

Formation of International Standard for the Administration of Justice through Investor–State Dispute Settlement Mechanism

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I . Introduction

There are 3,164 International Investment Agreements (IIA) including Bilateral Investment Treaties (BIT) in the world and known treaty-based cases had surged to 450 by the end of 2011 according to UNCTAD Report.¹⁾

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1) United Nations Conference on Trade and Development, *World Investment Report 2012: Towards a New Generation of Investment Policies*, at 84, 86

Thus, protection of foreign investor has been to the fore in the international relations. Diplomatic protection has been the traditional means of providing foreign investor injured by a host State with remedy.²⁾ Nevertheless, diplomatic protection has caused serious problems.³⁾ IIAs effectively redress such issues by allowing private investors to pursue States directly⁴⁾ before the international tribunal. Consequently, domestic administration of justice involving foreign investor has been subject to the review by ISDS tribunal according to concerning IIAs and the international law.⁵⁾ On the contrary, the domestic court reviews ISDS awards under the domestic law with regard to the international commercial arbitration⁶⁾ and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).⁷⁾ As a result, it is reasonable to believe that legal issues which caused by contradictory conclusions produced by domestic court and ISDS tribunal based on the same facts or the same legal rights will keep increasing.⁸⁾

UNCTAD/WIR/2012(2012)(hereinafter UNCTAD).

- 2) See e.g., William S. Dodge, "Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement", 39 *Vand. J. Transnat'l L.* 1, at 5(2006), See also, Jan Paulsson, *Denial of Justice in International Law* at 3(2005).
- 3) See e.g., Dodge Id at 7-9, See also, Hersch Lauterpacht, "The Subjects of the Law of Nations", 63 *L.Q. REV.* 438, at 454(1947).
- 4) See Christoph Schreuer, *THE ICSID CONVENTION: A COMMENTARY* at 398(2001).
- 5) See e.g., Paulsson, supra note 3 at 3.
- 6) See e.g., Kaj Hobér / Nils Eliasson, "Review of Investment Treaty Awards by Municipal Courts", in *Arbitration under International Investment Agreements: A Guide to the Key Issues*, at 635-669(Katia Yannaca-Small ed., 2010).
- 7) CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, Done at New York, 330 U.N.T.S. 38(1959) [hereinafter the New York Convention], See generally, August Reinisch, *Enforcement of Investment Awards*, in Katia Yannaca-Small ed. Id at 671-697.
- 8) See e.g., *Metalclad Corporation v. The United Mexican States.*, ICSID Case

Currently there is neither unified form of international investment law nor a central judicial body.⁹⁾ Nonetheless, judicial interaction achieved by the mutual review between the ISDS tribunal and the national court is expected to develop international standard of domestic administration of justice.¹⁰⁾

II. Change in Mechanisms of Protection of Foreigner

Mechanisms for the protection of foreigner used by nations have significantly changed.¹¹⁾ International disputes once had been redressed only by sovereign States through diplomatic protection but IIAs have granted private investors *locus standi* before the international tribunal.¹²⁾

1. Diplomatic Protection

Diplomatic protection is invoked by a home State of a natural or legal person who was injured by an internationally wrongful act of another State.¹³⁾ The Draft Articles on Diplomatic Protection adopted by the International Law Commission (ILC) in 2006¹⁴⁾ does not refer the use of the force, however

No. ARB(AF)/97/1, Award(August 30, 2000), *Metalclad Corp v Mexico*, Review by the supreme court of British Columbia, ICSID Case No ARB(AF)/97/1; IIC 162(May 2, 2001).

9) Organisation for Economic Co-operation and Development [hereinafter OECD] <http://www.oecd.org/daf/mai/intro.htm>(last visited Dec.17, 2012)

10) *Cf.* Robert B. Ahdieh, “Between Dialogue and Decree: International Review of National Courts”, 79 *N.Y.U.L. Rev.* 2029(2004).

11) *See e.g.*, Dodge, *supra* note 3 at 5.

12) *Id.*

13) *Id.*

history proves that diplomatic protection often had included use of the force, in other words, gunboat diplomacy.¹⁵⁾

1.1 The Legal Nature of Diplomatic Protection

A State has a duty but not an obligation to protect its nationals and therefore, it may assert nationals' claims on behalf of them against the responsible State.¹⁶⁾ This is because whoever injures a national indirectly causes harm to the State, whose duty is to protect its citizen.¹⁷⁾ The State is asserting its own infringed right by taking up the case of its national.¹⁸⁾ Nonetheless, whether to take up injured nationals' claim is at the home State's discretion, because there is no obligation to offer diplomatic protection for their nationals abroad.¹⁹⁾ The International Court of Justice(ICJ) stated that "within the limits prescribed by international law, a state may exercise diplomatic protection by whatever means and to whatever it thinks fit, for it is its own right that the state is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law."²⁰⁾

14) Rep. of the Int'l Law Comm'n, 58thSess(May 1-June 9, July 3-August 11, 2006), UNDocA/61/10.

15) See e.g., Paulsson supra note 3 at 15.

16) Malcolm N. Shaw QC, *International law* at 809(6th ed, 2008).

17) Emmerich Vattel, *The Law of Nations, or the Principles of Natural Law*, Book II, Chapter VI 136(1758) cited in Chittharanjan F. Amerasinghe, *Diplomatic protection* at 10(2008)

18) The Mavrommatis Palestine Concessions(Greece v. Britain), 1924 P.C.I.J at para 21(August 30).

19) See e.g., Shaw supra note 17 at 810.

20) Case Concerning the Barcelona Traction, Light and Power Company, Limited

Private party had had “no remedy” but only diplomatic protection under international law before the birth of ISDS mechanism and the emergence of IIA that grants the foreign investor *locus standi*.

1.2 State Responsibility

1.2.1 Injuries to Foreigner

Diplomatic protection can be invoked when the State responsibility is established due to the wrongful act of a State that affects the foreigner.²¹⁾ Accordingly, it is the nationality of ill-treated foreigner that grants the State the right to invoke diplomatic protection.²²⁾ The principle of international minimum standard(IMS) is applied to assess whether the State caused injury to foreigner or his property when it treated them.²³⁾

1.2.2 International Minimum Standard

The IMS has been recognized as a norm of customary international law which requires a minimum level of treatment for foreigners that States must comply with when it treats foreigners and their rights.²⁴⁾ Therefore, the breach of IMS gives rise to state responsibility. Traditionally, Western developed countries have maintained that an IMS ensures the protection

(Belgium v. Spain), 1970 I.C.J at para 78(Feb 5)(reports of judgments, advisory opinions and orders).

21) See *e.g.*, Shaw, *supra* note 17 at 778.

22) See The Panevezys–Saldutiskis Railway Case(Estonia v. Lithuania), 1939 P.C.I.J at para 65(Feb 28).

23) See *e.g.*, Chittharanjan F. Amerasinghe, Diplomatic protection at 37(2008)

24) See *e.g.*, Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* at 61(Oxford University Press, 2008).

of foreigner regardless of how the host State treats its nationals.²⁵⁾ On the contrary, Latin American countries had argued that foreigner is not entitled to claim greater rights than national of the host State citing Carlos Calvo.²⁶⁾ However, such traditional difference of opinion between capital-exporting and capital-importing countries has receded as emerging economies such as China have started to implement aggressive outward FDI strategy and to support strong investor protection.²⁷⁾

1.2.3 Attribution of Conduct as the Act of the State

The State is not internationally responsible unless it commits a wrongful act or an omission against an foreigner causing injury that is imputable to the State.²⁸⁾ The ICJ stated in the *Different Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Opinion* that “According to a well established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule...is of a customary character...”²⁹⁾ Above view of ICJ is reflected in the article 4 of the ILC’s 2001 Draft Articles on State Responsibility.³⁰⁾ Thus, it must be proved whether certain act caused harm

25) See e.g., Andreas F. Lowenfeld, *International Economic Law* at 473–481 (2nd ed. 2008).

26) Id.

27) See Karl P. Sauvant / Jose E. Alvarez, Introduction to Jose E. Alvarez et al., *THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS*, at. xxxix(Oxford University Press, 2011).

28) See e.g., Amerasinghe, supra note 24 at 225–226.

29) The Different Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Opinion, ICJ Reports 87, at para. 62(1999).

30) Rep. of the Int’l Law Comm’n, 53rd Sess., 23 April–1 June and 2 July–10 August, 2001, U.N.Doc.A/56/10at40

to the foreigner can be regarded as that of the host State or not in order to invoke diplomatic protection.

1.2.4 Exhaustion of Local Remedies

Exhaustion of local remedies is required as a condition of espousal by a home State on behalf of its injured national.³¹⁾ The Local remedies rule is a recognition and deference paid to the sovereignty of the host State by letting it redress the violation by its own means before the state responsibility is pursued.³²⁾ The ICJ stated in the *Interhandel* that “before resort may be had to an international court..., it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.”³³⁾ The issue arises when the foreigner is deprived of adequate administration of justice. Thus, judicial decision as a result of exhaustion of local remedies needs to be inconsistent with the international obligations in which a host State is supposed to abide in order to exercise diplomatic protection.³⁴⁾ Most modern IIAs contain the “fork-in-the-road” clause that requires an investor to choose either litigation in the domestic courts or ISDS tribunal instead of exhaustion of local remedies rule.³⁵⁾

31) See *e.g.*, Amerasinghe, *supra* note 24 at 142.

32) *Id.*

33) *Interhandel Case*(Switz. v. U.S.), 1959 I.C.J. 5, at 27(Mar. 21).

34) *Id.*

35) See *e.g.*, Stanimir Alexandrov, *Breach of Treaty Claims and Breach of Contract Claims*, in *supra* note 7 at 347.

1.3 Politicization of Dispute

One of the demerits of diplomatic protection is politicization of the legal dispute. Government has tendency to ignore an individual's interest and rights for "some overriding policy of fostering friendly relations."³⁶⁾ On the other hand, if investors' economic gain affects the home State's diplomatic decision making process, such influence of private party can be a detrimental factor to the foreign relations.³⁷⁾ ISDS mechanisms therefore have been devised to combat shortcomings of the diplomatic protection and government espousal as a necessary consequence of politicization of dispute. It enhances the protection of foreign investor by giving private party *locus standi* in the forum where public international law governs.

2. Arbitration under International Investment Agreement

2.1 Extension of *Locus Standi* by IIA

The most progressive improvement of IIAs is that it grants private investor standing to sue the host State directly for the breaches of the treaty obligation before the international tribunal.³⁸⁾ The natural or legal person traditionally

36) See Philip C. Jessup, "Responsibility of States for Injuries to Individuals", 46 *COLUM. L. REV.* 903 at 908(1946).

37) See J.L. Brierly, "La Fondement du Caractère Obligatoire du Droit International", 23 *RECUEIL DES COURS* 468, 531(1928) cited in Dodge *supra* note 3 at 28.

38) See Francesco Francioni, "Abstract to Access to Justice, Denial of Justice and International Investment Law", *EJIL* Vol. 20 No. 3, 729(2009).

has no remedy in international law³⁹⁾ since customary international law does not offer an individual right of access to justice in public international law.⁴⁰⁾ Furthermore, it is highly likely that an injured foreigner by a State might encounter sovereign immunity or the act of state doctrine even if the injured one tries to sue the responsible state in his/her home country.⁴¹⁾ In contrast, ISDS mechanism permits parties directly involved in a dispute to participate in the proceeding, to take charge of the costs of dispute and to earn potential rewards from the process.⁴²⁾ Moreover, ISDS mechanism guarantees injured investor access to international remedy by helping them to avoid the uncertainty which stems from the discretionary nature of government espousal in diplomatic protection.⁴³⁾ Lastly, in recognition of this trend, the ICJ noted that the protection of the rights of legal person and of their shareholders is governed by IIAs and the role of diplomatic protection faded in *Case Concerning Ahmadou Sadio Diallo*.⁴⁴⁾

39) See Barcelona Traction *supra* note 21.

40) See Francioni, *supra* note 39 at 731.

41) See *e.g.*, William S. Dodge, “National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA”, 23 *Hastings Int’l & Comp. L. Rev.* 357 at 357–58(2000).

42) See *e.g.*, David D. Caron, “The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution”, 84 *AM. J. INT’L L.* 104 at 155(1990).

43) See Rep. of the Int’l Law Comm’n, 58th Sess, “Draft Articles on Diplomatic Protection with commentaries”, Commentary to article 17 at(2) May 1–June 9, July 3–August 11, 2006, UNDocA/61/10.

44) See *Case Concerning Ahmadou Sadio Diallo* (Guinea v. Congo), 2007 I.C.J. at para 88(May 24).

Ⅲ. Interaction between ISDS Arbitration and National Court

Nowadays FDI often takes a form of an investment contract governed by domestic law between a foreign investor and an entity of the host State.⁴⁵⁾ Extension of locus standi enables ISDS tribunals to provide injured foreign investor who exhausted local remedies in the host State with legal relief when denial of justice occurred during the course of domestic judicial administration. As a corollary, a case pending or ruled by a domestic court and an ISDS case that assesses the measure taken by the domestic court often have the same backgrounds and/or the same legal rights.⁴⁶⁾ Nevertheless, one forum's decision is not able to give *res judicata* effect to the other court for following reasons that are discussed in this chapter. Such inapplicability of *res judicata* gives rise to the potential contradictory decision on the same fact by two different forums; the domestic court and the international investment tribunal.

1. *Res Judicata* as Premise of Contradiction

Res judicata in the context of the customary international rule extends only to the effect of the ruling of one international tribunal on a subsequent international tribunal.⁴⁷⁾ International investment tribunals constituted *ad hoc* for the specific case are not bound to follow previous decisions of other tribunals, though they frequently cite reasoning adopted by the other tribunals in practice.⁴⁸⁾

45) See *e.g.*, Alexandrov *supra* note 36 at 323.

46) See Alexandrov, *supra* note 36, See *e.g.*, Dodge, *supra* note 42 at 367–370.

47) See *e.g.*, Dodge, *Id.*

Analogously, domestic courts' decisions do not affect the international investment tribunal as the tribunal in *Amco v. Indonesia* wrote, "an international tribunal is not bound to follow the result of a national court."⁴⁹⁾

Hence, contradictory decisions based on the same set of facts can be rendered by ISDS tribunal and the domestic court because *res judicata* is inapplicable for the following reasons.

1.1 Parties

Many FDI agreements are most often concluded between a foreign investor and not the host State itself but entities of it.⁵⁰⁾ Therefore, to clarify whether action contented by an injured investor can be attributed to the act of the State is important question. The parties to the domestic court proceedings are different from parties to the ISDS disputes because it is only a contracting State to the IIA that is admitted as a party in the ISDS proceeding.⁵¹⁾

Secondly, investment dispute caused by domestic court's action in civil lawsuit between private parties has the distinctive characteristics. In the *Loewen Group, Inc and Raymond L. Loewen v. United States of America*, (hereinafter *Loewen*) parties to the domestic civil proceeding in the U.S.

48) See Christoph Schreuer / Matthew Weiniger, *A Doctrine of Precedent?* in *The Oxford Handbook of International Investment Law* at 1189(Peter Muchlinski, Federico Ortino / Christoph Schreuer, eds., 2008).

49) *Amco Asia Corporation, Pan American Development Limited, PT Amco Indonesia v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, at para. 177(November 20, 1984).

50) See Alexandrov, *supra* note 36 at 323.

51) See *e.g.*, Dodge, *supra* note 42 at 379–380.

were two private business owners; one from Canada and the other from Mississippi.⁵²⁾ It was the U.S. however, that had to stand as a respondent when foreign investor brought to the claim before the North American Free Trade Agreement (NAFTA) ISDS tribunal due to alleged wrongful act of Mississippi court.⁵³⁾

1.2 The Distinction between Contract Claims and Treaty Claims

The distinction between contract claims governed by domestic law and treaty claims which invoke IIA supports inapplicability of *res judicata*.⁵⁴⁾ FDI is frequently made by means of a contract whose enforce ability is derived from governing domestic law.⁵⁵⁾ Ergo, international investment tribunal examines legal issues resulting from not only IIAs but also private investment contracts.⁵⁶⁾ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States(the ICSID Convention) limits jurisdiction of International Centre for Settlement of Investment Disputes(ICSID). Jurisdiction of ISDS tribunal is limited to address legal dispute arising out of an investment under the IIA or/and ICSID Convention invoked by parties according to the article 25.⁵⁷⁾ The

52) The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID case No. ARB (AF)/98/3; IIC 253 Decision on hearing of Respondent's objection to competence and jurisdiction(Jan.5, 2001).

53) Id.

54) See e.g., Dodge, supra note 42 at 379-380, See e.g., Alexandrov, supra note 36.

55) See Alexandrov, supra note 36 at 323.

56) Yuval Shany, "Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims", 99 *A.J.I.L.* 835 at 835 (Oct., 2005).

distinction between contract claims and treaty claims is questioned when the foreign investor argues that there is a breach of treaty relating to the underlying contract.⁵⁸⁾ The *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan* (hereinafter *SGS*) tribunal noted that “as a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders.”⁵⁹⁾ Moreover, the *Impregilo SpA v. Islamic Republic of Pakistan* (hereinafter *Impregilo*) confirmed that “the fact that a breach may give rise to a contract claim does not mean that it cannot also -and separately- give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.”⁶⁰⁾

Still it is a difficult question to answer how to identify treaty claim arising out of a breach of a contract. ISDS tribunals have devised and applied tests that distinguish the legal basis of claim to decide their jurisdiction. An ad hoc annulment committee in the *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (hereinafter *Vivendi II*) noted that “fundamental basis of the claim” is to be assessed.⁶¹⁾ The *Azurix Corp v*

57) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (hereinafter the ICSID Convention).

58) See Alexandrov, *supra* note 36 at 336.

59) *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction at para 147(August.6, 2003).

60) *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/03, Decision on Jurisdiction at para 258(April. 22, 2005).

61) *Compania de Aguas del Aconquija S.A & Compagnie Generale des Eaux v. Argentine Republic*, ICSID Case No.ARB/97/3, Decision on Annulment at paras 101–103(July.3 2002).

Argentina (hereinafter *Azurix*) tribunal adopted *prima facie* test for purpose of determining its jurisdiction.⁶²⁾

1.3 Forks-in-the-Road

Forks-in-the-road provision makes the investor to select either forum between the domestic courts of the host state and ISDS proceeding to settle a dispute.⁶³⁾ The effect of the forks-in-the-road results in the loss of access to one of those adjudicatory bodies if the same legal dispute between the same parties is already dealt in either domestic courts or by ISDS tribunal. When it examined the respondent's objection, in, *Chevron Corporation and Texaco Petroleum Corporation v Ecuador* (hereinafter *Chevron*), the tribunal noted that "The question is whether "the dispute" submitted to this Tribunal has already been submitted to the national courts of Ecuador or New York so as to trigger the fork in the road provision..."⁶⁴⁾ Tribunals in earlier investment cases have applied a 'triple identity' test, requiring that in the dispute before the domestic courts and the dispute before the arbitration tribunal there should be identity of the parties, of the object, and of the cause of action..."⁶⁵⁾

A claim asserting alleged breach of treaty by domestic court's action during the proceeding does not invoke the forks-in-the-road. In *Pantechniki*

62) *Azurix Corp v Argentina*, Decision on Jurisdiction, ICSID Case No ARB/01/12; IIC 23 at para. 76(Dec. 8, 2003).

63) Christoph Schreuer, "Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road", *5J.W.I.T.2*, at 239-240(2004)

64) *Chevron Corporation and Texaco Petroleum Company v Ecuador*, Third interim award on jurisdiction and admissibility, PCA Case No 2009-23; IIC 524 at para.4.72(February. 27, 2012).

65) *Id.* at para. 4.75.

SA Contractors and Engineers v Albania (hereinafter *Pantechniki*) case, Albania argued that the fork-in-the-road provision does not permit the Claimant to consent to ICSID jurisdiction while pursuing the same matter before the Albanian courts.⁶⁶⁾ However, the tribunal of *Pantechniki* concluded that fork-in-the-road provision “does not exclude a claim for mistreatment at the hands of the Albanian courts: denial of justice.”⁶⁷⁾

To summarize, *res judicata* effect of domestic court’s decision does not extend to international arbitration for the different governing law, dissimilar parties and distinctive claims asserted in two independent forums.

2. Domestic Administration of Justice

Administration of justice is the maintenance of right within a political community by means of the physical force of the state; the state’s application of the sanction of force to the rule of right.⁶⁸⁾

It has been established that the act of judicial organ of a State is attributable to the State thereby making the State responsible when the action of judicial branch constitutes international wrong.⁶⁹⁾ Thus, domestic administration of justice is subject to review by ISDS tribunal if it affects foreign investor.

66) *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21 at paras. 52–53 (July 28, 2009).

67) *Id.* at para 68.

68) *Black’s Law Dictionary*, at 50 (Bryan A. Garner ed.) (9th ed, 2009).

69) Rep. of the Int’l Law Comm’n, 52nd Sess., 1 May to 9 June and 10 July. to 18 August, 2000, U.N. Doc. A/CN.4/L.600.

2.1 The Act of Court

The European Court of Justice noted that the government measures include actions of the judiciary, holding that the word embraces ‘any action, which affects the rights of persons’ by applying the relevant treaty provision in *Regina v Pierre Bouchereau*.⁷⁰⁾ In addition, Iran-United States claims tribunal in *Oil Fields of Texas Inc v NIOC* held that the judicial acts were an expropriation amounting to ‘measures affecting property rights.’⁷¹⁾ The State is to be regarded as a unit in the international relation⁷²⁾ since the judiciary is not independent of the State though it is separated from its executive and legislative branch.⁷³⁾

2.2 Judicial Function

Judicial function can be performed by various forms of organs or institutions other than a court because each nation has a different administrative and constitutional structure.⁷⁴⁾ Charles de Visscher wrote that “the important thing as an international matter is not the determination of the State organ to which one may attribute, under constitutional law, the origin of the state’s failure in its duty: the sole decisive element is the act in which this failure manifested itself in international relations.”⁷⁵⁾

70) Case 30 77, *Regina v Pierre Bouchereau*, at 11 1999 E.C.R.

71) *Oil Fields of Texas Inc v NIOC*, 12 Iran-US Cr Trib Rep 308 at 318-319 (1986)

72) See e.g., Paulsson, *supra* note 3 at 39.

73) Eduardo Jimenez de Aréchaga, *International Law in the Past Third of a Century*, 159-1 *Recueil des Cours General Course in Public International Law*, at 278 (1978) cited in Paulsson, *supra* note 3 at 39.

74) See e.g., Paulsson *supra* note 3 at 41.

Also, In *Amco Asia Corporation v. Republic of Indonesia* (hereinafter *Amco II*), the tribunal said “the Tribunal sees no provision of international law that makes impossible a denial of justice by an administrative body.”⁷⁶) Thus, denial of justice can be committed not only by judicial organs but also by any State entity that functions in respect to the administration of justice to foreigner.⁷⁷) In *Thunderbird v. Mexico* (hereinafter *Thunderbird*), the tribunal concluded that “The administrative due process requirement is lower than that of a judicial process.”⁷⁸) Citing decision of *Thunderbird*, however, the tribunal of *Frontier Petroleum Services Ltd v Czech Republic* (hereinafter *Frontier Petroleum*) added that “serious administrative negligence and inconsistency, and denial of access to a file in an administrative appeals process have been found to breach fair and equitable treatment.”⁷⁹) Recently in *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan* (hereinafter *Rumeli*), the tribunal admitted that the host State was responsible for the act of the Investment Committee.⁸⁰) The tribunal

75) Charles de Visscher, *Le deni de justice en droit international*, 54 *Recueil des cours* 370, at 391(1935) cited in Paulsson supra note 3.

76) *Amco Asia Corporation v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application by Indonesia and Amco Respectively for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Indonesia for Annulment of the Supplemental Award, (Dec. 17, 1992) (hereinafter *Amco II case*) at para.137.

77) See A. V. Freeman, *The International Responsibility of States for Denial of Justice*, at 106(1938).

78) *International Thunderbird Gaming Corporation v Mexico*, Award, Ad hoc–UNCITRAL Arbitration Rules, IIC 136 at para 200(Jan. 26, 2006).

79) *Frontier Petroleum Services Ltd v Czech Republic*, Final Award, PCA–UNCITRAL Arbitration Rules; IIC 465 at para. 292(November.12, 2010).

80) *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, Award, ICSID Case no ARB/05/16; IIC 344 at para. 615(July. 21, 2008).

ruled that “since the Investment Committee is an organ of the State...this breach amounts to a breach of the BIT by the Republic.”⁸¹⁾

2.3 Legislative Failures

The legislative failure constitutes the violation of IIA and international law. In *Limited Liability Company Amto v Ukraine* (hereinafter *AMTO*), the tribunal admitted that denial of justice can be done by the law-making body of the State.⁸²⁾ In *ATA Construction, Industrial and Trading Company v Jordan* (hereinafter *ATA*), the investor was deprived of right to arbitration under the arbitration agreement concluded between the investor and the state-controlled entity by the Amman Court of Appeal and the Court of Cassation of Jordan.⁸³⁾ Jordanian Arbitration Law allows domestic court to nullify an international arbitral award and subsequently to extinguish arbitration agreement under which the arbitral award is rendered.⁸⁴⁾ However, the tribunal found that the extinguishment of the arbitration agreement in accordance with Jordanian Arbitration Law constitutes the breach of Turkey-Jordan BIT.⁸⁵⁾

81) Id.

82) *AMTO LLC v. Ukraine*, SCC Case No. 080/2005, Award, at para. 75(March 26, 2008)

83) *ATA Construction, Industrial and Trading Company v Jordan*, Award, ICSID Case No ARB/08/2; IIC 430 at para. 46(May. 12, 2010)

84) Id. at para. 54.

85) Id. at para. 125.

3. Review of Domestic Administration of Justice by International Tribunal

This chapter observes international norms that are applied to the assessment of domestic judiciary acts. International review of national courts by ISDS tribunals is studied through the latest cases in order to understand recent trend in the interpretation and application of international principles.

3.1 Exhaustion of Local Remedies and Judicial Finality

Judicial finality serves for the different purpose from that of the exhaustion of local remedies rule though their substantial function is comparable.⁸⁶⁾ Judicial finality is uniquely required when a measure taken by the host State that is contended by the foreign investor is a domestic court's action. This is because it was regarded that the State was not responsible for judicial acts of lower courts.⁸⁷⁾ Therefore, judicial finality is examined in proceeding on the merits since the rule of judicial finality is considered with regard to the international state responsibility.⁸⁸⁾ In *Loewen*, the U.S. argued that a judicial act does not cause a NAFTA claim unless the act of a court is finalized because an appellate review may correct alleged denial of justice committed by the lower court.⁸⁹⁾ The tribunal of *Loewen* stated in its decision on the jurisdiction that "...the function of the

86) *supra* note 53 at paras. 64–67.

87) *See supra* note 53 at para 68. It quoted Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* at 198(1915).

88) *See Id* at paras. 66–67.

89) Memorial of the United States of America on Matters of Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3, 62–65(Feb. 15, 2000) at pp. 49–56.

local remedies rule was to establish whether the point had been reached at which the home State may raise the issue on the international level, now it is the function of the rule to establish that State responsibility for a breach of an international obligation may be invoked... we have concluded that this ground of objection should be dealt with at the hearing on the merits.”⁹⁰⁾

Nevertheless, the tribunal accepted the argument of the U.S. with regard to judicial finality in the merits phase.⁹¹⁾ Since the above decision of *Loewen*, ISDS tribunals have come to examine judicial finality in a case where an investor asserts a treaty violation caused by a lower court of the host State. Recently, the tribunal in *Pantechniki* noted that it was fatal to the claim of denial of justice for the investor who has not taken his/her case to the Supreme Court of the host State.⁹²⁾ In an agreement, the tribunal of *Jan de Nul NV and Dredging International NV v Egypt* (hereinafter *Jan de Nul*) recognized that the respondent State must be allowed to redress the wrongdoings of its judiciary within its system⁹³⁾ as a rule. Citing a prominent commentator, the tribunal stated that “...it cannot be held liable unless *the system as a whole has been tested and the initial delict remained uncorrected*. An exception to this rule may be made when there is no effective remedy or “no reasonable prospect of success...”⁹⁴⁾

90) supra note 53 at paras. 64–74.

91) The Loewen Group, Inc. and Raymond L. Loewen v. United States of America Case No. ARB(AF)/98/3; IIC 254 Award at para. 156.

92) supra note 67 at para. 102.

93) Jan de Nul NV and Dredging International NV v Egypt, Award, ICSID Case No ARB/04/13; IIC 356(October.24, 2008) paras 256, 258 supra note.

94) Paulsson, supra note 3 at 125. cited in Id. at para. 258.

3.2 Denial of Justice as an Element of Fair and Equitable Treatment

The notion of denial of justice is encompassed in the Fair and Equitable Treatment (FET) standard of IIAs.⁹⁵⁾ Since the concept of FET is vague and abstract, the application process to a particular case would form concrete shape of the standard.⁹⁶⁾ The actions or omissions that are attributable to the State which violated procedural fairness and/or constitute substantive denial of justice have been found to an infringement of the FET standard.⁹⁷⁾ Moreover, Article 5(2)(a) of 2004 Model Bilateral Investment Treaty (2004 U.S. Model BIT) suggests that the protection from denial of justice in judicial proceedings according to the principle of a due process is comprised in FET.⁹⁸⁾

3.2.1 The Concept of Denial of Justice

ISDS tribunals have concluded that the denial of justice is included in the FET standard. In the milestone case that provides a useful signpost of interpretation on the denial of justice; *Waste Management Inc v Mexico* (hereinafter *Waste Management*) the tribunal explained that the conduct which “grossly unfair or idiosyncratic, discriminatory and exposes the claimant to sectional or racial prejudice or involves lack of due process leading to an outcome which offends judicial propriety...” constitutes FET

95) See e.g., Tudor, *supra* note 25 at 157, See also, Garner, International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to denial of justice, 10 BYIL 181 (1929), Freeman, *The International Responsibility of States for Denial of Justice* (1938), Adede, A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law (1976).

96) *Id.* at 132.

97) *Id.* at 157–159.

98) U.S. Model Bilateral Investment Treaty, 2004, at art 5(2)(a).

standard violation.⁹⁹⁾ Following the precedent in which breach of FET standard was found as a result of denial of justice, the tribunal in *Jan de Nul* confirmed that “the fair and equitable treatment standard encompasses the notion of denial of justice” although, IIAs concerned do not have a provision with regard to “the miscarriage or denial of justice.”¹⁰⁰⁾ Therefore, ISDS tribunals review the legality of procedures in accordance with fair and equitable treatment standard in the IIA even if there is no specific wording indicates denial of justice in the given IIA.

The *Rumeli* tribunal supported that the denial of justice is an element of FET standard by finding that FET standard “also includes in its generality the standard of denial of justice”.¹⁰¹⁾ *Frontier Petroleum* tribunal stated that the FET standard has been interpreted on several occasions to include the concept of a denial of justice.¹⁰²⁾ The tribunal in *Amtco* recognized that the denial of justice constitutes the violation of a State’s obligation to offer not only FET but also IMS imposed by international law.¹⁰³⁾ Nevertheless, it is not an easy task to pass its rigorous standard that has been established by precedents of international courts and ISDS tribunals. In the *Mondev International Ltd v United States* (hereinafter *Mondev*) case, another authoritative case on the denial of justice standard, the tribunal gave a yardstick for an assessment that has been repeatedly referred by many ISDS tribunals afterwards by noting that:

The test is not whether a particular result is surprising, but whether the

99) *Waste Management Inc v Mexico*, Award, ICSID Case No ARB(AF)/00/3; IIC 270 at para. 98(April. 30, 2004).

100) *supra* note 93 at para. 188.

101) *supra* note 80 at para. 651.

102) *supra* note 79 at para. 293.

103) *supra* note 82 at para. 75.

shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome.... In the end, the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in light of all the available facts that the impugned decision was clearly improper and discreditable with the result that the investment has been subjected to unfair and inequitable treatment.¹⁰⁴⁾

Following jurisprudence of *Mondev*, the *Chevron* tribunal noted that the denial of justice test requires “a high threshold.”¹⁰⁵⁾ Mere legal error does not make a judicial action to be regarded as the denial of justice. In *Unglaube and Unglaube v Costa Rica* (hereinafter *Unglaube*), the tribunal further asked a claimant to prove that a measure which affected the investor was “manifestly inconsistent, non-transparent, unreasonable, or discriminatory”¹⁰⁶⁾ by referring *Saluka Investments BV v Czech Republic* (hereinafter *Saluka*) in which the tribunal examined whether there was a breach of FET standard.¹⁰⁷⁾ FET standard has been understood that it is one of the elements of the IMS of international customary law in which the principle of due process whose integral parts are non-denial of justice and lack of arbitrariness is firmly grounded.¹⁰⁸⁾

104) *Mondev International Ltd. v United States* ICSID Case No. ARB (AJ)/99/2, IIC 173 Award, at para 127(October, 11, 2002).

105) *Chevron Corp. and Texaco Petroleum Corp. v. Ecuador*, UNCITRAL Arbitration Rules ad hoc, Partial Award on Merits IIC 421 at para. 244(March, 30, 2010).

106) *Saluka Investments BV v Czech Republic*, PCA–UNCITRAL Arbitration Rules Partial Award, at para 309 IIC(17 March, 17, 2006).

107) *Unglaube and Unglaube v Costa Rica*, Award, ICSID Case No. ARB/08/1 and ARB/09/20; IIC 554 at para, 246(May, 16, 2012).

108) See e.g., OECD Directorate for Financial and Enterprise Affairs, Working Papers on International Investment Number 2004/3, *Fair and Equitable*

3.2.2 Delay

As a British politician William Gladstone said, justice delayed is justice denied. The decision of *Toto Costruzioni Generali SPA v Lebanon* (hereinafter *Toto*) stated that public international law does not appoint specific time within which certain type of case must be addressed.¹⁰⁹⁾ Hence, the assessment which determines whether a delay constitutes denial of justice inherently needs to be conducted on a case by case basis.¹¹⁰⁾ The assessment takes various factors into consider such as ①the complexity of the proceedings, ②the need for swiftness, ③the behavior of the litigants involved, ④the significance of the interest at stake and ⑤the behavior of the domestic courts.¹¹¹⁾ The tribunal assesses factors that affected delay objectively in accordance with the international standard. In *Jan de Nul*, the tribunal recognized that the issues before the Egyptian court were “complex and highly technical” though it agreed ten years is a long period of time for only a first instance judgment.¹¹²⁾

In respect of the need for swift resolution, the White tribunal rendered that it is allowed for commercial matters to be languish being distinguished from criminal proceedings where there is a special need for the urgent resolution of cases.¹¹³⁾

The White decision on the swiftness is obsolete and unreasonable because

Treatment Standard in International Investment Law, at 8–9, 40(2004).

109) *Toto Costruzioni Generali SpA v Lebanon*, Decision on Jurisdiction, ICSID Case No. ARB/07/12, IIC 391 at para. 155(September, 8, 2009). *See also*, *White Industries Australia Ltd v India*, Ad hoc–UNCITRAL Arbitration Rules;Final award, IIC 529 at para. 10.4.9(Nov. 30, 2011).

110) *White Industries Australia Ltd v India*, Id. at para. 10.4.10.

111) Id. at para. 10.4.10.

112) *supra* note 93 at para. 204.

113) *White Industries Australia Ltd v India*, *supra* note 109 at para. 10.4.14.

it too simply categorized litigation as either criminal or commercial. In addition, even short period of delay in judicial proceeding can bring about an enormous amount of pecuniary loss to an investor in the recent fast paced business world. For instance, the electronic products of Samsung Electronics have been banned the sales in the U.S. by request of Apple during the course of the patent law suit.¹¹⁴⁾ Apple could win a court order because the court determined that “although Samsung will necessarily be harmed by being forced to withdraw its product from the market before the merits can be determined after a full trial, the harm faced by Apple absent an injunction on the Galaxy Tab 10.1 is greater.”¹¹⁵⁾ This case well describes the recent international investment world in which fast-changing intellectual property decides. If undue delay occurs before a court’s ruling on merits is rendered thereby extending the period of an injunction, it is highly likely that the investor would experience astronomical loss. To determine the need for swiftness taking into account over-simplified dichotomy such as commercial or criminal, human rights or monetary loss does not reflect reality of international investment today.

Thirdly, an ISDS tribunal examines behavior of the litigants, including investor’s litigation strategy by applying the international law.¹¹⁶⁾ Especially, if an investor established his/her litigation strategy on the basis of investor’s reasonable expectation that obligation of the host State under the international treaty such as the New York Convention must be observed, the investor’s behavior is unprovable.¹¹⁷⁾ Furthermore, the ISDS tribunal takes into

114) “Samsung weighs legal options on U.S. Galaxy Tab ban”, *The Korea Herald*, June 27, 2012, available at http://khnews.kheraldm.com/view.php?ud=20120627001163&md=20120629003140_AK(last visited Dec. 20, 2012).

115) *Id.*

116) *White Industries Australia Ltd v India*, *supra* note 109 at para. 10.4.15.

account the host State's judicial infrastructure and the level of economic development when the behavior of the domestic court is assessed.¹¹⁸⁾

However, above factor is not determinative. The *White* tribunal cited decision of *El Oro Mining and Railway Co*, to support the ruling that “the amount of work incumbent on the Court and the multitude of law suits with which they are confronted, may explain, but not excuse, the delay.”¹¹⁹⁾ In *Frontier Petroleum*, the tribunal agreed to this view by stating that “the Czech courts were experiencing at once a high volume of cases and a shortage of judges. This helps to explain the delay, and although not an optimal situation for the efficient resolution of claims...”¹²⁰⁾

3.2.3 Procedural Due Process

The notion of the rule of law consists of a substantive and a procedural aspect.¹²¹⁾ The principle of the due process is applied to procedural dimension¹²²⁾ of judicial administration. The elements of the due process are the notification of the intended application to the one whom the coercive power of the state is enforced and to give opportunity to represent his/her position before an unbiased tribunal.¹²³⁾ ISDS tribunal shave agreed that

117) Id.

118) *White Industries Australia Ltd v India*, supra note 109 at para 10.4.18

119) *El Oro Mining and Railway Co (Ltd) (Great Britain) v United Mexican State*, V RIAA191 (Great Britain–Mexico Claims Commission, Decision No. 55 of 18 June 1931) *See also*, *White Industries Australia Ltd v India*, supra note 109 at para. 10.4.20.

120) supra note 79 at para. 336.

121) *See e.g.*, Kenneth J. Vandewelde, “A UNIFIED THEORY OF FAIR AND EQUITABLE TREATMENT”, 43 *N.Y.U.J. Int’l L. & Pol.* 43.

122) Id.

123) Id.

lack of the due process is a breach of FET standard. Dealing with procedural propriety and due process, the tribunal in *Frontier Petroleum* cited various previous ISDS cases such as *Toto*, *Metalclad*, *Waste management* and *Petrobart* case.¹²⁴⁾ The *Frontier Petroleum* tribunal concluded that a violation of FET standard is found when there is no fair procedure or serious procedural shortcomings are observed by referring interpretations of the FET standard made in many various precedents.¹²⁵⁾ Furthermore, the *Rumeli* tribunal noted that the process that lacked transparency and due process is not complied with the requirements of the FET Standard.¹²⁶⁾

International law does not allow a State to rely on its national law when it breaches international obligation under a treaty. The Article 27 of Vienna Convention on the Law of Treaties provides that “a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.”¹²⁷⁾ In an agreement, the tribunal in *Rumeli* stated that “although the Law grants the Investment Committee the right to terminate a Contract without first suspending the same, this provision can be supplemented by the express terms of each individual contract...moreover, it is a general principle of international law that a State cannot rely on its internal law to invalidate its own undertakings.”¹²⁸⁾

An analysis on the breach of the due process in procedure is highly the fact sensitive. There are overlapping requirements of the due process that ISDS tribunals have been of the same opinion namely, transparency

124) supra note 79 at paras. 295, 328, 334, 286, 289, 290, 291.

125) Id. at para. 289.

126) supra note 80 at para. 618.

127) Vienna Convention on the Law of Treaties art. 27, May, 23, 1969, 1155 U.N.T.S. 331.

128) supra note 80 at para. 616.

and to give parties to a dispute an opportunity to represent themselves at the trial.

3.2.4 Substantive Denial of Justice

ISDS tribunals have agreed that there is the substantive denial of justice as well. The *Mondev* clearly suggested that there can be the substantive denial of justice in a decision of judicial authority. The “impugned decision that was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment”¹²⁹⁾ constitutes the substantive denial of justice. Following the leading case, the *Amto* tribunal said that it needs to assess the available means that the host State’s legal system in order to examine the propriety of the outcome.¹³⁰⁾ Also, in *Jan de Nul* the tribunal examined whether there had been “any discrimination, bias or malicious application of the law based on a sectional prejudice”¹³¹⁾ to determine the substantive denial of justice. The tribunal of *Frontier Petroleum* as directly cited *Jan de Nul* decision which noted that “with respect to substantive denial of justice, the tribunal in *Jan de Nul* found that there was no indication of any discrimination, bias or malicious application of the law based on sectional prejudice.”¹³²⁾ Furthermore, the *Rumeli* tribunal stated if the substance of a decision is “so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith,”¹³³⁾ it would be a breach of the standard. Next, as the tribunal in *Pantechniki* noted citing Gerald Fitzmaurice¹³⁴⁾ that breach of national law does not automatically amount

129) supra note 104 at paras. 126–127.

130) supra note 82 at para. 76.

131) supra note 93 at para. 209.

132) supra note 79 at para. 294.

133) supra note 80 at para. 653.

to a violation of international law. However, such breach may bring about denial of justice.¹³⁵⁾ When the administration of justice has been done by a succession of conducts or decisions, the tribunal should consider entirety of those. The *Amto* tribunal stated that in order to determine whether the treatment of an investor by domestic courts amounts to the denial of justice, it should examine its entirety including consideration in proceedings either initiated or available to the investor.¹³⁶⁾

3.3 The Effective Means Standard

Contrary to the denial of justice incorporated in customary international law, only a handful of IIAs provided the provision that requires contracting States to offer a foreign investor “effective means.”¹³⁷⁾ In *White*, the Australian investor invoked Most Favored Nation (MFN) clause of the Australia-India BIT in order to rely on effective means the provision stipulated in the India-Kuwait BIT.¹³⁸⁾

3.3.1 Definition of the Effective Means

Energy Charter Treaty (ECT) provides effective means provision in Article 10(12) as follows.

Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights

134) Gerald Fitzmaurice, “The Meaning of the Term, Denial of Justice”, *BYIL* 93 at 111(1932).

135) *supra* note 67 at para. 94.

136) *supra* note 82 at para. 78.

137) *supra* note 105 at para. 241.

138) *White Industries Australia Ltd v India*, *supra* note 109 at paras. 11.1–11.2.9.

with respect to Investments, investment agreements, and investment authorizations.¹³⁹⁾

Other IIAs also are comprised of effective means provision in a similar terminology and analogous structure of sentence. For instance, the article 4(5) of India-Kuwait BIT provides effective means in detail.¹⁴⁰⁾ ISDS tribunals have come to interpret the effective means standard relatively from recent years. Therefore, jurisprudence on the effective means standard is young and needs to be refined more in various cases in order to be relied by foreign investors.

The *Amto* tribunal interpreted effective means provision in ECT. It said that the essential criteria of an effective means are “law and the rule of law” and thus there must be legislation for the recognition and enforcement of investment related rights.¹⁴¹⁾ The tribunal upheld the claimant’s argument that effective means standard in ECT orders a member State not only to ensure legislation for enforcement of rights concerning investment but quality of the legislation to reach the level of IMS.¹⁴²⁾ In *Duke Energy Electroquil Partners and Electroquil SA v Ecuador* (hereinafter *Duke*), the tribunal stated that effective means standard ensures foreign investors the access to justice and guarantees the institutional mechanism for the protection of investments.¹⁴³⁾ Consequently, effective means provision requires the host

139) The Energy Charter Treaty art. 10(12), Dec. 17, 1994, 2080 U.N.T.S. 100, 34 I.L.M. 360(hereinafter ECT)

140) The Agreement Between the Republic of India and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, art. 4(5), November. 27, 2001(hereinafter India-Kuwait BIT).

141) *supra* note 82 at para. 87.

142) *Id.*

143) *Duke Energy Electroquil Partners and Electroquil SA v Ecuador*, Award, ICSID Case No ARB/04/19; IIC 333 at para. 391(August, 12, 2008).

State to implement and to provide “more general guarantee against denial of justice.”¹⁴⁴⁾ Although both the effective means and the denial of justice impose the host State analogous duties, the test for denial of justice is stringent one.¹⁴⁵⁾ Hence, foreign investors have sought to invoke MFN in order to obtain protection under effective means standard¹⁴⁶⁾ because it is less-demanding but put the host States under comparable obligations. In *Chevron*, the tribunal confirmed that the effective means standard is different and more relaxed test than that of denial of justice.¹⁴⁷⁾ The conduct of a judicial organ must “shock, or at least surprise, a sense of judicial propriety” with “a particularly serious shortcoming” and “egregious conduct” in order to meet the denial of justice test.¹⁴⁸⁾ On the contrary, it is enough for a foreign investor to prove only the fact that the domestic administration of justice was not an effective and then such failure will be resulted in a treaty violation.¹⁴⁹⁾ Also, the *Chevron* tribunal stated that there is no need for a review whether there was the denial of justice once a breach of the effective means provision is upheld by the tribunal since effective means is a treaty obligation.¹⁵⁰⁾ In an agreement, the *White* tribunal also confirmed that the effective means standard is rather relieved test than denial of justice standard. The tribunal rejected the claimant’s argument that there had been a denial of justice although the Indian courts delayed nine years in dealing with the proceedings in which the set aside application was filed.¹⁵¹⁾ Nevertheless,

144) *Id.*

145) *supra* note 104 at para. 127.

146) *White Industries Australia Ltd v India*, *supra* note 109 at paras. 4.4.1–4.4.6.

147) *supra* note 105 at para. 244.

148) *Id.*

149) *Id.*

150) *Id.* at para. 275.

the tribunal concluded that over nine years of delay with regard to investor's jurisdictional claim that is attributable to the Indian judicial system and over five years undue delay arose out of the Supreme Court's inability to hear investor's jurisdictional appeal amount to breach of effective means obligation under the treaty.¹⁵²⁾

The *Pantechniki* tribunal noted that "denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole."¹⁵³⁾ Moreover, the *Amto* tribunal noted that "effective" is a systematic, comparative, progressive and practical standard" when it interpreted Article 10(12) of ECT.¹⁵⁴⁾ The *Amto* tribunal further clarified effective means standard that it is an obligation of the host State to offer an effective system or framework in which the enforcement of rights is feasible.¹⁵⁵⁾ However, the provision does not guarantee such systemic effectiveness in individual cases.¹⁵⁶⁾ The tribunal opined that "it is comparative in that compliance with international standards indicates that imperfections in the law might result from the complexities of the subject matter rather than the inadequacies of the legislation."¹⁵⁷⁾ It took into account that the modernization of aged legislation might not always immediately be delivered.¹⁵⁸⁾ Though the language of the effective means provision in the ECT and U.S-Ecuador BIT is analogous, ISDS tribunal

151) *White Industries Australia Ltd v India* supra note 109 at paras. 10.4.22, 10.4.23, 10.4.24.

152) *Id.* at para 11.4.19.

153) supra note 67 at para. 96.

154) supra note 83 at para. 88.

155) *Id.*

156) *Id.*

157) *Id.*

158) *Id.*

in *Chevron* rendered contradictory decision to that of the tribunal under the ECT. The effective means was applied not only in terms of the entire legal system but also in specific individual cases by the tribunal in *Chevron*. The Article II(7) of U.S-Ecuador BIT is as follows.

Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.¹⁵⁹⁾

The *Chevron* tribunal relied on the wording of effective means provision of the U.S-Ecuador BIT and stated that:

...While Article II(7) clearly requires that a proper system of laws and institutions be put in place, the system's effects on individual cases may also be reviewed. This idea is reflected in the language of the provision. The article specifies "asserting claims," so some system must be provided to the investor for bringing claims, as well as "enforcing rights," so the BIT also focuses on the effective enforcement of the rights that are at issue in particular cases.¹⁶⁰⁾

The context, object and purpose of the entire treaty should be taken into account when a tribunal interprets a provision in the present IIA. The *Amto* tribunal clearly mentioned that it interpreted the provision "bearing in mind the context and the object and purpose of the ECT."¹⁶¹⁾ Hence, it is

159) The Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, art. II (7)(August 27, 1993)(hereinafter U.S-Ecuador BIT).

160) *supra* note 105 at para. 247.

161) *supra* note 82 at para. 88.

reasonable that separate tribunals in dissimilar cases where two different IIAs were interpreted reached opposed conclusions. It is highly likely that the future ISDS proceedings under ECT would follow the interpretation of the *Amto* tribunal by limiting the scope of the effective means standard within a systemic and institutional judicial framework. On the contrary, it is expected that ISDS proceedings under an IIA that provides an effective means provision in a similar wording to the US-Ecuador BIT would apply an effective means test on each individual case.

3.4 Meaning and Scope of Full Protection and Security

Full protection and security provision can be also invoked when domestic administration of justice failed to meet the international standard. In *Frontier Petroleum*, the tribunal confirmed this view by citing *Elettronica Sicula SpA* (hereinafter *ELSI*),¹⁶²⁾ *CME Czech Republic B.V. v. The Czech Republic* (hereinafter *CME*)¹⁶³⁾ and *Lauder v. Czech Republic* (hereinafter *Lauder*)¹⁶⁴⁾ in which the tribunals respectively defined the scope that full protection and security provision covers. Leading authorities have found that the full protection and security standard provides “beyond protection against physical violence.”¹⁶⁵⁾

162) *Elettronica Sicula SpA (ELSI)*(United States of America v. Italy), 1989 I.C.J., at paras. 105–108(July 20).

163) *CME Czech Republic BV v Czech Republic*, Partial award and separate opinion, UNCITRAL Arbitration Rules, Ad hoc IIC 61 at paras. 378–380(Sept.13, 2001).

164) *Lauder v Czech Republic*, Final Award, UNCITRAL Arbitration Rules, Ad hoc; IIC 205 at para. 314(Sept. 3, 2001).

165) *supra* note 79 at para. 263.

The scope of the standard extends to the legal protection for the investor.¹⁶⁶⁾ In conclusion, the tribunal said that the duty arises under the full protection and security required the host State to provide “a legal framework that offers legal protection to investors-including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights.”¹⁶⁷⁾

3.4.1 Requirements of Full Protection and Security

Full protection and security provision provides that the host State has a treaty obligation to protect the investment from detrimental effects by taking actions necessary for the protection.¹⁶⁸⁾ Another requirement of full protection and security is ‘due diligence.’ The host State is not required to provide an absolute protection under the standard, but it has responsibility to exercise ‘due diligence’ and to take reasonable measures for protection of investment and investor.¹⁶⁹⁾ A “wrong” decision would not automatically give rise to state responsibility as long as due diligence is found.¹⁷⁰⁾ The *Frontier Petroleum* tribunal required the judicial organ of the host State to act in good faith and the measure taken by it to be reasonably tenable.¹⁷¹⁾ The fact that the host State could have provided better protection that is effective in both procedural and substantive ways does not invoke the violation of full protection and security standard.¹⁷²⁾

166) Id.

167) Id.

168) See e.g., Rudolf Dolzer / Christoph Schreuer, *Principles of International Investment Law*, at 149(2008).

169) See e.g., Dolzer / Schreuer, *supra* note 168 at p.150.

170) *supra* note 79 at para. 273.

171) Id.

4. Review of Investment Treaty Awards by National Court

The national court is authorized to review ISDS awards by international treaty with respect to international arbitration and the national law of each State that regulates international arbitration. Challenge to an international commercial arbitration has been dealt with in a municipal court of a seat of arbitration under the national law.¹⁷³⁾ The review of a domestic court on jurisdiction of an international commercial arbitral body generally examines whether the dispute “arose out of or in connection with” the contract in which the arbitration clause is inserted.¹⁷⁴⁾ By contrast, international investment arbitration based on IIAs determines complicated issues of public international law.¹⁷⁵⁾ Public international law matters because IIAs contain standards such as National Treatment(NT), IMS, and MFN.¹⁷⁶⁾ The review by the domestic court of the seat of arbitration facilitates interaction between ISDS tribunal and national court by offering useful advice that expresses municipal court’s legal view on the issue.

4.1 The ICSID Convention

The ICSID Convention provides the only absolutely insulated investment arbitration proceeding from the domestic court since it is not subject to

172) Id.

173) See *e.g.*, Kaj Hober / Nils Eliasson, *supra* note 7 at 637.

174) Id.

175) Id. at 639.

176) See *e.g.*, Id. at 638 See also, J. van Haersolte-van Hof / A. Hoffmann, “The Relationship Between Internaitonal Tribunals and Domestic Courts”, in *The Oxford Handbook of International Law* (Muchlinski et al., eds., 2008); C. Dugan et al., *Investor-State Arbitration* 635–673(2008).

any laws of any local jurisdiction.¹⁷⁷⁾ The contracting States must recognize and enforce the ICSID award without any prior review under their national laws for ICSID Convention provides a self-contained enforcement mechanism.¹⁷⁸⁾ Distinguishing characteristic of the ICSID Convention is that it does not even require an ISDS award to comply with public policy of the place of execution in order to be enforced.¹⁷⁹⁾ An annulment and revision is provided because the Article 53 bans any appeal or other remedy. Role of domestic court or State authority where enforcement is sought is limited to examine whether the award is authentic.¹⁸⁰⁾ State immunity stipulated in Article 55 suggests that ICSID award is executed within a property of a debtor State which is not used for the State's official purposes in practice.¹⁸¹⁾ Practically, the ICSID awards are rarely enforced by domestic court because compliance without enforcement has been common.¹⁸²⁾ Argentina argued that its compliance with an ICSID award is subordinate to prior enforcement through the domestic courts.¹⁸³⁾ Ad hoc Committees on annulment decision under the ICSID Convention have refused the assertion of Argentina.¹⁸⁴⁾ ICSID tribunal has exclusive power to determine its jurisdiction by Article

177) Id. at 638

178) Giuliana Cane, "The Enforcement of ICSID Awards: Revolutionary or Ineffective?", 15 *AM. REV. INT'L ARB.* at 439, 455(2004).

179) See e.g., Christoph Schreuer, "Interaction of International Tribunals and Domestic Courts in Investment Law", in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* 71 at 85(Arthur W. Rovine ed., 2010).

180) Id.

181) Id.

182) Id.

183) Id. at 86

184) Id.

41 of ICSID Convention. The article 41 prevents a domestic court of host State that is a party to a dispute from unilaterally halting the ISDS arbitration proceedings by negating ICSID tribunal's jurisdiction.¹⁸⁵⁾ In *SGS*, the tribunal manifested that a judgment issued by Supreme Court of Pakistan which is final in Pakistan, does not bind the tribunal according to international law.¹⁸⁶⁾ It further noted that it could not decline its capacity to determine the jurisdiction given by Article 41 of the ICSID Convention.¹⁸⁷⁾

4.2 Non-ICSID Awards

ISDS awards outside of ICSID regime are subject to national laws on international arbitration in a country where the arbitration has its seat and in the place of enforcement.¹⁸⁸⁾ It is established principle that the review on the merits of the arbitral award by domestic court is not allowed.¹⁸⁹⁾ However, the range of courts' review on international arbitration awards allowed in many different jurisdictions varies.¹⁹⁰⁾ Generally, most States has been adopted the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law or the Model Law) either in full or with some adaptation and have provided standardized recourse on the awards.¹⁹¹⁾

185) Id. at 87

186) *SGS Société Générale de Surveillance SA v Pakistan*, Procedural Order No 2, ICSID Case No. ARB/01/13; IIC 222(2002); ICSID Rep 406; 18 ICSID Rev — FILJ 301; 42 ILM 1290 at para 28(October, 16, 2002).

187) Id.

188) See e.g., Schreuer, supra note 179 at 91

189) See e.g., Hober / Eliasson, supra note 7 at 639

190) See e.g., Goode et al., *Transnational Commercial Law Text, Cases and Materials* at 17.130–17.131(Oxford University Press, 2007).

4.2.1 The UNCITRAL Model Law

The Model Law has been adopted by more than 60 jurisdictions in the world.¹⁹²⁾ The Model Law does not provide any ground on which a domestic court reviews the substance of an international award that are dealt with in merits such as a mistake of fact or a misapplication of law.¹⁹³⁾ Consequently, the international arbitral award is not subject to any appeal on the merits because most jurisdictions nowadays recognize the finality of the award.¹⁹⁴⁾ Procedural defects suggested in the Model Law may only be a ground for setting aside of the award.¹⁹⁵⁾ The Article 34 of the Model Law deals with procedural matters that are the grounds for setting aside against arbitral award such as the capacity of the parties to the dispute, procedure of arbitration, the arbitral tribunal's jurisdiction and the public policy in the seat of arbitration.¹⁹⁶⁾

Domestic court of a State having the seat of arbitration has jurisdiction on the arbitral procedural under its national law on international commercial arbitration even if neither of the parties have any relation to this state.¹⁹⁷⁾ The Stockholm District Court exercised its jurisdiction on an ISDS case in which the German-Soviet BIT was a governing treaty, in accordance with the Swedish Arbitration Act.¹⁹⁸⁾ The court stated that it was not

191) *Id.*

192) *See e.g.*, Hober / Eliasson, *supra* note 7 at 639.

193) *See e.g.*, Goode et al., *supra* note 190 at 17,126–17,128.

194) *See e.g.*, Hober / Eliasson, *supra* note 7 at 639.

195) *Id.*

196) *See e.g.*, Goode et al., *supra* note 190 at 17,129.

197) *See e.g.*, Hober / Eliasson, *supra* note 7 at 644.

198) *The Russian Federation v. Sedelmayer*, Judgment of the Stockholm District Court, December 21, 2002, Case No. T6–583–98. For English translations of the judgment of the Stockholm District Court, see 2 STOCKHOLM

required for parties to the arbitration to have a connection to Sweden in order to challenge an arbitral award that has its seat in Sweden before the Swedish courts.¹⁹⁹⁾ Moreover, the Swedish Arbitration Act is applied and the fact that the investment arbitration is governed by an IIA concluded between two sovereign States does not deny the Swedish court's jurisdiction because at least one of the parties; a private investor, to the arbitration is a subject of municipal law.²⁰⁰⁾

NAFTA proceeding is non-ICSID arbitration because Canada and Mexico are not member States of the ICSID Convention.²⁰¹⁾ Hence, some of NAFTA awards have been reviewed by domestic courts of the seat of arbitration.²⁰²⁾ In *Metalclad*, the Supreme Court of British Columbia empowered by Article 34 of the Canadian International Commercial Arbitration Act concluded that it has jurisdiction as a seat of arbitration to review a NAFTA award.²⁰³⁾ Article 34(2)(b)(ii) of the Act provides public policy of the seat of arbitration

INTERNATIONAL ARBITRATION REVIEW 2005 cited in Hober & Eliasson, supra note 7 at 644.

199) Hober / Eliasson, supra note 7 at 644.

200) Id.

201) See e.g., Schreuer supra note 179 at 92 see also, United Mexican States v. Metalclad, Canada, Supreme Court of British Columbia, 2 May 2001, 2001 BCSC 664, 1529, 5 ICSID Reports 236, 6 ICSID Reports 52; United Mexican States v. Feldman Karpas, Ontario Superior Court of Justice, 3 December 2003, 8 ICSID Reports 500; Ontario Court of Appeal, 11 January 2005, 9 ICSID Reports 508; Attorney-General of Canada v. S.D. Myers, Judicial Review, Federal Court of Canada, 13 January 2004, 8 ICSID Reports 194; Raymond L. Loewen v. United States, US District Court for the District of Columbia, 31 October 2005, 10 ICSID Reports 448.

202) Schreuer, Id. at 92.

203) United Mexican States v. Metalclad, Canada, Supreme Court of British Columbia, 2 May 2001, 2001 BCSC 664, 1529, 5 ICSID Reports 236, 6 ICSID Reports 52.

as a legal basis of setting aside an international award. Mexico argued before the Canadian court that the ISDS award produced from *Feldman Karpa v. Mexico* was in conflict with public policy of Canada.²⁰⁴⁾ Nevertheless, the Ontario Court of Appeal rejected Mexico’s argument by noting that the public policy aims “to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way...”²⁰⁵⁾

In a challenge proceeding brought by Canada against a NAFTA award of *S.D. Myers, Inc. v. Canada*, the Federal Court of Canada stated that “public policy’ does not refer to the political position or an international position of Canada, but refers to ‘fundamental notions and principles of justice.’”²⁰⁶⁾ The Federal Court continued that the award did not “breach fundamental notions and principles of justice so that the decision was not in conflict with the public policy of Canada.”²⁰⁷⁾

4.2.2 The New York Convention

The enforcement of non-ICSID award is subject to the national law of the place of execution and is governed by the New York Convention unlike ICISD awards, which are treated as if they are a final judgment. Review of non-ICSID investment treaty awards by the national court is permitted in many jurisdictions. Hence, it is possible that the national court renders divergent decision from that of ISDS tribunal as a result of review on the

204) *See e.g.*, Reinisch, *supra* note 8 at 680.

205) *United Mexican States v. Feldman Karpa*, Canada, Ontario Court of Appeal, 9 ICSID Reports 508, 521, at para. 66(January. 11, 2005).

206) *Attorney–General of Canada v. S.D. Myers, Inc. and United Mexican States(Internener)*, Canada, Federal Court, 8 ICSID Reports 194, 208, at para.55(January. 13, 2004).

207) *Id.* at para. 76.

award within which attitude of the domestic law on the issue and legal interpretation of municipal courts that takes into consider public policy of the seat of arbitration are reflected. Nevertheless, according to the *2008 Survey*,²⁰⁸⁾ 81% of the corporations answered that they did not enforce or file for enforcement of awards against States.²⁰⁹⁾ This is because States have shown the high degree of compliance with the awards.²¹⁰⁾

5. The Explanation of Contradiction

There have been cases where decisions of ISDS tribunals and those of domestic courts on the same set of facts are contradictory. Traditional controversy on the monism and the dualism may provide insight into this contradiction.

5.1 The Monist Theory and the Dualist Theory

The monist theory argues that both national law and international law have the same fundamental root.²¹¹⁾ International law is higher or more fundamental than domestic law because legal relationship between States

208) School of International Arbitration, *The 2008 Survey on Corporate Attitudes and Practices on Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration*, Queen Mary University of London, (2008).

209) See Crina Baltag, "Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Arbitral Awards Against States", 19 *Am. Rev. Int'l Arb.* 391 at 403(2008).

210) Id.

211) See e.g., Shaw, *supra* note 17 at 29.

can not be established without the rules of international law and also, the same definition of law is applied in both the international and domestic areas which resulted in logical unity by forming hierarchical system.²¹²⁾

On the contrary, the dualists believe that the international law and domestic law are separate and each law respectively governs different areas. Therefore, it is impossible for two laws to affect or override the other.²¹³⁾

5.2 The Modified Dualist Theory

The modified dualism argues that each law governs and is supreme in each field.²¹⁴⁾ When a State does not observe its international obligation imposed by international law, the conduct of the State which resulted in a violation of international order can be yet legitimate within its domestic jurisdiction.²¹⁵⁾ ISDS tribunals have consistently enunciated that they are not a court of appeal whenever they examine the measure of domestic courts. In *Amto* case, the tribunal stated that “this Tribunal is not a court of appeal for the decisions of the Ukrainian courts and, in any event, the Tribunal does not accept that these decisions are wrong in law.²¹⁶⁾ Furthermore, the *Jan de Nul* tribunal noted that:

Whether under Egyptian law the Court could or on the contrary could not invoke the provisions of the Contract in its Judgment is not for this

212) See Hans Kelsen, *Principles of International law*, at 557–9(1952). See also Kelsen, *General Theory of Law and State* at 363–80(1945).

213) See *e.g.*, Shaw, *supra* note 17 at 29,131.

214) *Id.* at 132.

215) *Id.*

216) *supra* note 82 at para 80.

Tribunal to decide. It is not the role of a tribunal constituted on the basis of a BIT to act as a court of appeal for national courts. The task of the Tribunal is rather to determine whether the Judgment is “clearly improper and discreditable” in the words of the Mondev tribunal.²¹⁷⁾

Compatibility and validity of both national courts and international tribunal’s decisions that are contrary to each other provide a basis for the interaction through which international norms in administration of justice is formed. A concept of the international appellate court can be hardly to be perceived as a realistic system. Also, validity of foreign judgment and foreign arbitral awards is an essential prerequisite for enforcement and recognition in the place of execution.²¹⁸⁾ Thus, the interaction under review across jurisdictions requires legitimacy and functionality of both international and national courts to render valid and compatible decisions in each jurisdiction.²¹⁹⁾

IV. International Standard of Administration of Justice

Dissimilar decisions respectively arose out of international and national proceedings are valid and compatible. Such contradiction gives rise to the interaction between national court and ISDS tribunal that would lead to formation of internationally accepted standard for the administration of justice.

217) *supra* note 93 at para. 209.

218) *Cf.* Ahdieh *supra* note 11 at 2093.

219) *Id.*

1. Interaction

It is not an easy task for a domestic court to achieve innovation due to its isolation and supremacy within its jurisdiction.²²⁰⁾ ISDS arbitration, meanwhile, can inspire the domestic court with new ideas which domestic court systematically has not been able to come up with; the principles in the international law. On the contrary, it is domestic court's role to brake ISDS tribunal's immoderate decision.

1.1 Distinguishing Features of ISDS Mechanism

Features that make ISDS mechanism different from conventional international courts facilitate the interaction. First of all, ISDS tribunal is able to put a host State under an obligation to pay monetary damages to a private investor.²²¹⁾ ISDS tribunal can impose a host State a payment obligation without offending national court or other related State organs.²²²⁾ ISDS tribunal is authorized by IIA to review a domestic court's action without the voluntary consent offered by domestic court itself.²²³⁾ Validity and Enforceability of ISDS awards are not affected by the national court of the host State which is subject to review because it is national court of the seat of arbitration that is permitted to set aside an ISDS awards.

220) Id. at 2065, *see also*, Oona A. Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System", 86 *Iowa L. Rev.* 601, at 604, 606–608(2001).

221) Id. at 2058, *But see*, Frederick M. Abbott, "NAFTA and the Legalization of World Politics: A Case Study", 54 *Int'l Org.* 489 at 537(2000).

222) Id.

223) Id. at 2058, 2060.

For those characteristics, ISDS tribunals enjoy more power over the host State than any other conventional international courts.²²⁴⁾ The ISDS mechanism can give rise to innovation in national judicial system by nudging it with the principles of the international law.²²⁵⁾ The governing law of ISDS proceeding is a given IIA and customary international law.²²⁶⁾ By applying international legal norms and standard when it examines domestic administration of justice in the host State, ISDS awards are able to suggest alternative perspective for desirable innovation to domestic judicial and legislative organs.²²⁷⁾ Secondly, ISDS tribunal consists of arbitrators who have expertise and work experience in the field of international law.²²⁸⁾ Thus, ISDS tribunals have capacity to introduce a domestic court the distinct ideas for innovation.²²⁹⁾

1.2 Communication from Domestic Court

Domestic courts in the seat of arbitration have exercised their authority to review on the jurisdiction of non-ICSID ISDS awards. Set aside decision reflects attitude of national law and domestic court's legal opinion as to the ISDS award in question.²³⁰⁾ The British Columbia Supreme Court

224) *Id.* at 2086.

225) *Id.* at 2068, 2083–2084, 2094–2097, *Cf.* Hathaway, *supra* note 220 at 643, 604–608, 650, *see also*, Ahdieh, “Between Mandate and Market: Contract Transaction in the Shadow of the International Order”, 53 *Emory L.J.* 691 at 749–50.

226) *Id.* at 2109.

227) *Id.* at 2095.

228) *Id.* at 2068.

229) *Id.* at 2068.

230) *supra* note 203 at para 51. In the verdict, it followed the leading British

reviewed NAFTA award of *Metalclad* under the International Commercial Arbitration Act.²³¹⁾ The court set aside a part of the award by reasoning that the NAFTA tribunal “made decisions on matters beyond the scope of the submission to arbitration.”²³²⁾ The Supreme Court suggested that transparency can be invoked by a claim under Chapter 18 of NAFTA “because there are no transparency obligations contained in Chapter 11.”²³³⁾ Later on, the *Feldman* tribunal stated that “while this Tribunal is not required to reach the same result as the British Columbia Supreme Court, it finds this aspect of their decision instructive.”²³⁴⁾

1.3 Formation of International Standard

Interaction between ISDS tribunal and domestic courts results in the formation of international standard of administration of justice.²³⁵⁾ ISDS award with certain degree of power on the host State offers domestic courts an interpretation of denial of justice and due process embodied in the international law that foreigner ought to be granted thereby encouraging innovation in domestic judicial system.²³⁶⁾ National courts reply to ISDS tribunals with an interpretation which reflects each country’s indigenous judicial systems and leading authority in national legal view. Such interaction,

Columbia authority on the provision concerned.

231) *Id.* at para 39.

232) *Id.* at para 134.

233) *Id.* at para 72.

234) *Feldman Karpa v Mexico*, Award and separate opinion, ICSID Case No ARB(AF)/99/1; IIC 157(2002); (2003) 18 ICSID Rev–FILJ 488; (2003) 42 ILM 625 at para 133(Dec.16, 2002).

235) *Cf.* Ahdieh *supra* note 11 at 2123.

236) *Id.* at 2082.

not unilateral pressure from ISDS tribunal, makes innovation more feasible by avoiding unnecessary challenges to sovereignty and resistance from domestic public opinion. The ultimate goal of the interaction is to form internationally accepted standard of due process²³⁷⁾ that benefits both foreigners and nationals, consequently enhancing human rights.

1.4 National Peculiarity

Each country has operated and developed different judicial and governmental structures. Nowadays, countries which have very distinctive judicial and governmental systems are entering into IIA and Free Trade Agreement (FTA). Furthermore, foreign investors are potentially exposed to local bias, nationalism or racism in the judicial proceeding of the host State. To encourage compliance with internationally accepted standard of administration of justice is not to impose Western developed countries' style on the rest of the world. Internationally accepted standard of denial of justice is urgently required to govern relationship among foreign investors and member States that have distinctive systems from each other. Furthermore, as the *Pantechniki* tribunal said, investors who entered into developing countries have a right to enjoy decision making, which is neither "xenophobic nor arbitrary".²³⁸⁾ Improvement of the domestic judicial system will eventually contribute to progress of the human rights in the host State by providing investors as well as nationals the judicial system that meets the international standard regardless of its economic achievement.

237) Id.

238) *supra* note 67 at para. 76.

2. Advantage of International Standard

2.1 Protection of Foreigner

Remarkable accomplishment of ISDS mechanism in the international law is that it strengthened protection of foreigner by granting *locus standi* to individuals and private enterprises.²³⁹⁾ Loss or damages of aggrieved individual caused by the host State is not left to the discretion of the home State that put amicable diplomatic relations with offending country²⁴⁰⁾ before interests of its nationals any more. Access to justice is the right to acquire the protection of law with valid legal remedies before a court or other judicial mechanism.²⁴¹⁾ The *Mondev* tribunal took into account the standard of access to justice provided by Article 6(1) of the European Convention on Human Rights.²⁴²⁾ Moreover, in *Saipem*, the tribunal determined that to forbid foreign investor from accessing the international arbitration is the abuse of rights by stating that “in conclusion, the Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights.”²⁴³⁾ The ISDS mechanism significantly raises

239) See Francioni, *supra* note 39 Abstract.

240) Jessup, *supra* note 37 at 908(1946); *see also* J.L. BRIERLY, *The Law Of Nations* 277(Humphrey Waldock ed., 6th ed. 1963); J. L. Brierly, “La Fondement du Caractère Obligatoire du Droit International”, 23 *RECUEIL DES COURS* 468, at 531 (1928). cited in Dodge 3 at 9.

241) See Francioni, *supra* note 39 at 729.

242) *Id.* 736.

243) *Saipem SpA v Bangladesh*, Award, ICSID Case No ARB/05/7; IIC 378 at para 161(June, 20, 2009).

the level of protection of foreigner by requiring the host State to observe international due process when the public interests are a primary objective of a measure in which police power.

2.2 Progress in National's right

The formation of internationally accepted standard of judicial administration is expected ultimately to give rise to improvement of national's rights through domestication of principles of international law. Let us suppose there is a situation in which domestic law does not provide a feasible remedy due to its inherent limitation or a loophole but international law is able to adjudicate.²⁴⁴⁾ In *Loewen*, domestic law of the U.S. could not correct inappropriate jury instruction, an inadequate omissions by allowing racist and discriminatory statements during the proceeding and the discretionary decision on a statutory appeal bond requirement that asks excessive amount.²⁴⁵⁾ The tribunal condemned Mississippi court according to FET and IMS by noting that "by any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace...By any standard of evaluation, the trial judge failed to afford Loewen the process that was due."²⁴⁶⁾...In the present case, the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant."²⁴⁷⁾ Needless to say, major consumer of domestic judicial service is its nationals. Thus, it is nationals of the host State who come to reap benefits from innovation in domestic

244) Cf. Ahdieh, *supra* note 11 at 2135.

245) *Id.*

246) *supra* note 91 at para. 119.

247) *Id.* at para. 136.

judicial system. In *Loewen*, the investor claimed that it practically precluded from an appeal proceeding due to decision of the courts that rejected to waive or reduce supersedeas bonds which required 125 percent of the damages (in this case \$625 million) that the investor ordered to pay as a result of civil lawsuit in the Mississippi trial court.²⁴⁸⁾ After the NAFTA tribunal found that it has jurisdiction in January 2001, the Mississippi Supreme Court revised procedural law to limit the amount of the bond according to the net worth of the party defeated and a sum certain.²⁴⁹⁾

V. Conclusion

ISDS mechanism has replaced the role of diplomatic protection by granting foreign investor locus standi. Therefore, ISDS proceeding has become the last resort of foreign investor who was ill-treated by the host State and was deprived of adequate and unbiased administration of justice. Inevitably, both international tribunal and municipal court with regard to the case that has the same background can conclude contradictory decisions. ISDS tribunal introduces principles of international law in the assessment of domestic judicial administration and the national court indicates national legal view on the ISDS awards. Such interaction is possible for the conclusions rendered by both forums are valid and compatible with each other under the modified dualism regardless of whether they are contradictory or not. Moreover, ISDS proceeding has distinctive power on the municipal administration of justice from that of conventional international courts since

248) *Id.* at paras. 180, 183.

249) *Cf.* Ahdieh, *supra* note 11 at 2120.

monetary damages can be ordered. The interaction between ISDS tribunal and national court gives rise to formation of international standard for the administration of justice. Internalization of the standard results in enhancement of judicial service in the host State. Progress in domestic administration of justice is expected to contribute to advancement for the human rights of foreigners as well as nationals by requiring the host State to observe due process.

Administration of justice must be abided in the due process as the last resort of an individual against sovereign. International standard for the administration of justice promotes observance of the due process by the State and it will benefit the nationals as well as foreign investors. Therefore, standard of judicial administration contributes to the improvement of human rights level in each State.

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[국문초록]

국가와 투자자 간 분쟁해결제도를 통한 국제 사법 기준의 형성

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국제 투자가 더욱 활발해짐에 따라 투자 협정과 이에 근거한 투자자-국가 분쟁해결(ISDS) 케이스가 점점 늘어나고 있다. 전통적으로 타국에 의해 피해를 입은 외국인에게는 외교적 보호가 주어졌으나, ISDS 분쟁 해결 제도가 이를 대체하여, 외국인 투자자가 직접 국가를 상대로 중재 소송을 제기할 수 있게 되었다. 국내 법원의 판결 등 국내 사법 운영의 결과물도 투자협정에서 정하는 국가의 '조치'에 해당하기 때문에 국내 법원 조치를 ISDS 중재원이 국제법과 투자협정에 근거하여 심사하게 되었다. 반대로, 국제투자분쟁해결기구(ICSID)의 중재판결을 제외한 ISDS 중재 소송 판결을 중재지국의 국내 법원이 국내법에 의거하여 심사하는 예도 늘어나고 있다. 그러므로 같은 배경의 사안일지라도 法廷과 준거법이 다르므로 각각 ISDS 중재와 국내 법원 소송으로부터 도출된 결과가 서로 모순하는 현상이 나타나고 있다. 본 논문은 이러한 모순이 국내법원과 ISDS 중재원의 상호작용을 야기하며, 그러한 상호작용으로부터 사법 운영의 국제 기준이 형성된다고 본다. 또한 사법 운영의 국제 기준 형성 및 확립의 결과로서 외국인 보호의 강화뿐 아니라 내국인의 권리도 향상되어 인권의 증진에 기여할 수 있다고 기대한다.

주제어 : 국제법, 국제 투자법, 투자 조약, 재판거부, 인권

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