The Role of the Domestic Law of the Host State in Determining the ratione materiae Jurisdiction of Investment Treaty Tribunals: The Partial Revival of the Localisation Theory

Eftekhar, R.

Author: Eftekhar, R.
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Part II: The Revival of the Localisation Theory in Light of the Developments in Investment Treaty Law

1. So far, I have reviewed the role played by the internal laws of the host state in the determination of certain jurisdictional and substantive issues in investment treaty arbitrations. In Chapter 1, it was shown that host state law functions as ‘law’, rather than as ‘fact’, in a paramount way in deciding specific issues of subject-matter jurisdiction. It was also said in that Chapter that the municipal laws of the host state have a voice in matters of liability and merits, but this time primarily as ‘facts’ rather than as ‘laws’ unless the treaty in question provides otherwise. Chapters 2 and 3 concerned two specific and essential questions of *ratione materiae,* namely the legality of investment and the existence of rights/interests underlying investments and the application of municipal laws of recipient states to these jurisdictional matters. These two Chapters delineated the legal bases of the application of domestic laws of recipient states to these jurisdictional prongs. The discussion then followed in these Chapters by an analysis of the impact that the application of this body of law could have on the outcome of the jurisdiction *ratione materiae* analysis of an investment treaty tribunal. In addition, in these two Chapters (i.e. Chapters 2 &3), I dealt with a series of practical and significant subject-matter jurisdictional-related legal questions that had to be answered by reference to the laws of the host state. Additionally, Chapter 4 of the Thesis addressed the related question of ascertaining the contents of the host state law in an investment treaty arbitration.
2. Having pinpointed the general role of the national law of the host state in investment treaty arbitrations and its specific function in the determination of issues of subject-matter jurisdiction and bearing the outcome of these analytical steps in mind, in Part II of this Thesis, I will consider the overall effect and the level of control that the laws and the national courts of the host state have on the fate of an investment treaty case.
3. All those interested in international law of investment and the so-called ‘international development law’[1] are familiar with concepts like the ‘Calvo Doctrine’ and the ‘Localisation Theory’. As will be explained below in more detail, these were theories which dominated a great bulk of the developing world for long periods of time by resorting to which the governments and theorists of the underdeveloped nations attempted to leave the destiny of disputes arising out of foreign investment contracts in the hands of the laws and domestic courts and tribunals of the host state. In other words, the ‘localisation theory’ had two main pillars: First, any dispute arising from a foreign investment contract should be decided in accordance with the local laws of the recipient state. Second, local courts of the host state would have sole jurisdiction to decide foreign investment disputes. Due to significant resistance by the developed states which materialised itself in many different guises like arbitral awards unfavourable to localisation-related theories, and, in particular,

[1] The term ‘international development law’ has been used by a number of commentators: see, for instance, O Schachter, ‘The Evolving International Law of Development’ (1976) 15 Columbia Journal of Transnational Law 1; M Bulajic, *Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order* (Vol. 38, Series: Nijhoff Law Specials 1986); E Kwakwa, ‘Emerging International Development Law and Traditional International Law - Congruence or Cleavage?’ (1987) 17 The Georgia Journal of International and Comparative Law 431; M Sornarajah, ‘The Climate of International Arbitration’ (1991) 8(2) J Int’l Arb 47, 72-73; AF Maniruzzaman, ‘International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View’ (2001) 20 Wisconsin International Law Journal 1.

with the advent of the bilateral investment treaties, nowadays, we treat these theories as stories of historical interest that one could tell his/her law students at a leisure time. The life and death of the 'localisation theory' will be reviewed in Chapter 5 of this Thesis.

4. That being said, although such kind of historical treatment does not seem to be far from the truth, a careful analysis of investment treaty law as it stands today would show that nowadays, the laws of the host state have a controlling role in the end result of investment treaty cases at least to some extent. This was very much shown in Chapters 1 to 3 and will be very briefly discussed here again with a focus on the shift of the approach of bilateral investment treaties and investment treaty arbitrations towards the issue. This topic will be covered in Chapter 6 of this Thesis. Additionally, Chapter 7 will demonstrate that, particularly as a result of recent developments in investment treaty law, the courts and tribunals of the host state have now a stronger foothold to make more outcome-determining interventions, observations, and decisions with respect to investment treaty cases not only on matters regarding jurisdiction but also on matters concerning admissibility and merits. When recalling the two pillars of the 'localisation theory' as it was formulated in the 1960s and 1970s, i.e., (1) foreign investment disputes should be decided in accordance with host state laws, and (2) foreign investment disputes should solely be decided by the host state courts, these developments in the role of the laws and the courts of the host state in modern investment treaty law, when seen and coupled together, might strike any reasonable bystander as giving rise to 'relocalisation of foreign investment disputes to some extent'. Indeed, one could say that although the 'localisation theory' in the context of foreign investment contracts has been purged long ago, a trend which has gradually got momentum in investment treaty law is considered to be reflective of several features of the old 'localisation theory'.
5. In order to examine the current level of the importance of the laws and the judicial systems of host states in investment treaty cases, I will open this Part Two by a historical analysis of the 'Calvo Doctrine' and the 'localisation theory' (Chapter 5). In this Chapter, I will also look into the historical roots, premises, and the contents of these theories and doctrines followed by an enquiry regarding the fate of these ideas. Chapter 5 will then continue by considering the emergence of investment treaties – in particular, bilateral investment treaties – and the function they were intended to carry out in eliminating the effects of the host state law and the interference and influence of the judiciary of the recipient state on the outcome of foreign investment disputes. Chapter 6 will then come in to distil the in-depth discussions of Chapters 1 to 3 of this Thesis (in particular, on the role of the laws of the host state on issues of subject-matter jurisdiction), followed by a brief consideration of the shift in the approach of investment treaty-making and investment treaty arbitration towards the role of the laws of the host state, thereby, outlining the overall impact of the laws of the host state on the outcome of investment treaty cases in light of the recent developments in investment treaty arbitration practice. However, the 'localisation theory' had two pillars as far as matters regarding dispute settlement were concerned. One pillar was that the laws of the host state governed the substance of the dispute and the other was that courts of the host state had sole jurisdiction to decide these investment contract cases. Therefore, in order to appraise the current level of 'localisation' of investment treaty law, it is imperative to analyse not only the current role of host state laws but also the current role of host state courts in investment treaty arbitrations. Put differently, both of the prime materialisations of the local state power, i.e., laws which are the products of the lawmaking

body of the state and courts which are emanations of the law-enforcing body of the state, should be analysed to see whether investment treaty arbitrations have been 'localised', and if so, to what extent. Furthermore, the true role of host state law in investment treaty arbitration will not be fully discovered without analysing the relevance of the courts of the host state and their findings in an investment treaty arbitration since laws are literally spelt out by the courts in practice. Therefore, Chapter 6 will be followed by another Chapter entailing a critical and thorough appraisal of the contribution that the national courts and tribunals of the capital-importing countries make to a given investment treaty arbitration proceeding (Chapter 7). The discussion considers the latest approaches and trends in investment treaty-making and investment treaty arbitration jurisprudence as to the role that is assigned to the courts of the host state in the resolution of investment treaty disputes.

6. As will be discussed in the ensuing Chapters, these developments in investment treaty law show that laws and courts of the host state have gained such significant and outcome-determining roles in current investment treaty law which could be reminiscent of the old 'localisation theory' to some extent.