Hanno Wehland  

The dramatic rise in the number of claims under bilateral and multilateral investment treaties has made investment treaty arbitration one of the more dynamic fields of public international law in recent decades. Yet as with many nascent regimes, teething problems have emerged concerning a number of substantive and procedural issues. This study, by Dr. Hanno Wehland, considers one such enduring difficulty: how to coordinate multiple investment treaty proceedings, in circumstances where there may be multiple claimants and respondents, various causes of action under different instruments, and more than one procedure or forum for the resolution of the dispute, or part of the dispute?

As Dr. Wehland observes, a set of facts may “give rise not only to investment treaty arbitrations, but may also lead to additional sets of proceedings between the same or closely related parties regarding largely identical issues” (p. 1). Such additional proceedings “may take place before other arbitral tribunals, the domestic courts of host States, and even specialized international forums such as the European Court of Human Rights” (p. 1). This can lead to disagreements over the appropriate forum for the resolution of the dispute (or aspects of the dispute), the fragmentation of adjudicatory competences, and the potential for abuse by claimants by having several attempts at dispute resolution proceedings (pp. 1–2). Equally problematic are the danger of “double recovery” in respect of the same wrongful conduct, the distortion of the claimant’s prospects of success, the possibility of conflicting outcomes, and increased litigation costs more generally (pp. 8–10).

These themes will resonate with anyone familiar with the saga of the *CME (Czech Republic) BV v. Czech Republic* and *Lauder v. Czech Republic* cases (on which see more below), as well as the decisions faced by an investor (and the investor’s advisers) who may be aggrieved by sovereign action by the host State relating to its investment. Should it commence judicial review of the government’s conduct before the national courts? Is there a national investment law, which confers any rights? Is there a claim under a multilateral or bilateral investment treaty (or both?) Is there a contractual claim, either against (e.g.) the local State-owned joint venture partner (if any) or the State’s Ministry of Resources? Is there another international claim, such as before a regional human rights court, a universal human rights committee, a regional economic court, or even an inter-State claim, brought by way of diplomatic protection? Which entity is the proper claimant – the foreign investor, the locally
incorporated investment vehicle, or another entity? Against this background, Dr. Wehland sets his task as to undertake “a systematic analysis of the different coordination mechanisms and their interrelationship,” which he does “by comprehensively addressing the coordination of multiple proceedings before investment treaty tribunals” (p. 3). He seeks to identify “clear, predictable, and sensible coordination rules,” which may serve to reduce jurisdictional fragmentation, jurisdictional competition, and the abuse of the complexities of the system (pp. 3–4).

After identifying the characteristics of investment treaty arbitration, which lead to the possibility of multiple proceedings (Chapter 2), this book examines possible solutions for the coordination of multiple proceedings in investment treaty arbitration. Chapter 3 discusses the application of forum selection options in BITs, contracts, and domestic investment legislation, as well as other jurisdiction-regulating rules, such as “fork-in-the-road” and waiver provisions. Chapter 4 considers mechanisms for the coordination of multiple investment treaty proceedings, such as consolidation of proceedings; this may be done either on an *ad hoc* basis, or pursuant to a rule in the applicable treaty or rules of arbitration (such as under Article 1126 of NAFTA). Chapter 5 considers whether there is any hierarchy among international and national courts and tribunals, which may be used as a coordinating mechanism. Dr. Wehland concludes that, although there is no hierarchy *per se* (pp. 144–147), an investment treaty tribunal may review the decisions of other forums that decide exclusively non-treaty claims (pp. 161–162).

In Chapter 6, Dr. Wehland turns to the potential application of the doctrines of *lis alibi pendens* and *res judicata*. He concludes that the first of these is not a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice (p. 196). The doctrine of *res judicata* is of limited use due to the strict conditions which govern its application, such as the “triple identity” requirement, which requires that the parties to the proceedings, the object of the claim, and the cause of action be identical (pp. 183, 199–205).

Finally, Chapter 7 examines whether other overarching principles can be used to coordinate multiple investment treaty claims, such as the principle of comity [which involves calling on international forums “to defer where appropriate to other courts, and to treat their decisions and procedures with courtesy and respect” (p. 208, citing Yuval Shany)], and the prohibition on the abuse of process [which prevents “the use of procedural instruments or rights ... for purposes that are alien to those for which the rights were established” (p. 218, citing Robert Kolb)]. Dr. Wehland sees much potential in the use of these more flexible doctrines, which may have application where