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The Dichotomy of Obligations of Conduct and Result in International Investment Law

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Abstract

The content of an international obligation must be ascertained before the investment tribunals have decided that the international obligation was breached. Whilst some obligations in investment treaties require a result to be attained by states or investors, other obligations require only their best efforts.

The dichotomy of obligations of conduct and result is a useful tool in analysing the content of international obligations derived from standards of treatment contained in investment treaties, thereby assisting in determining international responsibility.

Firstly, the standard of full protection and security is analysed through the lenses of the dichotomy. Secondly, the procedural obligations stemming from dispute resolution provisions are examined, including the obligation to submit to arbitration, the obligation to comply with arbitral awards, and the obligation to recognise and enforce the latter. Thirdly, the dichotomy serves to enhance the understanding of investors' obligations to respect human rights under investment treaties. The dichotomy may thus assist in establishing the content of the human rights' obligation in question, and thus the investor's responsibility for its breach.

Keywords

Dichotomy; International Obligation; Investment Protection; Obligation of Conduct; Obligation of Result; Primary Rules; Secondary Rules; State Responsibility.

1 Obligation of Conduct and Result as a Grand Dichotomy of International Law

The recognised legal theorist *Norberto Bobbio* dedicated one of his writings to "grand dichotomies".[1] He found it striking that dichotomies were omnipresent in social sciences, including the legal theory.[2] Their characteristic feature being that inclusion of the one part of the dichotomy means exclusion of the other part, and vice versa: *tertium non datur*.[3]

Dichotomy thus refers to a *"division of a whole into two parts, as with a class into two mutually exclusive and jointly exhaustive subclasses"*[4]. The purpose of dichotomies is to facilitate the understanding of the phenomenon as a one whole by analysing each of two parts separately.[5] Dichotomies may have an explanatory value to the extent one needs to understand the core of the problem. Yet, they may equally oversimplify reality, thus omitting details important for the understanding of the phenomenon.

In any case, dichotomies are alive and kicking in international legal theory.[6] One of grand dichotomies, which has regained attention of theorists

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1 BOBBIO, N. *Dalla struttura alla funzione. Nuovi studi di teoria del diritto.* Milano: Edizione di Comunità, 1977, p. 145.

2 Ibid.

3 Ibid., pp. 147–148; For the roots and explanation of *tertium non datur* in formal logic see CAGLIOTTI, G. The Tertium Non Datur in Aristotle's Logic and in Physics. *Journal of the Mechanical Behavior of Materials* [online]. 1994, Vol. 5, no. 3, pp. 217–224 [cit. 27. 7. 2022]. Available at: https://www.degruyter.com/document/doi/10.1515/JMBM.1994.5.3.217/html

4 GRAILING, A. Dichotomy. In: HONDERICH, T. (ed.). *The Oxford Companion to Philosophy.* New York: Oxford University Press, 2005, p. 213.

5 See DESCARTES R. *A Discourse on the Method.* Oxford: Oxford University Press, 2006, p. 17: *"The second* [rule] *was to divide all the difficulties under examination into as many parts as possible, and as many as were required to solve them in the best way."*

6 This seems to have to do with the revived interest in the analysis of the content of obligations and their classification in the doctrine of international law. See generally D'ARGENT, P. Les obligations internationales. In: *Recueil des Cours 2021*. Boston, Leiden: Brill, Nijhoff, 2021, Vol. 417, pp. 150–202.

of international law, is that of obligations of conduct and obligations of result.[7]

International responsibility for breach of an obligation of conduct arises, if the subject bound by the international obligation does not undertake the conduct required by the latter.[8] Whereas obligation of result is violated if the subject of law does not eventually achieve the result prescribed by international law (see the detailed discussion below).

Nonetheless, compared to publications on general international law, the dichotomy has attracted only a limited attention in the area of international investment law.[9] Two explanations exist for this. First, distinguishing between the two kinds of international obligations is of no use in the field of international investment law. Second, this may be a gap in the academic debate. Bearing in mind the words of Sir *James Crawford* that *"whether there has been a breach of an obligation always depends on the precise terms of the obligation, and on the facts of the case. Taxonomy may assist in, but is no substitute for, the interpretation and application of primary rules"*[10], it will be sought to demonstrate that the dichotomy is a useful analytical tool also in international investment law.

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7 See CRAWFORD, J. *State Responsibility. The General Part*. Cambridge: Cambridge University Press, 2014, pp. 220–226; WOLFRUM, R. Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations. In: ARSANJANI, M. H. et al. (eds.). *Looking to the Future. Essays on International Law in Honor of W. Michael Reisman*. Leiden, Boston: Martinus Nijhoff Publishers, 2011, p. 366; ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility*. Oxford: Oxford University Press, 2010, pp. 371–378; FOCARELLI, C. *International Law*. Cheltenham: Edward Elgar, 2019, p. 600; BARBOZA, J. *Derecho internacional público*. Buenos Aires: Víctor P. de Zavalía, 2008, p. 411; PALOMBINO, F. M. *Introduzione al diritto internationale*. Bari: Laterza, 2019, p. 196.

8 Variations in terminology exist. The original French (domestic law) expressions are *"obligation de moyen"* and *"obligation de résultat"*. However, the recent publications in the field of international law use the expressions "obligation of conduct" and "obligation of result". It is also possible to find the expression of *"obligation de comportement"* in French-written, internationalist, literature, which may be translated as "obligation of conduct". The terminology "obligation of conduct" and "obligation of result" will be used throughout this paper.

9 The exception is BLANCO, S. M. *Full Protection and Security in International Investment Law*. Cham: Springer, 2019, p. 338.

10 CRAWFORD, J. *State Responsibility. The General Part*. Cambridge: Cambridge University Press, 2014, p. 223.

2 Methodological Discussion and Caveats

The key research question is whether the classification of an obligation as one of conduct or result may have an impact on finding states or investors responsible for violations of investment treaties.

In order to answer this question, a doctrinal research will be employed in this paper. It starts by exploring the roots of the dichotomy in domestic law and continues with the observation of the process of it becoming part of the domain of international law. Thereby, the meaning of the dichotomy is sought to be ascertained. Subsequently, it will be examined whether the dichotomy plays any role in the cases of the International Court of Justice ("ICJ"). Thereafter, regard will be had to the analysis of international obligations under investment treaties through the lenses of the dichotomy of obligations of conduct and result.

Overall, this paper will offer conclusions, which are based on a combination of deductive and inductive reasoning. The research results submitted in this paper do not claim conclusiveness. Rather, this paper attempts to open the discussion on the dichotomy on the terrain of international investment law.

It will be submitted that two criteria should be taken into account in classifying an international obligation as one of conduct or result. Firstly, the utility and effectiveness of international obligation are of paramount importance for the classification. Thus, the classification that gives the international obligation an *effet utile* is to preferred.

Secondly, another criterion is a viability and realisability of the international obligation by its addressee, for *ultra posse nemo tenetur*.[11] As a result, an international obligation in an investment treaty cannot be classified as one of conduct or result, if the former or the latter would make it objectively impossible for

[11] For the meaning of the maxim see FELLMETH, A. X., HORWITZ, M. *Guide to Latin in International Law.* New York: Oxford University Press, 2009, p. 283.

the state or the investor to comply with it.[12] To prevent misunderstanding, however, this does not relieve the state or investor bound by the obligation to perform it in good faith as required by Article 26 of the VCLT.

The criteria of utility and reasonableness thus may inform the means of interpretation contained in the Article 31 para. 1 of the VCLT. Firstly, good faith as an overarching consideration in the use of the means of interpretation in the latter provision excludes the possibility of an unreasonable interpretation of treaty provisions.[13] This applies also to the content of international obligations contained therein. Secondly, in interpreting treaty terms containing international obligations, the object and purpose of the provision has to be taken into account in deciding whether the obligation is one of conduct or result.[14] Thus, the classification of the obligation in accordance with the purpose of the treaty provision containing it should be preferred.

Whilst the same international obligation might be classified as one of conduct in one point of time and as that of result in another, the use of the criteria of utility and reasonableness may help to reduce the risk of too frequent changes in the classification of an international obligation by international courts and arbitral tribunals.

Moreover, the dichotomy of obligations of conduct might not necessarily be seen as exhaustive.[15] For instance, international obligations of due

12 The idea that an obligation cannot come into existence, if its object is impossible, has its roots in Roman law. See BĚLOVSKÝ, P. *Obligace z kontraktu. Smlouva a její vymahatelnost v římském právu*. Praha: Auditorium, 2021, p. 166. Furthermore, the equivalent maxim *"ad impossibilia nemo tenetur"* is used in the law of international treaties with regard to "supervening impossibility of performance" under Article 61 of the Vienna Convention on the Law of Treaties ("VCLT"). It cannot be thus presumed that a treaty party has assumed an international obligation the former will not be able to perform. For a reflection of the maxim within Article 61 of the VCLT see GIEGERICH, T. Article 61. In: DÖRR, O., SCHMALENBACH, K. (eds.). *Vienna Convention on the Law of Treaties: A Commentary*. Berlin: Springer, 2012, p. 1052.

13 See YASSEEN, M. K. L'interpretation des traités d'après la Convention de Vienne sur le droit des traités. In: *Recueils des cours 1976*. Leiden: Brill, 1978, Vol. 151, p. 23; DÖRR, O. Article 31. In: DÖRR, O., SCHMALENBACH, K. (eds.). *Vienna Convention on the Law of Treaties: A Commentary*. Berlin: Springer, 2012, p. 548.

14 See DÖRR, O. Article 31. In: DÖRR, O., SCHMALENBACH, K. (eds.). *Vienna Convention on the Law of Treaties: A Commentary*. Berlin: Springer, 2012, p. 545.

15 See WOLFRUM, R. Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations. In: ARSANJANI, M. H. et al. (eds.). *Looking to the Future. Essays on International Law in Honor of W. Michael Reisman*. Leiden, Boston: Martinus Nijhoff Publishers, 2011, p. 366.

diligence may be found as a third kind of international obligation, different to obligations of conduct or result.[16] Thus, as Sir *James Crawford*, the former International Law Commission's Rapporteur for the international responsibility of states, rightly pointed out, international obligations constitute more of a "spectrum" than just two kinds of them.[17]

For the sake of clarity, however, no further decomposition of obligation of conduct into an obligation of conduct in a strict sense and obligation of due diligence or prevention as its specific manifestations will be sought for.[18] This further taxonomy may be legitimate. Yet, it does not change the fact that obligations of diligence and prevention are, after all, specific obligations of conduct.[19]

Furthermore, the dichotomy of obligations of conduct and result relates to the interpretation of the primary rules in an investment treaty.[20] Thus, investment treaties as the main source of rights and obligations of states and investors are subjected to interpretation under the VCLT's rules.[21] In the process of interpretation, the two obligations may help, it is argued, in clarifying the content of state and investors' obligations in the investment treaty.

As the distinction between obligation of conduct and result concerns the content of the international obligation included in a treaty provision (primary rule), it is assumed that the dichotomy may be applied equally to state and investors' obligations; and that notwithstanding the fact that the investors'

16 FOCARELLI, C. *International Law*. Cheltenham: Edward Elgar, 2019, p. 600.

17 CRAWFORD, J. *State Responsibility. The General Part.* Cambridge: Cambridge University Press, 2014, p. 223.

18 That a link exists between obligations of conduct and result on the one hand and obligation of due diligence on the other hand has been mentioned by ŠTURMA, P. "Náležitá péče" v mezinárodním právu: obecný pojem s variabilním obsahem. *Právník*. 2021, Vol. 160, no. 6, p. 402.

19 Along similar lines, DISTEFANO, G. *Fundamental of Public International Law. A Sketch of the international Legal Order*. Leiden, Boston: Brill, Nijhoff, 2019, p. 697.

20 For the relationship between interpretation and the dichotomy see KOLB, R. *The International Law of State Responsibility. An Introduction*. Cheltenham: Edward Elgar Publishing, 2017, p. 43.

21 Art. 31–33 VCLT.

responsibility need not be governed by the same set of secondary rules as that of states.[22]

Finally, this paper does not examine all standards of investment protection. Thus, only international obligations stemming from investment treaties, which are suitable for demonstrating the significance of the dichotomy of obligations of conduct and result, have been selected.

3 The Domestic Origins of the Dichotomy

The French scholar *René Demogue* is said to be the spiritual father of the dichotomy.[23] According to Demogue, some civil obligations are breached by a conduct *(obligations de moyen)*, whereas others when a particular result is not attained *(obligations de résultat)*.[24]

For instance, a mere attempt to deliver goods to the buyer would not be the sufficient performance of a sales contract and therefore triggers responsibility of the seller. Whilst if the doctor made his best efforts in having cured his patient, he will not bear the responsibility if the patient is not in good health eventually. Thus, the debtor's commitment with regard to obligation of result is to achieve the result, whereas obligation of conduct entails the commitment to undertake due diligence or best efforts in performing the obligation, but not a result, not being defining features of the latter obligation.

Whilst obligations of result are rather strict, obligations of conduct are more flexible.[25] The latter thus give the debtor more leeway in performing

22 Specific regimes of international law may have own rules of responsibility that are different to those of general international law, as foreseen in the Article 55 of the Draft Articles on State Responsibility for Internationally Wrongful Acts ("DARSIWA"). – See INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. Pp. 140–141 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

23 COULON C. René Demogue et le droit de la responsabilité civile. *Revue interdisciplinaire d'études juridiques* [online]. 2006, Vol. 56, no. 1, pp. 137–158 [cit. 27. 7. 2022]. Available at: https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2006-1-page-137.htm

24 DEMOGUE, R. *Traité des obligations en général. Tome V. Sources des obligations (suite et fin)* [online]. Paris: Libraire Arthur Rousseau, 1925, pp. 538–542 [cit. 27. 7. 2022]. Available at: https://gallica.bnf.fr/ark:/12148/bpt6k6473507n/f552.item.texteImage

25 ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility.* Oxford: Oxford University Press, 2010, p. 375.

its civil obligation. It is easier for the claimant to prove that the result has not been attained, and therefore the obligation has been breached. The only excuse for the debtor would be the circumstance of *force majeure* or another circumstance precluding wrongfulness.[26]

With regard to obligation of conduct, it is necessary for the injured party to prove the fault on the part of the wrongdoer in performing the latter's contractual or statutory obligation. In other words, the injured party will have to prove that the wrongdoer has not used all means to perform its obligation of conduct. As a result, the distinction between obligations of conduct and result has a significant importance for proving a breach of an obligation.

Nonetheless, the dichotomy is not recognised in common law systems.[27]

4 The Dichotomy and the International Responsibility of States

International responsibility of states requires two elements to arise: attribution of conduct to the state and breach of an international obligation.[28]

The breach of international obligation may be defined as the difference between the conduct or result required by international law and the actual conduct of the state or another subject of international law.[29] As a result, it is necessary to ascertain the content of the international obligation binding on the wrongdoer before finding its international responsibility.[30]

Thus, if the state has not attainted the result expected by the international obligation, then the state will bear responsibility for its breach, unless it shows there has been either a circumstance precluding wrongfulness under general

26 ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility.* Oxford: Oxford University Press, 2010, p. 375.

27 Ibid.

28 Art. 2 DARSIWA. In: INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. Pp. 34–36 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

29 DISTEFANO, G. *Fundamental of Public International Law. A Sketch of the international Legal Order.* Leiden, Boston: Brill, Nijhoff, 2019, p. 696.

30 Ibid.

international law or a defence based on the provisions of an investment treaty.[31]

The ascertainment of the obligation's content requires a transparent and well-founded interpretation of the provision containing the obligation and the correct assessment of the facts of the case. This includes that investment tribunals will identify whether the state or the investor should have undertaken their best efforts, or reached a particular result, as international responsibility of the former or the latter hinges on this question.[32]

The classification of international obligations as ones of conduct or result then entails three layers of analysis. First, *Roberto Ago*, the former Special Rapporteur of the International Law Commission, had introduced the dichotomy into the draft of what was to become the DARSIWA. Albeit, *Ago's* proposals have not eventually been adopted (see 4.1 below). Second, the ICJ expressly endorsed the dichotomy in its case law (see 4.2 below). Third, as has been intimated above, a number of qualified publicists, namely those with the civil-law background, have seen the distinction as viable and useful.[33]

Moreover, the dichotomy plays role with regard to the time aspect. The obligation of result is breached as soon as the result has not been ultimately achieved.[34] The obligation of conduct is breached whenever the conduct prescribed by a rule of international law has not been adopted.[35] This may have important legal consequences. Among others, it enables the injured party to adopt a reaction in accordance with international law to the breach of the international obligation in question. Generally speaking, the most

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31 For a detailed classification of defences against responsibility in international law see PADDEU, F. *Justification and Excuse in International Law: Concepts and Theory of General Defences*. Cambridge: Cambridge University Press, 2018, pp. 95–128; see also TOMKA, P. Defenses Based on Necessity under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties. In: KINNEAR, M. et al. (eds.). *Building International Investment Law. The First 50 Years of ICSID*. Alphen aan den Rijn: Kluwer Law International, 2016, pp. 472–492.

32 See DUPUY, P. M., KERBRAT, Y. *Droit international public*. Paris: Éditions Dalloz, 2018, p. 539.

33 See the majority of authors in the footnote 7 above.

34 KOLB, R. *The International Law of State Responsibility. An Introduction*. Cheltenham: Edward Elgar Publishing, 2017, p. 41.

35 See INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. P. 54 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

important role assigned to this dichotomy is establishing of the breach of international obligation and its proof.

International obligation may then be defined as a duty agreed to or imposed on subjects of international law by a treaty, custom or another source of international law.[36] The "corollary" of the breach is responsibility of the wrongdoer for it.[37]

However, the dichotomy does not seem to have constituted a part of "general principles of law" as a source of international law for the purposes of Article 38 para. 1 letter c) of the ICJ's Statute due to the lack of the general use of the dichotomy in a representative sample of domestic legal systems (let aside whether a dichotomy may be a "principle" of law).[38]

4.1 The ILC Special Rapporteur Ago's Approach to the Dichotomy

Roberto Ago found the distinction between obligations of conduct of such importance that he wished it to have become part of the codification of international responsibility of states.

Ago thus proposed Articles 20 and 21 as follows:

> *"Article 20. Breach of an international obligation calling for the State to adopt a specific course of conduct.*

36 *Sir Jennings* and *Sir Watts* aptly emphasise that international treaties are *"a source more of rights and obligations than law"*. JENNINGS, R. Y., WATTS, A. (eds.). *Oppenheim's International Law. Volume I. Peace.* London: Longman, 1996, p. 31. However, DARSIWA lack any definition of international obligation, which seems to be the International Law Commission's (ILC) deliberate choice. See CRAWFORD, J. *State Responsibility. The General Part.* Cambridge: Cambridge University Press, 2014, p. 93. For an attempt to define obligation in the settings of multilateral treaties see DOMINICÉ, C. The International Responsibility of States for Breach of Multilateral Obligations. *European Journal of International Law.* 1999, Vol. 10, no. 2, p. 354.

37 *"La responsabilité est le corollaire necessaire du droit."* – Decision of the PCIJ of 1. 5. 1925, *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni)*. In: *United Nations. Reports of International Arbitral Awards* [online]. P. 641 [cit. 27. 7. 2022]. Available at: https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlaw615-742arbitration.pdf

38 That a legal principle must be sufficiently general (concerning the doctrine of "unclean hands") was confirmed in the PCA Case of *Yukos Universal Limited (Isle of Man) and the Russian Federation*: *"General principles of law require a certain level of recognition and consensus."* – Final Award of 18. 7. 2014, *Yukos Universal Limited (Isle of Man) and the Russian Federation*, PCA Case No. AA 227. In: *Italaw* [online]. Para. 1359 [cit. 23. 10. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf

> *A breach by the State of an international obligation specifically calling for it to adopt a particular course of conduct exists simply by virtue of the adoption of a course of conduct different from that specifically requires.*
>
> *Article 21. Breach of an international obligation requiring the State to achieve a particular result*
>
> *1. A breach of an international obligation requiring the State to achieve a particular result in concreto, but leaving it free to choose at the outset the means of achieving that result, exists if, by the conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result.*
>
> *2. In cases where the international obligation permits the State whose initial conduct has led to a situation incompatible with the required result to rectify that situation, either by achieving the originally required result through new conduct or by achieving an equivalent result in place of it, a breach of the obligation exists if, in addition, the State has failed to take this subsequent opportunity and has thus completed the breach begun by its initial conduct."*[39]

Article 20 thus speaks of an obligation requiring specific course of conduct. As a result, international responsibility would arise if the state did not adopt this specific conduct. This formulation is rather strict, leaving no room to the state for choosing the means to fulfil its international obligation.[40]

Article 21 para. 1 of *Ago's* proposal then provided that the state would violate its international obligation requiring the specific result, if it did not choose among the possible means to achieve the result the one that would enable the realisation of the result required by the international obligation. The means to achieve the result were left to the state's free choice.[41] Compared to Article 20, this rule was leaving more leeway to the state to meet its international obligations.

Article 21 para. 2 was based on the idea of a complex breach of international obligation. It may be also termed, for our working purposes,

39 INTERNATIONAL LAW COMMISSION. Sixth report on State responsibility by Mr. Roberto Ago, Special Rapporteur. *United Nations* [online]. Pp. 8, 20 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_302.pdf

40 See DUPUY, P. M. Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility. *European Journal of International Law*. 1999, Vol. 10, no. 2, p. 376.

41 See COMBACAU, J. Obligation de résultat et obligation de comportement quelques questions et pas de réponse. In: *Mélanges offerts à Paul Reuter. Le droit International: unité et diversité*. Paris: Pedone, 1981, p. 187.

as a "second-chance rule". According to this provision the state, which does not attain the result required by an international obligation, may remedy such situation by the new conduct that would achieve the purpose or ensure the result equivalent to the one originally required by the international obligation. The state is then responsible for the breach of an international obligation, if, and only if, it does not use one of these two alternatives.

This concept of a complex breach of international obligation stems from the substantive requirement of exhaustion of local remedies as a precondition for finding that a state's conduct amounts to breach of an international obligation. This has particular significance when the foreigner as the injured party seeks reparation of the injury against the state breaching, for instance, the minimum standard of treatment.[42]

Ago's proposals of Articles 20 and 21 eventually did not find their way into DARSIWA.[43] On the one hand, the added value of the *Ago's* analytical work is undeniable in that he has demonstrated the complexness of the content of international obligations and thus responsibility for their breach. On the other hand, unfortunately, *Ago* also radically altered the traditional, civil-law, understanding of the divide.[44] This would not be problematic as not all principles of domestic law may be adopted into international law under the heading of general principles of law as per Article 38 para. 1 letter c) of the Statute of the ICJ (see also 4 above).[45]

However, *Ago* possibly reached the opposite meaning of the obligation of conduct and result.[46] Suffice it to have a look into the commentary to the Article 20 that mentions side by side the example the directive as the European Union legal act, which binds as to the result sought, and

42 See KOLB, R. *The International Law of State Responsibility. An Introduction*. Cheltenham: Edward Elgar Publishing, 2017, p. 42.

43 ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility*. Oxford: Oxford University Press, 2010, p. 376.

44 Ibid., p. 375.

45 See, e.g., Award of 31. 10. 2011, *El Paso Energy International Company and The Argentine Republic*, ICSID Case No. ARB/03/15. In: *Italaw* [online]. Para. 622 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf

46 See DUPUY, P. M. Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility. *European Journal of International Law*. 1999, Vol. 10, no. 2, p. 376.

the Article 2 of the International Covenant on Civil and Political Rights providing that *"each party* […] *undertakes to take the necessary steps* […] *adopt such legislative and other measures"*[47]. As a result, the first example, leaving aside the specific character of the EU law, is certainly one of result which is the defining feature of the international obligation, whereas the second example requires a conduct by the state in the sphere of its internal law.

Generally speaking, it seems that the confusion in the proposals is caused by the lack of clarity as to an overlap or difference (?) between positive "steps" and "particular course of conduct" and with regard to a legal significance assigned to the "result" in the particular instance of an international obligation. However, as rightly noted by *Dupuy*, it is the inadequate way the proposal describes the content of international obligations and resulting consequences in the sphere of international responsibility that is fraught with difficulties, not the terminology.[48]

In fact, it was *Dupuy* who returned to the dichotomy its original civil-law meaning.[49] As a result, obligation of conduct requires best efforts, whereas obligation of result demands the specific result. In the former case, if the wrongdoer shows he has made his best efforts, he will not sustain international responsibility. Also, in this case a result is sought, but the difference to an obligation of result is that the result is not the defining feature of the international obligation. Thus, the mere fact that it has not been reached does not trigger responsibility. This approach largely corresponds to what may be found in the ICJ's case law (see 4.2 below).

Eventually, the dichotomy of obligations of conduct and result did not find its way into DARSIWA. Only a commentary to the Article 12 of DARSIWA

47 INTERNATIONAL LAW COMMISSION. Sixth report on State responsibility by Mr. Roberto Ago, Special Rapporteur. *United Nations* [online]. P. 9 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_302.pdf; with reference to International Covenant on Civil and Political Rights.

48 ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility.* Oxford: Oxford University Press, 2010, p. 376.

49 DUPUY, P. M. Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility. *European Journal of International Law*. 1999, Vol. 10, no. 2, p. 378.

mentions the distinction between the two kinds of obligations.[50] The question then arises as to the interpretation of the silence of the DARSIWA's black-letter rules on the dichotomy.[51]

It is submitted that this silence is not a negation of the dichotomy.[52] Given the numerous references to the dichotomy in the existing literature on international law and cases endorsing it, the distinction between obligations of conduct and result has not disappeared from international law.[53] The role of the dichotomy seems to formally rest within the teachings of most qualified publicists under the Article 38 para. 1. letter d) of the Statute of the ICJ.[54] In this connection, it seems useful to have a look at the ICJ's approach to the dichotomy in its case law.

4.2 The Identification of the Dichotomy in the ICJ's Case Law

The ICJ's case law is of particular importance for our present context for two reasons. For first, the ICJ is a World Court in the sense that it is *"the principal judicial organ of the United Nations"*[55]. Given the fact that the United Nations assembles almost 200 states, the ICJ's role in unfolding and declaring international customary rules cannot be overstated.[56]

50 INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. P. 56 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

51 See ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility*. Oxford: Oxford University Press, 2010, p. 376.

52 See an interesting examination of the role and kinds of silence in music by FERRARI, E. *Ascoltare il silenzio. Viaggio nel silenzio in musica*. Milano-Udine: Mimosis Accademia del Silenzio, 2013, pp. 13–29. Nevertheless, two kinds of silences seem to exist in international law. First of them has no legal significance as such. By contrast, the second one constitutes a *"silence circonstancié"*, which combined with particular legal and factual circumstances may speak volumes. This latter kind of silence has been recalled in Dissenting Opinion of Professor Georges Abi-Saab of 28. 10. 2011 to the Decision on Jurisdiction and Admissibility of, ICSID Case No. ARB/07/5. In: *Italaw* [online]. Para. 169–170 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0237.pdf

53 See MALENOVSKÝ, J. *Mezinárodní právo veřejné: obecná část a poměr k jiným právním systémům*. Brno: Masarykova univerzita, 2020, p. 262.

54 The Statute of the International Court of Justice.

55 Art. 92 United Nations Charter.

56 See, *ex multis*, DUMBERRY, P. *The Formation and Identification of Rules of Customary International Law in International Investment Law*. Cambridge: Cambridge University Press, 2016, pp. 46–47.

For second, and connected therewith, the ICJ's cases may be useful in the context of international investment law.[57] For instance, investment tribunals have found a yardstick for measuring whether a host state committed denial of justice in the ICJ's ELSI case.[58]

In Avena, the ICJ found that obligations stemming from the international consular law required the United States to enable a reassessment of the capital punishment imposed on a number of Mexican nationals. The ICJ thus *"observe[d] that this obligation of result is one which must be met within a reasonable period of time. Even serious efforts of the United States, should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the Avena Judgment, would not be regarded as fulfilling this obligation of result."* [59]

It seems that the ICJ's reasoning is connected to purposive interpretation of the international obligation in question. Hence, the purpose of the international obligation in issue requires that the persons condemned to death must have an actual access to justice, viz the possibility to request new examination of their case. There is then a tenuous link between purposive interpretation and efficiency of the treaty terms (see 2 above). Therefore, the obligation in issue in the *Avena* case cannot be considered as one of conduct, but that of result, since otherwise such obligations would be deprived of any content and effects.

In *Application of the Genocide Convention*, the ICJ stated concerning the nature of the obligation to prevent genocide the following: *"It is clear that the obligation*

57 The present author is not overoptimistic about the ICJ's role in the decision-making of investment tribunals though. On the other hand, the ICJ seems to be one of few international courts or tribunals, alongside with the European Court of Human Rights and Iran-United States Claims Tribunal, whose case law may be of importance for investment cases. See the detailed discussion on the role of the ICJ cases in the decision-making of investment tribunals, and *vice versa*, in PELLET, A. The Case Law of the ICJ in Investment Arbitration. *ICSID Review*. 2013, Vol. 28, no. 2, pp. 223–240.

58 See, e.g., Decision on Jurisdiction and Liability of 24. 8. 2015, *Dan Cake (Portugal) S.A. and Hungary*, ICSID Case No. ARB/12/9. In: *Italaw* [online]. Para. 146 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw4457.pdf; with reference to Judgment of the ICJ of 20. 7. 1989, *Elettronica Sicula S.p.A. (ELSI), (United States of America vs. Italy)*. In: *International Court of Justice* [online]. P. 15 [cit. 7. 7. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/76/076-19890720-JUD-01-00-EN.pdf

59 Request for Interpretation of the Judgment of 31. 3. 2004 in the *Case concerning Avena and Other Mexican Nationals (Mexico vs. United States of America)*. In: *International Court of Justice* [online]. Para. 27 [cit. 7. 7. 2022]. Available at: https://www.icj-cij.org/en/case/139

in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide."[60]

Thus, in accordance with the ICJ's dictum, it is not possible to absolutely exclude that genocide would arise, whereas it is perfectly legitimate to request the state to take all steps to prevent it. The ICJ thus views the obligation of prevention through the prism of the dichotomy of obligations of conduct and result.[61] Moreover, the ICJ clearly engages reasonableness in what may be expected of the state in performing the international obligation in question.

In summary, these cases show two things. First, the classification of the obligation as one of conduct or result depends on the criteria of purpose and efficiency of the international obligation in question. Second, the ICJ impliedly reflects the maxim *ultra posse nemo tenetur* (see 2 above). As a result, it is reasonable to interpret the treaty rule in such a way that the performance of the international obligation contained therein is objectively not beyond the powers of the subject bound by the obligation.

5 Standards of Treatment and International Obligations in Investment Treaties

Investment treaties that they contain standards of treatment of investors and investments.[62] Standards are, in a nutshell, international legal rules formulated in a general fashion.[63] As opposed to rules, they provide a general guidance as to how host states must behave towards foreign investors. Only

60 Application de la convention pour la prévention et la répression du crime de génocide *(Bosnie-Herzégovine vs. Serbie-et-Monténégro)*. In: *International Court of Justice* [online]. Para. 430 [cit. 27. 7. 2022]. Available at: https://www.icj-cij.org/fr/affaire/91/arrets

61 See DISTEFANO, G. *Fundamental of Public International Law. A Sketch of the international Legal Order*. Leiden, Boston: Brill, Nijhoff, 2019, p. 697.

62 ORTINO, F. Refining the Content and Role of Investment "Rules": and "Standards": A New Approach to International Investment Treaty Making. *ICSID Review*, 2013, Vol. 28, no. 1, p. 155.

63 As to the difference between standards and rules, including the advantages and disadvantages of the use of one or another see Ibid., pp. 153–154.

recently, the drafters of new investment agreements have included specific kinds of breaches of these standards.[64]

The standards' advantage over rules lies in their flexibility, as not all specific host state's wrongdoings against investors and investments could have been foreseen at the time of the making of the investment treaty. Nonetheless, international obligations stemming from these standards will have to be implied in most cases by interpretation of the investment treaty provisions in accordance with the VCLT's interpretation rules by adjudicators in the investment dispute resolution (see also 5.2 below).

Investment treaties frequently include these standards: fair and equitable treatment; full protection and security; prohibition of arbitrary and discriminatory measures; most-favoured-nation treatment; and national treatment.[65] In addition, investment treaties contain other international obligations of states, namely prohibition of expropriation without compensation; umbrella clauses; and transfer of capital clauses.[66]

Investment standards may be divided into absolute and relative ones.[67] The criterion for such distinction is whether a comparison with other investors and investments is required before a violation of that standard may be found.

A relative standard is thus, for instance, the national treatment, as it requires a comparison between foreign investors and domestic entrepreneurs.[68] Absolute standards then require that investors and investments be treated according to these standards, regardless of the fact whether other foreign or domestic investors are treated differently. The example of an absolute standard is full protection and security (see 5.1 below), which must be guaranteed whether or not the host state offers such protection to its own nationals.[69]

64 See, e.g., Art. 8.10 para. 2 letters a)–f) of the Comprehensive Economic and Trade Agreement (CETA). This provision elaborates on the standard of fair and equitable treatment by including the most frequent instances of violation of this standard.

65 See in general, REINISCH, A., SCHREUER, C. *International Protection of Investments: The Substantive Standards*. Cambridge: Cambridge University Press, 2020, pp. 251–854.

66 Ibid., pp. 1–250 and 855–998.

67 See DE NANTEUIL, A. *Droit international de l'investissement*. Paris: Pedone, 2014, pp. 288, 313.

68 See, *ex multis*, BJÖRKLUND, A. K. The National Treatment Obligation. In: YANNACA-SMALL, K. (ed.). *Arbitration under International Investment Agreements: A Guide to the Key Issues*. Oxford: Oxford University Press, 2018, p. 532.

69 REINISCH, A., SCHREUER, C. *International Protection of Investments: The Substantive Standards*. Cambridge: Cambridge University Press, 2020, p. 540.

Whether the standard of investment protection is absolute or relative, it implies international obligations for the host state. In addition, as will be shown below (5.3), also investors may have international obligations under investment treaties.

5.1 Standard of Full Protection and Security and an Obligation of Diligence

Host states are under an international obligation to guarantee full protection and security to the investors and investments contained in a number of investment treaties.[70] Not only that the investor and investment are protected against interferences therewith by the host state, but also against the acts of private parties.[71]

Some controversies surround this standard though. Firstly, does it entail physical or legal security of investors and investments?[72] Secondly, to what extent, if any, does this standard overlap with other standards, namely fair and equitable treatment?[73] Thirdly, should the subjective conditions of the country, in which the investor situated its investment, play any role in the assessment of as to whether the standard was breach or not?[74] Fourthly, is the full protection and security standard different to the minimum treatment of foreigners under general international law?[75]

However, the most important issue of high practical relevance is this: which standard of state responsibility the full protection and security standard would require? Two possibilities exist here.

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70 See, *ex multis*, Art. 5 Agreement between Japan and the Kingdom of Bahrain for the Reciprocal Promotion and Protection of Investment; Art. 4 para. 2 letter b) Agreement between the Government of Uruguay and the Government of Turkey (in Spanish). However, terminology differs. One may find not only the expression, but also *"full protection and security"* or *"the most constant protection and security"*, for instance. For the former wording see the two bilateral investment treaties in this footnote. The latter formulation is contained in Article 10 para. 1 of the Energy Charter Treaty.

71 ZEITLER, H. E. Full Protection and Security. In: SCHILL, S. W. (ed.). *International Investment Law and Comparative Public Law*. Oxford: Oxford University Press, 2010, pp. 187–190.

72 Ibid., pp. 195–198.

73 REINISCH, A., SCHREUER, C. *International Protection of Investments: The Substantive Standards*. Cambridge: Cambridge University Press, 2020, pp. 550–558.

74 Ibid., pp. 584–585.

75 Ibid., pp. 545–550.

The first option is that a state's fault is irrelevant for finding its international responsibility. For instance, if a guerrilla group destroyed the investor's factory, it would make no difference whether the host state sent its soldiers to defend the factory or remained inactive. In both cases, the state would be responsible.[76]

The second possibility reflects the concept of responsibility for not exerting due diligence in protecting the investor or investment. Thus, if a guerrilla group destroyed the investor's factory, the state would be responsible only if it did not take steps against this destroying of the factory or the state's action was insufficient to prevent it. By the same token, the state may exculpate itself by proving its due diligence.

The concept of obligation of diligence as one of conduct was confirmed in *AAPL Ltd. vs. Sri Lanka*, where the arbitral tribunal put it thus: *"The arbitral tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with full protection and security was construed as absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a 'strict liability' on behalf of the host State."*[77]

As also noted by the tribunal in *L.E.S.I. S.p.A. and Astaldi S.p.A. vs. Algeria*: *"The obligation of security is an obligation of conduct and not an obligation of result guaranteeing to the investor that nothing would ever happen to its investment. The obligation of security implies that the host state must do everything in its power to avoid that a damage is inflicted upon the investment."*[78]

In *AMPAL-American Israel Corp. vs. Arab Republic of Egypt*, the tribunal found that if the host state does not implement measures to protect the investment

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76 Of course, the state will not be responsible if one of the circumstances precluding wrongfulness under general international law has arisen. See Article 20–27 of the DARSIWA, which contain a list of these circumstances, in INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. Pp. 31–114 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

77 Final Award of 27. 6. 1990, *Asian Agricultural Products Ltd. vs. Republic of Sri Lanka*, ICSID Case No. ARB/87/3. In: *Italaw* [online]. Para. 43 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf

78 Award of 12. 11. 2008, *L.E.S.I. S.p.A. and Astaldi S.p.A. vs. Algeria*, ICSID Case No. ARB/05/3. In: *Italaw* [online]. Para. 153 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf (translated in English by the present author).

against repeated attacks, it fails to meet its obligations arising out of the full protection and security standard.[79] On the other hand, in *Strabag SE vs. Libya*, the tribunal decided that the standard was not breached as it was not possible for Libya *"to take consistent and effective measures to protect Claimant's investment"*.[80]

As a result, there is a broad consensus that the standard of full protection and security does not obligate the host state to ensure that no damage would arise to the investor or investment in any circumstances. The state does not bear the objective responsibility.[81] Therefore, since it is impossible for the host state to protect the investor and investment absolutely, the full protection and security standard must entail a diligence of the host state in protecting investor and investment. The state must exert due diligence in preventing and punishing the acts that would interfere with them as well.[82] Yet, the state objectively cannot ensure the result that no damages arises to the investor or its investment.

However, *Mantilla Blanco* rightly points out that the mere fact that diligence lies at the heart of the standard might not be sufficient for showing the such obligation is necessarily one of conduct or result.[83] Nevertheless, the criteria of utility and reasonableness indicate that full protection and security requires rather conduct than result. Obligation of diligence is thus no separate obligation, but a specific obligation of conduct (see also 2 above).[84]

79 Decision on Liability and Heads of Loss of 21. 2. 2017, *AMPA-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLLS, and BSS-EMG Investors LLc*, ICSID Case No. ARB/12/11. In: *Italaw* [online]. Para. 287 [cit. 21. 10. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf

80 Award of 29. 6. 2020, *Strabag SE vs. Libya*, ICSID Case No. ARB (AF)/15/1. In: *Italaw* [online]. Para. 236 [cit. 21. 10. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf

81 See, with regard to the standard applied in ICSID arbitration, ALEXANDROV, S. A. The Evolution of the Full Protection and Security Standard. In: KINNEAR, M. et al. (eds.). *Building International Investment Law. The First 50 Years of ICSID*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 320.

82 See ZEITLER, H. E. Full Protection and Security. In: SCHILL, S. W. (ed.). *International Investment Law and Comparative Public Law*. Oxford: Oxford University Press, 2010, p. 189.

83 BLANCO, S. M. *Full Protection and Security in International Investment Law*. Cham: Springer, 2019, p. 338.

84 *Malenovský* views the obligation of vigilance in protecting the rights of foreigners as a specific expression of the obligation of conduct. See MALENOVSKÝ, J. *Mezinárodní právo veřejné: obecná část a poměr k jiným právním systémům*. Brno: Masarykova univerzita, 2020, p. 262.

5.2 International Obligations Contained in Investment Dispute Resolution Clauses

In contrast to the standard of full protection and security dealt with above, dispute resolution clauses include procedural obligations.[85] Dispute resolution clauses refer, for the purposes of our present discussion, to the provisions of investment treaties that provide means of resolution of disputes between investors and host states. By the same token, the present paper does not examine dispute resolution clauses concerning resolution of disputes between the investment treaty parties.[86] Dispute resolution clauses in investment treaties have rarely been analysed from the perspective of the international obligations contained therein.

For instance, the Article 8 of the investment treaty between the Czech Republic and the Russian Federation reads:

> *"Disputes between one Treaty Party and the Investor of the other Treaty Party arising in connection with realisation of investments, including disputes relating to the scope, conditions and means of compensation, shall be resolved, as far as possible, by negotiations.*
>
> *When such disputes cannot be resolved by negotiations in the course of six months from the date of the notice of the investor of one of the Treaty Parties to the other Treaty Party, the investor shall be entitled to submit the dispute either to:*
>
> > *a) Competent court or arbitral court of the Treaty Party on whose territory the investments were made;*
> >
> > *b) International Centre for Settlement of Investment Disputes* […]*;*
> >
> > *c) Arbitral tribunal established ad hoc under the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL)."* [87]

Dispute resolution provisions include the state parties' offer to arbitrate addressed to the other treaty party's investors as potential claimants.[88] The

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85 For the distinction between procedural and substantive obligations see D'ARGENT, P. Les obligations internationales. In: *Recueil des Cours 2021*. Boston, Leiden: Brill, Nijhoff, 2021, Vol. 417, pp. 167–168.

86 See generally HAZARIKA, A. *State-to-state Arbitration based on International Investment Agreements Scope Utility and Potential*. Cham: Springer, 2021, pp. 19–23.

87 Translated by the author from the authenticated Czech version of the treaty – Dohoda mezi vládou Ruské federace a vládou České republiky o podpoře a vzájemné ochraně investic.

88 See*, ex multis*, ŠTURMA, P., BALAŠ, V. *Mezinárodní ekonomické právo.* Praha: C. H. Beck, 2013, p. 411.

dispute resolution clause at hand contains the right of the investor to sue the host state in arbitration and the corresponding obligation of the latter to submit to arbitration. As a consequence, the state is under an international obligation to resolve the dispute with the investor by arbitration as a specific means of dispute resolution.

That the treaty gives the *right* to the investor to choose between arbitration and courts does not alter the fact that the *obligation* of state to submit to arbitration is one of result, provided that the investor opted for arbitration. Thus, depending on the content of the dispute resolution clause in question, the host state cannot require resolution of the dispute with the investor through other means than arbitration, e.g., before its domestic courts.[89] As a result, the obligation to submit to arbitration is that of result.

Moreover, dispute resolution clauses regularly contain an international obligation to engage into negotiations to settle the dispute amicably.[90] If a settlement between the investor and state is not reached within a period of time (the so-called cooling-off period), investor may commence arbitration.[91] The obligation for both state and investor to negotiate is certainly one of conduct.[92] This is so, it is argued, because the parties may be held to do their best to reach a settlement, but cannot guarantee they will reach it.

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89 The same conclusion has been drawn, although following a different path of argumentation based on the absence of the requirement of exhaustion of local remedies in the law of international investment protection, by MOURRE, A. Expropriation by Courts: Is It Expropriation or Denial of Justice? In: ROVINE, A. W. (ed.). *Contemporary Issues in International Arbitration and Mediation: The Fordham papers 2011*. Leiden, Boston: Brill, Martinus Nijhoff Publishers, 2012, p. 60.

90 See, *ex multis*, FEIGERLOVÁ, M. Dopad nesplnění přátelského řešení sporu na rozhodčí řízení. In: ŠTURMA, P., TRÁVNÍČKOVÁ, Z. (eds.). *Pokojné řešení sporů v mezinárodním právu*. Praha: Česká společnost pro mezinárodní právo, 2020, p. 155.

91 Ibid., p. 160.

92 In *Pulp Mills*, the ICJ *"dr[e]w attention to the characteristics of the obligation to negotiate and to the conduct which this imposes on the States concerned"* (with further reference to its previous cases). – See Judgment of the ICJ of 20. 4. 2010, *Pulp Mills on the River Uruguay (Argentina vs. Uruguay)*. In: *International Court of Justice* [online]. P. 14, para. 145 [cit. 27. 7. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf; Despite this being an inter-state case, there is no reason why the logic behind classifying the obligation to negotiate as one of conduct cannot be used in an investor-state dispute.

In addition, a number of dispute resolution provisions in investment treaties encompass an international obligation for both states and investors to comply with the terms of the arbitral award.[93] The German-Lebanese investment treaty, for instance, stipulates that *"the awards of arbitration shall be final and binding on both parties to the dispute. Each Contracting Party shall carry out without delay any such award and such award shall be enforced in accordance with domestic law."*[94]

Above all, the compliance with the award means that the state's executive will pay a monetary compensation to the investor or provide a specific performance, whichever kind of reparation under international law was ordered by the tribunal in its award.[95] The compliance with the award is more an obligation of result, for interpreting this provision, as requiring a mere effort would undermine the spirit and an *effet utile* of the obligation.[96]

Moreover, dispute resolution clauses contain obligations to recognise and enforce the arbitral award. Thus, for instance, Article 10 para. 2 of the investment treaty between the Czech Republic and Germany provides that *"the award shall be recognized and enforced under the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards."*[97]

Pursuant to Article VII of the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), domestic rules on recognition and enforcement apply

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93 As far as states are concerned, such obligation may be seen as confirming the customary principle *pacta sunt servanda,* which comprises also the duty to comply with arbitration award as an outcome of the dispute arising out of an international treaty. See SCHREUER, C. H. et al. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2009, p. 1099.

94 Agreement between the Lebanese Republic and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments.

95 BRANBANDERE, E. de. *Investment Treaty Arbitration as Public International Law Procedural Aspects and Implications*. Cambridge: Cambridge University Press, 2014, pp. 175–201.

96 Investment awards are rendered by tribunals established on the basis of an international investment treaty. Investment treaties are governed by international customary rules codified in the VCLT, including its Article 26, which requires that *"every treaty in force is binding upon the parties to it and must be performed by them in good faith."* Hardly would it be reconcilable with the obligation to perform the investment treaty in good faith, were the obligation to comply with the award to be a matter of best efforts.

97 Germany and Czech and Slovak Federal Republic Treaty concerning the Encouragement and Reciprocal Protection of Investments (with Protocol and Exchange of Notes dated 10 January and 13 February 1991).

to the extent they are more favourable to recognition and enforcement of arbitral awards than the New York Convention.[98]

Thus, in case that the losing party, namely the host state, does not observe the award, both states, as parties to the investment treaty, are bound to recognise and enforce that award, either under the New York Convention or its domestic law (the part of which may be the said convention).[99]

The international obligation to recognise and enforce arbitral award seems to be one single international obligation under the New York Convention.[100] All awards need to be recognised, should they be enforced. Not all recognised awards have to be enforced though. Recognition and enforcement are thus distinct processes.[101] Whilst recognition is governed by the investment treaty and the New York Convention as sources of international law, enforcement runs under a domestic law.[102]

Moreover, the state may invoke its immunity as a defence against recognition and enforcement, despite the fact that the state immunity is not among the grounds contained in Article V of the New York Convention. Whilst immunity from jurisdiction under international customary law may be invoked in the stage of recognition, the defence of immunity from enforcement may be invoked against enforcement.[103] This also supports the necessity to analyse recognition and enforcement separately.

98 Art. VII para. 1 New York Convention.

99 New York Convention. As to the legislative incorporation of the New York Convention into domestic laws see BERMANN, G. A. Introduction. In: BERMANN, G. A. (ed.). *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*. Cham: Springer, 2017, pp. 7–9.

100 For instance, *Scherer* mentions only one single obligation – SCHERER, M. Article III. In: WOLFF, R. (ed.). *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Article-by-Article Commentary*. München: C. H. Beck, 2019, pp. 202–203.

101 BLACKABY, N., PARTESIDES, C., REDFERN, A., HUNTER, M. *Redfern and Hunter on International Arbitration: Student Version.* Oxford: Oxford University Press, 2015, pp. 610–611.

102 It has been pointed out that enforcement is carried out by organs of the state of the enforcement and on the basis of domestic rules of the procedure. See PAULSSON, M. R. P. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 124.

103 See SAGAR, S. "Waiver of Sovereign Immunity" Clauses in Contracts: An Examination of their Legal Standing and Practical Value in Enforcement of International Arbitral Awards. *Journal of International Arbitration*. 2014, Vol. 31, no. 5, p. 617.

Hence, for the purposes of our analysis through the prism of the dichotomy of obligations of conduct and result, suppose there were discrete obligations: a) to recognise awards, and b) to enforce awards.

The obligation to recognise awards contained in investment treaties and the New York Convention would be one of result. Thus, *"each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles"*.[104] To conceive this kind obligation as one of conduct would contravene its purpose to prompt the obligated subject to comply with the award and threatening him with enforcement in the case of non-compliance. Also, should such obligation be interpreted as requiring a mere effort to recognise the award, it would cast doubt on its binding effect.[105]

Nevertheless, the obligation to enforce arbitral awards will be more one of conduct than result. This is supported by the fact that grounds for non-enforcement exist in the Article V of the New York Convention.[106] The systemic reading of the Articles III and V of the New York Convention thus excludes the conclusion that the obligation to enforce arbitral awards is that of result.[107]

In addition, there is no international customary rule to the effect that obligations to enforce awards under dispute resolution clauses of investment

104 New York Convention.

105 Some commentaries to the New York Convention indicate a decreased flexibility with regard to the content of this international obligation. This concerns namely the binding, hence preclusive, effect of arbitral awards recognised as such under the New York Convention. See SCHERER, M. Article III. In: WOLFF, R. (ed.). *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Article-by-Article Commentary*. München: C. H. Beck, 2019, p. 203.

106 Article V para. 1 contains the grounds for which the recognition may be refused at the request of the party against whom the award is invoked, whereas Article V para. 2 contains grounds that must be examined by the court or another authority of the state where the enforcement is sought on their own motion. However, given the wording "may refuse", courts or other authorities of the state of enforcement are not obliged to refuse the recognition and enforcement when it finds that the subject-matter was not arbitrable or contrary to public policy. As to the intricacies of the Article V's wording "may" versus "must" in the five languages, in which the New York Convention is authenticated, see PAULSSON, J. May or Must Under the New York Convention: An Exercise in Syntax and Linguistics. *Arbitration International*. 1998, Vol. 14, no. 2, pp. 227–230.

107 This internal systemic approach to the treaty text is required by Article 31 para. 1 in conjunction with Article 31 para. 2 of the VCLT.

treaties or the international obligation under Article III of the New York Convention must be interpreted as removing state immunity from enforcement. As a result, the obligation to enforce awards is one of conduct.

Nonetheless, now we have to re-connect the analyses concerning obligation of recognition and that of enforcement. Is this twofold obligation one of result or conduct? The purpose of this international obligation speaks in favour of the classification as an obligation of result. As elucidated above, the effective enforcement of arbitral awards would require a strict reliance on the performance of the obligation. However, the maxim *ultra posse nemo tenetur* softens this conclusion in favour of the classification as an obligation of conduct. As a result, it is reasonable to perceive the obligation to recognise and enforce arbitral awards contained in dispute resolution clauses of investment treaties as one of conduct.

This conclusion regarding the nature of the obligation applies *mutatis mutandis* to dispute resolution clauses referring to enforcement in accordance with "domestic law", to the extent the domestic law incorporates the New York Convention.[108] Whilst "incorporation" refers, for our working purposes, to "the formalised reception of international law into domestic law".[109] Most Contracting States of the New York Convention have given some domestic legal effects to it.[110] Albeit, not all Contracting States have considered the New York Convention as self-executing.[111]

Moreover, in states whose legal order is based on a dualist relationship between international and domestic law *"no treaties have formal status of law"*.[112] It is thus the domestic statute which incorporates the New York Convention, including all modifications to the treaty text contained therein,

108 The overwhelming majority of states are bound by the New York Convention. See List of the Contracting States. *New York Arbitration Convention* [online]. [cit. 27. 7. 2022]. Available at: https://www.newyorkconvention.org/list+of+contracting+states

109 FATIMA, S. *Using International Law in Domestic Courts*. Oxford: Hart Publishing, 2005, p. 55.

110 BERMANN, G. A. Introduction. In: BERMANN, G. A. (ed.). *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*. Cham: Springer, 2017, pp. 7–9.

111 *Bermann* speaks of almost one third of the Contracting States that deem the New York Convention as self-executing. See ibid., p. 7. The uncertainty surrounding the status of the New York Convention as (non-)self-executing has been occasionally criticised. See BORN, G. B. The New York Convention: A Self-Executing Treaty. *Michigan Journal of International Law*. 2018, Vol. 40, no. 1, p. 115 *et passim*.

112 SLOSS, D. Domestic Application of Treaties. In: HOLLIS, D. B. (ed.). *The Oxford Guide to Treaties*. Oxford: Oxford University Press, 2014, p. 370.

that will inform the wording "domestic law" in the dispute resolution clause of an investment treaty.[113] Consequently, the "domestic law" for the purposes of the dispute resolution clause in an investment treaty will be the one without the New York Convention, unless the latter has been incorporated into it.[114] However, the reference to a domestic law must be taken seriously also in monist legal orders, so that the internal hierarchy between the legislation incorporating the New York Convention and other pieces of domestic legislation is maintained.[115]

Moreover, only a minority of states are not bound by the New York Convention.[116] Such states will be under the obligation of conduct to enforce the award by virtue of the dispute resolution clause in an investment treaty in accordance with its domestic legislation.[117] They would not be obliged to reach the result of enforcing the award, given that in most states grounds for non-enforcement exist.

As a result, the obligation to enforce arbitral awards in accordance with domestic law is that of conduct. This result is substantially the same with the recognition and enforcement under the New York Convention.

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113 *Bermann* speaks of almost one third of the Contracting States that deem the New York Convention as self-executing. BERMANN, G. A. Introduction. In: BERMANN, G. A. (ed.) *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention*. Cham: Springer, 2017, p. 7.

114 It goes beyond the realm of this paper whether investment tribunals would be bound by the domestic law's self-perception as not including the New York Convention in interpreting the dispute resolution clause, despite the fact that the state is bound by the latter as a matter of international law. It seems that Article 27 of the VCLT provides the answer in negative.

115 SLOSS, D. Domestic Application of Treaties. In: HOLLIS, D. B. (ed.). *The Oxford Guide to Treaties*. Oxford: Oxford University Press, 2014, p. 374.

116 For instance, Somalia is not the Contracting Party to the New York Convention. Yet, Somalia concluded three investment treaties. See Somalia Bilateral Investment Treaties. *Investment Policy Hub* [online]. [cit. 27. 7. 2022]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/194/somalia; Note, however, that Somalia is the ICSID Contracting State. See Database of ICSID Member States. *ICSID* [online]. [cit. 27. 7. 2022]. Available at: https://icsid.worldbank.org/about/member-states/database-of-member-states

117 See Art. 10 para. 7 Agreement between the Government of the Republic of Turkey and the Federal Government of the Republic of Somalia concerning the Reciprocal Promotion and Protection of Investments.

However, also the ICSID Convention should be taken into consideration for two reasons.[118] First, it may form part of the domestic law which the dispute resolution clause refers to. Second, even if such reference is lacking, a dispute resolution clause may allow the choice of the ICSID as a forum for a dispute between an investor and state (see the dispute resolution clause above). In such scenario, the ICSID Convention will apply also to the enforcement of the pecuniary awards rendered under the aegis of the Centre. The provision at the heart of our interest is thus Article 54 para. 1 of the ICSID Convention which reads: *"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state…"*[119]

Article 54 para. 1 lays down a strict, positive obligation *(facere)* to enforce "pecuniary obligations", leaving no other choice to the state of their enforcement. As a result, this is an obligation of result. However, the question remains whether this conclusion would remain intact, if we read the said provision in conjunction with Article 55 of the ICSID Convention setting forth that *"nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution"*. It is argued that if this contextual reading is adopted, then the obligation to enforce pecuniary obligations becomes closer to the one of conduct, as it releases the state of the enforcement from the strict obligation to enforce the award.

The result is thus substantially the same as with the New York Convention (see above). A systemic reading of international investment treaties may reveal that an international obligation seemingly one of result is actually one of conduct. However, it should be noted that the reason for "softening" of the obligation of result is compliance with international obligations

118 Convention on the Settlement of Investment Disputes between States and Nationals of other States that expressly maintain the immunity from enforcement, despite the existence of the obligation to recognise and enforce awards.

119 Ibid.

binding on the enforcement state, namely the respect for execution immunity of other states.[120]

5.3 Investors' Obligations to Comply with Human Rights' Obligations

Thus far, the role of the dichotomy for international obligations of states has been discussed. However, recently concluded investment treaties contain not only substantive obligations for states under the heading of investment standards, but also obligations for investors.[121]

For instance, the Article 14 of the investment treaty between Qatar and Ethiopia provides that *"investors and their investments shall comply with the labor and environment laws and regulations of the host contracting party with respect to management and operation of an investment."*[122]

A different formulation may be found in the Article 18 of the investment treaty between Morocco and Nigeria:

> *"Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties."*[123]

These treaty clauses have come into existence as a reaction to (alleged or real) human rights' abuses by investors.[124] Whilst it might be welcomed that an initial asymmetry in international obligations between investors and states in detriment to the latter has now been (perhaps) more balanced, this comes at a price of vagueness of the international obligations imposed on investors.

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120 The significance of the execution immunity was emphasised by the ICJ. See Judgment of the ICJ of 3. 2. 2012, *Jurisdictional Immunities of the State (Germany vs. Italy, Greece intervening)*. In: *International Court of Justice* [online]. Pp. 51–52, para. 113 [cit. 27. 7. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-EN.pdf

121 See generally RADI, Y. *Rules and Practices of International Investment Law and Arbitration*. Cambridge: Cambridge University Press, 2020, pp. 218–230.

122 Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Qatar for the Promotion and Reciprocal Protection of Investments.

123 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria.

124 See MUCHLINSKI, P. Can International Investment Law Punish Investor's Human Rights Violations Copper Mesa, Contributory Fault and its Alternatives. *ICSID Review*. 2022, Vol. 37, no. 1–2, p. 371 et passim.

Nonetheless, given the generally accepted principle of treaty interpretation that every treaty provision should be presumed to have some meaning and effect,[125] the arbitral tribunal cannot conclude that it does not understand what was the treaty parties' intention in a nebulous formulation of a human right obligation binding on the investor, and therefore refuse to interpret and apply the provision. This would amount to situation of *non licet*.[126]

Thus, it is submitted that the distinction between obligation of conduct and result may be helpful in establishing the content of human rights and related obligations of investors. It is suggested that human rights' obligation worded as a positive obligation, i.e., active conduct, should be interpreted as obligations of conduct requiring due diligence, not attaining the protection of human rights as a specific result. Whilst obligations formulated as negative, i.e., prohibitions of conduct, ought to be interpreted as those of result.

A justification for this difference lies in the already mentioned rationales of utility and reasonableness. First, it is rather with ease for the investor to refrain from violating human rights. However, positive actions require more effort than abstaining from a conduct. As a result, the obligation to the effect that the investor must promote or observe human rights cannot be but one of conduct.

6 Findings

The answer to the key research question (see 2 above) is that the dichotomy of obligations of conduct and result actually assists in establishing the existence of a breach of an international obligation under investment treaties. The use of the dichotomy is revealing in that it enhances our understanding of the content of international obligations. Since international responsibility presupposes determining of the content of the international obligation, employing the dichotomy is by no means a superfluous operation.

125 DÖRR, O. Article 31. In: DÖRR, O., SCHMALENBACH, K. (eds.). *Vienna Convention on the Law of Treaties: A Commentary*. Berlin: Springer, 2012, p. 539.

126 For the explanation of this legal principle in the context of the related principles of *jura novit curia* and *ne infra petita* see TANZI, A. M. Ne ultra petita. In: BERGAMINI, L. (ed.). *L'arbitrato negli investimenti internazionali*. Napoli: Edizioni Scientifiche Italiane, 2020, p. 695.

The standard of full protection of security, which implies the obligation of due diligence on the part of the host state, may be classified as one of conduct. Host states, therefore, will not normally be responsible for a breach of this standard, provided that they undertake their diligence to protect the investor and investment.

Moreover, the classification of obligations as one of conduct and result may be useful in analysing dispute resolution clauses in investment treaties. This classification enables, it is argued, a valuable insight into the complexity of these provisions, including quite a few international obligations. Hence, the obligation to negotiate requires a conduct, not a result. Secondly, the obligation to submit to arbitration has been one of result. Thirdly, the obligation to comply with arbitral awards was classified as one of result. Fourthly, the obligation to recognise and enforce awards has been found to be that of conduct.

Nonetheless, a caveat has been identified with regard to the obligation to enforce arbitral awards. The systemic reading of the treaty may show that the obligation to enforce awards, which may seem in isolation as one of result, has to be "softened" in favour of an obligation of conduct. However, since the execution of immunity of states was the specific factor for assessing the obligation to enforce as one of conduct, it would require a further research to draw general conclusions thereof.

In addition, the investor obligations to observe human rights contained in the recent investment treaties were examined through the lenses of the dichotomy. Given that these provisions are rather nebulous, it is necessary to find analytical tools that would endow their content with a meaning. Whilst bearing in mind the peril of defining *ignotum per ignotius*, the dichotomy of obligations of conduct and result may be a promising starting point in the analysis of the investor human rights' obligations.

Furthermore, the analysis has shown that the distinction between positively *(facere)* and negatively *(non facere)* formulated investors' obligations to observe human rights ought to be taken into account. It has been submitted that obligations prohibiting breaches of human rights should be classified as obligations of result, whereas the obligations requiring their active protection by the investor are obligations of conduct.

In summary, the analysis might not have removed all doubts surrounding the classification of international obligations on the basis of the dichotomy. It could not (and did not intend to) conceal the fact that the explanatory power of dichotomies is necessarily influenced by their schematic nature leading to generalisations (see 2 above). In any event, there will always be an element of subjectivity in the classification of international obligations.

What has remained to be analysed in a future research is whether and to what extent the dichotomy has an impact upon reparation of damages in international investment law, including causation and quantum. Also, whilst one may imagine what would be the legal consequences of a breach of the standard of full protection and security or investor's breach of human rights, it would be interesting to examine what would be the form of reparation for breaches of procedural obligations contained in dispute resolution clauses.

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