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THE INVESTIGATION, PROSECUTION, AND RESOLUTION OF PARALLEL PROCEEDINGS

Abstract

Taking into consideration that there is a considerable amount of international courts and tribunals, this article explores both theoretical and practical approaches to the problem of parallel proceedings in international dispute settlement and tries to investigate its nature, (il)legality, and (im)possible solutions. Parallel proceedings arise wherever the same or a related dispute is submitted concurrently to more than one forum (arbitral tribunal or court) for resolution[1] and constitute a breach of public international law. In this regard, the article examines consequences of parallel proceedings and harmful results to the dispute settlement process itself and the parties as well as tries to find fruitful solutions to this issue by analyzing the legislation of different countries, the general principles of law recognized by civilized nations, judicial doctrines such as judicial propriety and judicial comity, decisions of (inter)national courts and tribunals, works of a number of authors, different views on the issue and different practices adopted in the world. In conclusion, the article summarizes all the positions studied on the issue and expresses the attitude towards this concern and its law-violating nature.

Annotasiya

Çox sayda beynəlxalq məhkəmənin və tribunalın olduğunu nəzərə alaraq, bu məqalə beynəlxalq mübahisələrin tənzimlənməsində paralel icraat probleminə həm nəzəri, həm də praktik yanaşmanı araşdırır və onun mahiyyətini, qanuni olub-olmamasını, həmçinin, mümkün və ya qeyri-mümkün həll yollarını müəyyənləşdirməyə çalışır. Paralel icraat eyni və ya əlaqəli mübahisənin həlli üçün birdən çox foruma (arbitraj tribunalına və ya məhkəməyə) müraciət təqdim edildiyi təqdirdə meydana gəlir və beynəlxalq hüququn pozuntusunu təşkil edir. Bununla əlaqədar olaraq, məqalədə paralel icraatın nəticələri və mübahisələrin həlli prosesinə və tərəflərə vurduğu zərər araşdırılır, bu məqsədlə, müxtəlif ölkələrin qanunvericiliyi, sivil xalqlar tərəfindən tanınan ümumi hüquq prinsipləri, hüquqi ədəb və hüquqi hörmət kimi doktrinalar, milli və beynəlxalq məhkəmələrin və tribunalların qərarları, bir sıra müəlliflərin əsərləri, mövzuya fərqli baxışlar və dünyada qəbul edilən fərqli təcrübələr təhlil edilərək bu məsələyə səmərəli həll tapmağa çalışılır. Son olaraq, məqalədə araşdırılan bütün mövqelər ümumiləşdirilmiş və bu problemə və onun yaratdığı qanun pozuntusuna münasibət bildirilmişdir.

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[1] Emmanuel Gaillard, *Parallel Proceedings: Investment Arbitration*, Max Planck Encyclopedia of International Procedural Law [MPEiPro], A(1) (2019).

Introduction

Parallel proceedings arise when the same or a related dispute is submitted concurrently to more than one forum (arbitral tribunal or court) for resolution[2]. It mainly happens when there are two or more different dispute settlement options in two or more separate treaties between the same parties over the same or related issue. As an example, in "AmTrust Europe Ltd v Trust Risk Group SA"[3] and "Monde Petroleum SA v Westernzagros Ltd"[4], parties filed an application to the Commercial Court[5] in order to resolve the issue of competing jurisdiction clauses in separate but related agreements between the same parties and decide whether one court will hear the case or another in order to avoid parallel proceedings. Parallel proceedings may also appear when one party prefers one court or tribunal for the resolution of the dispute and the other party prefers another one.
Parallel proceedings are regarded as a breach of international law. According to the Mox Plant Case**,** a procedure that could lead to two conflicting decisions on the same issue would not be helpful for the resolution of the dispute between the Parties.[6] Also, as a compromise between the positions of Mexico, which wanted a forum selection similar to the NAFTA, and the EU, which wanted to strengthen the bilateral DSM[7], in EC-Mexico Joint Council it was agreed that if a dispute can be brought under both agreements, a complainant is empowered to select a forum, but no parallel proceedings are allowed.[8]

Parallel proceedings are the wellspring of various difficulties in international dispute settlement. For example, they may cause delays, augment costs, create an abuse of process, encourage forum shopping or lead to conflicting results.[9] Parties would like to avoid parallel proceedings as they would be forced to spend additional time and effort over the identical dispute with the same set of facts. Having to litigate the same cause issue twice would undermine some of the notable advantages of international arbitration, such as the speed of the proceedings and relatively lower expenses, after all.

[2] *Ibid*.
[3] AmTrust Europe Ltd v Trust Risk Group SpA, EWHC 4169 (Comm), § 51 (2014).
[4] Monde Petroleum SA v Westernzagros Ltd, EWHC 67 (Comm), § 35 (2015).
[5] The High Court of Justice, Queen's Bench Division Commercial Court.
[6] MOX Plant Case, Ireland v United Kingdom, ITLOS Case No 10, § 28 (2001).
[7] Dispute Settlement Body of the World Trade Organization.
[8] Decision No. 2/2000 Of The EC-Mexico Joint Council Of 23 March 2000, Art. 47(4) (2000).
[9] David W Rivkin, *The Impact of Parallel and Successive Proceedings on the Enforcement of Arbitral Awards*, Parallel State and Arbitral Procedures in International Arbitration (ICC Publishing), 271 (2005).

Parallel proceedings also run the risk of being characterized as an abuse of process, depending on the facts and circumstances of the particular dispute.[10]

These problems are complications that come from the existence of parallel proceedings in different forums at the same time. This means that they are unnecessary and should be avoided if possible.

I. Judicial doctrines regulating the issue of parallel proceedings

Given the above-mentioned issues and potentially negative impacts of parallel proceedings, it seems obvious that effective measures should be taken in order to avoid them. Now that we have identified the problems and issues caused by parallel proceedings, we will turn to the most effective and widely recognized doctrines reducing the amount of the cases being heard in multiple fora at the same time: the doctrine of judicial propriety and the doctrine of judicial comity. Examining these two doctrines, we will discuss the possible means through which tribunals could limit or prevent parallel proceedings from taking place.

A. Judicial propriety

One of the doctrines regulating the issue of parallel proceedings is that the doctrine of judicial propriety. This doctrine is a matter that the Court should examine, *proprio motu* if necessary, so as to make sure that it is not only right as a matter of law but also proper as a matter of judicial policy for the Court as a judicial body to exercise jurisdiction within the concrete context of the case. This implies that the Court would be required to engage in in-depth scrutiny of all aspects of the actual circumstances of the case.[11]

An issue of propriety was applied in the Northern Cameroons case. In this case, the Court said that: whether or not, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an application would be incompatible with its judicial function, it should refuse to do so.[12] This issue of propriety had also led the Permanent Court of International Justice to refrain from exercising a part of its jurisdiction in the Free Zones of Upper Savoy and District of Gex case.[13]

[10] Denice Forsten, *Parallel Proceedings and the Doctrine of Lis Pendens in International Commercial Arbitration*, 37-38 (2015).
[11] Judicial propriety in advisory opinions of the International Court of Justice, Separate Opinion of Judge Owada, § 2 (2004).
[12] Northern Cameroons, Preliminary Objections, ICJ Reports, 15-37 (1963).
[13] Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.), P.C.I.J. (ser.A/B) No. 46, 161 (1932).

There are two general principles of international law constituting a basis of the doctrine of judicial propriety: *lis alibi pendens* and *forum non conveniens* principles.

1. Lis Alibi Pendens principle

According to Black's Law Dictionary[14], the phrase "*lis alibi pendens*" is defined as a lawsuit pending elsewhere. To translate from Latin, it literally means "dispute elsewhere pending."

Being a rule of general international law *lis alibi pendens* principle requires States to avoid parallel proceedings on the identical issue, between the identical parties in several courts and tribunals. It permits a court to refuse to exercise jurisdiction when there is parallel litigation pending in any other jurisdiction.[15] The fact that proceedings are pending between a plaintiff and defendant in one court with respect to a given matter is a ground for preventing the plaintiff from taking proceedings in another court against the same defendant for the same object arising out of the same cause of action.[16]

In recent years the attitude to the present definition of *lis alibi pendens* principle has changed. Especially with regard to the identity of the subject matter, many authors, judges argue that the similarity of issues should also be considered as the "same issue." For example, according to the decision of the ICSID Tribunal in Apotex Holdings Inc. and Apotex Inc. v United States of America case, the identical ground means "the same rights and legal arguments relied upon in different proceedings." In Southern Bluefin Tuna dispute the Tribunal accepts Article 16 of the 1993 Convention as an agreement by the Parties to seek settlement of the instant dispute justifying its decision via stating that the Parties to this dispute are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions.[17] Furthermore, in Glaziou v France dispute Human Rights Committee concludes that the parallel proceedings based on substantially, not entirely identical provisions found in different instruments encounter the same subject matter.[18]

The European Union, a Community, based on, and characterized by the common market provides the ideal background for legal disputes arising simultaneously in different Member States. The European legislation on conflicts of jurisdiction has taken account of this and adopted the *lis pendens* principle. The provision on *lis pendens* is now to be found in Articles 27–30 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil

[14] Garner, B. A., & Black, H. C. Black's law dictionary (9th ed. 2009).
[15] *See* generally, German Interests in Polish Upper Silesia (Germ. v. Pol.), P.C.I.J. (ser. A) No. 6 (1925).
[16] Mof'Oluwawo, MojolaOluwa, Private International Law and the Doctrine of Lis Alibi Pendens, 4 (2017).
[17] Southern Bluefin Tuna Case (Australia and New Zealand v Japan), § 54 (2000).
[18] Glaziou v France, Human Rights Committee, Communication No. 452/1991, § 7.2 (1994).

and Commercial Matters (September 1968) as amended by the "Brussels Regulation." When lis pendens is detected in virtue of Article 27, 'every court seised second must stay its proceedings until the court first seised has decided upon its jurisdiction.' This concept, known as the 'first-come, first-served' rule, is designed to avoid irreconcilable judgments that may arise within the European Union and is conceived as a very mechanical concept that rarely allows an exception.[19]

According to the concept of *lis alibi pendens* principle, in case of parallel litigation, the case should be heard in the body first applied to. For example, if state A applied to the tribunal 1 alleging that state B breached its treaty obligations with regard to state A and state B files an application with a counter-submission to the tribunal 2, then the case should be heard in the tribunal 1 in order to avoid parallel proceedings. In Turner v Grovit[20] judgment on April 27, 2004, an English court, being the first court seised, issued an injunction to restrain one of the parties from pursuing the proceedings they had commenced in Spain. Even where the defendant is acting in bad faith with the intention of frustrating the current proceedings, the issue of an injunction was inconsistent with the Convention. The English court should trust the Spanish court to apply Article 27(2).[21]

2.Forum non conveniens principle

Forum non conveniens is defined as: "the doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place."[22] It is a principle that allows courts that have jurisdiction over a case to stay or dismiss the case upon a determination that the case may be heard more appropriately in another court.[23] The trial court is given substantial discretion in determining whether a more appropriate forum exists and, if so, whether to remain or dismiss in favor of that other court.[24]

Although in Owusu v Jackson[25], the European Court of Justice stated that application of this principle and also the exercising of discretionary power by the Court, available under its national law, even where the jurisdiction of no other Contracting State under the 1968 Brussels Convention is in issue, and

[19] *See* Eisengraeber, *Lis alibi pendens under the Brussels I Regulation - How to minimise 'Torpedo Litigation' and other unwanted effects of the 'first-come, first-served' rule* , Exeter Papers in European Law No. 16, (2004).
[20] *See* Turner v Grovit (C-159/02), (2004).
[21] Blanke G., *The Turning Tides of Turner*, Business Law Review, 261–270 (Oct. 2004).
[22] Black's Law Dictionary (8th ed. 2004).
[23] Spiliada Maritime Corporation v Cansulex Ltd, 476 (1987).
[24] *See* Ronald A. Brand, *Forum non conveniens*, Max Planck Encyclopedia of Public International Law [MPEPIL] (2019).
[25] *See* Owusu v Jackson, JUDGMENT OF THE COURT (Grand Chamber), C-281/02 (2005).

the proceedings have no connecting factors to any other Contracting State[26], is inconsistent with the Brussels Convention[27], this principle continues to be widely-recognized and applicable.

The doctrine of *forum non conveniens* is fundamental when the same claim is brought between the same parties in multiple courts. In such instances of parallel litigation, *forum non conveniens* creates an emphasis on the first to render judgment and is founded on the implicit assumption that the case should not be heard in the court seised but rather in the court most appropriately situated in light of the facts and circumstances of the case.[28]

For an issue of propriety under the principle of *forum non conveniens* to arise before the Court because of overlapping jurisdictions, it is necessary that the defendant State contests the Court's jurisdiction or at least argue that the dispute is referred to the other court or tribunal. Several elements have to be weighed by the Court before concluding that it is inappropriate to exercise its jurisdiction. Some of those elements are as follows: the other court or tribunal might not have jurisdiction over the whole dispute; the settlement of the dispute may well be delayed; deciding the dispute would require an examination of questions of international law that are not included among those for which the other court or tribunal is thought to be particularly qualified; the procedure before the other court or tribunal would not provide the same opportunities for defense.[29]

As a legal practice, In Gulf Oil Corp. v. Gilbert[30], the Supreme Court held that federal courts have the discretion to dismiss suits properly within their jurisdiction under the doctrine of *forum non conveniens*.[31] The doctrine makes dismissal appropriate whenever another forum exists where the suit may also be brought.[32]

B. Judicial comity

Another judicial doctrine regulating the issue of parallel litigation, the doctrine of judicial comity requires, out of deference and respect, one Court in one state or jurisdiction to give effect to the laws and judicial decisions of another.[33] Comity is a principle derived from national legal systems, mostly from common law countries.[34] It is a flexible doctrine enabling the cooperation

[26] *Supra* note 16, § 7.
[27] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968).
[28] *Id.*, A(3).
[29] Giorgio Gaja, "*Relationship of the ICJ with Other International Courts and Tribunals*", Statute of the International Court of Justice: A Commentary, 647-660, § 15 (3rd ed. 2019).
[30] Gulf Oil Corporation v Gilbert, 330 US 501 (1947).
[31] *Ibid*.
[32] 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 3828 (1976).
[33] A Dictionary of Law, Oxford University Press (2014); *See* Also Cases: Cases: Attorney General V Jonathan Cape Ltd (1976); Newland V. Hall, 527 F.3d 1162 (2008).
[34] Yuval Shany, The Competing Jurisdictions Of International Courts And Tribunals, 260 (2004).

of tribunals within the international legal order.[35] In the sense that it functions as a principle for resolving issues of overlapping jurisdiction, it operates to allow the tribunal to limit its own jurisdiction where the exercise of that jurisdiction would be unreasonable or inappropriate in particular circumstances.[36] The interest of comity is especially strong where a foreign parallel proceeding is ongoing... and there is a possibility that the award will be set aside since a court may be acting improvidently by enforcing the award prior to the end of the foreign proceedings.[37]

Comity may be exercised at three levels of multi-fora litigation. Firstly, it can be invoked if no further proceedings are initiated, but the possibility exists, and the tribunal which was charged with the case takes this into account. The second and third possibilities are if parallel proceedings have already been initiated.[38] If a court or tribunal exercises comity, it is not in the position to fully decline jurisdiction if there is no legal obligation to do so, as that would go beyond its power and contravene the rights of the parties to seek a ruling from that court or tribunal. Therefore, if this right has not been waived by the parties, a tribunal that exercises comity and is in doubt about there being a legal obligation of the parties to refrain from proceedings as a result of another tribunal having exclusive jurisdiction, it may only suspend proceedings.[39] If it declines jurisdiction, both tribunals could end up declining jurisdiction. This would result in a potential complainant, originally enjoying the possibility of bringing the case before two different fora, being left without a remedy at all.[40] This possibility was addressed in the Southern Pacific v. Egypt case by an ICSID tribunal. Originally the ICSID tribunal had suspended proceedings because there were parallel proceedings ongoing before the French cour de cassation (French Court of Cassation). However, the tribunal was aware that declining jurisdiction could lead to a "negative conflict of jurisdiction." Therefore, the ICSID tribunal had "as a matter of comity"[41] not exercised its jurisdiction, while there was a decision pending by the other tribunal. After the cour de cassation had declined jurisdiction, the ICSID tribunal took up the case again.[42]

Judicial comity was referred to in several cases as a basis for declining to exercise jurisdiction by courts. For instance, in 1996, The New York District Conn declared not to have jurisdiction in the Aguinda proceedings, based on *forum non conveniens* and "international comity." Also, in the Laker Airways v.

[35] Slaughter, A Global Community of Courts, 44 (2003).
[36] Caroline Henckels, *Overcoming Jurisdictional Isolationism at The WTO – FTA Nexus: A Potential Approach for The WTO*, 19 EJIL 571, 584 (2008).
[37] Higgins v. SPX Corporation, Case No. 1:05-CV-846, 4 (2006).
[38] *Supra* note 36.
[39] *Ibid*.
[40] Tim Graewart, Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO, 1 Contemp. Asia Arb.J. 287, 316 (2008).
[41] *Ibid*.
[42] *Ibid*.

Sabena decision, the Court stated that it has to consider interests in international comity and the avoidance of conflicting judgments as part of its analysis as to whether any such agreement existed.[43]

Conclusion

With the proliferation of judicial and quasi-judicial bodies aiming the settlement of international disputes, the cases of hearing of the disputes on the identical or related subject matters between the same parties in several dispute settlement organs at the same time increased. The potential room for parallel proceedings is growing day by day. Lots of cases are heard in two or more judicial or quasi-judicial bodies at the same time, especially in arbitration law. Parallel proceedings, being quite widely spread nowadays, constitute a breach of the international legal order. For example, when two states having a dispute apply to two different dispute settlement organs, this ends up with one of two possible results: two absolutely contradicting decisions or one state being punished by the decisions of two bodies at the same time.

While there is no universal solution to this problem, different procedural mechanisms have been developed to avoid or mitigate the undesirable effects of parallel proceedings.[44] Even these mechanisms that include such judicial doctrines as judicial propriety and judicial comity are not enough as there are still inherent limitations and glaring weaknesses with each of those methods. Left alone, parallel proceedings can eventually lead to 'fragmentation and unpredictability'.[45] After all, by increasing the burden on the parties and frustrating their attempts to enforce arbitral awards, parallel proceedings are bound to have a negative impact on the role of the international dispute settlement mechanism.

Problems, concerning the multiplication of available dispute settlement forums and the related substantive issue of increased fragmentation of international law, have received heightened academic attention. This is also evidenced by the International Law Commission's decision to include the topic of 'fragmentation of international law' in its long-term work program in 2000. In 2002 an ILC study group was formed dealing with the topic 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'. Although the ILC's own terms of reference concentrate on substantive problems of fragmentation and purport to exclude issues concerning the relationship among international

[43] Hulley Enterprises Ltd. v. Russian Federation, PCA Case No. 2005-03/AA226, Memorandum Opinion of the US District Court for the District of Columbia, § 36 (2016).
[44] Bernardo M. Cremades, Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24 Arbitration International 507, 507 (2008).
[45] Nadia Erk-Kubat, Jurisdictional Disputes in Parallel Proceedings: A Comparative European Perspective on Parallel Proceedings Before National Courts and Arbitral Tribunals,1 (2014).

judicial institutions, these issues do regularly surface also in connection with substantive problems.[46]

Taking into account all above-mentioned facts, we could come to the conclusion that, different international bodies and research centres try to find a solution to the issue of parallel proceedings in international dispute settlement. Nevertheless, now, Dispute Settlement Bodies may reduce the number of cases being heard in multiple dispute settlement bodies through applying doctrines mentioned in this work: the doctrine of judicial propriety and the doctrine of judicial comity.

[46] August Reinisch, International Courts and Tribunals, Multiple Jurisdiction, § 27, (2006).