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Arbitrary and Unreasonable Measures

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A. Introduction

Arbitrary and unreasonable measures are among the many causes of action often available to investors under bilateral and multilateral investment treaties. Various formulations have been adopted to establish a legal standard providing protection against such measures. However, the relevant treaty provision usually provides protection to investors against either arbitrary or unreasonable measures, but rarely for both. Does this mean that, regardless of the formulation, such provisions are intended to provide protection against identical or at least similar measures? Or is there a legally definable difference between 'arbitrary' and 'unreasonable' measures that is of relevance in the context of arbitral decision-making?

To complicate matters, many investment treaties provide for protection against arbitrary and unreasonable measures in the form of a standard that combines protection against arbitrary or unreasonable measures and/or discrimination ('arbitrary or discriminatory measures'; 'arbitrary and discriminatory measures'; 'unreasonable or discriminatory measures'; 'unreasonable and discriminatory measures'). When confronted with such formulations, arbitral tribunals have generally taken the view that the disjunctive 'or' has a normative function and that, accordingly, in order to establish a breach of the standard, it is sufficient for the claimant to demonstrate that one of the two legs of the standard has been breached, ie that arbitrary or unreasonable measures, as the case may be, have been taken, *or* that the claimant has been discriminated against.[1] Thus, in such instances the relevant provision effectively embodies two different standards—one protecting against arbitrary or unreasonable measures, as the case may be, and the other against discriminatory measures. Based on recent case law, the disjunctive formulation of the standard also appears to be the more common one in practice, although other formulations can also be found.[2]

[1] For further discussion see below n. 42 and accompanying text.

[2] See, eg, *Ronald S. Lauder v Czech Republic* (UNCITRAL), Award, 3 September 2001, para. 219, concluding that the wording of Article II(2)(b) US/Czech Republic BIT—'arbitrary

This chapter focuses on arbitrary and unreasonable measures and, accordingly, will not address discrimination, except where relevant. In practical terms, this means that the chapter deals primarily with treaty provisions that provide protection against arbitrary or unreasonable measures, as the case may be, *or* discrimination.[3]

As regards protection against *arbitrary* governmental measures, the *locus classicus* is the *ELSI*[4] case, the first case brought before the International Court of Justice (ICJ) dealing with substantive standards of investment protection. There, the relevant provision, Article I of the Supplementary Agreement to the Treaty of Friendship, Commerce and Navigation between the United States and Italy of 1948 (the 'FCN Treaty') provided, in relevant part:

> The nationals, corporations and associations of either High Contracting Party shall not be subjected to *arbitrary or discriminatory* measures within the territories of the other Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, (b) impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise.[5]

This formulation of the standard, which appears to have been common in FCN treaties, has been adapted and reformulated in modern bilateral and multilateral investment treaties. However, despite the more concise formulation, the substance of the standard has remained largely unaltered. In *Noble Ventures* the tribunal was faced with the new formulation, contained in Article II(2)(b) of the US/Romania BIT, which provided protection against arbitrary (or discriminatory) measures in terms that appear to have become standard in modern investment protection treaties:

> Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.[6]

and discriminatory measures'—implied that a breach of the standard required both an arbitrary *and* a discriminatory measure by the State. A recent case involved a bilateral investment treaty where the relevant provision ensured foreign investments 'equitable and reasonable treatment'. See *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Final Award, 11 September 2007. The tribunal found that the 'difference of interpretation between the terms "fair" and "reasonable" is insignificant' and concluded that this standard was in effect identical to the fair and equitable treatment standard. Ibid., paras 271–278.

[3] The prohibition of discrimination is addressed in two separate chapters of this book, dealing with the national treatment and most-favoured-nation treatment standards, respectively. See A. Bjorklund, at Chapter 3 above and A. Ziegler at Chapter 4 above.

[4] *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, Judgment, 20 July 1989.

[5] Article I US/Italy FCN Treaty (1948) (emphasis added).

[6] *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Final Award, 12 October 2005, para. 47.

A similar formulation can be found in Article 10(1) of the Energy Charter Treaty (ECT), perhaps the most important multilateral treaty in the field of foreign investment protection. But unlike Article II(2)(b) of the US/Romania BIT, the ECT formulation protects investors against 'unreasonable' rather than 'arbitrary' measures:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and *no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.* In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.[7]

A similar or identical formulation of the standard is often found in bilateral investment treaties. In *Saluka*, which concerned a formulation identical to the ECT standard, contained in Article 3(1) of the Netherlands/Czech Republic BIT, the tribunal referred to this formulation as the 'non-impairment standard'.[8] This seems an appropriate shorthand, and accordingly it will also be used in this chapter.

B. Non-impairment Standard: Three Perspectives

In arbitral practice, breach of the non-impairment standard is usually asserted alternatively or cumulatively with breaches of other related standards, including expropriation, breach of fair and equitable treatment and failure to provide full security and protection. The relationship between these standards is far from clear, however, in particular if one approaches the issue from the standpoint of a less-known standard such as non-impairment. A number of issues arise, both from the point of view of arbitration strategy as well as of arbitral decision-making. Under what circumstances should the claimant pursue breach of the non-impairment standard as the principal basis of its claim? Should this be done only when an expropriation claim is not available? Or when neither an expropriation claim nor a fair and equitable treatment standard claim is available? What is the scope of application of, and the relationship between, the non-impairment standard and the full security and protection standard? Similarly, from the perspective of

[7] Article 10(1) ECT (emphasis added).

[8] *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006; Article 3(1) of the Netherlands/Czech Republic BIT provides that, with reference to the investments of investors of the other contracting party, '[e]ach Contracting Party [...] shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors'.

the arbitral tribunal, in what circumstances should the tribunal rely on a breach of the non-impairment standard as the *ratio decidendi* of its decision? When an expropriation claim has not been proven? Or when neither an expropriation nor a breach of the fair and equitable treatment standard has been proven? If one or both of these have been established, is it still necessary or appropriate to proceed to deal with the non-impairment claim?

In practice, the non-impairment standard is rarely relied upon by investors as the principal or exclusive basis of their case. It is therefore hardly surprising that arbitral decisions usually do not turn on whether or not this particular standard has in fact been breached. Indeed, there appears to be only one case where the only breach of treaty found by the tribunal was that of the non-impairment standard. In *Lauder*, where the claimant asserted a number of alternative causes of action in addition to impairment, including expropriation, breach of fair and equitable treatment, failure to provide full security and protection, and failure to ensure minimum standard of treatment under international law, the tribunal found, after having examined and dismissed each of these claims, that only the 'arbitrary and discriminatory' measures standard had been breached. However, even if the tribunal found that a breach had occurred, it eventually concluded that no compensation was due because the losses sustained by the claimant were not directly or proximately caused by the measure which the tribunal found to be arbitrary and discriminatory:

> The arbitrary and discriminatory breach by the Respondent of its Treaty obligations constituted a violation of the Treaty. The alleged harm was, however, caused in 1999 by the acts of CET 21, controlled by Mr Železný. The 1993 breach of the Treaty was too remote to qualify as a relevant cause for the harm caused. A finding on damages due to the Claimant by the Respondent would therefore not be appropriate.[9]

More generally, despite the growing body of arbitral jurisprudence dealing with the various substantive standards of investment protection, arbitral tribunals have struggled to develop a consistent approach to the relationships between the various standards and to define, even approximately, their scope of application. As noted above, the opacity of arbitral practice becomes particularly striking when one approaches it from the perspective of a less-known standard such as the non-impairment standard, rather than expropriation or fair and equitable treatment. When analysing the existing jurisprudence, one is constantly confronted with the interrelation between this and the other related standards. While this chapter is limited to pointing out these issues as they arise, the proper scope of application of each of the different standards, or the methodology that arbitral tribunals employ in determining the sequence in which the various causes of action should be considered, clearly deserves further discussion among investment arbitration professionals.

[9] *Lauder*, above n. 2, para. 235.

Given the varying approaches adopted by different tribunals, it seems convenient to analyse the recent arbitral jurisprudence from three different perspectives—the perspective of 'judicial economy', a 'methodological' perspective, and a 'substantive' perspective. Each of these perspectives is addressed below in turn.

The Perspective of 'Judicial Economy'

From the point of view of arbitral decision-making, one of the key issues in analysing the relationship between the non-impairment standard and the other related investment protection standards is whether, in cases where the claimant asserts a number of alternative or cumulative claims, there is a pragmatic way of establishing a priority between the various causes of action such that it would allow the tribunal to dispose of the case by dealing with only one of them rather than addressing each of them one by one.

As noted above, one such possible approach could be based on 'judicial economy'. In this approach, the tribunal would look at the possibility of prioritization from the perspective of valuation and quantification of the claims. In other words, the tribunal would ask itself whether one (or more) of the various causes of action asserted by the claimant should be given priority because, from the quantification and valuation perspective, compensation for a breach of such a standard, if established, would necessarily subsume any remedies that might be available as a result of a breach of all the other standards.

From this perspective, *expropriation* clearly appears to be the primary cause of action under multilateral and bilateral investment treaties. Assuming the various causes of action are asserted on the basis of the same set of facts, expropriation seems logically to be the one to be considered first since compensation for expropriation by definition covers a total loss of business and thus compensates the claimant for the loss of business as a whole. Accordingly, if the loss of business is compensated as a whole (or as a going concern), there can be, virtually by definition, no loss or damage left to be compensated separately based on a breach of the other, 'lesser' standards. Such losses are effectively subsumed by compensation for expropriation.

Conversely, compensation for breach of standards other than expropriation arguably should be granted only if the governmental measure in question falls short of a full-blown expropriation. From a valuation perspective, such other standards are designed to deal with business interruption rather than a total loss of business. Thus, for example, arbitrary and unreasonable governmental measures may damage a business and cause financial losses, but they do not usually result in a total loss of business, which continues after the interruption—if they did, they would effectively amount to expropriation. The only exception would appear to be the situation where the business is destroyed as a result of acts or omissions attributable to the government, which however

neither seeks nor obtains any economic benefit as a result of such destruction. In such a case, the measure in question can perhaps more appropriately be characterized as failure to provide full security and protection (in case the property is destroyed by third parties whose acts are not attributable to the government) or as an arbitrary or unreasonable measure, depending on whether the government is able to provide any (police powers-based) justification for its action, rather than as an expropriation.[10]

Recent case law lends some support to the relevance of judicial economy as an approach to arbitral decision-making. Thus, in *Saluka*, the claimant asserted a number of causes of action, including failure to ensure fair and equitable treatment, impairment, failure to provide full security and protection, and expropriation, in this particular order. Disregarding the order in which the claims were asserted, the tribunal considered the expropriation claim first, dismissing it.[11] Similarly, in *Lauder* the tribunal addressed the expropriation claim first, even though the claimant put it forward as the last item on its list of causes of action. The tribunal did not provide any explanation or justification for its approach, simply stating that it felt it 'appropriate to address the issues in th[at] order'.[12] In *Nykomb*, an ECT case, the tribunal also followed the same approach, prioritizing the expropriation claim even though it appeared to have been the last claim among the claimant's pleadings.[13] In *Occidental* the tribunal also gave priority to the expropriation claim.[14]

By contrast, in *CME* the tribunal adopted a more complex approach. The tribunal first bifurcated the proceedings between liability and quantum, and when dealing with the liability issue, addressed in turn each of the various causes of action asserted by the claimant, finding a series of breaches of the various treatment standards.[15] In its final award on quantum, however, the tribunal quantified the claimant's losses applying only one methodology, focusing on compensating the claimant for the fair market value of the investment as a whole.[16] Of course, this is a methodology that applies in cases where the investment has not only been damaged but irreversibly lost—in other words, in cases of expropriation.

[10] See V. Heiskanen, 'The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal', 8 *Journal of World Investment and Trade* (2007) 315, 230 and notes 31, 36 and 46. For further discussion see below n. 17 and accompanying text.

[11] *Saluka*, above n. 8 paras 252–265.

[12] *Lauder*, above n. 2, paras 193, 195.

[13] *Nykomb Synergetics Technology Holding AB v Latvia*, Stockholm Rules Energy Charter Treaty Arbitration, Final Award, 16 December 2003.

[14] *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA No. UN 3467, Award, 1 July 2004. For further discussion see below n. 25 and accompanying text.

[15] See *CME Czech Republic B.V. v Czech Republic* (UNCITRAL), Partial Award, 13 September 2001, paras 611–614, finding that the facts that constituted an unlawful expropriation also breached fair and equitable treatment, the prohibition of unreasonable or discriminatory measures, the obligation of full security and protection and the minimum standard of treatment under the Netherlands/Czech Republic BIT.

[16] *CME Czech Republic v Czech Republic* (UNCITRAL), Final Award, 14 March 2003.

While the *CME* tribunal can be criticized for having made, in effect, 'unnecessary' findings of liability, to the extent that it went beyond the finding of expropriation, on quantum it in a sense respected judicial economy by refraining from quantifying each of the breaches separately. The question arises, however, whether arbitral tribunals should be even more aggressive and whether they should, when dealing with liability issues, limit their findings to expropriation alone, assuming it can be established, without proceeding any further. There seems to be no serious argument against such a more economical approach. Even in the context of possible annulment proceedings (in an ICSID context) or judicial review (in the context of an *ad hoc* arbitration), it is unlikely that the party seeking annulment or setting aside of the award—which invariably would be the respondent—would argue that the tribunal has failed to exercise its jurisdiction by failing to deal with the other causes of action asserted by the claimant.

In case the expropriation claim fails, does judicial economy provide any guidance for prioritizing the remaining causes of action? This is a more complicated question. From the perspective of quantification and valuation, none of the remaining standards—fair and equitable treatment, full security and protection and the non-impairment standard—would appear to command any priority. A breach of any of these standards does not generally result in a total loss of the investment—otherwise an expropriation would have been found—and in these circumstances judicial economy appears to provide little guidance. As noted above, the only exception would be the situation where the investment has been destroyed as a result of acts or omissions attributable to the government, with no economic benefit to the government itself. In such situations, the government's failure may be properly characterized as a failure to ensure full security and protection (in case of omission) or an arbitrary or unreasonable measure (in case of a positive act), rather than as an expropriation.[17]

'Methodological' Perspective

Where judicial economy fails to provide guidance, the question arises whether the various investment protection standards could be prioritized on another, more formal, or 'methodological' basis. Can it be argued that there is a formal 'hierarchy' among the various standards in the sense that a breach of one of the standards would *ipso jure* amount to a breach of another, related standard? Or vice versa, is it rather arguable that some of the standards are more specific or concrete than others and that therefore an arbitral tribunal should start its analysis from such more specific standards—*lex specialis derogat legi generali*? While arbitral tribunals appear to have recognized that these are legitimate questions, there seems to be no settled methodological approach.

[17] See above n. 10 and accompanying text.

From the perspective of a legal 'hierarchy', and setting aside expropriation, the argument can be made—and indeed has been made and also accepted—that the fair and equitable treatment standard is broader than the two other standards (full security and protection and non-impairment) and that, accordingly, its breach in itself amounts to a breach of the other two standards, or at least one of them. Thus, in *Saluka* the tribunal, having first dismissed the claimant's expropriation claim, went on to determine whether there had been, nonetheless, a breach of the fair and equitable treatment and non-impairment standards. The tribunal first examined the claimant's fair and equitable treatment claim and concluded that it was well-founded. Turning to the non-impairment standard, the tribunal found that this and the fair and equitable treatment standard were 'associated', and that a violation of the former does not 'differ substantially' from a violation of the latter, but merely identifies 'the more specific effects' of any such violation:

> The standard of 'reasonableness' has no different meaning in this context than in the context of the 'fair and equitable treatment' standard with which it is associated, and the same is true with regard to the standard of 'non-discrimination.' The standard of 'reasonableness' therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of 'non-discrimination' requires a rational justification of any different treatment of a foreign investor.
>
> Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the 'fair and equitable treatment' standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor.[18]

The tribunal eventually concluded that the Czech Government had also breached the non-impairment standard, in part on the same grounds which led the tribunal to find a violation of the fair and equitable treatment standard.[19]

However, in *CMS*[20] the tribunal adopted a somewhat different approach. The tribunal first considered the claim for breach of the fair and equitable treatment standard, finding that it had been breached. The tribunal then proceeded to deal with the claimant's claim for breach of the non-impairment standard (prohibition of arbitrary and discriminatory measures). While one would have expected that the tribunal, like the *Saluka* tribunal, would have raised the question of whether a breach of the fair and equitable treatment standard would also, *ipso jure*, amount to a breach of the prohibition of arbitrary or discriminatory measures, the tribunal, somewhat surprisingly, took the reverse approach and asked

[18] *Saluka*, above n. 8, paras 460–461.

[19] Ibid., paras 503–504. See also ibid., para. 465, summarizing its findings and concluding that 'by violating the "fair and equitable treatment" standard, [...] [the Czech Republic] at the same time violated its non-impairment standard'.

[20] *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

itself whether a finding of a breach of the prohibition of arbitrary or discriminatory measures in itself would also constitute a breach of the fair and equitable treatment standard:

> The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.[21]

However, the tribunal did not leave matters there, noting that

> [...] [t]he standard is next related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted.[22]

Based on the requirement of impairment, the tribunal eventually found that, although 'some adverse effects can be noted', there had been no sufficient impairment and dismissed the claim.[23]

Some tribunals appear to have adopted an approach that prioritizes the more specific standards. Thus, in *Noble Ventures* the tribunal decided to disregard, without providing any explanation, the order in which the claimant asserted the various causes of action—which was also the same in which standards were listed in the applicable treaty (the US/Romania BIT)—and chose to deal first with the non-impairment standard rather than the fair and equitable treatment standard or indeed expropriation. Finding neither arbitrariness nor discrimination, the tribunal turned to the fair and equitable treatment standard, making, along the way, some interesting observations about the relationship between the various treaty standards:

> Considering the place of the fair and equitable treatment standard at the very beginning of Art. II(2) [of the US/Romania BIT], one can consider this to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor. As demonstrated above, none of those obligations or standards has been breached. While this in itself cannot lead to the conclusion that the more general fair and equitable treatment standard has not been breached, it remains difficult to see how the judicial proceedings can be regarded as a violation of Art. II(2)(a) of the BIT.[24]

Thus, characterizing the fair and equitable treatment standard as the 'more general standard' and setting aside on this basis, provisionally, the consideration of this particular standard, the tribunal appears to have applied what could be termed a *lex specialis* approach to arbitral decision-making. However, as noted above, the tribunal did not provide any explanation or justification as to why it preferred this particular approach.

[21] Ibid., para. 290.
[22] Ibid.
[23] Ibid., paras 292, 295.
[24] *Noble Ventures*, above n. 6, para. 182.

The non-impairment standard and its relationship to the other investment protection standards has also been raised in a number of other BIT arbitrations, although in none of them has it been asserted by the claimant as the principal or exclusive cause of action. Apart from *Saluka* and *Noble Ventures*, perhaps the most elaborate analysis of the standard has been conducted in *Occidental*[25] and *MTD*.[26]

In *Occidental* the claimant again raised a number of causes of action, including failure to ensure fair and equitable treatment, breach of the non-impairment standard, and expropriation, in this particular order.[27] The tribunal first considered the expropriation claim, dismissing it as being manifestly without merit and thus inadmissible. It then decided to examine the claimant's remaining claims 'following the reverse order', which led it to consider first the impairment claim (ie prohibition of arbitrary or discriminatory treatment).[28] Stressing that 'the claim that these measures [complained of by the claimant] are also discriminatory has a meaning under this Article only to the extent that impairment has occurred', the tribunal was eventually persuaded that the respondent had acted arbitrarily, 'at least to an extent'.[29] The tribunal then went on to consider the claim that the respondent had failed to honour its obligation to accord fair and equitable treatment. The tribunal found a breach and concluded that

> [...] [i]n the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full security and protection.[30]

Thus, the tribunal effectively subsumed the full security and protection standard under the fair and equitable treatment standard, while treating the non-impairment standard as a stand-alone cause of action. This approach may well have been adopted by the tribunal because it reflected the structure of the US/Ecuador BIT itself, since the BIT in question was somewhat unusual in that the non-impairment standard was contained in a separate provision of the BIT (Article II (3)(b)), whereas the fair and equitable treatment and the full security and protection standards were included in the same provision (Article II (3)(a)).

In *MTD* the claimant alleged a series of breaches of the Chile/Malaysia BIT and certain other BITs, based on a most-favoured-nation clause, including failure to ensure fair and equitable treatment, breach of foreign investment contracts, breach of the non-impairment standard (prohibition of unreasonable or

[25] *Occidental*, above n. 14.

[26] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

[27] *Occidental*, above n. 14, para. 36.

[28] Ibid., para. 158.

[29] Ibid., paras 162, 165.

[30] Ibid., para. 187. See also *Azurix v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras 406–408.

discriminatory measures) and expropriation. In this case, however, the tribunal decided to follow religiously the order in which the claimant had asserted its claims. When reaching the non-impairment claim, the tribunal recognized the potential overlap between the various treatment standards, including that between fair and equitable treatment and the non-impairment standard. Observing that '[t]o a certain extent, this claim [ie the non-impairment claim] has been considered by the tribunal as part of the fair and equitable treatment', the tribunal noted that the approval of an investment against the Government urban policy—the measure that formed the basis of the claimant's claims—'can be equally considered unreasonable'.[31] However, the tribunal found no discrimination, and although the reasoning is not entirely clear, eventually appears to have concluded that there had been no breach of the BIT on this account.[32]

Instead of seeking to establish an order of priority among the many causes of action, one possible methodological approach that indeed could be adopted is that the arbitral tribunal simply respects the manner in which the claimant has chosen to argue its case and examines the causes of action in the same order in which they have been asserted by the claimant. This approach would have the advantage of avoiding any surprises to the parties, even though it might often be considered rather inefficient from the perspective of judicial economy, nor particularly creative from the point of view of legal methodology. Indeed, in practice, instead of following the pleadings of the claimant, certain arbitral tribunals have preferred the opposite approach where they not only disregard the order in which the claimant has chosen to assert the causes of action it relies upon, but simply select one of them as a basis of their decision and disregard, without discussion, all others. This approach, which could be characterized as a *jura novit curia* approach, in effect equates arbitral tribunals with courts—according to this approach, arbitral tribunals, like courts, are not bound by the parties' pleadings and remain free to choose the basis of their decision.[33]

[31] *MTD*, above n. 26, para. 196.

[32] See the dispositif of the award, *MTD*, above n. 26, para. 253, referring only to a breach of Article 3(1) of the Malaysia/Chile BIT, which contains the fair and equitable treatment standard, but not mentioning Article 3(3) of the Croatia/Chile BIT, which contains the impairment standard. For a discrimination claim see also *Champion Trading Co v Egypt*, ICSID Case No. ARB/02/09, Final Award, 27 October 2006, paras 125–156, finding no discrimination since the relevant parties were not in 'like situations'.

[33] The *jura novit curia* has been explicitly endorsed by the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), in a number of decisions. Perhaps the most opportune in this context is the formulation adopted by the ICJ in *The Application of the Convention of 1902 Governing the Guardianship of Infant (Netherlands v Sweden)*, Judgment, 28 November 1958: '[The Court] retains its freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose.'