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International State Responsibility for Wrongful Judicial Acts

I Introduction

As a consequence of the expansion and development of international investment law, the breaches of international law obligations that are invoked in claims submitted to investment arbitration have diversified. An area that has experienced an exponential growth is state responsibility for wrongful judicial acts. Indeed, the application of international investment law to judicial acts has increased significantly since the beginning of the twenty-first century.

The subject of international state responsibility for judicial acts is underpinned by extensive academic writing along with a well-developed body of case law on the subject of denial of justice in international law. Denial of justice is a relatively old institution of public international law. Its roots even precede the emergence of the modern state. Naturally, what this notion means, how it is implemented and against whom a denial of justice claim can be invoked are aspects that have since evolved. The 1920s and 1930s witnessed a remarkable increase in the academic research on denial of justice and more generally on state responsibility for judicial acts. To name some of the leading and most comprehensive studies, Fitzmaurice,[1] De Visscher,[2] Eustathiadès,[3] Freeman[4] and, more recently, Paulsson[5] and Douglas[6] have explored the conceptual aspects of denial of

[1] GG Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 *BYBIL* 93.
[2] Charles De Visscher, 'Le déni de justice en Droit international' (1935-II) 52 *RCADI* 365.
[3] Constantin Th Eustathiadès, *La responsabilité internationale de l'Etat pour les actes des organes judiciaires et le problème du déni de justice en Droit international* (Pédone, 1936).
[4] Alwyn V Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, 1938).
[5] Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005).
[6] Zachary Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63(4) *ICLQ* 867.

justice. The topic was also surveyed by leading institutions[7] and at international conferences.[8]

Responsibility for judicial acts has a special place in international law for at least four reasons. The first reason is that there are special wrongs that can be committed only in the framework of the judicial function. The second is that the structure of domestic courts within the judicial organ plays an important role in the materialisation of the breach. Third, determining the loss of the individual due to wrongful judicial acts is not always straightforward in that the loss does not generally concern a direct harm to a property or contractual right but to a claim of right that is not certain that belongs to the individual. Fourth, redressing a wrong committed by domestic courts frequently calls for the use of non-pecuniary remedies, which is not very usual in investor-state disputes or other international disputes involving the espousal of individual's rights.

A Scope and Thesis of the Study

This book visits various aspects of state responsibility that may be relevant for bringing a claim in investment treaty arbitration for wrongful judicial acts. These aspects involve primary rules of state responsibility, i.e. the substance of international law and investment treaty law protection with respect to judicial function within the host state, as well as secondary rules of state responsibility, e.g. the pertinence of the procedural requirement of exhaustion of local remedies, the legal interest of investors in bringing such claims, remedies that may be sought to redress the wrongful judicial act. This book systemises these various elements and examines different scenarios of state responsibility for judicial acts in investment treaty arbitration.

[7] Inter alia, Institut de Droit international (Strisower), *Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers* (Session de Lausanne, 1927), available at www.idi-iil.org/idiF/resolutionsF/1927_lau_05_fr.pdf (see especially Articles 5 and 6 of the resolution); Harvard Law School (Borchard), 'Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners' (1929) 23 *AJIL (Special Supplement)* 133 (see especially Article 9). For a later research on a draft convention, see Harvard College (Sohn/Baxter), 'Draft Convention on the International Responsibility of States for Injuries to Aliens' (1961) 55 *AJIL* 548.

[8] Inter alia, Articles adopted by the Third Committee of the Hague Conference for the Codification of International Law (1930) (reproduced in 1956/II *ILC Ybk* 225) (see especially Article 9).

The thesis of this book is an argument that can be divided into two parts. The first part of the argument is that international state responsibility for judicial acts arises for different grounds, such as procedural and substantive denial of justice, violation of due process and breaches of other norms of international law. The host state can be held responsible for the breach of an international norm by domestic courts, to be more specific, even for a misapplication of a treaty norm or a violation of the investor's due process rights by a first instance court. An investment treaty tribunal's jurisdiction to hear all or a part of these causes of action depends on the scope of the host state's offer to arbitration recorded in the dispute settlement provision of the applicable investment treaty. Under a sufficiently broad dispute settlement provision, an investment treaty tribunal would have jurisdiction to hear an investor's claim invoking state responsibility for an international wrong committed by a court of first instance.

The second part of the argument is that there may be several admissibility constraints which could preclude an investor from bringing an investment claim even if domestic courts of the host state have committed a wrongful judicial act. State responsibility cannot be invoked until there is a complete breach by the judiciary and this breach is remediable in investment arbitration. Most of the time, the only available remedy in investment arbitration would be damages. In order to have a legal interest in such an international proceeding, the investor should claim that it has suffered some loss throughout the domestic judicial process as a result of the wrongful judicial act. Invoking state responsibility for wrongful judicial acts in investment treaty arbitration entails, most of the time, a circumstance which generates a loss of a right. An internationally wrongful first instance court judgment, which is subject to appeal, would not thus suffice for the investor to resort to investment arbitration. Indeed, should the appeal be successful, the investor would not suffer any loss despite the judgment of the court of first instance being internationally wrongful. It is, however, possible that the investor suffers loss from a wrongful first instance court judgment notwithstanding the right to appeal. This would be the case, for instance, when the appeal does not suspend the execution of the judgment. This admissibility constraint relates to investor's legal interest in the particular investment claim and is not an application of the local remedies rule.

B Structure of the Book

This introductory chapter provides a framework for bringing a claim for a wrongful judicial act in general international law. It treats the development

and nature of international state responsibility for judicial acts. It emphasises contemporary dynamics of invoking state responsibility for a breach committed in the exercise of judicial function and compares responsibility for the acts of the judiciary with responsibility for the acts of other state organs. Most importantly, it discusses whether denial of justice is the only cause of action that may be invoked in the context of international state responsibility for judicial acts or whether there may be other wrongful judicial acts which trigger state responsibility.

Following the framework drawn in Chapter 1, this book treats the subject of international state responsibility for judicial acts in investment treaty arbitration in two parts. The first part focuses on some crosscutting issues, whereas the second part examines specific circumstances where judicial function exercised by the host state gives rise to a breach.

Chapter 2 analyses the substantive protection with respect to judicial function and judicial acts in international law. The international protection in relation to judicial acts comprises the protection afforded under investment treaty undertakings and the protection by the norms of international law that may be found elsewhere. This chapter introduces main investment treaty standards of treatment that may be relevant for the judicial function. These standards are the fair and equitable treatment standard, the effective means standard of asserting claims and enforcing rights and the prohibition of unlawful expropriation. Chapter 2 also discusses the conditions under which an investor may invoke international causes of action relating to judicial acts other than investment treaty undertakings. Overall, the chapter addresses general questions such as whether acts exercised within the context of judicial function can amount to an expropriation, and if so, what test and approach should be adopted to determine when a judicial act becomes expropriatory; to what extent the protection under one standard differs from the other; and whether the breach of other norms of international law may be a basis of an investment claim.

Chapter 3 treats another general issue, which is the completeness of a breach committed in relation to judicial function. Considering that judicial function is exercised as a process which is extended over time, an isolated misconduct does not usually amount to a breach of investment treaty standards of treatment. The chapter discusses when a breach would be regarded as complete and whether the materialisation of a breach committed in relation to judicial function necessitates the prior exhaustion of local remedies as a substantive requirement. It also distinguishes this requirement from the procedural rule of local remedies.

Chapter 4 addresses the issue of redressing wrongful judicial acts in investment treaty arbitration. It covers a number of problems which are common to investment claims involving state responsibility for judicial acts, such as an investor's legal interest in an investment claim and incurrence of loss as a justification for legal interest, causality between the wrongful judicial act and the damage and availability of non-pecuniary remedies for redressing wrongful judicial acts that do not necessarily generate a financial loss.

Denial of justice and violation of due process are the first specific wrongful judicial acts that are treated in the second part. These traditional causes of action for judicial function are introduced in Chapter 5, which suggests a test for 'injustice' with respect to the wrongful act of denial of justice. It also discusses whether a breach of due process rights of an investor may be invoked separately from a denial of justice.

The second specific circumstance, which is analysed in Chapter 6, pertains to the supervisory function of domestic courts over international commercial arbitration proceedings. In this context, a wrongful judicial act may arise in relation to the determination as to the validity of an arbitration agreement or rejection of the enforcement of a commercial arbitral award.

Chapter 7 treats the last specific circumstance, which involves coercive measures taken by domestic courts against the investor. These coercive measures include provisional measures and enforcement and bankruptcy proceedings as well as criminal prosecutions. In order to reveal what is assessed to be unlawful, this chapter brings a case-by-case analysis. Chapter 8 concludes.

II Invoking State Responsibility for Judicial Acts under General International Law

A The Term 'Judicial Act'

This book studies international state responsibility for judicial acts in investment treaty arbitration. For this purpose, one must first clarify the meaning of the terms of art 'act' and, more specifically, 'judicial act'. Using the term 'act' conforms to the terminology employed by the International Law Commission (ILC) in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[9] An 'act' or a 'wrongful act'

[9] ILC, *Report of the Fifty-Third Session* (2001), UN Doc. A/56/10, 2001/II(2) *ILC Ybk* 26.

is 'conduct' which encompasses 'action' and 'omission'.[10] The terms 'act' and 'conduct' are used interchangeably in the ARSIWA. Indeed, Articles 2 and 4(1) of the ARSIWA read, respectively, '[t]here is an internationally wrongful *act* of a State when *conduct* consisting of an *action* or *omission* [. . .]' and '[t]he *conduct* of any State organ shall be considered an *act* of that State under international law'.[11]

Accordingly, a 'judicial act' is an act of the state which comes forth as a result of its judicial function. It comprises decisions, judgments and other conducts of domestic courts as well as their failure to act in the course of the adjudicatory process. Nevertheless, a 'judicial act' does not necessarily designate an act within the organisation of the judiciary. As a judicial function may be assigned to authorities outside the organisation of the judiciary, a wrongful judicial act can also be committed by a state organ which is not the judiciary. For a similar reason, the Convention on Jurisdictional Immunities defines 'court' as 'any organ of a State, however named, entitled to exercise judicial functions'.[12] The ILC explained that this definition covers the acts of courts and administrative organs regardless of the author that exercises the judicial function.[13] It illustrated the scope of judicial functions as follows:

> Judicial functions may be exercised in connection with a legal proceeding at different stages, prior to the institution or during the development of a legal proceeding, or at the final stage of enforcement of judgements. Such judicial functions may include adjudication of litigation or dispute settlement, determination of questions of law and of fact, order of interim and enforcement measures at all stages of legal proceedings and such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to, a legal proceeding. Although judicial functions are determined by the internal organizational structure of each State, the term does

[10] ILC's Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the Fifty-Third Session* (2001), UN Doc. A/56/10, 2001/II(2) *ILC Ybk* 31 (ILC Commentary to ARSIWA), Commentary to Article 1, para 8.

[11] Emphases added.

[12] Article 2(1)(a) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (concluded on 2 December 2004, not in force as of 1 May 2017).

[13] ILC's Commentaries to the Draft Articles on Jurisdictional Immunities of States and Their Property, *Report of the Forty-Third Session* (1991), UN Doc. A/46/10, 1991/II(2) *ILC Ybk* 13, Commentary to Article 2, para 3. See also Tom Grant, 'Article 2(1)(*a*) and (*b*)' in Roger O'Keefe and Christian J Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) 40, 45–46.

> not, for the purposes of the present articles, cover the administration of justice in all its aspects which, at least under certain legal systems, might include other functions related to the appointment of judges.[14]

Parallel to the definition of the term 'court' provided in Article 2 of the Convention on Jurisdictional Immunities, the term 'judicial act' implies in this book an act of any state organ exercised for the purposes of judicial function.

B Historical Evolution of the Modalities of Reparation under International Law

Redressing denial of justice or, more generally, reparation of wrongful acts directed at individuals[15] has been evolved in four stages.[16] These stages do not necessarily reflect the evolution of the content of state responsibility for a particular wrong. Rather, they correspond to the modality of how a wrongful act has been alleged and redressed in international law. These stages are as follows: (1) reparation by reprisals; (2) gunboat diplomacy; (3) peaceful settlement of the dispute through the diplomatic protection provided by the home state of the individual; (4) direct access of individuals to some international courts and tribunals. In the modern era, the third and fourth modalities exist simultaneously. It is also worthy of note that, among these modalities, only human rights treaties provide a protection against wrongful acts directed at individuals regardless the nationality of individuals; the remaining methods could or can be used specifically by or in the benefit of foreigners.

The first stage corresponds to the medieval rule of private reprisals issued by the sovereign of the individual upon the *denegatio justitiae* that had occurred in a foreign country. In the worlds of Legnano,

[14] ILC Commentary to the Draft Articles on Jurisdictional Immunities of States and Their Property Article 2, para 3.

[15] The term 'individual' is intended to cover both physical persons and legal entities, e.g. companies.

[16] For further reading on the historical evolution, see Hans W Spiegel, 'Origin and Development of Denial of Justice' (1938) 32 *AJIL* 63; De Visscher, 370–374; Freeman, 53–67; Paulsson, 10–37; AA Cançado Trindade, 'Denial of Justice and Its Relationship to Exhaustion of Local Remedies' (1978) 53 *Philippine Law Journal* 404, 404–415; Ali Ehsassi, 'Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle' Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 213, 217–219.

> In the early days of the supreme Pontiffs and the Roman Emperors, when all were in subjection both in law and in fact, there was no need of reprisals, since the *complement of justice was administered* by princes, *with observance of the due order of law*. But when the Empire began gradually to be exhausted, so that now there are some who in fact recognise no superior, and by them justice is neglected, the need arose for a subsidiary remedy, when the ordinary remedies fail, but which is on no account to be resorted to when they exist. But this extraordinary remedy had its origin in the law of nations. For it is a form of lawful war. For it is lawful to take arms in defence of one's own body; and not only in defence of one's private and individual body, but also of the mystical body. *For a community is one body, whose parts are the several members of the community; and so a community may defend the parts of its own body*. [. . .] For its final object is that justice may obtain its due effect, and its occasion is *when there is a failure of remedy, arising from the neglect of those who govern and rule peoples, and the absence of recognition of superiors in fact, at which time this extraordinary remedy is needed*.[17]

The international community explicitly acknowledged that the exercise of private reprisals would not be considered an act of war so long as it was duly used following a denial of justice.[18] The *denegatio justitiae* would arise if the foreign sovereign did not provide reparation for the loss that the individual had suffered and the sovereign or his courts acted in bad faith, in favour of one disputant, or with the desire to please a local ruler.[19] Private reprisals provided for implementation of private justice, conferring the aggrieved individual the right to repossess his goods or the equivalent thereof, from any subject of the sovereign who had denied him justice.[20] Accordingly, under this modality of justice, an infringed individual was not taking an action against the delinquent state or sovereign or even not necessarily against the original wrongdoer but against any subject of the sovereign.[21] Owing to this nature, the exercise of private reprisals is said to represent an idea of collective responsibility[22] or an association of 'self-help and communal solidarity'.[23]

The reparation of 'denial of justice' started to be detached from the exercise of private reprisals with the emergence of the modern state, which is

[17] Giovanni da Legnano, *De Bello, De Represaliis et De Duello*, TE Holland (ed) (Oxford University Press, 1917), 307–308 (JL Brierly (trans)) (emphases added, references omitted). Generally on reprisals, see Legnano, 307–331 (JL Brierly (trans)).
[18] De Visscher, 373; Freeman, 56. [19] Paulsson, 13.
[20] De Visscher, 371. See also Freeman, 58–59.
[21] Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge University Press, 2004), 25–26.
[22] De Visscher, 371. [23] Spiegel, 64.

an institution that encompasses an improved political organisation and a more effective authority.[24] Paulsson agrees with this statement when he explains the link between exclusive jurisdiction of states, which provides full control of legal processes, and external responsibility for wrongs suffered by foreigners in its territory.[25] Starting from this stage, international responsibility of state has gradually been shaped as this concept is understood today. The emergence of the modern state not only made the (host) state, instead of the community, the actor responsible for injustice vis-à-vis the foreigner; it also empowered the (home) state to act in the international domain against a wrongful act committed to one of its subjects. As a result, measures taken by states on behalf of private persons took the place of private reprisals.[26] The idea behind Vattel's maxim 'whoever ill-treats a citizen indirectly injures the State, which must protect that citizen'[27] became the basis for the practice of diplomatic protection of citizens abroad.[28]

The Jay Treaty of 1794 between Great Britain and the United States is the pioneering example of an international treaty that envisages an international commission, which would hear claims in respect of the loss suffered by private parties of a specific nationality that had not been recovered during the ordinary course of judicial process.[29] The option of referring such disputes to peaceful dispute settlement mechanisms thus arose by the end of the eighteenth century.

Some other states were, nevertheless, more reluctant to recognise the existence of international requirements that could trump national standards, of which the Calvo doctrine[30] is the leading example. This approach prevented state responsibility from being implemented through

[24] Freeman, 61–62. [25] Paulsson, 14. [26] Freeman, 62.

[27] Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758) repr by James Brown Scott (ed), Vol I (Carnegie Institution of Washington, 1916), Livre II, Chap VI, para 71.

[28] Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008), 10.

[29] Article 6 of the Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty and the United States of America (Jay Treaty) (concluded on 19 November 1794, entered into force on 29 February 1796). For the text of the treaty, see Hunter Miller (ed), *Treaties and Other International Acts of the United States of America*, Vol 2 (US Government Printing Office, 1931) 225.

[30] M Charles Calvo, *Le droit international théorique et pratique*, Vol III (5th edn, Librairie nouvelle de Droit et de Jurisprudence, 1896), 137–138. Calvo explicitly stated that '[l]a responsabilité des gouvernements envers les étrangers ne peut être plus grande que celle que ces gouvernements ont à l'égard de leurs propres citoyens' (ibid, 138).

For an analysis and critics of the doctrine, see Patrick Juillard, 'Calvo Doctrine/Calvo Clause', *MPEPIL* (2007); Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013), 23–27; Paulsson, 20–24.

peaceful dispute settlement mechanisms. The frustration encountered in the peaceful exercise of diplomatic protection provoked unilateral use of force by home states, which is called gunboat diplomacy.[31] The unilateral use of force by the national state of the aggrieved individual was justified as a necessary measure of the home state to protect its citizens and their property. For obvious reasons, gunboat diplomacy could be employed by powerful states against weaker states and not vice versa or between states having similar strength. As a result, greater degree of responsibility was exacted from weaker states.[32] This method of repairing individual's loss was employed by colonial states, causing the institution to be associated with the imperialist project.[33]

The quest for peaceful settlement of disputes led to the First and Second Hague Peace Conferences.[34] The 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes aimed to refrain states from using force in settling disputes. Article 1 of the 1899 and 1907 Conventions provides that 'the Contracting ["Signatory" in the 1899 Convention] Powers agree to use their best efforts to ensure ["insure" in the 1899 Convention] the pacific settlement of international differences'. These conventions make a reference to the possibility for Contracting Powers to conclude new treaties expressly stipulating recourse to compulsory arbitration.[35] By including such reference, both Hague Conventions promoted compulsory international arbitration for the resolution of disputes between states – which naturally involve individuals' claims espoused by their home states. The encouragement of peaceful settlement of disputes became a principle that each UN Member must obey.

[31] See Paulsson, 15. See also Amerasinghe, *Diplomatic Protection*, 15.

[32] Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (New York: The Banks Law, 1915), 448–449.

[33] James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), 75. See also M Charles Calvo, *Le droit international théorique et pratique*, Vol I (5th edn, Librairie nouvelle de Droit et de Jurisprudence, 1896), 350–351; Christopher F Dugan / Don Wallace Jr / Noah D Rubins / Borzu Sabahi, *Investor-State Arbitration* (Oxford University Press, 2008), 26–27.

[34] The First Peace Conference was held in 1899 and gave birth to the 1899 Convention for the Pacific Settlement of International Disputes (concluded on 29 July 1899, entered into force on 4 September 1900). This convention established the Permanent Court of Arbitration that is the first global institution for the settlement of disputes between states. The Second Peace Conference took place in 1907. The Contracting Powers expanded the content of the 1899 Convention and concluded the 1907 Convention for the Pacific Settlement of International Disputes (concluded on 18 October 1907, entered into force on 26 January 1910).

[35] Article 19 of the 1899 Convention and Article 40 of the 1907 Convention.