5. THE RELATIONSHIP OF PARALLEL TREATY-BASED INTERNATIONAL ARBITRAL PROCEEDINGS AND CONTRACT-BASED DOMESTIC COURT PROCEEDINGS IN INVESTMENT TREATY DISPUTES

A. Conflicting Jurisdictions under International Investment Treaties and Contracts between a Foreign Investor and a Host State

In public international law, the proliferation of disputes and dispute resolution mechanisms and their corollary, the fragmentation of international law, have led to an increased jurisdictional competition among international tribunals. Whether these developments will have positive effects on the evolution of international law as a whole is subject to controversial debates. The present work is not the forum to further inquire into these problems. This chapter concerns a purportedly more traditional subject matter of competing jurisdictions: the relationship between international proceedings and local court proceedings.

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3 See, e.g., Mexican Union Railway Ltd. (GB v. Mexico) (1930) 5 RIAA 115; North American Dredging Company of Texas (US v. Mexico) (1926) 4 RIAA 26 (hereinafter, North American Dredging Company v. Mexico). Notwithstanding the antiqueness of such incidences, several recent developments such as the increased application of domestic law by international courts and tribunals or the increased application of international law by domestic courts, in short, the increased interaction between both spheres in general, turn this subject into a very recent problematic area.
The emergence of the investment treaty regime and its impact upon contracts concluded between a foreign investor and a host State generates the need to examine this aspect more closely with regard to investment treaty proceedings and national court proceedings. Particularly, the impact of the principle of possible coincidence of contract claims and treaty claims and the operation of umbrella clauses entail a dynamic convergence of both systems’ jurisdictional competences which requires further clarification.

At the outset, this paper will explain how and what kind of jurisdictional conflicts arise between both legal systems in the framework of investment treaty arbitration. The traditional means of avoidance and resolution of jurisdictional conflicts and the treaty provisions which are aimed at the resolution of such conflicts will be examined and it will be shown that their capability to resolve emerging problems in this area of law is minimal. In the second part, the historical evolution of contractual forum selection clauses and their present impact under the investment treaty regime will be examined. Thereafter, a resolution of both kinds of conflicts between contract and treaty—asymmetrical and symmetrical conflicts—will be proposed.

I. Jurisdictional Conflicts in Investment Treaty Law

1. Generation and Risks of Parallel and Multiple Proceedings

Two of the main elements underlying the evolution of international investment law or more abstractly, the protection of the individual’s rights on the international plane may be regarded in general as essential to the increase in jurisdictional conflicts in this field of law. Firstly, the multiplication of international tribunals with often vague and overlapping jurisdictions4 entitle the investor to bring its claim before

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