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Interaction between domestic and international law, umbrella clauses and legitimate expectations



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Current Issues of Investment Arbitration for
Representatives of State Organs, Representatives and
Institutions
Minsk, 18 September 2019

Applicable law in Investor-state disputes

- Normally determined by consent
- If the parties fail to agree, law of the host state plus any applicable rules of international law
- Deference of tribunals to regulatory powers or states
- Importance of international law (the level of detail, the background of arbitrations, practical considerations)

Conflict between international and domestic law

- Art 32 of the ILC Articles on State Responsibility ('The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part')
- Art 27 of the 1969 Vienna Convention on International Law of Treaties ('A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty')

Conflict between international and domestic law

- States may not invoke privileges, such as cabinet privileges, secret diplomatic negotiations, State secrets or the secrecy of law enforcement investigations (e.g., domestic law on evidentiary privileges, *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*)
- Evidence in domestic criminal proceedings may be relevant to proving facts in arbitration, determinations of domestic courts are not binding on international tribunals.

Deference to the acts of states

- Tribunals are not courts of appeal over decisions of domestic courts
- Deference to the acts of states (*Amco v Indonesia, Tokios Tokelés*)
- In *Tokios Tokelés v Ukraine*, the tribunal did not find a denial of justice in a situation where criminal charges for tax evasion were discontinued, then twice revived and remained pending three years after the alleged misconduct
- The tribunal did not rule out the possibility that the charges were intended to put pressure on the investor to settle an expensive arbitration and yet still did not find that there had been a denial of justice

Changes in domestic legislation and legitimate expectations of investors

- The tension between regulatory power of States and legitimate expectations of investors
- The concept of fair and equitable treatment at the core, the most litigated concept in ISDS
- Different and often inconsistent approaches by tribunals

Approach 1: Changes in legislation do not violate legitimate expectations of investors

- Approaches taken by many tribunals. In most cases, not fundamental changes in domestic legislation do not breach legitimate expectations of investors.
- Need to prove three elements:
 - 1) specific representation
 - 2) reliance on representation
 - 3) representation must have been reasonable

(Peter A. Allard v The Government of Barbados (PCA Case No. 2012-06) Award of 27 July 2016, para 194)

Approach 2: Breach of legitimate expectations in the absence of specific representations

- Some tribunals conclude that there was a breach even in the absence of specific representations, where the state had failed to provide fundamental stability in basic legal system
- Cases related to energy in Spain (fundamental change of regulatory regime, retroactive application of law)

The interplay between contracts and international law obligations

- Consent to arbitration may come from contract
- Contract is an important part of legitimate expectations
- Broad umbrella clauses: 'each party shall observe any obligation it may have entered into with regard to investments'
- Can be relevant even in the absence of umbrella clauses
- Contractual rights can qualify a investment
- Breach of contract may constitute a violation of FET

Attribution of conduct to states

- Article 4 of the ILC Articles on State Responsibility:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

Attribution to states of contracts concluded by state entities

- Usually no attribution if the contract is between the foreign investor and a distinct legal entity (Impregilo S.p.A. v. Islamic Republic of Pakistan)
- But in some cases concluded there was attribution (Noble Ventures v. Romania)
- Question whether ILC Articles apply or it is a matter of domestic law because the contract is governed by domestic law

Practical conclusions

- Loyalty to the State and compliance with int'l law
- Application of international law and domestic law by tribunals
- Executive and judiciary – all actions of the state (be aware of denial of justice)
- Acts by controlled legal entities
- The effect of specific commitments and legislative changes

Reforming the system

- Growing trend in the world to modernise international investment agreements
- Substantive protections in International investment agreements (FET, expropriation, obligations of investors, the right to regulate, exceptions)
- Reform of dispute resolution (making the process more transparent, quick and address legitimate expectations)
- The current system exposes Belarus to an increasing number of investment claims
- The standards and treaty provisions often too broad and do not offer legal certainty to the State or investors
- Modern treaties reflect different approaches – the question is to be a rule-taker or a rule-maker?

Questions?

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