Interaction of International Tribunals and Domestic Courts in Investment Law

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INTRODUCTION

One of the main purposes of investment arbitration is to avoid the use of domestic courts. From the investor’s perspective, domestic courts are not an attractive forum for the settlement of their disputes with the host State. Rightly or wrongly, the investor will fear partiality from the courts of the State against which it wishes to pursue its claim. In many countries there is no independent judiciary. Executive intervention in court proceedings is often normal. Even if there is no intervention, a sense of judicial loyalty to the forum State is likely to influence the outcome of proceedings especially where large amounts of money are involved. In addition, in many countries domestic courts are bound to apply the local law even if it is at odds with international legal rules protecting the rights of investors.\(^1\) Even if the investor succeeds in proceedings before domestic courts, the executive may choose to ignore the verdicts of the judiciary.\(^2\)

The courts of the investor’s home country and of third States are usually not a viable alternative. In most cases they lack territorial jurisdiction over investments taking place in another State. An additional obstacle to using domestic courts outside the host State would be State immunity. Host States dealing with foreign investors will frequently act in the exercise of sovereign powers (\textit{jure imperii}) rather than in a commercial capacity (\textit{jure gestionis}).

An agreement to arbitrate between the host State and the foreign investor does not mean that domestic courts no longer have a role to play. The transfer of competences from domestic courts to an international tribunal is only the beginning of a story that is surprisingly complex. Numerous points


\(^{2}\) See \textit{Siag v. Egypt}, Award, 1 June 2009, paras. 33-87, 436, 448, 454-455.
of contact between the two remain. The present paper can offer no more than a broad overview of the interplay between international tribunals and domestic courts.

It is possible to identify a number of typical forms of interaction between domestic courts and international investment tribunals. Some of these interactions are regulated by treaty or customary international law others have been developed through the practice of courts and tribunals. For purposes of the present paper these interactions are broken down into the following categories: I. Prior use of domestic courts, II. Competition between investment tribunals and domestic courts, III. Support by domestic courts in investment arbitration, IV. Interference by domestic courts in investment arbitration, and V. Mutual scrutiny of investment tribunals and domestic courts.

PRIOR USE OF DOMESTIC COURTS

Exhaustion of Local Remedies?

Under traditional international law, before an international claim on behalf of an investor may be put forward in international proceedings by way of diplomatic protection, the investor must have exhausted the domestic remedies offered by the host State’s domestic courts. But it is well established that, where consent has been given to investor-State arbitration, there is generally no need to exhaust local Remedies. This principle applies in ICSID as well as in non-ICSID arbitration. Article 26 of the ICSID Convention makes it clear that a State may make the exhaustion of local remedies a condition of

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4 See esp. Helnan v. Egypt, Decision on Annulment, 14 June 2010, paras. 9, 28-57.

5 See e.g. Rosinvest v. Russian Federation, decided under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, Award on Jurisdiction, October 2007, para. 153: “So far as it is necessary to do so the consent to investor-state arbitration, as explained, amounts to a waiver of the principle of exhaustion of local remedies. By choosing international arbitration to settle third party investment arbitration disputes the principle of exhaustion of national legal remedies is excluded.”