ČSMP SIL
Česká společnost pro mezinárodní právo
Czech Society of International Law

CZECH YEARBOOK OF PUBLIC & PRIVATE INTERNATIONAL LAW

Česká ročenka mezinárodního práva veřejného a soukromého

Vol. 8

Prague 2017

EDITION

widely-shared treaty practice."[45] Admittedly, its clauses defining the Contracting Parties in international treaty *inter alia* as the Member States of the EU represent the unique nature of EU law. However, they are not a safety net of continued participation of the UK because the UK will not satisfy the definition of Member States linked to "Contracting Parties to the TEU and the TFEU" in the preamble. This conclusion is further supported by the scope of territorial application of EU treaties.

Among many other experts, professor Koutrakos has said it very openly during the referendum campaign that "following Brexit, the UK would have to renegotiate a whole host of trade agreements with third countries."[46] As trade relations with countries outside the EU are traditionally essential for British exports and this share of British trade is rising,[47] now the UK has to find ways how to mitigate negative impacts of losing its status. If the UK does not conclude a transitional agreement with the EU safeguarding future participation in EU FTAs, there is a high probability that the UK will exit without market access and other trade benefits to the 63 countries now accessible under EU FTAs.

Regarding next steps, it is best for the UK to follow one of two possible options: (i) to seek membership to EU FTAs as a third party, while the effective accession of the UK would then be conditional upon consent of the EU and the relevant partner; or (ii) replicate EU FTAs and deviates from its texts based on specific UK priorities and interests.[48] Indeed, as Brexit is an unprecedented situation, parties involved can bring up a completely different and creative provisional framework. But only after gaining some experience and a comprehensive understanding of the content of FTAs could the British Government prepare its own template of trade agreement for future reflecting about the country's trade preferences.

[45] OLSON, Peter M., Mixity from the Outside: the Perspective of a Treaty Partner. In: HILLON, Christophe, KOUTRAKOS, Panos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford: Hart Publishing 2010, p. 333.

[46] KOUTRAKOS, *supra* note 6.

[47] House of Commons Library, Brexit: impact across policy areas, *Briefing Paper No. 07213* (26 August 2016), p. 28.

[48] Institute for Government, Taking back control of trade policy (17 May 2017), p. 36.

LIS PENDENS BETWEEN INTERNATIONAL INVESTMENT TRIBUNALS AND NATIONAL COURTS *

Zdeněk Nový

Abstract: The paper addresses *lis pendens* between international investment arbitration tribunals and national courts in case of factually and legally related disputes. After giving an overview of the role of *lis pendens* in national law, it focuses on the analysis of its position in public international law. Afterwards, the paper specifically turns to parallel proceedings in international investment arbitration, in particular those pending simultaneously before arbitrators and in national courts. Thereafter, it is submitted that the principle of abuse of process, often invoked as a corrective tool for *lis pendens*, does not actually offer a reliable solution or mitigation thereto. Finally, the paper suggests that a solution to the problem of *lis pendens* between an investment tribunal and national court might not be resolved by international law, but national law. Although this solution does not provide a unity, it is realistic.

Resumé: Příspěvek se zabývá problematikou litispendence mezi investičními tribunály a národními soudy ve fakticky a právně souvisejících sporech. Nejprve je podán výklad o roli litispendence v národních právních řádech. Následně se příspěvek zaměřuje na pojetí litispendence v mezinárodním právu veřejném. V zápětí je analýza zúžena již pouze na oblasti mezinárodní investiční arbitráže. Poté příspěvek klade otázku, zda princip zákazu zneužití procesních práv, mající svůj původ v národních právních řádech, může poskytnout řešení či zmírnění nepříznivých důsledků litispendence mezi investičními tribunály a soudy. V závěru se navrhuje, že řešení otázky litispendence možná neleží v rovině práva mezinárodního, leč práva vnitrostátního. Tento přístup nezaručuje jednotnost, nicméně je realistické.

Key words: Arbitration, Courts, Investment Arbitration, Lis Pendens.

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* *The paper has been created within the project supported by the Grant Agency of the Czech Republic GA15-08182S "The Role of Public Interests in International Commercial and Investment Arbitration."*

1. Introduction

International investment arbitration has been a subject to extensive criticism, in particular for its alleged lack of the protection of public interest. The exponential rise in the number of international investment treaties has led over the years to the mushrooming of investment arbitrations, including strategic choices by claimants.

One of the points of critique is thus an artificial multiplication of proceedings. The main risks connected to such developments are two: irreconcilable decisions in different fora may lead to irreconcilable decisions or double compensation to an investor.

This paper will address the issue of *lis pendens* between international investment tribunals and national courts. Imagine (not an unlikely) scenario, in which an investor commences national court proceedings in order to protect its investment.[1] As long as the national court proceedings are protracted and accompanied by the usual 'judicial exchange' of the case among court instances, the investor decides to turn to investment arbitration. Should this situation be considered as *lis pendens*? How should react the arbitration tribunal seized of the dispute?

The paper recognizes that the so-called triple identity test is alive and well in international investment arbitration. It is then unrealistic to expect that there would be any unified solution to this problem in international law, including attempts to introduce traditional procedural devices limiting procedural right under national laws, like abuse of process. The paper thus proposes that a 'solution' should not be looked for in international, but in national law. Legislation as one of the typical functions of states allows for reaction to unwelcome parallel proceedings.

2. The Domestic Origins of the *Lis Pendens* Rule

Lis (alibi) pendens is a rule recognised by Civil Law countries, whereas Common Law systems have traditionally used different tools to prevent/coordinate parallel proceedings.[2] The traditional solution to *lis pendens,* i.e. pending proceedings in two or more fora, in Civilian countries is the first-in-time rule, meaning that the second court seized should stay the proceeding.[3] Common laws use the wider repertoire of doctrines and procedural devices to react to parallel proceedings, like forum *non conveniens* or anti-suit injunction.[4]

The idea behind preventing *lis pendens*, similarly to *res judicata*, is that *interest rei publicae ut sint finis litium,*[5] hence there is some wisdom in reducing disputes than in multiplying them. As noted by Kaj Hobér, '[t]he rationale underlying the principle of *lis pendens* is threefold: (i) to prevent parallel proceedings which usually cause a waste of time, money

1 It may, for instance, bring an action against the state for damages caused by wrongful use of public power, an incorrect decision etc.

2 For the purposes of the present article, the discussion on compatibility of traditional procedural devices of English law as the EU Member State is not omitted.

3 BANTEKAS, Ilias, *An Introduction to International Arbitration* (1 edn CUP 2015)138.

4 MCLACHALAN, Campbell, *Lis Pendens* in International Litigation *RDCADI* 366 (1edn, Martinus Nihoff Publishers, 2009).

5 See CAPPELLETTI, Mauro, *The Judicial Process in Comparative Perspective* (Clarendonn Press 1989) 68.

and energy; (ii.) to avoid conflicting judgments; to protect parties from oppressive litigation tactics.'[6]

There are three requirements shared by the Civil Law system for finding *lis pendens* (the so-called triple identity test):

- the same parties (*partes*),
- the same legal grounds (*causae petendi*),
- the same subject-matter (*petitum*).[7]

It has to be said now at this point that it is not possible to artificially isolate these elements from each other. In parallel proceedings in international investment arbitration and national courts, where legal grounds are different, the parties would be different.

3. Cross-border *Lis Pendens*

Lis pendens and similar procedural devices are accepted under national laws and scarcely pose problems. However, given the impermeable nature of national states and their legal orders in the post-Westphalian world, the admission of *lis pendens* in a cross-border situation, where courts of one sovereign state take into account the court proceedings pending before courts of another, can be considered as some, albeit recent, achievement.[8]

Now the rules on *lis pendens* among Member States' courts are contained in the so-called Brussels I bis regulation.[9] However, this regulation deals only with parallel proceedings among courts, not courts and arbitrators.[10]

Furthermore, as a rule, it is rather rare that international arbitrators should defer to court proceedings pending in the same matter before a state court, since arbitrators are authorised to consider their jurisdiction regardless of any other proceedings (Kompetenz-Kompetenz principle).[11]

It does not come, therefore, as a surprise that there has been no international treaty directly regulating *lis pendens* between commercial arbitration and national courts.[12] As noted by Hans Van Houtte:

6 HOBÉR, Kaj, Res Judicata and *Lis Pendens* in International Arbitration *RDCADI* 366 (1 edn, Martinus Nijhoff Publishers 2014) 144. Yet, perhaps more importantly, if *res judicata* as a finalization of the proceedings is deemed to represent (juridical) truth (*res judicata facit de nigro album et de rotundo quadratum*) and therefore a correct solution of the case, there may be only one truth – hence no reason for two pending proceedings. The acceptance of two proceedings pending in the same matter would prevent finding of the true (single) solution of the case. This conclusion surely presupposes a certain concept of civil procedure as seeking for truth.

7 MCLACHALAN, Campbell, *Lis Pendens* in International Litigation 283.

8 MCLACHALAN, Campbell, *Lis Pendens* in International Litigation 282.

9 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

10 See article 1 (2) (d) in conjunction with article 29 (1) of the Regulation.

11 One of the exceptions to the rule is the decision of the Swiss Supreme Court ATF 4P 37/2001 Le cour civil 14 mai 2001, Fomento de Construcciones y Contratas S.A., à Madrid (Espagne) a sentence arbitrale rendue le 30 novembre 2000 par un Tribunal arbitral CCI siégeant à Genève et composé de MM. Bruno Keppeler, président, Alberto Mazzoni et José Carlos Fernandez Rozas, arbitres, dans la cause qui oppose la recourante à Colon Container Terminal S.A., à Eldorado (République de Panama), représentée par Mes Benoît Dayer et Howard Kooger, avocats à Genève. Available at: http://www.swissarbitrationdecisions.com/application-of-the-lis-pendens-principle-to-an-arbitral-tribunal> accessed 29 May 2017.

12 To be sure, there is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New

'There does not yet exist a clear and global transnational *lis alibi pendens* – exception in the arbitration and jurisdiction conventions. **Arbitration and court proceedings belong to separate worlds** with their own jurisdiction and enforcement conventions, which have neglected the interface between arbitration and court jurisdiction.'[13]

In sum, as international investment arbitration has a 'hybrid foundations',[14] sharing the features of both public and private international law, the existence of a cross-border *lis pendens* in private international law may be a promising indicator for finding the same legal tool in public international law.

4. Lis Pendens in Public international law

Given that at least national laws use *lis pendens*, the essential question is whether the principle of *lis pendens* also forms part of international law. International law was initially based on national law analogies.[15] Thus, as traditional international law was rather poor on procedural rules,[16] it borrowed from national procedures, including *lis pendens*.[17] This would intimate that international *lis pendens* would be basically the same as that in national law. Nonetheless, the situation is more complex.

First of all, we may distinguish the following situations of potential *lis pendens*:[18]

- among international courts;
- among public international arbitrations (including investment arbitration);
- between international courts and public international arbitration;
- between international courts and national courts;
- between public international arbitration and national courts.

York, 1958) (the NY Convention) UN Treaty Series vol 330 p.3. The article II (3) of this convention provides that '[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.' See also Art. V European Convention on International Commercial Arbitration (1961) UN Treaty Series Vol. 484 p. 349. Available at:< https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en> This former convention regulates, however, recognition and enforcement, hence not jurisdiction, whereas the latter provides rules for jurisdiction, but is accepted by a rather limited number of states (31 Parties – the number valid as to 29 May 2017).

[13] VAN HOUTTE, Hans, "Parallel proceedings before state court and arbitration tribunals: is there a transnational *lis alibi pendens* – exception in arbitration or jurisdiction conventions? In *Arbitral Tribunals or State Courts. Who must defer to whom?*" ASA Special Series No. 15 (2001), pp. 53-54. Emphasis added by the author.

[14] DOUGLAS, Zachary, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74 *BYIL* 152 et seq

[15] The reason for adopting civil law analogies in the form of general principles of law was the relative paucity of international law rules at the inception of modern international law. The procedural vehicle for doing so was arbitration, which allowed for entering of civil law concepts as general principles of law into international law. See ČEPELKA, Čestmír, ŠTURMA, Pavel, *Mezinárodní právo veřejné* (1edn, C. H. Beck 2008) 123.

[16] See MALENOVSKÝ, Jiří, *Mezinárodní právo veřejné Obecná část a poměr k jiným právním systémům* (6th edn., Doplněk-Aleš Čeněk 2014) 27.

[17] BOISSON DE CHAZOURNES, L., 'Plurality in the Fabric of International Courts and Tribunals The Threads of a Managerial Approach' (2017] 28 *EJIL* 46.

[18] A similar attempt at systematization of parallel proceedings may be found e.g. in CREMADES, Bernardo M., MADALENA, Ignacio, 'Parallel Proceedings in International Arbitration' (2008} 24 *Arbitration International* 515-526.

International courts and arbitrators will apply primarily international law. A national court will apply national law and international law, to the extent that it was incorporated into the national law.

Next, it is necessary to look for a source of the *lis pendens* principle in international law. The starting point of the analysis would article 38 (1) of the International Court of Justice Statute.

'a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'[19]

The 'usual suspect' concerning *lis pendens* would be the 'general principle of law' shared by national legal orders. Indeed. Yet, the level of abstraction in the analysis is of importance. There would be perhaps no legal system which would not react on the situation on more pending proceedings before state courts and/or arbitrators. Nevertheless, different states react to the situation with different legal instruments and tools, which may be comparable to only using a probably too-stretched functional approach in such legal comparison.[20]

As to the opinions of highly qualified publicists, Campbell McLachlan summarized the finding of his study on *lis pendens* in international law as follows, '[t]he question whether the doctrine of *lis pendence* is a general principle of law common to civilized nations has still not been authoritatively answered by an international tribunal. However, the research presented in these lectures strongly suggests the existence of such principle.'[21]

Kaj Hobér also within his lecture on *lis pendens* and *res judicata* held at the Académie de droit international de la Haye denied the existence of such a principle in international law, '[a]s far as the principle of *lis pendens* is concerned, its status under international law is **more** uncertain [compared to *res judicata*]. Based on existing case law, (...) it [the principle of *lis pendens*] is not – at least not yet – a general rule or principle of international law.'[22]

Judge Tréves in his separate opinion in the *Mox Plant Case* declared that:

'It seems also useful to underline that while article 282 [UNCLOS] can be seen as a mechanism for avoiding that situations of litispendence arise, it is not a rule providing for the consequences of litispendence. It leaves completely open the question as to whether, in case a dispute concerning the interpretation of provisions of a treaty other than the Convention but equivalent or similar to provisions of the Convention has been submitted to a court or tribunal competent under the provisions of such a treaty, the dispute settlement bodies competent under the Convention would consider it fit to hear a dispute concerning

[19] Statute of the International Court of Justice. Available at< http://www.icj-cij.org/documents/index.php?p1=4&p2=2&> accessed 29 May 2017.

[20] For functionality as a key methodological tool in legal comparision see the classical piece KÔTZ, Hein, ZWEIGERT, Konrad, *Einfühurng in die Rechtsvergleichung : auf dem Gebiete des Privatrechts* (3edn J. C. B Mohr 1996) 33.

[21] MCLACHALAN, Campbell, *Lis Pendens* in International Litigation *RDCADI* 366 (1edn, Martinus Nihoff Publishers, 2009) 506.

[22] HOBÉR, Kaj, 'Res Judicata and Lis Pendens in International Arbitration' 331.

equivalent or similar provisions of the Convention. The existence and content of a customary law rule or of a general principle concerning the consequences of litispendence, as well as considerations of economy of legal activity and of comity between courts and tribunals, might be discussed in such a situation.'[23]

As pointed out by Yuval Shany:

'[I]t looks as if existing case-law on the question of *lis alibi pendens* is also too scarce and non-definitive to establish the existence of such general rules or principle in international law, in the relations between international courts and tribunals. Nonetheless…one can make a plausible case that *lis alibi pendens* may qualify as a general principle of law, recognised by most legal systems, at least with respect to intra-systematic jurisdictional competition.'[24]

Hence, the rule of *lis pendens* is applicable to **intra, not inter, systemic conflicts** of jurisdiction. In other words, it is possible to think of *lis pendens* either among national courts or international courts, the underlying premise being a strict dualism between international and national law.[25] The rationale behind *lis pendens* is a consistency and coherence within one legal system. This is not the case of international adjudication on the one hand, based on international law an applying it, and national decision-making systems on the other hand.

As long as international law has claimed its superiority over national law[26] before international tribunals, an international investment tribunal need not take into account the pending proceedings before a national court.[27] The specific implication of such superiority is that national court decision may not have any impact on the jurisdiction of an international tribunal.[28]

Moreover, as noted by the Permanent Court of International Justice (PCIJ) in the *Upper Silesia Case*:

'There is no occasion for the Court to devote time to this discussion in the present case, because it is clear that the essential elements which constitute litispendance are not present. There is no question of two identical actions: the action still pending before the Germano-Polish Mixed Arbitral Tribunal at Paris seeks the restitution to a private Company of the factory of which the latter claims to have been wrongfully deprived; on the other hand, the Permanent Court of International Justice is asked to give an interpretation of certain clauses of the Geneva Convention. **The Parties are not the same**, and, finally, **the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character, and,** ***a fortiori*****, the same might be said with regard to the Court and the Polish Civil Tribunal of Kattowitz.**'[29]

[23] International Tribunal for the Law of the Sea (ITLOS), Mox Plant Case (Ireland v United Kingdom), Provisional Measures, Separate Opinion of Judge Tréves, para 5. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Treves.E.orig.pdf.

[24] SHANY, Yuval, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003) 244.

[25] MCLACHLAN, *Lis Pendens* in International Litigation 500.

[26] See only article 27 of the Vienna Convention on the Law of Treaties.

[27] CUNIBERTI, Gilles, 'Parallel Litigation and Foreign Investment Dispute Settlement' 393.

[28] ICSID Case No. ARB/03/4-Annulment Proceedings Industria Nacional de Alimentos, S. A. and Indalsa Peru, S.A. v. The Republic of Peru, 5 September 2007, para 87.

[29] Case concerning Certain German Interests in Polish Upper Silesia. Series A-No.6, at 20. Emphasis added by the author.

As a result, the international tribunal may approach national court proceedings as a mere fact, not as comparable judicial proceedings. As put by the arbitration tribunal resolving the pre-WW II dispute between Germany and Romania, '[a]s regards foreign states, the decisions of national courts are less judgments than simple manifestations of state activity (…) It is solely within the internal law that authority of *res judicata* by a national court finds its application.'[30]

Thus, *lis pendens* is possible between international courts or tribunals on the one hand, or between national courts on the other hand, but not an international arbitration tribunal and national court. In short, 'comparable adjudicators' are lacking here.[31]

However, one may ask whether the above arguments based on a strictly dualist approach are compatible with the contemporary reality of the ever-increasing penetration of international law into national laws and decision-making. Should not it matter that national courts play more than ever the dual role (*dédoublement fonctionnel*) of protectors of both international and national values?[32]

On the other hand, a national court may and, depending on the domestic law, must take into consideration pending proceedings before an international court or tribunal. Hence, the issue of *lis pendens* might be resolved in the sphere of national law (see below).

Kaj Hobér stated that '*in addition to the triple identity test, under international law the proceedings must be, or must have been, conducted before courts and tribunals in the international legal order.*'[33]

From this short exposé, it is clear that there has been disagreement on the very issue whether *lis pendens* as a principle originating in national law successfully found its way into international law. The reason behind such a conclusion is not that it would be unimaginable that *lis pendens* is part of international law, but due to the fact that *lis pendens* is inherently limited to one legal system (national vs. international law).

5. *Lis Pendens* in Internatinal Investment Arbitration

At the outset, two situations have to be distinguished:

- *Lis pendens* between two investment tribunals;
- *Lis pendens* between an investment tribunal and national court/commercial arbitration.

It should be borne in mind that arbitration is based on the idea of exclusive jurisdiction flowing from the arbitration agreement between the parties.[34] It is thus unnecessary for any arbitration tribunal to pay regard to a court procedure, even in a similar matter.

[30] Affaire de Chemins de fer Bužau-Nehoiași (Allemagne contre Roumanie), 7 juillet 1939 RIAA Vol 3 1836. Available at: <legal.un.org/riaa/cases/vol_III/1827-1842.pdf> accessed 29 May 2017.

[31] CUNIBERTI, Gilles, 'Parallel Litigation and Foreign Investment Dispute Settlement' (2006) 21 *ICSID Review* 399-401.

[32] See TZANAKOPOULOS, Antonios, 'Domestic Courts in International Law: The international Judicial Function of National Courts' (2011) 34 *Loy LA Int't & Comp L Rev* 133-168. The present author is not, however, overoptimistic about the 'dédoublement' thesis, seeing e.g. Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, I. C. J. Reports, 2012.

[33] HOBÉR, Kaj, 'Res Judicata and Lis Pendens in International Arbitration' 311.

[34] BOISSON DE CHAZOURNES, L., 'Plurality in the Fabric of International Courts and Tribunals The Threads of a Managerial Approach' (2017) 28 *EJIL* 47.

Parallel proceedings in international investment arbitration involve three key issues. First is the litigation as CME/Ronald Lauder where the same set of facts generated two arbitrations, with two legally different, albeit economically connected, parties and contradictory outcomes. Second is the situation in which a contract claim is pursued in an international investment tribunal although it should be heard by national court instead.[35] The last issue is treaty shopping, i.e. an attempt to establish jurisdiction of an investment arbitral tribunal on the basis of the investment treaty by evasive or unfair means.[36]

In the following, only the situation of two pending proceedings will be considered. One of them had been initiated by a local company before a state court of the host state and second commenced later in international investment tribunal by the company's shareholders by virtue of a bilateral investment treaty. Does this situation present *lis pendens*?

The starting point for considering, *inter alia*, the situation of *lis pendens* is the text of the investment treaty. The treaty may require that domestic remedies are exhausted before initiating investment arbitration or set forth a fork-in-the-road provision. The letter provision means that an investor has to choose between going to arbitration or courts. Once it has made such choice, it cannot select another dispute resolution option.[37]

It should be emphasised that the state undertook by the bilateral investment treaty *obligation de moyen*, meaning that it will resolve a dispute with an investor specifically in international investment arbitration as a dispute resolution means. It is submitted that requesting the investment tribunal to stay arbitration proceedings because there is a national court proceedings, albeit in a related matter, would contradict this international legal obligation assumed by the state.

Regarding the requirement of exhaustion of local remedies, unless expressly laid down by the treaty, it is usually dispensed with in international investment arbitration. First of all, exhaustion of local remedies is the rule developed within general international law for the invocation of responsibility of states by injured states for internationally wrongful conduct. As long as international investment law is deemed to be *lex specialis*, the rule on exhaustion of local remedies does not apply.[38] Another limitation of the rule is that only the exhaustion of effective remedies is necessary. [39]

Yet, unless there is one of these rules, there does not seem to be an obstacle for investment arbitration tribunals to hear cases, regardless of whether there are also pending proceedings with similar/identical factual and legal background. This, however, should be verified by the analysis of the investment arbitration cases.

[35] This situation may arise due to an umbrella clause which may allow a contract claim to have become the international one.

[36] Jorun Baumgartner aptly distinguishes between 'treaty shopping' and 'forum shopping'. Forum shopping means, in a nutshell, choice of the most favourable forum to claimant. See BAUMGARTNER, Jorun, *Treaty Shopping in International Investment Law* (OUP 2016) 15/-19.

[37] BLACKABY, Nigel, PARTESIDES, Constantine, REDFERN, Alan, HUNTER, Martin, *Redfern and Hunter on International Arbitration Student Version.* (6th edn OUP 2015) 463.

[38] See Article 17 Draft Articles on Diplomatic Protection. Available at:http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf accessed 29 May 2017.

[39] Case concerning Elettronica Sicula s.p.a. (ELSI) (United States of America v. Italy) ICJ Judgment of 20 July 1989.

6. Investment Arbitration Cases

In SPP v. Egypt (the Pyramids case), the tribunal found no reason why it should be bound by a *lis pendens* rule:

'when the jurisdiction of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising jurisdiction.'[40]

An investment tribunal in GAMI v Mexico stated that '[i]nternational arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such an international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court, to disregard the same…'[41]

The tribunal continued that '[u]ltimately each jurisdiction is responsible for the application of the law under which it exercises its mandate. It was for the Mexican courts to determine whether the expropriation was legitimate under Mexican law. It is for the present Tribunal to judge whether there have been breaches of international law by any agency of the Mexican government…'[42]

Also the tribunal in SGS v. Pakistan observed that '[I]f the claims are not *idem*, *bis* does not arise. As the causes of action are not identical, the doctrine of lis pendens cannot operate to preclude us from exercising jurisdiction over the BIT claims.'[43]

In Benvenuti & Bonfant v. Congo, the arbitration tribunal had to decide whether it had jurisdiction to hear the case when there were proceedings before a national court in Brazzavile. The tribunal decided that '[t]he Government's plea of *lis pendens* could only succeed if there were identity of the parties, the object and the cause of action in the two sets of proceedings. This was not the case here.'[44]

As stated by the tribunal in SGS v. Pakistan '[I]f the claims are not *idem*, *bis* does not arise. As the causes of action are not identical, the doctrine of *lis pendens* cannot operate to preclude us from exercising jurisdiction over the BIT claims.'[45]

In addition, the ILA Final Report on *lis pendens* and *res judicata* refers to the Svea Court of Appeal decision in CME v. Czech Republic, which 'has confirmed that one of the fundamental conditions for *lis pendens* is identity of parties, and that a controlling shareholder and the company are not identical for this purpose.'[46]

[40] Cited in SHANY, Yuval, *The Competing Jurisdictions of International Courts and Tribunals.* 243.

[41] GAMI Investments Inc. v. The Government of the United Mexican States, NAFTA/UNICTRAL, Final Award of 15 November 2004 para 39.

[42] Ibid para 41.

[43] Société Générale de Surveillance S.A. (Claimant) versus Islamic Republic of Pakistan (Respondent) ICSID CASE No. ARB/01/13 SGS (Decision of The Tribunal on Objections To Jurisdiction), para 182.

[44] Rosemary Rayfus (ed.) ICSID Reports Vol. I. (Grotius Publications Ltd, 1993), 332.

[45] Société Générale de Surveillance S.A. (Claimant) versus Islamic Republic of Pakistan (Respondent) ICSID CASE No. ARB/01/13 SGS (Decision of The Tribunal on Objections To Jurisdiction), para 182.

[46] International Law Association (ILA) Final Report on Lis Pendens and Arbitration Toronto Conference (2006) at 9. Available at: < http://www.ila-hq.org/index.php/committees?committeeID=14 > accessed 29 May 2017

In Pantechniki v. Albania, the sole arbitrator Paulsson refused the claim before him because 'the Claimant's grievance thus arises out of the same purported entitlement' before the Albanian courts.[47]

In sum, the tribunals tend to consider the triple identity test as decisive.

7. Abuse of Process as a Panacea?

Easy solutions are tempting ones. Some of them are those based on general legal ideas, like abuse of process.[48] It is, however, rather difficult, though not impossible, to define what constitutes an abuse of process.

Before embarking on the journey in search for the role of abuse of process in international investment arbitration, three factors should be taken into account. Firstly, there is a right to go to investment arbitration given to an investor by the investment treaty. An investor may indeed use/exercise this right. As bilateral investment treaties do not usually set limits to the exercise of such right, such limitation can be looked for outside the treaty, i.e. in other sources of international law, namely customary law and general principles of law.

In that respect, it should be perhaps mentioned that probably[49] the only international convention expressly reacting to abuse of process is the UNCLOS, as follows:

'Article 294 Preliminary proceedings

1. A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or it is, prima facie, well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall **take no further action in the case**.'

Interestingly, the very same convention prohibits abuse of rights, 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.'[50]

The issue of starting (public) international arbitration under the UNCLOS was one of the matters dealt with by the Arbitral Tribunal in an arbitration between China and Philippines. The tribunal 'note (d) that the mere act of unilaterally initiating an arbitration under Part XV in itself cannot constitute an abuse of rights.'[51] It added that, '(I)n light of the serious consequences of a finding of abuse of process or *prima facie* unfoundedness, the Tribunal considers that the procedure is appropriate in only the most blatant cases of abuse or harassment.'[52]

[47] ICSID Case No. ARB/07/21 between Pantechniki Contractors & Engineers SA (Greece) (Claimant) and the Republic of Albania (Respondent), Award, 30 July 2009, para 67.

[48] See recently Emmanuel Gaillard 'Abuse of Process in International Arbitration' (2017) 32 ICSID Review 17-37.

[49] There are of course more or less explicit references to the notion of abuse of rights in other treaties as well, see e.g. article 17 European Convention on Human Rights (ECHR).

[50] Article 300 United Nations Convention on the Law of the Sea (UNCLOS) UN Treaty Series vol 1833 p. 3.

[51] PCA Case No 2013- 19 before an arbitral tribunal constituted under Annex VII to the United Nations Convention on the Law of the Sea between the Republic of Philippines and the Peoples Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, para 126.

[52] Ibid, para 128.

In a similar vein, in the F*ree Zones of Savoy and the District of Gex*, the PCIJ stated that *'a reservation must be made as regards the case of abuses of a right... But an abuse cannot be presumed by the Court.*[53] Thus, there is presumption of good faith (lack of abuse of process).

Let us apply these facts to international investment arbitration.[54]

First of all, it seems that the situation where the treaty expressly prohibits abuse of rights should be distinguished from those which do not do so, like most bilateral investment treaties.[55] Moreover, investment arbitral tribunals from time to time apply equitable principles, including abuse of rights.[56]

Secondly, there is a rebuttable presumption of not abusing the right to arbitration by an investor.

Yet, before the court uses the remedy not to continue to hear the case as to its merits, it would have to be proven that there actually is an abuse of process.[57]

The present author agrees with the dictum in the China v. Philippines arbitration, in that it may not be sufficient to say that the investor had started proceedings in national courts, which has not been finished yet, before it sought the protection of its investment in investment arbitration. It would have to be demonstrated by the state as respondent in the investment arbitration that the investor has maintained the two parallel proceedings for malicious reasons. Another interpretation would mean denial of justice to the investor – company or to shareholders in the investment arbitration proceedings. The decline of jurisdiction either by an investment tribunal or national court should not be taken lightly as it may result in denial of justice.[58]

As a practical note, it would be oftentimes very expensive and time-consuming for the investor not only to go to international investment arbitration but also to continue in national court proceedings. Thus, the commencement of investment arbitration would not always be some kind of caprice by investor, but rather a last resort to protect its investment.

[53] Permanent Court of International Justice, Free Zones of Upper Savoy and the District of Gex, Judgment of 7th June 1932.

[54] The present author's assumption is that the considerations regarding general principles may be extrapolated from the law of the sea to international investment arbitration. This assumption is neither self-evident nor uncontroversial. The argument behind the assumption is that general principles, if they are actually 'general', are shared by all or most 'regimes' of international law. However, the present author is aware that such a view is not accepted by all authors, e. g. SCHWARZENBERGER, Georg, *International Law and Order* (Stevens & sons 1971) 118.

[55] Moreover, in contrast to the majority of investment treaties, the article 295 UNCLOS requires exhaustion of local remedies. It might thus be reasonably assumed that the Contracting Parties to the UNCLOS did not have in mind a situation of two parallel disputes between national courts and dispute settlement body under the UNCLOS as abuse of rights.

[56] ICSID Case no. ARB/06/5 Phoenix Action, Ltd. (Claimant) v. The Czech Republic (Respondent), Award, 15 April 2009, paras. 106-107.

[57] KOLB, Robert, 'General Principles of Procedural law' in ZIMMERMANN, Andreas, TOMUSCHAT, Christian and OELLERS-FRAHM, Karin (eds) *The Statute of the International Court of Justice A Commentary* (OUP 2006) 831.

[58] French law, which may be considered as arbitration-friendly jurisdiction, guarantee a right to arbitration (*le droit à l'arbitrage*) based on arbitration agreement as contract. GUINCHARD, S., CHAINAIS, C. DELICOSTOPULOS, C. S., DELICOSTOPOULOS, J. S., DOUCHZ-OUDOT, M., FERRAND, F., LAGARDE, X., MAGNIER, V., RUIZ FABRI, H., SINOPOLI, L., SOREL,J.-M., *Droit processual. Droit fondamentaux du procès* (8 edn Dalloz 2015) 1377. Normally, investment arbitration is based on an arbitration provision in the investment treaty. This, however, does not exclude the 'logic' behind right to arbitration.

7.1 Abuse of Process v. Denial of Justice

Abuse of process is to be used, as any other legal device limiting the use of individual rights, with caution. In particular, erroneous finding of abuse of process may lead to denial of justice to investors. As the PCIJ in the Chórzow factory case found that '[t]he Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice.'[59]

But also the ILA Final Report on *Lis Pendens* and Arbitration underscores the importance of access to justice *vis-à-vis* other considerations, including an abuse of process: 'On the one hand, the tribunal should seek to avoid inconsistent decision, but on the other hand a tribunal is mandated to decide the dispute referred to it without unnecessary delay and a claimant has a right to have its claim determined (see e.g. Article 6 ECHR).'

On the other hand, the problem of national parallel proceedings may be resolved by the very BIT. Some may contain a fork-in-the-road clause. Nevertheless, for various reasons, these two instruments have not been effective in preventing multiplication of proceedings.[60] In general public international, the best prevention of possible *lis pendens* would be the application of the exhaustion of local remedies rule. Yet, this rule is, unless expressly provided for in a bilateral investment treaty, excluded in this specific regime of international law.[61]

Nonetheless, when there is no such express provision in the BIT, its reading into the text would deprive the investor of the possibility to protect its investment. In addition, two factors should be taken into account. Firstly, there may be considerable delays in national court proceedings, with no reasonable prospect of a final decision. Secondly, if national court proceedings were initiated by a company and investment arbitration by its shareholder, or vice versa, then these two remain different subjects of law. It may be difficult to justify why one subject should bear detrimental consequences of the action by another one.[62] The result would be clear and unwelcome: denial of justice.

8. In Lieu of Conclusion: A Possible Solution in National Law (?)

There is ample literature offering various theories how to cure parallel proceedings. Most authors appear to believe in improvement through a change of international law. Thus, the elements of the triple-identity test should be re-interpreted,[63] or investment arbitrators should defer to courts or other arbitrators etc.

There are some difficulties with these ideas. First of all, at a more abstract level, the belief that it is possible to change the order of things simply by changing laws may prove to be unfounded. Secondly, these opinions expect of international law perhaps too much, taking

[59] Factory at Chorzow, Claim for Indemnity, Jurisdiction, Judgment of 16 July 1927, PCIJ Series No. 9 (1927), at 30.

[60] MCLACHLAN, Campbell, 'Are National Courts and International Arbitral Tribunals in Two Worlds or One?' (2016) 7 *J.Int. Disp. Settlement* 578.

[61] See e.g. DOUGLAS, Zachary, *The International Law of Investment Claims* (CUP 2009), 178, 179.

[62] This holds true unless a doctrine of piercing of the corporate veil is recognised in international investment law.

[63] See recently SCHWARABOWITZ, Michal, 'Identity of Claims in investment Arbitration: A Plea for Unity of theLegal System' (2017) *JIDS* 280-302; see also REINISCH, August, 'The Issue Raised by Parallel Proceedings and Possible Solutions' in WAIBEL, Michael, KAUSHAL, Asha, CHUNG, Kyo-Hwa, BALCHIN, Clair (eds), *The Backlash against Investment Arbitration Perception and Reality.* (Kluwer Law International 2010), 122.

into account that international law is historically a much less developed system of law than national laws, in particular as regards procedural rules.[64]

There is certainly no secret master plan how to rebuild international investment arbitration, and international law in general, so that it satisfies all interests involved. However, would not it be a better solution for states to reconceptualise *lis pendens* under national law? It should be remembered what was said above, *lis pendens* has its roots in national law, and it is maybe there where the search for an improvement may start. It is the state as the central subject of international law that has a wide discretion in changing its internal laws.[65]

If, for instance, states wish to exclude parallel proceedings of shareholders in international investment arbitration and their local company before national courts, why do not they alter the rules on *lis pendens* by relaxing the requirement of identity of parties in national law if there is an inseparable factual and economic link between the parties in national and international proceedings?

Thus, once the court decides the case before the national court in favour of the state, and the arbitral tribunal will later render the award in favour of the investor, then the state may resist the recognition and enforcement of the award in its territory[66] on the basis of *res judicata* (provided that the above change as regards the identity of the parties is adopted). Moreover, if the state wins the dispute in national courts, the final judgment may be a strong - if not decisive - piece of evidence in pending international investment arbitration, which may in turn lead to the end of the arbitration.

In another scenario, where an arbitration award favourable to the state is rendered, the latter may rely on the *res judicata* effect of the arbitration award in the pending court proceedings. In this respect, one should not forget that in states like the Czech Republic,[67] arbitral award has the same legal effects as judgement,[68] namely *res judicata*.

It should be also recalled, as regards the ICSID arbitration awards, that article 54 (1) of the ICSID Convention stipulates that '[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as **if it were a final judgment of a court in that State.**'[69] Thus, reading the text of this provision in good faith it seems that the ICSID award is to be treated as a final judgment in the state, including the possibility to attack its finality to the extent allowed under national law.[70] No more, no less.

[64] See above.

[65] That national law-making may have important consequences for investment protection has been recently emphasised with regard to consent to arbitration. See MULLEN, Stephanie, WHITTSIT, Elisabet, 'ICSID and Legislative Consent to Arbitrate: Questions of Applicable Law ' (2017) 32 *ICSID Review* 92-115.

[66] In other states, the state will invoke state immunity, which is not possible before its own courts as this is not a decision-making of a organ of a foreign state (hence par in parem 'logic' does not apply here).

[67] The jurisdiction of the present author.

[68] § 28 (2) no 216/1994 Coll., Law on Arbitration and Enforcement of Arbitration Award.

[69] Convention on the Dispute Settlement of Investment Disputes between States and Nationals of other States. Available at: http:<//icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/parta-chap04.htm> Accessed 29 May 2017. Emphasis added by the author. The textual interpretation, which is the starting consideration under the general rule of interpretation under article 31 VCLT, suggests that the ICSID awards do not enjoy more favourable regime than final judgments in a particular state. See also BALDWIN, Edward, KANTOR, Mark and NOLAN, Michael, 'Limits to Enforcement of ICSID Awards' (2006) 23 *Journal of International Arbitration* 1-24.

[70] The limit of this might be an idiosyncratic rule which has no counterpart in other legal orders.

There are of course counterarguments. International arbitral awards should not be automatically treated as judgment of national courts.[71] Hence, as a pro-arbitration environment, which has been created in the international society, they should be maintained and developed.[72]

At any rate, states must comply with their international obligations in good faith.[73] If a treaty provides for binding mechanism of resolution of dispute in case of its breach, here arbitration, then it is the part of the *pacta sunt servanda* principle that also the decisions arising thereof are respected.[74] This is even clearer where the investment treaty expressly lays down such obligation, like the abovementioned article 54 (1) ICSID Convention or certain provisions in bilateral investment treaties.[75]

Thus, they may not refuse the recognition and enforcement of arbitration award for reasons other than those foreseen under international,[76] *in eventu* national law.

[71] International Law Association (ILA) Final Report on Lis Pendens and Arbitration.

[72] See GAILLARD, Emmanuel, 'The Urgency of Not Revising the New York Convention' in Albert Jan van den Berg (ed) *50 years of the New York Convention*: ICCA International Arbitration Conference ICCA Congress Series Vol 14 (Kluwer Law International 2009) 692. Available at: <http://www.shearman.com/en/newsinsights/publications/2009/06/the-urgency-of-not-revising-the-new-york-convent> accessed 29 May 2017.

[73] Article 26 VCLT.

[74] The present author inclines to say that international investment arbitration awards ought to be generally put on equal footing with judgments of international courts as regards their effects in national legal order. The argument behind such conclusion is that the source of the binding force of both awards and judgments is the result of consent of the state. Their main legal effect is the same, meaning that both are binding between the parties. With regard to the binding nature of international judgments from the perspective of the Czech constitutional law see MOLEK, Pavel 'Čl. 1 Základní principy' in BAHÝLOVÁ, L., FILIP, J., MOLEK, P., PODHRÁZSKÝ, M., SUCHÁNEK, R., ŠIMÍČEK, V., VYHNÁNEK, L., *Ústava České republiky. komentář*. Linde, Praha 2010, p. 32.

[75] See e. g. article 10 (2) Czechoslovak-German treaty on support and mutual protection of investments (Dohoda mezi Českou a Slovenskou Federativní Republikou a Spolkovou republikou Německo o podpoře a vzájemné ochraně investic). Available in both original versions at:< http://www.mfcr.cz/cs/legislativa/dohody-o-podpore-a-ochrane-investic/prehled-platnych-dohod-o-podpore-a-ochra#word_n> accessed 29 May 2017.

[76] See art. V of the NY Convention.

WAR: FOREIGN INVESTMENTS IN DANGER

CAN INTERNATIONAL HUMANITARIAN LAW OR FULL PROTECTION AND SECURITY CLAUSE ALWAYS SAVE IT?

Petr Stejskal [1]

Abstract: The aim of this article is to think of particular scenarios which can put foreign investment in jeopardy during an armed conflict and give some real examples. It provides those model scenarios with a prospective legal framework provided by the law of armed conflict and law of international investments with special focus on so-called full protection and security clauses and war clauses. The scope of application of norms of international humanitarian law is quite wide and a foreign investor enjoys the protection stemming from certain standards of conduct towards civilian property (namely those relating to the principle of distinction and protection of civilian objects). Nevertheless, parties to the conflict are allowed to act in a damaging way towards civilian objects under certain conditions when pursuing a legitimate military aim. International law of foreign investments provides a foreign investor with more generous standards of treatment and stronger enforceability of his rights through the mechanism of dispute settlement. However, the standards of treatment and investor's *locus standi* are dependent on the existence and content of an investment treaty in a particular situation. Even if there is an investment treaty applicable, the protection provided by these treaties seem to be limited in times of armed conflict as they do not substantially cover the conduct of all the parties to the conflict and even in the situation where the state leading a military operation is bound by a particular investment treaty, its standards of protection may be evaded if a qualified exception is triggered. The article also identifies some practical issues and interactions between the law of armed conflict and the law of foreign investments.

Resumé: Cílem tohoto článku je zamyšlení se nad konkrétními situacemi, ve kterých může být ohrožena zahraniční investice během ozbrojeného konfliktu s odkazem na reálné případy. Článek k těmto modelovým situacím nabízí možný aplikovatelný právní rámec vycházející z práva ozbrojených konfliktů a práva zahraničních investic se zaměřením na tzv. 'full protection and security' a válečné doložky. Nomy práva ozbrojených konfliktů jsou poměrně široce aplikovatelné a nabízí investorovi ochranu zejména skrze zásadu rozlišování a pravidel týkajících se ochrany civilních objektů. Nicméně i přes to mohou válčící strany za určitých podmínek investici poškodit v rámci naplňování vojenského cíle. Mezinárodní právo zahraničních investic nabízí štědřejší standardy ochrany a jejich lepší vymahatelnost, nicméně pouze v závislosti na existenci a obsahu smlouvy o ochraně investic v konkrétním případě. I když bude nějaká taková smlouva na konkrétní případ dopadat, aplikace standardů zacházení může být v ozbrojeném konfliktu omezená ať už z toho důvodu, že regulují

[1] The present article is an interim outcome of a project named *Selected Aspects of the Protection of Foreign Investments during the Armed Conflict*, project number IGA_PF_2017_005, financially supported by the Internal Grant Agency of University Palacky in Olomouc (Interní grantová agentura UP Olomouc).

This article was written with the kind help of the supervisor in my doctoral studying program, JUDr. Pavel Bureš, Ph.D., D.E.A., who provided me with valuable suggestions and opinions. I would like to thank him very much for that.