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Domestic courts in investor-state arbitration : partners, suspects, competitors

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PART III

Domestic Courts as Competitors:

Jurisdictional Interactions between Domestic Courts and Investment Tribunals

III. INTRODUCTION INTO PART III

The focus of the final three chapters of the present inquiry is on that aspect of the relationship between domestic courts and investment tribunals where the former can be seen as competitors of the latter. Of interest here is not the competition between both types of adjudicatory bodies for human and capital resources (in the form of some rivalry for competent judges and adequate funding), but competition for adjudicatory authority – the latter understood here as the struggle over which legal order has or should have the most legitimate claim to adjudicate a particular controversy.[1] The focus, specifically, is on the investment tribunal's response to such adjudicatory competition, and thus to determine whether they treated domestic courts on terms of mutual equality or inferiority, and whether they accorded deference or ignorance.

For adjudicatory bodies to be in a position of competition, there needs to be overlap in the matters falling within the ambit of their adjudicative authority. The existence of such overlap is a matter of degree. In some cases, overlaps can only occur in a partial way, such as where different adjudicatory bodies have competence to decide on substantively the same *issue* (e.g. the interpretation of the same rule of the applicable law). In other cases, the overlap can be a complete one, such as where different adjudicatory bodies have the authority to decide the same *claim* – a situation that, pursuant to what is commonly known as the triple-identity test, exists where an action arises between the same litigants (*personae*), has the same object (*petitum*), and is based on the same grounds (*causa petendi*). But in between these two extremes, overlap can broadly happen to occur in relation to the same *dispute* – that is, in relation to controversies having their source in the same set of events, which are brought to resolution by materially the same parties, but are possibly formulated in terms of different claims.[2] The present study adopts this looser understanding of jurisdictional overlap and considers jurisdictional competition to arise as between domestic courts and investment tribunals when there is overlap at the level of a specific dispute.[3]

This is not to say that the problem of jurisdictional competition could not be studied solely from the perspective of overlapping claims. In contrast to some other areas of international law, in the field of investment arbitration concurrency between the jurisdiction of investment tribunals and domestic courts can certainly emerge with respect to a specific claim. On the one hand, an investment tribunal may itself be vested with jurisdiction to pronounce upon claims relating to obligations other than those arising under the instrument on which their jurisdiction is based, including claims based on a contract or claims based on domestic law in general (to the extent that such claims relate to a dispute concerning an investment). Conversely, domestic courts may themselves be endowed with jurisdiction over treaty claims, either because the

[1] On the notion of adjudicatory authority, see eg A Von Mehren, *Adjudicatory Authority in Private International Law: A Comparative Study* (Brill/Nijhoff 2007), 1.

[2] For this looser understanding, see eg Y Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP 2007) 2, where jurisdictional overlaps are defined as 'interactions taking place between national and international courts with respect to disputes between the same parties (or, closely related sets of parties) over essentially identical issues, potentially or actually brought, simultaneously or consecutively, before national and international courts'. See also C McLachlan, *Lis Pendens in International Litigation* (Brill/Nijhoff 2009) 14, where the object of the inquiry are the rules or principles that 'properly govern the cases where exercises of adjudicatory authority in different jurisdictions over aspects of the same, or closely related, disputes run into conflict with each other'.

[3] See eg C Giorggetti, 'Horizontal and Vertical Relationships of International Courts and Tribunals - How Do We Address Their Competing Jurisdiction?' (2015) 30(1) ICSID Review 98, at 99-100, who similarly speaks of jurisdictional competition to exist 'when two or more forums are competent to hear a dispute between parties', and distinguishes such competition from 'decisional competition' which arises in circumstances of issue overlap.

domestic legal system in general allows domestic courts to decide claims in accordance with international law, or because the litigating parties specifically agreed, in the context of a contractual relationship, that the domestic courts granted with exclusive jurisdiction to decide disputes arising out of the such contract will apply the provisions of investment treaty to the extent necessary.[4] This notwithstanding, enlarging the scope of the study to the interaction between domestic courts and investment tribunals in relation to the dispute as such fits better into the hybrid nature of investment arbitration, in which both domestic and international law play important and complementary roles.

The present study proceeds on the assumption that regulation of jurisdictional competition between domestic courts and investment tribunals is not only desirable, but to a certain extent also necessary. It is generally desirable because the duplication of proceedings that have more or less the same objective is costly, because the potential incompatibility of decisions rendered by different adjudicatory bodies creates difficulties for parties to comply with such decisions, and because allowing the same dispute to be litigated before different fora could put one of the litigating parties in unjustified advantage by allowing it to obtain double recovery for the damage it might have suffered. Regulation between domestic courts and investment tribunals is also necessary, given that the alternative of no regulation is not really an alternative at all. In some contexts, the possibility of their interaction being left unregulated may seem attractive, to the extent that problems arising out of conflicting outcomes can ultimately be resolved at the stage of an award's enforcement.[5] But such a solution would not be particularly effective in the context of the still prevailing type of investment arbitrations – those taking place under the ICSID Convention – considering the obligation of the states to recognize any ICSID award and enforce pecuniary obligations imposed by it "as if it were a final judgment of a court in that State."[6] Regulation is furthermore necessary in view of the particular design of the system of investment arbitration, which, as pointed by some, contains features that have the potential for provoking greater incidence of parallel litigation than in relation to other forms of international arbitration: first, the bilateral and *ad hoc* nature of investment arbitration, where every dispute is decided by separately constituted tribunals deciding claims arising under different legal instruments; second, the very fact that the system of investment arbitration has been created to provide an alternative to, but not a replacement of, domestic courts; third, the specific design of investment treaties, which allow for the multiplication of potential claimants as a result of the extended definition of what constitutes a protected investment; and fourth, the exclusion of the local remedies rule as procedural requirement conditioning access to international procedures.[7] This last, procedural feature, which makes recourse to domestic courts optional rather than compulsory, is probably the most important factor influencing the interaction between domestic courts and international tribunals in the field of investment arbitration, and also one that distinguishes such interaction from similar interactions occurring in other fields of international law, where the local remedies rule performs the function of a general ordering principle.[8]

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[4] On domestic courts' general entitlement to adjudicate international claims, see A Nollkaemper, *National Courts and The International Rule of Law* (OUP 2011) 27ff. Specifically on their jurisdictional entitlement to adjudicate investment disputes, including claims grounded in international law, see T Jardim, 'The Authority of Domestic Courts in Investment Disputes: Beyond the Distinction Between Treaty and Contract Claims' (2013) 4(1) JIDS 175, 178-179. For examples of claims concerning violations of investment treaties decided by domestic courts, see specifically W Ben Hamida, 'Investment Treaties and Domestic Courts: a Transnational Mosaic Reviving Thomas Wälde's Legacy' in J Werner et al (eds), *A Liber Amicorum Thomas Wälde: law beyond conventional thought* (Cameron May, 2009), 69-85, at 72-75. See further *infra* Section 9.1.1.

[5] See eg McLachlan (n 2), 60.

[6] ICSID Convention, art 54(1).

[7] See McLachlan (n 2), 254-55.

[8] The very notion of "exhaustion" implies that domestic remedial procedures had ended, so that there can be no issue of concurrence or duplicity of domestic and international proceedings.

III.1. The Demise of the Local Remedies Rule as a General Ordering Principle

As already explained in chapter 2, in the context of the traditional law on State responsibility for injuries to aliens, before a State could espouse a claim on behalf of one of its nationals in the exercise of diplomatic protection, the national had to exhaust all available local remedies. In the context of the emerging practice of contract-based investor-State arbitrations, in contrast, arbitral remedies were generally treated as exclusive and as obviating the need to exhaust other local remedies before a claim be maintained. It was by reference to this practice that the drafters of the ICSID Convention proceeded then to incorporate in its Article 26 a general presumption against the requirement of exhaustion of local remedies. But was such presumption also valid in relation to dispute settlement clauses provided under bilateral investment treaties that incorporated only standing offers of consent to arbitrate all grievances with unspecified investors, even in the absence of specific contracts concluded with the particular complainant? Broches himself conceded that the interpretative presumption might normally not be applicable outside the context of contractual arbitration clauses.[9] But more significantly perhaps, the ICJ itself in the *ELSI* case (1989) took the position that the local remedies requirement – as an important principle of customary international law – should not "be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".[10] Though criticized for contradicting clear treaty language,[11] the ICJ's proposition was reason to argue that the capital exporting states better spare their investors from having to comply with the obligation to resort to domestic procedures, by incorporate drafting changes to their investment treaties[12] – especially because by then, most of these treaties already desisted from specifically demanding prior recourse to domestic procedures.[13]

Such concerns have not materialized, however. As cases begun to be brought against States pursuant to the open-ended offers to arbitrate in bilateral investment treaties, the view has prevailed that the duty to exhaust local remedies was dispensed with as a *procedural precondition* for the presentation of claims. Perhaps expectedly, in the context of arbitrations conducted on the basis of the ICSID Convention, most investment treaty tribunals relied for that purpose on the interpretative presumption provided by the Convention itself, readily rejecting objections based on the alleged lack of exhaustion of domestic remedies by simple reference to the clear language of Article 26 of the ICSID Convention.[14] Less expectedly, however, other treaty-based tribunals,

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[9] cf *supra* 2.1.4.

[10] Elettronica Sicula SpA (ELSI) (United States of America v Italy) (Judgment) [1989] ICJ Rep 15, at 31, [50].

[11] SD Murphy, 'The ELSI Case: An Investment Dispute at the International Court of Justice' (1991) 16 Yale J. Int'l L. 391, at 408-9 (considering the ICJ's interpretative approach as likely to have frustrated an otherwise clear treaty provision specifically establishing jurisdiction).

[12] See MH Adler, 'The Exhaustion of the Local Remedies Rule after the International Court of Justice's Decision in *ELSI*' (1990) 39 ICLQ 641, at 653 (suggesting in the aftermath of the ELSI decision that States should 'endeavour to carve out a specific exception to the exhaustion rule in any future investment treaties').

[13] See P Peters, 'Exhaustion of Local Remedies: ignored in most bilateral investment treaties' (1997) 44 Netherlands International Law Review 233.

[14] See inter alia: Lanco International Inc v The Argentine Republic (Award on Jurisdiction) (ICSID Case No ARB/97/6, 8 December 1998) [39]-[40]; Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Award) (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic) (ICSID Case No ARB/97/3, 21 November 2000) [81], and (Decision on Annulment) 3 July 2002 [52]; CMS Gas Transmission Company v The Republic of Argentina (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/01/8, 17 July 2003) [72]-[73]; Generation Ukraine, Inc v Ukraine (Award) (ICSID Case No ARB/00/9, 16 September 2003) [13.4]-[13.6]; IBM World Trade Corporation v República del Ecuador (Decision on Jurisdiction and Competence) (ICSID Case No ARB/02/10, 22 December 2003) [80]-[84]; LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic (Decision of the Arbitral Tribunal on Objections to Jurisdiction) (ICSID

too, invariably adopted the same interpretative presumption despite the absence of equivalent language in UNCITRAL, ICSID Additional Facility, or other sets of arbitral rules. Thus, already in *Saar Papier v. Poland* (1995) – probably the first arbitration conducted pursuant to a bilateral investment treaty under the UNCITRAL rules – the local remedies requirement was interpreted as being dispensed with on the ground that the applicable BIT did not expressly require prior recourse to domestic courts.[15] Indeed, it is precisely the absence of specific language in the applicable investment treaty that has most often been used as an indication that prior recourse to local remedies was not required,[16] occasionally considered in conjunction with arguments pertaining to the "special regime" of investment treaty arbitration,[17] or else in combination with arguments based on policy considerations relating to the effectiveness of investment treaty arbitration as a dispute settlement mechanism.[18] Admittedly, such interpretative presumptions might be difficult to reconcile with the stance of the ICJ in the *ELSI* case.[19] On the other hand, the fact that investment treaties now grant investors the procedural capacity to invoke the

Case No ARB/02/1, 30 April 2004) [75]-[77]; AES Corporation v The Argentine Republic (Decision on Jurisdiction) (ICSID Case No ARB/02/17, 26 April 2005) [69]; Gas Natural SDG, SA v The Argentine Republic (Decision of the Tribunal on Preliminary Questions on Jurisdiction) (ICSID Case No ARB/03/10, 17 June 2005) [30]; Saipem SpA v The People's Republic of Bangladesh (Award) (ICSID Case No ARB/05/07, 30 Jun 2009) [175]; Helnan International Hotels A/S v Arab Republic of Egypt (Decision of the ad hoc Committee) (ICSID Case No ARB/05/19, 14 June 2010) [42]-[47]; Hochtief AG v The Argentine Republic (Decision on Jurisdiction) (ICSID Case No ARB/07/31, 24 October 2011) [47]; and Mr Franck Charles Arif v Republic of Moldova (Award) (ICSID Case No. ARB/11/23, 8 April 2013), 333-334. For an implicit recognition of the principle, see also SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/01/13, 6 August 2003) [151]; and Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (Award) (ICSID Case No ARB/04/13, 6 November 2008) [255].

[15] *Saar Papier Vertriebs GmbH v Poland (Final Award)* (UNCITRAL, 16 October 1995) [72] ('Poland claims that Saar Papier could bring an action before the Arbitral Tribunal only once the legal remedies in the host country were exhausted. As a matter of law, the *Arbitral Tribunal does not see such a requirement in the Treaty*.' (emphasis in the original)).

[16] See eg *CME Czech Republic BV v The Czech Republic (Partial Award)* (UNCITRAL, 13 September 2001) [416] ('It is generally accepted that claims under investment treaties can be and shall be dealt with separately from the judicial process in local courts, unless otherwise specifically provided for in the respective Treaty. Such a requirement to exhaust local remedies is not found under this Treaty and the initiating of a judicial process in the Czech Republic does not bear upon proceedings under the Treaty.'); *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar (Award)* (ASEAN ID, Case No ARB/01/1, 31 March 2003) [40] ('The 1987 [ASEAN] Agreement nowhere provides that a Claimant must exhaust domestic remedies, whether against the host State or any specific entity within the host State, before proceedings are commenced under Article X.'); or *RosInvestCo UK Ltd v The Russian Federation (Award on Jurisdiction)* (SCC Case No V079/2005, 1 October 2007) [155] (arguing that the exclusion of the principle of exhaustion of local remedies 'gives primacy to the text of the treaty provisions and provides an interpretation in good faith'). However, see also *Waste Management v United Mexican States (II) (Award)* (ICSID Case No ARB(AF)/00/3, 30 April 2004) [133], where such inference was made on the basis of the specific waiver requirement pursuant to art 1121 of the NAFTA.

[17] See eg *RosInvestCo,* ibid [153] and [155] for the argument that consent to investor-state arbitration *per se* amounts to a waiver of the principle of exhaustion of local remedies, such a waiver being 'conclusively' established by the 'special regime established for investor-state arbitration'.

[18] See *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia (Partial Award on Jurisdiction)* (UNCITRAL, 8 September 2006) [222] ('The result that BITs granting private investors direct access to international arbitration do not require local remedies to be exhausted is also confirmed by underlying policy reasons. A requirement for the exhaustion of local remedies as a general precondition to mixed investment arbitration would seriously undermine the effectiveness of this form of dispute settlement.'). For a similar argument of effectives, see also *Saar Papier v Poland* (n 15), [76] ('The Arbitral Tribunal is of the opinion that the Treaty does not provide for the exhaustion of the host country remedies. On the contrary, anticipating that in the host country the administrative procedure might be extremely slow, it provides only for a six months cooling period').

[19] But see *American International Group, Inc. v. Islamic Republic of Iran* (1983) 4 Iran–USCTR 96, at 102, where the Iran-US Claims Tribunal accepted that the Algiers Declaration had waived the local remedies rule by negative implication.

responsibility of the host State directly, without the intervention of its home state, might perhaps justify a different interpretative approach.[20]

At the end of the day, one has therefore been left with the absence of a general principle that could provide the basis for regulating jurisdictional competition between domestic courts and investment tribunals. This requires then looking into alternative ways to achieve regulation.

III.2. Ways to Regulate Jurisdictional Competition

The premise of the present analysis, which also informs the organization of the discussion in the following chapters, is that the interaction between domestic courts and investment tribunals *can be*, and in practice often *is* regulated at different levels.[21] First of all, regulation can be left to the *investment tribunals* themselves. Chapter 9 therefore discusses the various legal techniques employed by arbitrators in dealing with situations of actual or potential jurisdictional overlap, and the problems ensuing from such situations. Second, regulation can be pursued by *States* in their capacity of contracting parties to the investment treaties. Chapter 10 thus proceeds to discuss various ways in which States have attempted to regulate jurisdictional interactions through specific treaty provisions. Third, and finally, regulation can be pursued at the level of each specific *investor*. Hence, Chapter 11 discusses various possibilities for an investor itself to affect the way in which various dispute settlement bodies will interact in the event that they are presented with the same underlying investment dispute.

What the next three chapters intend to demonstrate, however, is that attempts at meaningfully regulating interactions between investment tribunals and domestic courts have largely been ineffective, as investment tribunals persistently refused to abrogate their adjudicatory authority in favour of domestic courts, instead constituting themselves as "autonomous decision-makers".[22] Hence, in the process of adjudicatory competition, they did not merely assert themselves as functional alternatives to domestic courts, but as the dominant forum for the resolution of investment disputes.

[20] See also *Mytilineos Holdings v Serbia & Montenegro,* ibid [224], where the distinction was drawn between the type of treaty at issue in the *ELSI* case, which provided only for the espousal of private party claims by the home State in the context of an inter-State dispute settlement mechanism and therefore justified the presumption in favor of the local remedies rule, and modern BITs providing for direct access to dispute settlement.

[21] A point worth pointing at is the fact that jurisdictional interactions can be regulated at different stages. Before a dispute has arisen, parties may already consider restricting the range of available dispute settlement bodies before which they will be able to bring potential, future disputes for resolution. The problem is then dealt with by way of a *choice of forum*. In the event that a dispute has already arisen and one of the parties has brought it before an adjudicatory body, the other party may attempt to bring it before another dispute settlement body, from which it expects to obtain a more favorable decision. The problem then turns into one concerning the regulation of *parallel proceedings*. Finally, a dispute may already have been decided, but a party dissatisfied with the outcome of the first proceedings wishes to initiate new proceedings, though in relation to the same dispute. The problem then changes into one concerning the regulation of *successive proceedings*. Various aspects of this last problem have already been discussed in chapter 4 (which looked at the legal effects of existing domestic judicial decisions on proceedings pending before investment tribunals) and chapters 6 and 7 (which dealt with investment tribunals exercising review over domestic courts' conduct for the purposes of determining the conformity of the latter with international legal standards). The focus of the ensuing three chapters, instead, is on how to prevent duplication of litigation, both at the stage when there is already concurrency of proceedings, and at the prior stage, when concurrency can still be prevented through a *choice of forum*.

[22] G Van Harten, Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration (OUP, 2013), 155.