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Exposé

Judicial Expropriations in International Investment Law

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Judicial Expropriations in International Investment Law

1. Current State of Research

A. Introduction

In the extensive corpus of awards by investment arbitration tribunals, a wide range of state organs and agencies have been found responsible for breaches of investment protection standards – regardless of their affiliation to a certain branch of the state. However, measures taken by the legislative or executive branch seem to constitute the basis of the vast majority of decisions holding the state liable for mistreating foreign property. There has been a certain reluctance of arbitration tribunals to find violations of treatment standards caused by acts of the judiciary.¹ It is however undisputed that national courts may bring about the international responsibility of their state, both in general international law² and specifically in relation to investment law.³ And while in many instances, national courts were found to have disrespected international obligations of investment protection (most prominently, the guarantee of fair and equitable treatment) by way of a “denial of justice”, the question whether judicial acts can, as such and maybe even independently from the concept of a denial of justice, constitute unlawful expropriations remains largely unresolved.⁴ The issue of expropriations caused by national courts has become relevant in several recent cases, but it

¹ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd ed. 2010), 346; Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, *Recueil des Cours* 159 (1978), 278; Amicus Curiae submission by the United States in *Eli Lilly v. Canada*, para. 204 (“According to the United States, under international law, the actions of domestic courts are accorded a greater presumption of regularity than legislative or administrative acts are.”)

² As reflected in Article 4 (1) ILC Articles on State Responsibility (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions [...]”); on the general responsibility of a State for judicial wrongs see Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, *Recueil des Cours* 159 (1978), 278.

³ *Robert Azinian, Kenneth Davitian & Ellen Baca v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, paras. 98-99; *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 March 2007, para. 200; *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award of 6 July 2012, paras. 261-262; *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability of 24 August 2015, para.143.

⁴ Sebastian Mantilla Blanco, ‘Justizielles Unrecht im Internationalen Investitionsschutzrecht: Zur Verletzung völkerrechtlicher Standards des Investitionsschutzes durch nationale Gerichte’, In: 21 *Studien zum Internationalen Investitionsrecht* (Nomos 2016), 147-148; Mavluda Sattorova, ‘Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct’ 61 *International & Comparative Law Quarterly* (2012), 234-235; Christopher Greenwood, ‘State Responsibility for the Decisions of National Courts’, In Fitzmaurice/Sarooshi (eds.), *Issues of State Responsibility Before International Judicial Institutions* (2004), 55-73.

has received little attention in academic writing.⁵ It poses a number of complex, but highly important questions of a conceptual and practical nature that have not yet been conclusively dealt with in the context of judicial expropriations.

B. Preliminary Issues: Conceptual and Practical Implications

The lack of “precedent” in this regard, one may argue, might exist for good reasons. Court rulings are generally elaborate findings, well-founded on evidence and law. As much as this might prevent a high frequency of internationally wrongful domestic decisions, it does not exclude their occurrence in general. An abstract hypothesis might even lead us to think that judicial expropriations are more likely to occur: Every court decision awarding property rights to one party (private or State) and depriving the other party (such as an investor) of them could technically be considered to have the effect of ‘expropriating’ the judgment debtor.⁶ This rather simplistic theory would not survive the stringent tests developed by jurisprudence when determining whether an expropriation has occurred, which focus on whether the right at issue was protected by international law and whether the interference in that right was grave enough to be deemed expropriatory.⁷ The assessment of whether an expropriation has occurred is furthermore dependent on whether one is to follow the (emerging) ‘police powers’ doctrine or its counterpart, the ‘sole effects’ doctrine.⁸ In determining whether a governmental measure constitutes an expropriation, the latter solely focuses on the measure’s effect to establish a taking,⁹ while the first does not detect an expropriation at all if the measure formed

⁵ See for instance: Alexis Mourre, ‘Expropriation by Courts: Is It Expropriation or Denial of Justice?’ *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2011); Mavluda Sattorova, ‘Judicial Expropriation or Denial of Justice? A note on Saipem v. Bangladesh’ 2/35 *International Arbitration Law Review* (2010); Sebastian Mantilla Blanco, ‘Justizielles Unrecht im Internationalen Investitionsschutzrecht: Zur Verletzung völkerrechtlicher Standards des Investitionsschutzes durch nationale Gerichte’, In: 21 *Studien zum Internationalen Investitionsrecht* (Nomos 2016); Mavluda Sattorova, ‘Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct’, 61 *The International and Comparative Law Quarterly* (2012), 225.

⁶ For a similar thought experiment see *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, para. 133 (“If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds”).

⁷ Ursula Kriebaum, ‘Expropriation’ In: Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch (eds.), *International Investment Law. A Handbook* (2015), 963-964; Rudolf Dolzer/ Christoph Schreuer, *Principles of International Investment Law* (2012), 99.

⁸ Ben Mostafa, ‘The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law’, 15 *Australian International Law Journal* (2008), 267; Ursula Kriebaum, ‘Regulatory Takings: Balancing the Interests of the Investor and the State’, 8/5 *The Journal of World Investment and Trade* (2007), 724; Rudolf Dolzer, ‘Indirect Expropriations: New Developments?’, 11 *New York University Environmental Law Journal* (2003), 79.

⁹ August Reinisch, ‘Expropriation’ In: Peter Muchlinski/Federico Ortino/Christoph Schreuer, *The Oxford Handbook of International Investment Law* (2008), 445; *Starret Housing Corporation v. Iran*, Iran-United States

part of state regulations for the purposes of general public welfare.¹⁰ And while drawing the line between non-compensable regulations and compensable expropriations remains a delicate matter,¹¹ rejecting the existence of an expropriation on grounds of a state's "police power" has received support in relation to cases in which courts interfere in property rights by awarding compensatory damages to victims.¹² Apart from these specific substantive issues, two other fundamental concerns are triggered by the increasing figure of claims alleging judicial expropriations: The first is that international review of domestic rulings would be allowed under the pretence of seeking compliance with investment standards.¹³ The second cause some authors are apprehensive for, is that the rise of claims alleging judicial expropriations instead of a denial of justice may be motivated by the aim of circumventing the rule that local remedies be fully exhausted, a rule that is accepted as a substantive requirement for every submission connected to a denial of justice.¹⁴ A core question of this thesis will therefore be whether judicial expropriation and denial of justice are essentially different concepts or rather intertwined.

Faced with these important conceptual and practical implications, it appears crucial to attempt to clarify conditions for assessing an (unlawful) expropriation enacted by national courts in order to prevent an alleged 'review through the back door' and the eluding of the local remedies requirement. It is the suggestion of this work that the conditions applied in current practice to determine whether a judicial act constitutes an expropriation and whether it

Claims Tribunal, IUSCTR 154 (often cited as authority for the 'sole effects doctrine'); see Rudolf Dolzer/Christoph Schreuer, *Principles of International Investment Law* (2012), 114.

¹⁰ Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' 8 *Journal of World Investment and Trade* (2007), 726; Rudolf Dolzer/ Christoph Schreuer, *Principles of International Investment Law* (2012), 120; as applied in: *Methanex Corporation v. United States of America*, UNCITRAL, Award of 3 August 2005, Part IV, Chapter D, Page 4, para. 7.

¹¹ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para. 263 ("In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.")

¹² In *Weinstein v. Iran*, a US Court of Appeals rejected that there was an expropriation, as the compensatory decisions were based on the entity's "unlawful actions in support of terrorism" and hence confirms relevance of the circumstances for which the damages were granted for the definition of an expropriation. See United States Court of Appeals (2nd Circuit), *Weinstein v. Iran*, 609 F.3d 43 (2010), 54.

¹³ In *Loewen v. US*, the criticism departs from the assumption that this form of 'international review' of domestic rulings would ultimately lead to "put[ting] the label of international wrong on what is a domestic error." *Loewen Group, Inc. v. the United States*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, para. 242; *Robert Azinian, Kenneth Davitian & Ellen Baca v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, para. 99.

¹⁴ Jan Paulsson, *Denial of Justice in International Law* (2005), 109; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award of 6 November 2008, paras. 255-261; *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009, para. 164.

may qualify as unlawful are not yet uniform, but crystallizing into a common direction. In recent years, not overwhelmingly large but still sound judicial practice has emerged, which elaborates on the possibility of domestic courts causing compensable expropriations.¹⁵ The tests applied for such determination in the practice of investment dispute settlement and their basis in international law shall be examined in this thesis.

C. Judicial expropriations in arbitral practice

Despite general divisiveness on what constitutes a judicial expropriation, in recent years various investment arbitration tribunals have recognized that national courts are capable of effecting expropriations in breach of investment protection standards.¹⁶ With expropriation claims arising out of judicial conduct being on the rise,¹⁷ it has become imperative for tribunals to define elements to be fulfilled in order for such claims to prevail. As will be discussed below, the awards dealing with court-ordered expropriations, while not being entirely uniform on the list of factors to be considered, still appear to follow a common line of argumentation: For a judicial decision or conduct to bring about a violation of expropriation standards, serious flaws within the procedure or the substance of the ruling have to have occurred. It might therefore be tempting to hinge the existence of a judicial expropriation on a violation of the prohibition of denial of justice. Some of the awards however suggest that a denial of justice is not a prerequisite of an expropriatory court ruling.¹⁸

¹⁵ The author has to date discovered 16 investment arbitration awards having dealt with the question, and many more currently pending to be decided.

¹⁶ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002, para. 139; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, paras. 704-707; *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award of 9 September 2009, paras. 118-119, 128; *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award of 6 July 2012, para. 314; *OAQ Tatneft v. Ukraine*, PCA UNCITRAL, Award on the Merits of 29 July 2014, paras. 459-461; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award of 19 December 2016, para. 365; *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, para. 131.

¹⁷ See for instance this list of emerging cases: *Transnational Dispute Management*, announcing the Special issue on "Judicial Measures and Investment Treaty Law", available at: <https://www.transnational-dispute-management.com/news.asp?key=1662>.

¹⁸ *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, para. 181 ("While the Tribunal concurs with the parties that expropriation by the courts presupposes that the courts' intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice."); *Eli Lilly and Company v. Canada*, Case No. UNCT/14/2, Award of 16 March 2017, para. 223 ("[...] the Tribunal is unwilling to shut the door to the possibility that judicial conduct characterized other than as a denial of justice may engage a respondent's obligations under NAFTA Article 1105.").

One of the earliest claims of judicial expropriation was dealt with in *Azinian v. Mexico*. The dispute arose out of irregularities in the performance of a concession contract concluded between the American investor and a Mexican authority. The contract was annulled due to misleading promises and misfeasance by the investors, and the Mexican courts confirmed this annulment in various instances. In its assessment of whether the court decisions violated Article 1110 (1) NAFTA,¹⁹ the tribunal focused on the central question “whether the Mexican court decisions themselves breached Mexico’s obligations under Chapter Eleven.”²⁰ This would be the case if a denial of justice had occurred, either in the form of procedural errors or by way of a ruling that was “arbitrary or unsustainable in light of the evidentiary record”²¹ or “bereft of a basis in law”.²² The decision in *Azinian v. Mexico* hence focuses on a denial of justice as the core element for a judicial expropriation.

The most prominent investment award in the context of judicial expropriations, *Saipem v. Bangladesh*, partly confirmed this approach, but also went beyond it. The Italian investor and the state-owned corporation Petrobangla were parties to a concession contract which included an arbitration clause. As a dispute between the parties arose, Saipem initiated arbitration at the International Chamber of Commerce (ICC) in accordance with the arbitration agreement. Upon several legal actions by Petrobangla, a number of national courts of Bangladesh had interfered with the arbitration in different forms, ranging from anti-arbitration injunctions to revocation decisions and ultimately triggering a declaration that the ICC award was a “nullity in the eyes of the [Bangladeshi] law”.²³ The ICSID tribunal considered these interventions by Bangladesh’s courts to be an indirect expropriation. In doing so, it held that the injunctions and the nullification had “substantially depriv[ed] Saipem of the benefit” of contractual rights encompassed by the award and therefore constituted a measure tantamount to expropriation.²⁴ Departing from the ‘sole effects doctrine’ discussed above, it went on to emphasize that a

¹⁹ Article 1110(1) NAFTA: “No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such investment (“expropriation”) except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.”

²⁰ *Robert Azinian, Kenneth Davitian & Ellen Baca v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, para. 97.

²¹ *Robert Azinian, Kenneth Davitian & Ellen Baca v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, para. 120; Francesco Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’, 20 *European Journal of International Law* (2009), 731.

²² *Robert Azinian, Kenneth Davitian & Ellen Baca v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, para. 105.

²³ *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, para. 50.

²⁴ *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, para. 129.

factual and substantial deprivation would not be sufficient to give rise to a claim of expropriation; the actions must also have been “illegal”.²⁵ The illegality of the taking was on the one hand derived from an abuse of rights by the domestic court which handed a ruling with no foundation in evidence,²⁶ and on the other from a violation of Article II of the New York Convention.²⁷ By revoking the authority of the ICC arbitrators in a revocation decision, the Bangladeshi court had *de facto* prevented the arbitration and thus “completely frustrat[ed]” its obligation to recognize and respect arbitration agreements under the Convention.²⁸ The significance of the tribunal’s decision in *Saipem v. Bangladesh* therefore not only lies in finding – among the first – in favour of an investor’s claim to have been expropriated by a court, but also in its consideration of a violation of international law that is independent from concepts of denial of justice or unfair procedures.²⁹

Other decisions, such as *Paushok v. Mongolia* introduced general considerations of the classic conditions for unlawfulness of expropriations,³⁰ specifically the respect for due process.³¹ Consequently, the tribunal found that an asset freeze imposed by Mongolian courts was lawful as they did not “act in bad faith or without respect for due process.”³²

A very recent ICSID case also examined the potential violations of expropriation standards by national courts without presupposing the occurrence of a denial of justice. In *Eli Lilly v. Canada*, the tribunal firstly confirms the possibility for judicial acts to contribute to an

²⁵ *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, para. 133.

²⁶ *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, para. 155; *Andrew Stephenson/Lee Carroll/Jonathon Deboos*, Interference by a local court and a failure to enforce: Actionable under a bilateral investment treaty? in: Chester Brown/Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2012), 429, 435.

²⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 10 June 1958, 330 UNTS 38, Article II (1) (“Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not, concerning a subject-matter capable of settlement by arbitration.”)

²⁸ *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, para. 167.

²⁹ Mavluda Sattorova, ‘Judicial Expropriation or Denial of Justice? A note on Saipem v. Bangladesh’ 2/35 *International Arbitration Law Review* (2010), 35; Alexis Mourre, ‘Expropriation by Courts: Is It Expropriation or Denial of Justice?’ *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2011), 65.

³⁰ On the classical requirements for lawfulness (such as the payment of prompt, adequate and effective compensation), see August Reinisch, ‘Legality of Expropriation’, in August Reinisch (ed.), *Standards of Investment Protection* (2008), 171; Christina Knahr, ‘Indirect Expropriation in Recent Investment Arbitration’, 12 *Austrian Review on International & European Law* (2007), 95.

³¹ In addition to *Paushok v. Mongolia*, see *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002, para. 139.

³² *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, UNCITRAL, Award on Jurisdiction and Liability of 28 April 2011 paras. 661-663.

expropriation within the meaning of Article 1110 NAFTA.³³ While the tribunal refuses to rule on the question with finality, it seems to implicitly address the prevailing confusion towards the correlation of judicial expropriations and denial of justice: interestingly, its approach is to confirm the separate existence of these two concepts, despite the fact that under the framework of Chapter Eleven of NAFTA, a lack of respect for due process is made a condition for the unlawfulness of an expropriation.³⁴ Establishing an inseparable link between expropriations by the judiciary and the denial of justice as reflected in the FET standard would have stood for reason. However, the tribunal decides not to exclude the possibility of a judicial expropriation separate from a denial of justice as Article 1105 NAFTA may also be breached by contravening a customary international law minimum standard of treatment.³⁵

This examination of the relevant arbitration practice exemplifies the existing uncertainty as to the determination of judicial expropriations and their unlawfulness. It is true that the arguments underlying the findings may be traced to one common ground, namely serious flaws within the procedure or the ruling contravening the general prohibition of denial of justice or the requirement of due process. However, a number of crucial questions remain unresolved: Do the “legality” considerations in *Saipem v. Bangladesh* form part of the finding of an expropriation as such, or for establishing its unlawfulness? What role do the established features of a “classical” expropriation play in the determination of a judicial expropriation and how do the usual conditions for lawfulness (*e.g.* payment of compensation) come into play? Can the unlawfulness or illegality of a judicial expropriation be based on other international wrongs that are independent from procedural propriety and denial of justice? This thesis aims to provide a thorough analysis of these questions by addressing the research questions listed below.

³³ *Eli Lilly and Company v. Canada*, Case No. UNCT/14/2, Award of 16 March 2017, paras. 219-221.

³⁴ Article 1110(1) NAFTA: “No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such investment (“expropriation”) except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.”

³⁵ *Eli Lilly and Company v. Canada*, Case No. UNCT/14/2, Award of 16 March 2017, para. 223.

2. Research Questions

The above analysis leads to the following research questions:

1. What are the elements to be established in order to find an expropriation of a foreign investor by a domestic court? What considerations of legality are involved and at what stage of the assessment?
2. How is the concept of denial of justice connected to judicial expropriations? Can an unlawful judicial expropriation occur by way of a violation of international law that is independent from the finding of a denial of justice?

The research thesis will be divided into three parts, using different methodology for each of these parts, ranging from comparative study of investment protection treaties and treaty interpretation, to examinations of scholarly opinion and judicial findings.

Part one will deal with the general legal foundations of the topic. These will be separated into considerations on the concept of expropriations and their unlawfulness under international investment law, and examinations of the extent to which judicial organs were included into investment treaty making and treaty interpretation relating to the protection of investments.

Part two will analyse the dealing of international investment tribunals with claims that allege unlawful expropriations by the judiciary. In doing so, it will ultimately aim at defining the elements considered by the tribunals in their assessment. This part will then conclude with examinations on whether there is consistency in application of the established elements and what considerations of legality are involved.

Part three will then address the question whether all of these elements ultimately lead to the concept of denial of justice and if therefore the existence of an unlawful judicial expropriation is dependent on the finding of a denial of justice. In doing so, it will highlight general foundations of the concept of denial of justice in international investment law.

3. Preliminary Structure

- I. Foundations in International Law
 - A. The Law of Expropriations
 - a. Expropriations under Sources of International (Investment) Law
 - i. Customary International law
 - ii. Bilateral Investment Treaties
 - iii. Multilateral Investment Agreements (NAFTA, ECT, etc.)
 - b. Special Issues in Expropriation Law
 - i. Elements of Direct and Indirect Expropriations
 - ii. Conditions for Lawfulness
 - iii. Regulatory Takings
 - B. Acts of the judiciary in International (Investment) Law
 - a. General Considerations of State Responsibility
 - i. The *finality* rule
 - ii. The idea of international review
 - b. Special Considerations in Investment Law
 - i. The exhaustion of local remedies
- II. Arbitral Practice on Judicial Expropriations
 - A. Review of Cases
 - a. Investor claims: From breaches of FET to judicial expropriations
 - b. Tribunal considerations: Can courts expropriate?
 - B. Constitutive elements of judicial expropriations established in arbitral practice
 - C. Elements of Unlawfulness of judicial expropriations
- III. Denial of Justice and Judicial Expropriations
 - A. Denial of Justice in International Law
 - B. Denial of Justice and Due process
 - C. Interdependence
 - 1. Elements considered relating to denial of justice
 - 2. Independent elements
 - 3. Considerations on the applicability of the local remedies rule
- IV. Conclusion

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