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BRIDGING THE GAP BETWEEN INVESTMENT  
AND COMMERCIAL ARBITRATION AT THE  
ENFORCEMENT STAGE: REGIME INTERACTIONS  
BETWEEN THE NEW YORK CONVENTION AND  
INTERNATIONAL INVESTMENT LAW

FRANCO FERRARI\* AND FRIEDRICH ROSENFELD\*\*

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## INTRODUCTION

The interaction between different regimes of public international law has attracted considerable scholarly attention in the last decade. Much of the academic discourse has focused on the abstract implications resulting from the diversification of international law and the proliferation of international dispute resolution mechanisms.<sup>1</sup> While there appears to be consensus that fragmentation is an artifact that may involve both risks and opportunities,<sup>2</sup> the concrete implications of this observation in practice are yet to be examined. Recent case law gives cause to do so with regard to the interaction of two distinct regimes, i.e., the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958<sup>3</sup> (New York Convention) and international investment law.<sup>4</sup>

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1. See, e.g., Int'l Law Comm'n, Rep. of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (2006), as corrected by U.N. Doc. A/CN.4/L.682/Corr.1 (2006) (finalized by Martti Koskenniemi); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004); THE PRACTICE OF INTERNATIONAL LAW AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW (Ole Kristian Fauchald & André Nollkaemper eds., 2012) [hereinafter PRACTICE OF INTERNATIONAL LAW]; Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

2. See JOEL P. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT* 222 (2013).

3. Convention on the Recognition and Enforcement of Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force June 7, 1959) [hereinafter *New York Convention*].

4. For earlier contributions on this topic, see José E. Alvarez, *Crossing the "Public/Private" Divide: Saipem v. Bangladesh and other "Crossover Cases"*, in INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE? 400 (ICCA Congress Series No. 17, 2013). See also Loukas A. Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement*, 28 INT'L CTR. SETTLEMENT INV. DISPS. REV. 64 (2013); Friedrich Rosenfeld, *The Systemic Integration of the New York Convention with International Investment Treaties*, N.Y.U. TRANSNATIONAL NOTES (Dec. 5, 2012), <http://blogs.law.nyu.edu/transnational/2012/12/the-systemic-integration-of-international-investment-treaties-and-the-new-york-convention/>; Claudia Priem, *International Investment Treaty*

The New York Convention is the key instrument for the recognition of arbitration agreements and the recognition and enforcement of arbitral awards.<sup>5</sup> Article II of the New York Convention provides that each contracting state shall recognize arbitration agreements as binding. Pursuant to Article III of the New York Convention, contracting states are further obliged to recognize and enforce arbitral awards in accordance with the rules of procedure of the territory where the award is relied upon. Recognition and enforcement of arbitral awards may only be refused on the limited grounds set forth in Article V of the New York Convention. The domestic authorities in the country where enforcement is sought are competent to take this decision.<sup>6</sup> If these authorities unduly interfere with the enforcement instead of taking the required arbitration-friendly stance, a success in arbitration proceedings may turn out to be a mere pyrrhic victory. This holds true, in particular, where all of the debtor's assets are located in one jurisdiction. Here, a contracting state's compliance deficit with the New York Convention cannot be mitigated by seeking enforcement in a different contracting state.<sup>7</sup>

In response to these shortcomings, investors have begun to exploit the linkages between the New York Convention and the regime of international investment law. In a recent case, the Italian company Enel Green Energy S.p.A. initiated investment arbitration proceedings against El Salvador.<sup>8</sup> Enel claimed reparation on the grounds that El Salvador breached its obligations under the bilateral investment treaty (BIT) between Italy and El Salvador by interfering with the enforcement of a commercial arbitral award. In a similar vein, the U.S. company KBR initiated investment arbitration proceedings against Mexico.<sup>9</sup> KBR contended that Mexico violated its obli-

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*Arbitration as a Potential Check for Domestic Courts Refusing Enforcement of Foreign Arbitration Awards*, 10 N.Y.U. J.L. & BUS. 189 (2013).

5. See Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25 (2009).

6. *New York Convention*, *supra* note 3, art. V.

7. With regard to enforcement in different states, see Silberman, *supra* note 5, at 27.

8. *Enel Green Power S.p.A. v. Republic of El Salvador*, ICSID Case No. ARB/13/18. The request for arbitration was registered on August 21, 2013. The tribunal held its first session on July 18, 2014. *Id.*

9. *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Claimant's Notice of Arbitration (Aug. 30, 2013).

gations under the North American Free Trade Agreement (NAFTA) by interfering with the enforcement of a commercial arbitral award.<sup>10</sup> KBR's subsidiary COMMISA had previously attempted to enforce this commercial arbitral award under the 1975 Inter-American Convention on International Commercial Arbitration<sup>11</sup> (the Panama Convention), whose Article V is virtually identical to Article V of the New York Convention.<sup>12</sup> Both cases have in the meantime been concluded. In *Enel v. El Salvador*, the parties reached a settlement, which was reflected in an award on agreed terms of September 14, 2015.<sup>13</sup> In *KBR v. Mexico*, the arbitral tribunal reportedly dismissed the case for lack of compliance with the waiver requirement set forth in Art. 1121 NAFTA.<sup>14</sup> While these particular disputes have been resolved, the fundamental questions they raised have remained unanswered:

Do these cases herald a new era of regime shopping in the arbitration context that transcends the already existing practice of forum shopping?<sup>15</sup> Has the paradigmatic shift from co-existence to co-operation<sup>16</sup> of different regimes of international law paved the way for new forms of implementing the New York Convention? In the present paper, these questions will be examined from two perspectives. The first part of the paper focuses on the perspective of international investment

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10. *Id.*

11. Inter-American Convention on International Commercial Arbitration, adopted Jan. 30 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (entered into force June 16, 1976) [hereinafter *Panama Convention*].

12. For the sake of simplification, all further references will only be made to the New York Convention.

13. While the award is not public, its outcome is reported on the ICSID website. See Case Details of *Enel Green Power S.p.A. v. Republic of El Salvador* (ICSID Case No. ARB/13/18), ICSID, <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/13/18> (last visited Feb. 22, 2016).

14. See Luke Eric Peterson, *Mexico Secures Dismissal of NAFTA Claim Brought by Kellogg, Brown and Root (KBR) in Dispute Arising out of Unpaid ICC Arbitration Award*, INV. ARB. REP. (June 23, 2015), <https://www.iareporter.com/articles/mexico-secures-dismissal-of-nafta-claim-brought-by-kellogg-brown-and-root-kbr-in-dispute-arising-out-of-unpaid-icc-arbitration-award/>.

15. See generally FRANCO FERRARI, *FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT* (2013) (discussing forum shopping).

16. Yuval Shany, *One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?*, in *PRACTICE OF INTERNATIONAL LAW*, *supra* note 1, at 15, 18.

law and examines under which circumstances international investment law allows for the systemic integration of the New York Convention (see Part I). The second part focuses on the perspective of the New York Convention and assesses in how far the actual outcome of investment proceedings may help to implement the New York Convention (see Part II).

## I.

### PERSPECTIVE OF INTERNATIONAL INVESTMENT LAW

From the perspective of international investment law, the systemic integration of the New York Convention meets challenges at the jurisdictional stage (see Part I.A) as well as on the merits (see Part I.B).

#### A. *Jurisdiction*

The jurisdiction of arbitral tribunals in investment arbitrations presupposes an investment. This follows from the fact that investment treaties typically limit the subject matter jurisdiction of arbitral tribunals to disputes relating to an investment, e.g., by requiring a measure that has an effect on the management, use, enjoyment or disposal of an investment. For arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID), Article 25 ICSID Convention<sup>17</sup> further requires legal disputes to arise directly out of an investment.

The question of whether or not the interference with the enforcement of a commercial arbitral award may fulfill this jurisdictional requirement has been assessed differently in case law. It is less the traditional debate about the correct legal definition of the term “investment” that explains this divide.<sup>18</sup> In-

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17. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *adopted* Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter *ICSID Convention*].

18. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 60 (2d ed. 2012). For case law on the definition of “investment” under Article 25 of the ICSID Convention see, for example, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 45 (July 16, 2001); *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 114 (Apr. 15, 2009); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award ¶ 293 (Oct. 31, 2012). For case law suggesting an objective definition of the term “investment” under bilat-

stead, the difficulties predominantly originate from different approaches of defining the factual basis for an investment. Thus, investment arbitral tribunals have struggled over the question of what exactly needs to be looked at in determining whether or not an investment is given. Three approaches can be distinguished in this regard.

The first approach is to look strictly at the arbitral award itself and to examine whether or not it qualifies as an investment. The arbitral tribunal in *GEA Aktiengesellschaft v. Ukraine* took this position.<sup>19</sup> It endorsed Ukraine's argument that an arbitral award in and of itself constitutes no investment, as it was no asset that was contributed to Ukraine. The arbitral tribunal refused to look at the economic operation from which the arbitral award had resulted. It held that a sharp analytical distinction needed to be maintained between the commercial arbitral award and the economic operation from which it arose.<sup>20</sup>

The second approach focuses on the rights that are crystallized in the arbitral award. The arbitral tribunal in *Frontier Petroleum Services Ltd. v. The Czech Republic*,<sup>21</sup> for example, considered that the claimant Frontier had made an investment by making payments to a Czech company.<sup>22</sup> According to the arbitral tribunal, this investment had been transformed into an entitlement to a first secured charge in the arbitral award. As the BIT between Canada and the Czech Republic provided that "[a]ny change in the form of an investment does not affect its character as an investment," the arbitral tribunal found the jurisdictional requirement as set forth in the BIT to be fulfilled: the Czech Republic had affected the management, use, enjoyment, or disposal by the claimant of its original investment as crystallized in the arbitral award.<sup>23</sup>

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eral investment treaties, see *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280, Award ¶ 237 (Nov. 26, 2009).

19. *GEA Grp. Aktiengesellschaft v. Ukr.*, ICSID Case No. ARB/08/16, Award, ¶¶ 160–61 (Mar. 31, 2011).

20. *Id.* ¶ 162. This approach was criticized by the arbitral tribunal in *White Indus. Australia Ltd. v. India*, UNCITRAL, Final Award, ¶¶ 7.6.7–8 (Nov. 30, 2011).

21. *Frontier Petrol. Serv. Ltd. v. The Czech Republic*, UNCITRAL, Final Award (Nov. 12, 2010).

22. *Id.* ¶ 231.

23. *Id.*

The third approach is to examine whether the entire economic operation out of which the arbitral award resulted qualifies as investment. The arbitral tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh* established the main precedent for this proposition.<sup>24</sup> In this case, the arbitral tribunal had to decide whether a dispute arising from the non-enforcement of a commercial arbitral award fell within its jurisdiction. The arbitral tribunal confirmed this. It held that "the entire operation" would have to be considered in order to determine whether there is an investment under Article 25 of the ICSID Convention.<sup>25</sup> Given that the arbitral award crystallized rights, which had arisen under a pipeline construction contract, the arbitral tribunal confirmed the existence of an investment in the sense of Article 25 ICSID Convention. The arbitral tribunal left open whether the award as such qualified as investment.

The latter approach has, to date, been relied upon in the majority of cases by both ICSID and non-ICSID tribunals. Examples from case law include the decisions in *ATA Construction, Industrial and Trading Company v. the Hashemite Kingdom of Jordan*,<sup>26</sup> *White Industries Australia Limited v. The Republic of India*,<sup>27</sup> and *Romak S.A. v. The Republic of Uzbekistan*.<sup>28</sup> The prevalence of this approach in practice can be explained by the fact that it prevents intricate problems of delimitating the jurisdictional contours of investment tribunals. Moreover, it takes due account of the fact that an investment typically consists of a bundle of rights which results from

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24. *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (Mar. 21 2007).

25. *Id.* ¶ 110.

26. *ATA Constr., Indus. & Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010).

27. *White Indus. Australia Ltd. v. India*, UNCITRAL, Final Award (Nov. 30, 2011).

28. *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280, Award (Nov. 26, 2009). While the arbitral tribunal in *Romak S.A. (Switzerland) and The Republic of Uzbekistan* denied its jurisdiction to hear a dispute arising from the non-enforcement of a GAFTA Award, it did so on the ground that the underlying transaction was a wheat supply transaction and thus not an investment. This confirms that arbitral tribunals may have to look at the economic operation from which the commercial arbitral arose in ruling upon jurisdiction. *Id.* ¶¶ 242-43.

a complex, interrelated operation.<sup>29</sup> It would be hardly desirable if individual parts of this bundle of rights (here: the rights crystallized in the arbitral award) could be denied protection simply by assessing them out of context (here: the underlying economic operation).

## B. *Merits*

Once an arbitral tribunal has jurisdiction, this triggers the secondary question whether and, if so, to what extent the New York Convention becomes relevant for the decision on the merits. The answer will be set forth below. It will be demonstrated that arbitral tribunals have considered the New York Convention both in their decision on liability and in their decision on the quantum.

### 1. *Decision on Liability*

As regards the decision on liability, there has to date been no case where an arbitral tribunal treated the mere breach of the New York Convention as an independent cause of action. Instead, arbitral tribunals have considered the New York Convention incidentally, i.e., in deciding whether the failure to recognize and enforce an arbitral award or the failure to recognize an arbitration agreement constituted a violation of the applicable BIT. Arbitral tribunals have notably done so in interpreting and applying the protection against unlawful expropriation as well as the obligation to provide fair and equitable treatment. Other standards of investment protection have been interpreted without such reference to the New York Convention.

#### a. Protection Against Unlawful Expropriation

The idea that the interference with the enforcement of a commercial arbitral award could constitute an unlawful expro-

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29. Tribunals have also taken this approach in cases, which did not concern the interference with the enforcement of arbitral awards. *See, e.g.*, Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 260 (Dec. 14, 2012); Chevron Corp. and Texaco Petro. Corp. v. Republic of Ecuador, UNCITRAL, Interim Award, ¶ 180 (Dec. 1, 2008); Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Rep., ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 72 (May 24, 1999).

priation might depart from the archetype of an unlawful expropriation. Yet, the arbitral tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh* constitutes authority for this proposition.<sup>30</sup> The facts underlying this case were as follows: the Italian company Saipem had entered into a contract on the construction of a pipeline with the Bangladeshi state entity Petrobangla.<sup>31</sup> When a dispute arose among the parties, Saipem initiated arbitral proceedings against Petrobangla with Dhaka as place of arbitration.<sup>32</sup> Already during the arbitration proceedings, the courts of Bangladesh issued an injunction in order to prevent Saipem from properly conducting the arbitration. This interference continued after the rendering of the final award. The Supreme Court of Bangladesh held that the arbitral award was non-existent and therefore incapable of being enforced in Bangladesh.<sup>33</sup> In reaction to this, Saipem initiated ICSID arbitration proceedings against Bangladesh. It claimed that Bangladesh had violated its obligation under the Italy–Bangladesh BIT not to engage in an unlawful expropriation. Saipem relied on this standard, because the applicable BIT did not contain more specific standards of protection.

The arbitral tribunal ruled in favor of Saipem. It did so on the basis of two main considerations. First, the arbitral tribunal held that the rights crystallized in the ICC award were capable of being expropriated.<sup>34</sup> The arbitral tribunal found support for its view in the case law of the European Court of Human Rights, which held in the *Case of Stran Greek Refineries and Stratis Andreadis v. Greece* that a commercial arbitral award, being “final and binding,” was a possession under Article 1 of Protocol No. 1.<sup>35</sup> As the “final and binding” character of the arbitral

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30. *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (June 30, 2009).

31. *Id.* ¶¶ 6, 7.

32. *Id.* ¶ 25.

33. *Id.* ¶ 50.

34. *Id.* ¶ 128; see also *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 127 (Mar. 21 2007).

35. *Stran Greek Refineries and Stratis Andreadis v. Greece*, App. No. 13427/87, 301-B Eur. Ct. H.R. (ser. A) (1994). For similar cases, see *Case of Regent Company v. Ukraine*, App. No. 773/03 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/eng?i=001-85681>; *Case of Kin-Stib and Majkic v. Serbia*, App. No. 12312/05, at ¶ 85 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/eng?i=001-98355>. See also CHRISTOPH GRABENWARTER, EUROPEAN CONVEN-

award finds normative support in the New York Convention, this instrument may at least implicitly have played a role in defining a right that was capable of being expropriated.<sup>36</sup> Second, the arbitral tribunal held that the actions of the Bangladeshi courts were tantamount to a taking as they resulted in substantially depriving Saipem of the benefit of the arbitral award.<sup>37</sup> In reaching this decision, the arbitral tribunal made extensive references to the New York Convention. Among others, it examined whether a substantial deprivation could be denied on the ground that Saipem had the opportunity to enforce the award outside of Bangladesh under the New York Convention. While acknowledging this enforcement option in theory, the arbitral tribunal rejected its practical relevance because Petrobangla had no assets outside Bangladesh.<sup>38</sup> Beyond this, the arbitral tribunal relied upon the New York Convention in order to assess the lawfulness of Bangladesh's acts. The arbitral tribunal concluded that Bangladesh had acted unlawfully by abusing its rights and violating its obligations under the New York Convention.<sup>39</sup> Having briefly set forth that the local remedies rule—even if applicable—would not require to exhaust ineffective or improbable remedies, the arbitral tribunal came to the conclusion that Bangladesh had breached the protection against unlawful expropriation.<sup>40</sup>

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TION ON HUMAN RIGHTS: A COMMENTARY 367 (2014); Alvarez, *supra* note 4, at 12.

36. In light of the fact that both ICSID and non-ICSID tribunals have defined the factual basis for an investment by reference to the entire operation underlying the award, it would have been more consistent to take a similar approach on the merits and to characterize the interference as a partial expropriation. On partial expropriations, see Ursula Kriebbaum, *Partial Expropriation*, 8 J. WORLD INV. & TRADE 69 (2007).

37. Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, ¶ 129 (June 30, 2009).

38. *Id.* ¶ 130.

39. *Id.* ¶¶ 133, 170. The arbitral tribunal held that Bangladesh had violated its obligation to recognize arbitration agreements by revoking the authority of the arbitrators. *Id.*

40. *Id.* ¶ 181. For a discussion of arguments in favour of extending the local remedies rule to all forms of review of judicial misconduct, see Alvarez, *supra* note 4, at 10. See also Mavluda Sattorova, *Judicial Expropriation or Denial of Justice? A Note on Saipem v. Bangladesh*, 13 INT'L ARB. L. REV. 35 (2010); Mavluda Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Pro-*

In sum, the arbitral tribunal in *Saipem S.p.A. v. Bangladesh* paid considerable attention to the New York Convention in interpreting and applying the protection against unlawful expropriation. The arbitral tribunal's reasoning was shaped by a "normative" approach towards the New York Convention. Thus, it looked at the normative content of the New York Convention and not at Bangladesh's factual compliance with it.<sup>41</sup> As will be shown below, some arbitral tribunals have taken a different approach when interpreting the obligation to accord fair and equitable treatment.

#### b. Fair and Equitable Treatment

The obligation to accord fair and equitable treatment is a broad standard of international investment law, which has been described as an embodiment of the rule of law.<sup>42</sup> Among others, it protects the investor's legitimate expectations and certain fundamental guarantees of due process.<sup>43</sup> In various cases concerning the interference with the enforcement of an arbitral award, investment tribunals have examined this standard. They have done so with different degrees of deference to the New York Convention.

The arbitral tribunal in *White Industries Australia Limited v. India*<sup>44</sup> showed a rather low degree of deference towards the New York Convention in interpreting and applying the obligation to accord fair and equitable treatment. Thus, the arbitral tribunal looked at the factual compliance with the New York Convention and not at its normative force. The case resulted

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*tection of Foreign Investors from Judicial Misconduct*, 61 INT'L & COMP. L.Q. 223, 234-35 (2012).

41. The arbitral tribunal even held that it would be "self-serving" if one were to argue that Saipem had accepted the risk of interference by the Bangladeshi authorities by agreeing on Dhaka as place of arbitration. See *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, ¶¶ 185-87 (June 30, 2009).

42. Stephan W. Schill, *Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law* (Inst. Int'l. L. & Justice, Working Paper No. 2006/6, 2006). See also Stephan W. Schill & Benedict Kingsbury, *Investor-State Arbitration as Governance, Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* 8-10 (Inst. Int'l. L. & Justice, Working Paper No. 2009/6, 2009).

43. Schill & Kingsbury, *supra* note 42, at 11-14.

44. *White Indus. Australia Ltd. v. India*, UNCITRAL, Final Award (Nov. 30, 2011).

from attempts of the Australian investor White to enforce an arbitral award against the Indian company Coal India. White had made an application for a declaration of enforceability before Indian courts, whereas Coal India had filed an application to set aside the award.<sup>45</sup> Over a period of more than nine years, the Indian courts failed to reach a final decision on these applications. White subsequently initiated investment arbitration proceedings against India and asserted, among others, a violation of the obligation to accord fair and equitable treatment. The arbitral tribunal, however, rejected this claim and only accepted White's further claim based on the violation of the obligation to provide effective means of asserting rights. According to the arbitral tribunal, White had no legitimate expectation that India would comply with the New York Convention. In reaching this decision, the arbitral tribunal considered that India had a history of non-compliance with the New York Convention at the time the investment was made. According to the arbitral tribunal, an investor must generally take a host state as it finds it.<sup>46</sup> This approach differs from the one taken by the arbitral tribunal in *Saipem S.p.A. v. Bangladesh* where the arbitral tribunal rejected the proposition that Saipem had assumed the risk of interference by agreeing on Dhaka as place of arbitration.<sup>47</sup>

The arbitral tribunal in *Frontier Petroleum Services Ltd. v. The Czech Republic* showed a higher, but not yet sufficient degree of deference towards the New York Convention.<sup>48</sup> In this case, the arbitral examined whether the refusal to recognize and enforce an arbitral award on the ground of the public policy exception under Article V(2)(b) of the New York Convention constituted a violation of the obligation to accord fair and equitable treatment.<sup>49</sup> While the arbitral tribunal acknowledged that the Czech Republic enjoyed a certain discretion in giving contours to the public policy exception under Article V(2)(b) of the New York Convention, it nevertheless examined whether the Czech courts had come to a "plausible

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45. *Id.* ¶ 3.2.35.

46. *Id.* ¶ 10.3.12.

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

48. *Frontier Petrol. Serv. Ltd. v. The Czech Republic*, UNCITRAL, Final Award, ¶ 26 (Nov. 12, 2010).

49. *Id.* ¶ 525.

interpretation” of the public policy exception as set forth in Article V of the New York Convention.<sup>50</sup> As will be shown below, the arbitral tribunal thereby introduced an international standard of public policy that is not adequately reflected in the New York Convention.<sup>51</sup>

Finally, the award of the arbitral tribunal in *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan* evidences a high degree of deference towards the New York Convention.<sup>52</sup> In this case, the arbitral tribunal had to examine, among others, whether Jordan had violated the Turkish–Jordan BIT by extinguishing an arbitration agreement.<sup>53</sup> The arbitral tribunal confirmed this. It based its reasoning primarily upon a violation of the obligation to recognize arbitration agreements as contained in Article II of the New York Convention.<sup>54</sup> The arbitral tribunal did not specify which particular provision of the Turkey–Jordan BIT had been violated, let alone by which technique such provision can be systemically integrated with the New York Convention. Instead, it merely held that the failure to abide by Article II of the New York Convention constituted a violation of the “letter and spirit of the Turkey–Jordan BIT.”<sup>55</sup> In a footnote, it referred to the obligation to accord fair and equitable treatment as well as the obligation to accord treatment no less favorable than that required by international law.<sup>56</sup>

### c. Other Guarantees

Other guarantees of international investment protection that have been examined by arbitral tribunals in cases concerning the interference with the enforcement of commercial

50. *Id.* ¶ 527. The arbitral tribunal confirmed that the interpretation of the Czech courts was “plausible.” *Id.*

51. *See infra* Part II.

52. *ATA Constr., Indus. & Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010).

53. *Id.* ¶ 35–37.

54. *Id.* ¶ 124. For a similar case, see *Salini Costruttori S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award (Jan. 31, 2006). As Claimants failed to prove the existence of a binding arbitration agreement, the arbitral tribunal did not need to decide whether the failure to go to arbitration constituted a violation of the Italy–Jordan BIT. *See id.* ¶ 100.

55. *ATA Constr.*, Case No. ARB/08/2 ¶ 125.

56. *Id.* ¶ 125 n.16.

awards include the protection against a denial of justice, the obligation to provide effective means of asserting claims and the obligation to ensure full protection and security.<sup>57</sup> To date, the New York Convention has hardly played a role in interpreting and applying these standards.

In the above-mentioned case of *White Industries Australia Limited v. India*, for example, the arbitral tribunal rejected White's argument that the standard for a denial of justice must be informed by India's obligations under the New York Convention.<sup>58</sup> The arbitral tribunal's approach reflects the fact that the mere misapplication of international law constitutes no denial of justice.<sup>59</sup> Instead of applying the New York Convention, the arbitral tribunal therefore entered into a factual assessment of the complexity of the proceedings, the need for swiftness, the behavior of the litigants involved, the significance of the interest at stake, and the behavior of the courts. Having considered all these circumstances, the arbitral tribunal concluded that the delay of the courts—while being unsatisfactory—did not pass the threshold of a claim for a denial of justice.<sup>60</sup> The arbitral tribunal reached a different conclusion in its analysis of whether India had breached its obligation to provide effective means of asserting claims.<sup>61</sup> Again, the decision was highly fact-specific and without relevant reference to the New York Convention.

As regards the obligation to accord full protection and security, the arbitral tribunal in *Frontier Petroleum Services Ltd. v. The Czech Republic* held that this obligation may require the Czech Republic to make a functioning system of courts and legal remedies available. It stressed, however, that not every failure to obtain redress would trigger responsibility and fi-

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57. In *KBR v. Mexico*, KBR contended that Mexico also breached the obligation to afford U.S. investors and investments non-discriminatory treatment under NAFTA Articles 1102 and 1103. See *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Claimant's Notice of Arbitration, ¶ 49 (Aug. 30, 2013).

58. *White Indus. Australia Ltd. v. India*, UNCITRAL, Final Award, ¶ 4.3.6 (Nov. 30, 2011).

59. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 69, 83 (2005).

60. *White Indus. Australia*, UNCITRAL ¶ 10.4.16.

61. *Id.* ¶ 11.4.16.

nally rejected Frontier's claim that this obligation had been breached.<sup>62</sup>

## 2. *Decision on the Quantum*

In the decision on the quantum, arbitral tribunals have considered the New York Convention in even greater detail than in the decision on liability. Three sets of observations can be made in this regard.

First, arbitral tribunals have shown a tendency to award damages amounting to the nominal value of the arbitral award with whose enforcement the state entities had unduly interfered. They have done so with considerable reference to the New York Convention. The arbitral tribunal in *White Industries Australia Ltd. v. India*, for example, entered into a detailed analysis of grounds for denying recognition under the New York Convention.<sup>63</sup> Among others, it assessed whether enforcement of the award could be refused due to allegations of tribunal bias, excess of jurisdiction, delay, or a violation of public policy.<sup>64</sup> Having concluded that no such ground existed, the arbitral tribunal held that White was entitled to the nominal amount due under the award.<sup>65</sup> The arbitral tribunal in *Saipem S.p.A. v. Bangladesh* came to a similar conclusion.<sup>66</sup> While it omitted to enter into an equally full-fledged analysis of the New York Convention as the tribunal in *White Industries Australia Ltd. v. India*, it did so on the ground that Bangladesh had failed to substantiate reasons for non-enforcement under the New York Convention.<sup>67</sup> Both tribunals, hence, took the nominal value of the award as basis for its decision on the quantum. In light of the fact that the market value of arbitral awards (or of the rights that are crystallized in the award) typically lies below their nominal value, it is questionable whether this approach can serve as guidance for future cases.<sup>68</sup>

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62. *Frontier Petrol. Serv. Ltd. v. The Czech Republic*, UNCITRAL, Final Award, ¶ 273 (Nov. 12, 2010).

63. *White Indus. Australia*, UNCITRAL ¶ 14.2.33.

64. *Id.* ¶ 14.2.65.

65. *Id.* ¶ 14.3.1.

66. *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, ¶¶ 202, 204 (June 30, 2009).

67. *Id.* ¶ 203.

68. On valuation, see IRMGARD MARBOE, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* 169 (2009). See also Jose

Second, arbitral tribunals have also shown a tendency to award interest in the same amount as awarded under arbitral awards with whose enforcement the state entities had unduly interfered. The arbitral tribunal in *Saipem S.p.A. v. Bangladesh*, for example, found that Saipem was not entitled to interest beyond the amount awarded in the ICC award.<sup>69</sup> It rendered this decision despite the fact that the BIT between Italy and Bangladesh explicitly specified a concrete rate of interest and period of interest that were different from the ones applied by the arbitral tribunal in the ICC Award. According to Article 5 of the BIT between Italy and Bangladesh, compensation should include interest calculated on a six-month LIBOR basis accruing from the date of nationalization or expropriation to the date of payment.<sup>70</sup> In light of this clear wording, the tribunal's approach raises more questions than answers. Would it have been better to apply the interest rate specified in the treaty as of the date of expropriation on the capitalized total amount due under the award at that date? Or would this alternative approach of awarding compound interest have led to an unlawful enrichment of the award creditor?

Third, tribunals have occasionally awarded remedies other than compensation. The award of the arbitral tribunal in *ATA v. The Hashemite Kingdom of Jordan* illustrates this. Having found that Jordan had violated its obligation under Article II of the New York Convention, the arbitral tribunal restored the claimant's right to arbitration.<sup>71</sup> It ordered that ongoing court

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Alberro, *Estimating Damages When an Investment Treaty is Used to Enforce a Commercial Arbitration Award*, 15 INT'L ARB. L. REV. 195, 199 (2012).

69. *Saipem S.p.A.*, Case No. ARB/05/7, ¶ 211 (May 18, 2010); see also *White Indus. Australia Ltd. v. India*, UNCITRAL, Final Award, ¶ 14.3.6 (Nov. 30, 2011) (describing a similar decision taken by the arbitral tribunal).

70. *Saipem S.p.A.*, Case No. ARB/05/7 ¶ 209. Article 5 of the Treaty between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments, It.-Bang., March 20, 1990, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/268>, provides: "Compensation shall include interest calculated on a six-month LIBOR basis accruing from the date of nationalization or expropriation to the date of payment." See also Alberro, *supra* note 68, at 200.

71. *ATA Constr.*, Case No. ARB/08/2 ¶ 131. Due to jurisdictional limitations *ratione temporis*, the arbitral tribunal did not order reparation for the further interference with the enforcement of the commercial arbitral award. *Id.* ¶ 133.

proceedings in Jordan be immediately and unconditionally terminated with no possibility to conduct further judicial proceedings on the substance of the dispute.<sup>72</sup> As this non-pecuniary remedy was exempt from the simplified enforcement procedure under Article 54 of the ICSID Convention,<sup>73</sup> one may wonder whether it was of practical benefit for the award creditor.

### 3. Conclusion

The above-referenced jurisprudence shows that international investment law allows for the systemic integration of the New York Convention.<sup>74</sup> This is subject to the following caveats: first, investors who seek reparation for the interference with the enforcement of an arbitral award must demonstrate that the underlying economic operation, from which the award resulted, constitutes an investment. Second, it depends on the concrete standard of investment protection whether and, if so, to what extent the New York Convention is taken into consideration. A clear doctrinal approach, i.e., a methodology of integrating the New York Convention into the framework of international investment treaties, is to date still lacking. While some forms of systemic integration may be explained by reference to Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), this provision is far from resolving all questions of regime interaction.<sup>75</sup> After

72. *Id.* ¶ 132.

73. CRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1139 (2d ed. 2009).

74. On the general approach of arbitral tribunals towards systemic integration, see also *Asian Agric. Prods. Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶ 21 (June 27, 1990). See also Matthew T. Parish & Charles B. Rosenberg, *Investment Treaty Law and International Law*, 23 *AM. REV. INT'L ARB.* 137 (2012); Ralph Alexander Lorz, *Fragmentation, Consolidation and the Future Relationship Between International Investment Law and General Law*, in: *INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES* 482 (Freya Baetens ed., 2013).

75. See also Gabrielle Kaufmann-Kohler, *Commercial Arbitration Before International Courts and Tribunals—Reviewing Abusive Conduct of Domestic Courts*, 29 *ARB. INT'L* 153, 168 (2013) (discussing the absence of further applicable conflict rules in the Vienna Convention on the Law of Treaties). On the difficulties of applying Article 31(3)(c) of the Vienna Convention on the Law of Treaties, see Jean D'Aspremont, *The Systematic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the Interna-*

all, its focus is on matters of interpretation, i.e., the determination of the meaning of norms. Even with regard to this interpretive process, Article 31(3)(c) of the VCLT fails to specify which "relevant rules" shall be "taken into account," let alone which degree of systemic integration this may actually result in.

## II.

### PERSPECTIVE OF THE NEW YORK CONVENTION

The above observation that international investment law allows for the systemic integration of the New York Convention gives cause to examine whether this has paved the way for new forms of implementing the New York Convention through the vehicle of international investment law. The answer depends on the concrete factual setting and the specific norms that are applied. As will be shown below, the effects of looking at the New York Convention through the lens of international investment law may produce different normative results. While some awards of investment tribunals may support the policy behind the New York Convention, other decisions may weaken or even contradict the policy behind the New York Convention.

#### A. *Decisions Supporting the Policy Behind the New York Convention*

To begin, there are situations where investment tribunals reach decisions that support the policy behind the New York Convention. The above-referenced decision of the arbitral tribunal in *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan* is one example.<sup>76</sup> The arbitral tribunal found that Jordan had breached its obligation under Article II of the New York Convention and concluded that this violated the spirit and letter of the BIT. The result would have been hardly different, had the tribunal examined the breach of the New York Convention as separate cause of action. The same observation can be made with regard to the award rendered by the arbitral tribunal in *Saipem S.p.A. v. Bangladesh*,

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*tional Legal Order*, in PRACTICE OF INTERNATIONAL LAW, *supra* note 1, at 141, 148.

76. See *supra* text accompanying notes 52-56.

which applied the New York Convention through the lens of the protection against unlawful expropriation.<sup>77</sup>

Such forms of linkage bear the potential of promoting compliance with the New York Convention. This is because they offer a cross-regime sanction.<sup>78</sup> To put it in different terms: the prospect of being held liable for the interference with the enforcement of arbitral awards may, at least to some extent, set incentives to states to refrain from such behavior. These incentives are particularly strong where the investment tribunal renders a pecuniary award that is subject to the delocalized enforcement regime under Article 54 of the ICSID Convention.<sup>79</sup> Such award is even easier to enforce than a commercial award under the New York Convention. States can effectively be forced to internalize the error costs that would otherwise have been borne by the investor.<sup>80</sup>

#### B. *Decisions Weakening the Policy Behind the New York Convention*

Second, there are situations, where investment tribunals reach decisions that risk weakening the policy behind the New York Convention. Take the example of *White Industries v. India*, where the arbitral tribunal examined whether India had violated the fair and equitable treatment standard. As has been set out above, the arbitral tribunal denied a breach on the ground that Indian courts were regularly interfering with the enforcement of arbitral awards so that no legitimate expectation of *White Industries* was frustrated.<sup>81</sup> From the perspective of international investment law, there is no reason to criticize this approach. In order to assess whether the obligation to accord fair and equitable treatment has been breached one may indeed have to examine whether the legitimate expectations of the investor have been breached.<sup>82</sup> From the perspective of the New York Convention, in contrast, things look different.

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77. See *supra* text accompanying notes 30–41.

78. Cf. TRACHTMAN, *supra* note 2, at 246.

79. Inna Uchkunova & Oleg Temnikov, *Enforcement of Awards Under the ICSID Convention—What Solutions to the Problem of State Immunity?*, 29 INT'L CTR. SETTLEMENT INV. DISPS. REV. 187, 189 (2014).

80. See ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 13–36 (2012).

81. See *supra* text accompanying note 18.

82. See Schill & Kingsbury, *supra* note 42, at 11.

The New York Convention has normative force irrespective of whether a state actually complies with it. It would virtually be counterproductive if a state could evade its obligations under the New York Convention by pointing to a track record of non-compliance. Caution must therefore be exercised that the regime interaction between the New York Convention and international investment treaties does not result in a new lower standard that lags behind the policy enshrined in the New York Convention.

C. *Decisions Contradicting the Policy Behind the New York Convention*

Third, there are situations where investment tribunals reach decisions that contradict the policy behind the New York Convention.<sup>83</sup> Among others, this may be the case where investment tribunals apply idiosyncratic standards in reviewing the public policy exception under Article V(2)(b) of the New York Convention. The above-referenced award in *Frontier Petroleum Services Ltd. v. The Czech Republic* shows that even a prudent arbitral tribunal may face difficulties in defining the adequate standard of review.<sup>84</sup> While acknowledging a margin of appreciation in determining the notion of public policy, the arbitral tribunal nevertheless examined whether the Czech courts had reached a “plausible interpretation” of the public policy exception contained in Article V of the New York Convention.<sup>85</sup> The arbitral tribunal confirmed this by reference to decisions of the German Supreme Court and the French Cour de Cassation. Such approach does not properly reflect the wording of Article V(2)(b) of the New York Convention, which subjects the notion of public policy to domestic and not to international standards.<sup>86</sup> To put in the taxonomy

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83. For a discussion on the potentially malignant effects of linkage, see also TRACHTMAN, *supra* note 2, at 222.

84. See *supra* text accompanying notes 48–51.

85. *Frontier Petrol. Serv. Ltd. v. The Czech Republic*, UNCITRAL, Final Award, ¶ 527 (Nov. 12, 2010).

86. CHRISTIAN BORRIS ET AL., *NEW YORK CONVENTION: CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958—COMMENTARY* 406 (Reinmar Wolff ed., 2014); James D. Fry, *Désordre Public International Under the New York Convention: With or Truly International Public Policy*, 8 CHINESE J. INT'L L. 81, 91 (2009).

of the fragmentation discourse, the situation would have called for an even greater degree of “deferential” linkage.<sup>87</sup>

Beyond this, the risk of backlashes for the policies behind the New York Convention is rather low. While there have been cases where the actual enforcement of an arbitral award—as opposed to the interference with the enforcement—were asserted as violations of investment treaties, these cases have to date not been successful for the claimants. In *Kaliningrad v. Lithuania*, for example, the region of Kaliningrad asserted that Lithuania had violated the protection against unlawful expropriation by enforcing a commercial award under the New York Convention.<sup>88</sup> The investment tribunal rejected this claim on the ground that a BIT may not be interpreted as triggering state responsibility for the mere fact of having complied with the New York Convention. In the subsequent set-aside proceedings, the Paris Cour d’ Appel confirmed this ruling.<sup>89</sup> In a similar vein, the arbitral tribunal in *Helnan International Hotels A/S v. The Arab Republic of Egypt* held that the mere enforcement of an award constituted no violation of the Denmark–Egypt BIT.<sup>90</sup> From a doctrinal point of view, one may certainly criticize such apodictic propositions.<sup>91</sup> It is, for example, well conceivable that serious forms of procedural misconduct during the enforcement proceedings constitute a violation of international investment treaties.<sup>92</sup> Yet, the prospect that such award would impede the policy behind the New York Convention is rather low. This is because the New York Convention allows ruling out such serious forms of procedural misconduct.

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87. David W. Leebron, *Linkages*, 96 AM. J. INT’L L. 5, 16 (2002).

88. The award is not public. The case is, however, referred to in the decision of the Paris Cour d’ Appel on the application to have the award set aside. Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., Nov. 18, 2010, 09/19535.

89. *Id.*

90. *Helnan Int’l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, ¶ 150 (July, 3 2008).

91. See also Kaufmann-Kohler, *supra* note 75, at 165.

92. See also *Helnan Int’l Hotels A/S*, Case No. ARB/05/19 ¶ 151. The arbitral tribunal still considered Helnan’s further assertion that Egypt had interfered with the enforcement proceedings by improperly influencing a judge and only dismissed this claim for lack of evidence. *Id.* Implicitly, it thereby acknowledged that serious forms of procedural misconduct may violate international investment treaties.

## CONCLUSION

The following conclusions can be drawn from the above observations on the regime interactions between the New York Convention and international investment law: states that unduly interfere with the enforcement of a commercial arbitral award are not immune from claims to reparation. In certain cases, investor-state proceedings may provide an instrument to obtain a cross-regime sanction for compliance deficits with the New York Convention.

The threshold for such regime shopping is, however, high. The systemic integration of the New York Convention into the framework of international investment law presupposes that the jurisdiction of the respective investment tribunal is given. Investors who seek reparation for the undue interference with an arbitral award have to demonstrate that the economic operation from which this award resulted constituted an investment. Even where this jurisdictional requirement is met, investment tribunals have to date applied the New York Convention only incidentally, i.e., when interpreting and applying international investment law. While this may result in a claim for reparation based on the undue interference with the enforcement of an arbitral award, there is no guarantee that the outcome of investment proceedings is always in line with the policies behind the New York Convention. In the absence of suitable fora for bringing claims based merely on the New York Convention,<sup>93</sup> one may have to accept this as the result of the systemic integration of multi-sourced norms with only partially equivalent content.<sup>94</sup>

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93. It remains to be seen whether investment tribunals would accept such claims on the basis of broad jurisdictional clauses. In this respect, see Berk Demirkol, *Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration*, 30 INT'L CTR. SETTLEMENT INV. DISPS. REV. 56, 60 (2015). The further alternative of diplomatic protection is little promising. See Kaufmann-Kohler, *supra* note 75, at 162 (referring to the case *Société Commerciale de Belgique (Belg. v. Greece)*, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15)).

94. On multi-sourced equivalent norms in international law, see MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW (Tomer Broude & Yuval Shany eds., 2011).