CALVO’S GRANDCHILDREN: THE RETURN OF LOCAL REMEDIES IN INVESTMENT ARBITRATION

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I. INTRODUCTION

One of the purposes of investor/State arbitration is to avoid the use of local courts. Litigation in the host State’s domestic courts is often seen as lacking the objectivity that the investor desires. In addition, domestic courts are often bound to apply domestic law even if that law falls short of the standards provided by international law.

The traditional international remedy in investor/State disputes is diplomatic protection. But diplomatic protection is contingent upon the exhaustion of local remedies. It does not free the investor from going to the host State’s courts. First going to the local courts of the host State meant delay and additional expense to the investor. But it also carried disadvantages for the host State. Public proceedings in the domestic courts are likely to exacerbate the dispute and may affect the host State’s investment climate. Once the host State’s highest court has made a decision, it may be more difficult for the government to accept compromise or a contrary international judicial decision. The Preamble to the ICSID Convention states that “while such [investment] disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases.”

It is for these and other related reasons that international investment arbitration dispenses with the requirement to exhaust local remedies, at least in principle. Article 26 of the ICSID Convention specifically does away with this traditional requirement “unless otherwise stated”.

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1 The Report of the Executive Directors to the ICSID Convention states:
   “10. The Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.” 1 ICSID Reports 25.
It is open to a host State to insist on the exhaustion of local remedies when consenting to international arbitration. The ICSID Model Clauses contain a sample for a text to this effect for inclusion in an agreement between the host State and the investor. Some bilateral investment treaties (BITs), providing for investment arbitration, make the exhaustion of local remedies a condition of consent. But clauses of this kind seem to be rare and are found mostly in BITs of older vintage. Two countries, Israel and Guatemala, have given notifications to ICSID that they will require local remedies to be exhausted. But Israel subsequently withdrew that notification.

Arbitral practice confirms that the exhaustion of local remedies is not required in contemporary investment arbitration. Both ICSID and non-ICSID tribunals have held that claimants were entitled to institute international arbitration directly without first trying their luck in the local courts.

This is not to say that proceedings in domestic courts will not play a role in investment arbitration. For instance, domestic courts can become active either to compel or to stay the arbitral proceedings. They may be competent to issue provisional measures. They can play a crucial role in the enforcement of awards. In non-ICSID arbitration domestic courts may have the power to set aside international arbitral awards. The activities of domestic courts may be the object of scrutiny by the international tribunal, especially where a denial of justice has been alleged. Most importantly, they may be in a position to clarify preliminary points of domestic law that are relevant to the case before the international tribunal: for instance if an

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2 ICSID Model Clauses, Clause 13, 4 ICSID Reports 365.
6 Attorney-General v. Mobil Oil NZ, New Zealand High Court, 1 July 1987, 4 ICSID Reports 117; SGS v. Pakistan, Decision on Jurisdiction, 6 August 2003, paras. 35 et seq., 42 ILM 1290, 1297 (2003).
7 Schreuer, Commentary, pp. 376 et seq.
8 Czech Republic v. CME, Svea Court of Appeals, 15 May 2003, 42 ILM 919 (2003); Mexico v. Metalclad, Supreme Court of British Columbia, 2 May 2001, 5 ICSID Reports 236.
9 Loewen v. United States, Award, 26 June 2003, paras. 54 et seq., 42 ILM 811 (2003).