, para. 9.

¹⁶² *Papamichalopoulos and Others v. Greece*, (Article 50), 31 Oct. 1995, ECHR, Series A, No. 330-B, para. 34.

VI. CONCLUSION

The recent jurisprudence of investment arbitration tribunals (under BITs) and the European Court (under the ECHR) demonstrates that public international law can offer an invaluable weapon in protecting commercial arbitration agreements and commercial arbitration awards from domestic court or other State interference. Investment arbitration tribunals in particular have shown themselves ready and able to step in to protect the holders of international commercial arbitration rights from a range of interferences by domestic State authorities. In many of those cases, the tribunals concerned have mandated compliance by the State with the basic infrastructure of the New York Convention. Whilst investment arbitration tribunals have shied away from any inference that they provide a form of international appeal against the decisions of domestic courts, the circumstances in which they have been willing to find a violation of treaty norms, and to impose remedies against the State so as to uphold the commercial arbitration process, have been increasingly broad.

Importantly, the public international law rights of action at issue under BITs and the ECHR exist regardless of whether or not the underlying arbitration process involved the host State as an arbitral party. A number of the recent cases analysed in this article have arisen out of interferences by host State courts into the commercial arbitration agreements or awards of private contractual counterparties.

Without doubt, the most significant recent trends have involved the decisions of investment arbitration tribunals under applicable BITs. Those tribunals, many of which are constituted of individuals well-versed in the commercial arbitration process, have shown no hesitation in stepping in to protect that process from illicit State interference. Many of the cases have spoken of the expropriation of arbitration rights, or violations of the fair and equitable treatment standard writ large, rather than the traditionally narrow concept of 'denial of justice'. Further, investment arbitration tribunals have shown themselves willing to impose a broad range of remedies against violating State parties in order to ensure respect for the commercial arbitration process.

The circumstances in which the European Court has intervened have been narrower in scope. They have related principally to the protection of arbitration awards, as forms of protected 'possessions', from takings by the State rather than any broader philosophical drive to safeguard the arbitration process. However, the Court has on multiple occasions compelled States to pay up sums owing under commercial arbitration awards that have been unlawfully frustrated by domestic authorities. The European Court therefore has an important part to play (just as does the Inter-American Court, in its own region) as a forum for the enforcement of international law rights and protections in the arbitral process, particularly in cases where no BIT arbitration remedy is available.

All told, the shadow of public international law looms ever larger over domestic courts and other State authorities in their oversight of the commercial arbitration process. Any bad faith or arbitrary conduct, or serious incompetence, by such authorities in connection with that process is increasingly vulnerable to international censure and, ultimately, to findings of State responsibility.