Parallel proceedings in construction claims: the overlap between commercial and investment arbitration

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I Introduction

Parties involved in large construction and infrastructure projects are familiar with the traditional means of enforcing their rights. Many jurisdictions around the world have established bodies of construction law, whether as branches of their laws of contract and tort or otherwise; some have specialist courts where the judges are chosen for their experience with technical issues;[2] and commercial arbitration, both international and domestic, has long been a popular choice in construction contracts and is included in many popular industry standard forms.

Less well-known are the rights and enforcement mechanisms that can arise under investment treaties. Such treaties have existed since the 1950s, but have taken on a particular significance since the 1980s. There are now more than 3,000 in place between various countries.[3] They take many forms, including a variety of bilateral investment treaties ("BITs") between individual states, and a range of multi-lateral investment treaties ("MITs") with investment provisions, such as the Energy Charter Treaty, the North American Free Trade Agreement, the Central American Free Trade

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2 The Author's home jurisdiction, England and Wales, offers the Technology and Construction Court; specialist courts have also been established in other jurisdictions including Abu Dhabi and Malaysia.

3 UNCTAD, International Investment Agreement (IIA) Database

Agreement, the Association of South East Asian Nations, and the relatively recent investment protections in the Common Market for Eastern and Southern Africa.

Where they are available, these treaties confer certain rights upon nationals of one signatory state against the other signatory state(s). These rights exist at a level above the States' domestic legal system, and are generally enforced through procedures separate from standard domestic litigation or commercial arbitration. As such, they offer a parallel set of protections for the interests of investors. Claims to enforce a right under an investment treaty may be founded on the same factual subject matter as, say, a claim in contract, but will be based on separate, additional rights of the investor that can be pursued alongside a "traditional" court or commercial arbitration claim. There are many potential advantages, and some potential drawbacks, to pursuing such claims in parallel to more traditional proceedings.

Such protections are particularly relevant for construction contracts. In developed, liberal countries, large infrastructure and construction contracts frequently involve the State or one of its organs, either as a party to the project or in some regulatory or oversight role; *a fortiori* in developing nations or more controlled economies. The sums of money and the risks involved in modern large construction projects mean that contractors are well-advised to take advantage of as many protections as they can.

This paper sets out briefly to explain the range of treaty protections that are potentially available to parties to construction projects under BITs and MITs. The core of this paper will then discuss the potential benefits and potential pitfalls of commencing treaty claims in parallel with court litigation or commercial arbitration,[4] with a particular focus on the questions that arise where the separate proceedings begin to overlap. Finally, this paper aims to provide some practical guidance to contractors on the steps to take at the outset of a project and throughout its life, to identify potential protections that are available, and to monitor and record the

[4] For convenience, throughout this paper the range of court litigation and commercial arbitration proceedings available to contractors is referred to by the shorthand "domestic proceedings", to be contrasted with treaty claims. Such reference to "domestic proceedings" is at all times intended to refer also international commercial arbitration.

information that may be useful as evidence in the unfortunate event that dispute resolution procedures are necessary.

II Treaty claims potentially available in the construction sector

Each BIT or MIT is a distinct instrument, imposing its own obligations on the signatory states, and conferring its own rights on nationals of those states with respect to their investments in the other states. The particular rights and protections that may be available to any given investor are therefore dependent on the existence and particular terms of the relevant treaties.

There are, however, certain key features that are shared by most treaties with investment protection provisions. Over the last three decades a body of decisions of arbitral tribunals determining treaty claims has developed regarding such provisions. These decisions do not create a system of "precedent", as individual decisions in treaty cases are not binding on anyone other than the parties to the particular dispute. But in many areas the published decisions, combined with a weight of academic writing, has led to the development of consensus positions: positions to which arbitral tribunals are not bound, but which nevertheless they may follow and at least are likely to take into consideration in making their own decisions. It is therefore possible to draw out a series of principles relating to protections that may be offered by treaties, and the characteristics that a contractor must have to take advantage of them.

Qualification criteria

Every investment treaty sets qualification criteria that a contractor must meet before they can claim any rights under the treaty. Most obviously, there must be a treaty to which the relevant state is a party. That treaty must be in force: it must have been fully signed and ratified by the state against which the contractor seeks protection, and also by the home state of the contractor. The rights under the treaty also must not be subject to any temporal limits which have not yet taken effect or which have expired.

Assuming a valid treaty is in place, the treaty must include provisions allowing individual investors directly to enforce their rights against the signatory states. Most, but not all, BITs and MITs do include such provisions. Typically, they provide for a rights enforcement mechanism that ultimately leads to arbitration under the procedures of the International Centre for the Settlement of Investment Disputes (ICSID) or under those of the United Nations Conference on International Trade Law (UNCITRAL).

A contractor then needs to qualify as an investor under the treaty. This has two key requirements. First, the contractor must be a national of one of the signatory states at the material time. This is a potentially complex question which is beyond the scope of this paper, but for present purposes it suffices to note that in some cases this is as simple as requiring that an intermediate holding company is incorporated in the relevant jurisdiction to take advantage of the protection; while in other cases it is necessary for the entity in the relevant state to play a functional role in the project, for example by being the primary decision maker or otherwise directing the operations on the project.

Secondly, the contractor must also establish that it has made a qualifying "investment" in the signatory state. Again, this question is complicated. At a minimum, the contractor must show that it has met the definition of "investment" in the relevant BIT or MIT. It may also need to show that its contribution to a project meets a second, narrower definition of "investment" as provided for in the decisions of previous arbitral tribunals and which some argue has become part of public international law.[5] An examination of these principles is beyond the scope of this paper, which will assume that in many cases it is possible, if not likely, that a

[5] This second test arises primarily out of Article 25 of the ICSID Convention, which includes a reference to "investment" that is not defined in the same terms as used in relevant BITs and MITs. The requirements of this second definition have been considered in numerous papers and tribunal decisions. *Salini Costruttorio S.p.A. and Italstrade S.P.A. v Morocco*, ICSID Case No. ARB/00/4, sets out a frequently-invoked "test" for whether a particular contribution or asset constitutes an "investment". There is some debate whether this test applies to all investor-state cases, or only to those brought under the auspices of ICSID: compare, for example, *Romak S.A. v The Republic of Uzbekistan*, UNCITRAL Case, Award dated 26 November 2009, to *White Industries Australia v India*, Award on Jurisdiction 30 November 2011.

contractor's contribution to a large infrastructure project will qualify as an "investment" under many BITs and MITs.

Available protections

The particular rights offered to investors with a qualifying "investment" against the signatory states vary from treaty to treaty. The rights are seldom drafted in particular terms. Instead, relatively broad language is included in the treaties, offering scope for interpretation and flexibility to adapt the protections to a wide range of investments.

That said, five categories rights are frequently found, in one form or another: (i) protection from wrongful expropriation; (ii) a right to "fair and equitable treatment" and "full protection and security"; (iii) a right to "national treatment" or "most-favoured nation treatment"; (iv) freedom to transfer funds; and (v) so-called "umbrella clauses". The following paragraphs provide a brief summary of each of these categories of protection.

Expropriation protection

Protection from wrongful expropriation is found in most treaties with investment protection provisions. It usually consists of a guarantee that the signatory state shall not expropriate the assets of the investor, unless such expropriation takes place in accordance with due legal process, for a public purpose, and in circumstances where the investor is provided with effective, prompt and adequate compensation for the assets removed.

Wrongful expropriation can be direct, where the state or its agents simply take possession of an investor's assets, often by force. It can also be indirect, where the state deprives the investor of some critical permission or access to some resource, with the consequence that the value of the investment is effectively destroyed, in the sense of losing its capacity to make a commercial return. It can occur in one event or chain of events, or it can take the form of a series of events elongated over time, each in themselves less than a full taking of the investment, but which cumulatively have the same effect: a so-called "creeping" expropriation.

The protection against wrongful expropriation is clearly an important protection for investors, particularly in countries where the political circumstances are unpredictable and there is a perceived risk that the state may seek to nationalise or otherwise seize assets. Although protections against expropriation are frequently found in the domestic law of countries, by elevating the protection to the treaty level, BITs and MITs provide an additional layer of protection against state action by preventing the state from re-writing its own laws.

Fair and equitable treatment, and full protection and security

The second right, to "fair and equitable treatment" (sometimes referred to as "FET") is more broad. There is no settled definition of what constitutes "fair and equitable treatment". It is therefore a standard that can be difficult to delimit in practice,[6] but which offers an important protection for investors against arbitrary and capricious conduct of state agencies.

In particular, previous decisions have determined that the FET standard includes certain key features. It encompasses requirements that the host state treat an investment equitably and fairly, in good faith and without discriminating against that investment in comparison to others. It protects the "legitimate expectations" of investors. This is not concerned with the purely subjective assumptions and hopes of an investor, but instead requires states to adhere to promises and representations that they or their official agents have made directly to an investor and upon which an investor has relied in making its investment: the "legitimate expectation" of the investor being that the state will abide by its statements. The FET standard also requires states to provide investors with access to an appropriate judicial system, so as not to deny them justice.

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6 Compare *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Partial Award 13 September 2001 with *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award dated 3 September 2001: two cases arising of the same facts, but under different BITs, in which the tribunals reached opposing conclusions on whether the fair and equitable treatment standard had been breached.

Many BITs and MITs also include a requirement on the host state to offer "full protection and security", or similar, to investments. Often this requirement is included in the same clause as the FET standard.

There is some debate in the decisions of tribunals and in the literature as to whether this "full protection" standard is merely an extension of the FET standard or whether it stands alone and in addition to FET. It is generally accepted that the "full protection and security" standard goes further, although its full extent is not settled. The more traditional view is that the right only requires protection by the state against physical harm caused by third parties to persons and property, including staff and business assets of the investor.[7] More recent tribunals have, however, interpreted the standard as imposing an obligation on a state to provide a sufficient and effective regulatory regime, so as to prevent a "*secure environment, both* [sic] *physical, commercial and legal*".[8]

National treatment and MFNs

"National treatment" clauses are obligations on states to provide investors with treatment no less favourable than that given to the state's own nationals. Such obligations are often expressed to apply in particular defined circumstances, for example in determining protection and compensation in the event of war, insurrection or rioting.

A "most favoured nation" clause is similar to a "national treatment" provision, in that it requires the host state to treat the investor no less favourably than any investor from any other country. Their impact is, however, a matter of some debate, particularly concerning the extent to which they entitle an investor to take advantage of more favourable rights or dispute resolution procedures available to investors from other countries under a different BIT or MIT.

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7 *Gold Reserve, Inc v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1.

8 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22. See generally "*The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?*", M. Malik, November 2011

Freedom to transfer funds

The freedom to transfer funds is an important protection in ensuring the ability of investors to repatriate earnings and profits from their investment in the host state. Generally, the right obliges host states not to take any step that would stand in the way of an investor's ability to transfer its payments out of the jurisdiction, in a freely convertible currency and without undue restriction or delay.

Umbrella clauses

"Umbrella clause" is the term used to refer to broad obligations sometimes included in treaties requiring a host state to observe any obligation it may have entered into with respect to the particular investment of an investor, for example through a contract relating to the investment to which the state or one of its agents is a party. The effect of such provision is to transform a breach by the state entity of its contractual obligations into a breach by the state of its treaty obligations. Depending on the particular language of the relevant treaty, such an "umbrella clause" can extend to the state's obligations of any nature, whether contractual or non-contractual.[9] In some cases, an investor may need simply to establish a breach of the relevant underlying obligation in order to establish a breach of the treaty standard;[10] in others, the treaty language may require that the underlying breach represented some abuse by the state of its sovereign authority, acting in exercise of the powers of state rather than through powers available to private citizens.[11]

Advantages of treaty protections

As this brief analysis of the available protections shows, taking the steps needed to qualify for investment treaty protections offers a number of advantages to contractors.

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9 See *Micula et al v Romania*, ICSID Case No. ARB/05/20, Award 11 December 2013

10 *SGS Societe Generale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Award 10 February 2012.

11 *Bosh International, Inc and B&P Ltd v Ukraine*, ICSID Case No. ARB/08/11, Award 25 October 2012.

The nature of treaty protections, existing above the level of domestic law, insulates contractors from political risk. They cannot be weakened or negated by a change in the state's domestic law, and continue in circumstances where rights and remedies under the project contracts might be rendered ineffective, or where the project contracts would not in any event have offered any remedy. They provide direct recourse against the state itself, potentially offering a further respondent from whom compensation can be sought. Awards and certain interim decisions in both ICSID and UNCITRAL proceedings are also published, which can have an effect in an investor's favour: host states anxious not to impede the flow of foreign investment, for example, may take a less confrontational approach in disputes if publicity is an issue.

In the next part of this paper, we discuss one aspect of these advantages: the ability of a contractor with the benefit of treaty protection to bring proceedings under the treaty in parallel with claims under their project contracts, and the strategic benefits and disadvantages of doing so.

III Parallel claims in treaty arbitration and commercial proceedings

It is first important to clarify what is meant by "parallel proceedings" in this context.

In the domestic context, or in the case of international litigation, the term "parallel proceedings" is used to refer to situations in which the same claims, as to law and as to fact, are brought between the same parties in more than one forum, be that parallel court proceedings in different jurisdictions or parallel proceedings in court and commercial arbitration.

Such parallel proceedings arise in only one scenario in the treaty claim context. Where an investor has entered into a contract directly with a state entity, the state is subject to an umbrella clause under an applicable treaty, and the state entity breaches the direct contract, it is possible that such breach of contract will also constitute a breach of the state's umbrella clause obligations. In such case, if an investor chooses to commence a claim under the direct contract and also chooses to commence a treaty claim, both claims will relate to the same issues of fact, and both will need to

determine the existence of a breach of the underlying contract. The only difference will be the potential need to consider whether the breach resulted from an act of the state *qua* state in the treaty claim proceedings. The treaty and domestic proceedings would therefore be "parallel" in the sense given above.

That is not the case for other treaty claims. As explained in the previous section, treaty claims, properly formulated, are claims by an investor against a state (which may or may not be its contractual counterparty)[12] alleging that the state has breached its obligations under a BIT or MIT. While issues of fact may be common between treaty and domestic claims, issues of law will not be: the questions of law that arise in a treaty claim will relate to the interpretation of the treaty and its application to the state; the questions of law in the domestic proceedings will relate to the interpretation of the relevant contract, or the relevant provisions of domestic law.[13]

As such, when the term "parallel proceedings" is used to refer to parallel treaty and domestic claims, the distinction between the causes of action, and the potential distinction between the parties to the claims and between the precise issues of fact to be considered, must still be recognised. The "parallel" nature of the proceedings imports only that they are brought by the same or closely related claimants, and that they arise out of the same overall circumstances and factual background.

In the infrastructure context, there are many scenarios in which parallel proceedings might arise in this way. For example, a contractor in dispute with an employer over its entitlement to an extension of time and additional costs for delay and disruption, where the delays and disruption have been caused by discriminatory or inequitable treatment by the state (either as employer or separately), may have a claim under its

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12 Questions often arise as to whether the actions of a state agency or state entity can properly be attributed to the state as a whole for the purposes of determining whether a breach of a treaty right has been committed. *Emilio Agustin Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000 provides a good example of the applicable principles of state responsibility in public international law.

13 As recognised in *Vivendi v Argentina (No 1)*, Annulment Decision, 3 July 2002, treaty standards are distinct, and can and should be analysed separately from contractual or domestic law standards.

project contracts and a parallel treaty claim for breach of the FET standard. Alternatively, an owner that is a state entity may wrongfully terminate the project contracts, exclude the contractor from the site and seize related assets, which would potentially give rise to claims under the project contracts and parallel claims against the state for wrongful expropriation or breach of other obligations. Other examples can readily be posited or taken from previous investment arbitration cases.

The distinct legal bases for treaty claims and claims in domestic proceedings readily lend themselves to parallel proceedings. Whether this is a desirable outcome is a matter on which commentators are divided. This section of the paper will consider first certain questions as to the direct consequences in proceedings of claims being brought in parallel, particularly with respect to the ways in which claims, counterclaims and defences may be split across two different forums. It will then consider certain measures that exist in a number of treaties that are aimed at preventing parallel proceedings, and their effectiveness. The section then concludes with consideration of the potential advantages, from the point of view of contractors, of this division of proceedings, as well as the disadvantages.

Claims and counterclaims in parallel proceedings

The first question we will consider concerns the extent to which claims and counterclaims can be brought by parties, and what the effect on those claims and counterclaims of ongoing parallel proceedings would be.

Generally speaking, in domestic proceedings a defendant or respondent is entitled to raise counterclaims, provided that they fall within the jurisdiction of the relevant court or tribunal. In the case of construction contracts, where the counterclaims relate to some aspect of the contract or its performance, that jurisdiction will readily be established.

In investment treaty arbitration, the jurisdiction of a tribunal to hear counterclaims from a state is less apparent.

In principle, counterclaims can be raised in response to treaty claims. Article 46 of the ICSID Convention provides that "*except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre*". This presents three hurdles for states seeking to bring counterclaims.

First, the state must establish the consent of the investor to counterclaims being filed in the treaty proceedings. It is unlikely that this consent will be given expressly by the investor, which is not itself a party to the BIT or MIT under which the state's own consent is given. However, tribunals in previous cases have been willing to find that the act of an investor in filing a Request for Arbitration is sufficient to show its acceptance of the state's offer to arbitrate any claims *and counterclaims*.[14] The investor's act in filing a claim may therefore suffice to demonstrate the necessary consent.

However, this analysis also leads to the conclusion that, if the investor's investment is invalid (on the grounds that it was illegal, for example), then the tribunal's jurisdiction to hear the counterclaims will also fail. The state's offer to arbitrate claims relating to investments does not extend to a willingness to arbitrate claims over invalid or illegal investments. If the investor's investment is invalid, the state's offer falls away and the investor therefore cannot accept it. Without acceptance of the offer, there is nothing on which to found the investor's consent to the counterclaims.[15]

Second, the state must establish that its counterclaims arise directly out of the subject matter of the primary dispute brought by the investor. It is on this point that states regularly fail to establish jurisdiction. The nature of treaty protections is that they are largely one-sided, at least from the perspective of the investor. The treaties are agreements between states concerning rights that they will bestow upon each other's

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14 *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011.

15 *Metal-Tech v Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013.

national investors. The investors themselves owe no obligations to the states. Any counterclaims from the state are therefore not usually founded in the treaty, but arise separately under a project contract or under domestic law. In many cases, tribunals have found that this distinction prevents the state's counterclaims from being raised.[16] It appears that only in the rare case that the relevant treaty imposes direct and relevant obligations on investors as well as states will it be possible for a state to bring its counterclaims in treaty proceedings.[17]

The third requirement is that any counterclaims must be "otherwise within the jurisdiction of the Centre". However, it is unclear to what extent this adds much to the two previous requirements. It is notable that the tribunal in *Metal-Tech* did not address this limb as significantly different from the requirement for consent.

If states cannot bring counterclaims in treaty proceedings commenced by the investor, they must instead be brought in other forums: domestic proceedings of one form or another. What impact would there be on such counterclaims if the investor has already commenced such domestic proceedings in parallel with their treaty claim? The answer is unclear, but it is suggested that in practice the presence of such existing proceedings, in which the investor has appeared voluntarily, may make it more likely that the counterclaims will be pursued. To that extent, where counterclaims from the state may be expected, pursuing domestic proceedings in parallel with treaty claims may be to the disadvantage of the investor.

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16 *Hamester v Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010; *Saluka v Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004; *Paushok v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011.

17 For an example of such a case, see *Al-Warraq v Indonesia*, UNCITRAL, Final Award, 15 December 2014. The treaty in that case, the Organisation of the Islamic Conference, imposed a positive obligation on investors to respect the law of the host state, public order and morals. On this basis, the tribunal accepted jurisdiction to hear the states counterclaim for restitution of certain assets alleged to have been taken unjustly by the investor. The counterclaim, however, failed on the merits.

Defences in parallel proceedings

A second, related question concerns the effect that parallel proceedings may have on the defences available to the parties. Consider, for example, a slight variation on one of the scenarios posited above: a contractor is facing claims from the employer in domestic proceedings for liquidated damages for delay. The contractor considers that the delay was caused by the actions of the host state, in breach of the FET standard or the full protection and security standard. The contractor has commenced a claim under the treaty. Can the contractor raise this alleged breach of its treaty rights as a defence to the claim in the domestic proceedings?

There do not appear to be any decisions in which this question has been addressed directly. It is suggested, however, that the answer depends on the identity of the employer.

If the employer is the state, and it is therefore the acts of the employer itself that the contractor criticises, then the contractor may have a defence in the domestic proceedings based on the principles that a party to a contract should not prevent the other party from performing, and that a party cannot benefit from its own wrong. In this, however, it would appear unnecessary for separate treaty proceedings to be commenced for the defence to be valid. The act of interference could excuse contractual delay irrespective of whether it also constitutes a breach of any treaty provision.

If the employer is a third party, unconnected with the state, then it would appear that the contractor could not rely upon the treaty breach in its defence. The employer would not be responsible for the acts of the state, and so there would be no reason to prevent it enforcing its rights against the contractor. However, in such circumstances the contractor would appear to be entitled to claim against the state for the treaty breach, and to seek appropriate compensation for the losses it suffers in paying off the employer. The parallel proceedings against the state would therefore be beneficial to the contractor, although the link between the proceedings would not be direct.

However, if the employer is a state entity, but not the same entity that is responsible for the alleged breach of the contractor's treaty rights, the position may be different. For the purposes of the domestic proceedings, the employer may not be regarded as at fault in causing the delay. However, at the treaty level, the employer and the other state entities at fault would all be regarded as part of the state. It may be that in practice this case would be treated no differently to scenarios in which the employer is a third party. But it is suggested that there would be stronger grounds in such case for staying the domestic proceedings pending resolution of the treaty claim, and allowing the contractor to use the outcome of the treaty claim in its domestic defence.

Appointment of tribunals and conduct of hearings

Further questions arise as to the procedures that might be adopted so as best to manage parallel proceedings, to resolve disputes more efficiently and avoid some of the negative consequences that might otherwise ensue.

One option would be to stay one set of proceedings pending resolution of the other. This would help to avoid the proceedings reaching inconsistent findings on the issues in dispute, by allowing one set of proceedings to determine these points first. In circumstances where the same issues arise in both proceedings, this may be attractive, and it is an approach that is recognised in international law.[18]

Consolidation of the separate proceedings could also be considered. However, this may be difficult. Arbitral tribunals only have authority over the parties that are governed by a treaty or an agreement, and in many cases they have no power to force consolidation on the parties. Consolidating court and arbitration procedures may also raise difficulties as to jurisdiction and arbitrability.

If formal consolidation of disputes is not possible, however, then a "softer" form of consolidation might be considered.

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[18] See, for example, the decision of the UNCLOS tribunal in *MOX Plant (Ireland v United Kingdom)*, Order No. 3, 42 ILM 1187

An example of such approach is found in the *Salini v Morrocco* case.[19] At the time that Salini Costruttorio S.p.A. brought its claim, the ICSID Secretariat was aware of another claim by other Italian investors against Morocco, had been raised under the same BIT and was based on similar facts. The ICSID Secretariat proposed that the parties appoint the same three-member tribunal for their respective cases, which the parties accepted. Although the cases were never formally merged, and each proceeded with its own set of pleadings and its own hearings, the appointment of the same tribunals in both cases helped to avoid inconsistent decisions being reached.

Salini concerned "soft" consolidation of two similar claims brought by separate investors under the same treaty against the same respondent state. However, there is no reason in principle why a similar approach could not be adopted for claims brought by the same or related entities under treaties and domestic rights.

The author is aware of one case in which a contractor commenced commercial arbitration alleging breach of a commercial contract against a federal state entity. In parallel, the contractor commenced a claim under a treaty against the state itself, relying on largely the same facts. The parties appointed different tribunals to hear each set of proceedings. However, the tribunals in each set of proceedings were made aware of the existence of the other proceedings, and received regular updates on how they were progressing. Given the overlap in proceedings, it was proposed that hearings of fact evidence could be held jointly between the two tribunals, with them sitting as a panel of six arbitrators, albeit that each tribunal would remain separate and would determine only the claims specifically referred to it. The intention was both to try to avoid inconsistency in the final decisions of each tribunal, and also to maximise the efficiency of the proceedings by eliminating the need for fact evidence to be prepared and heard twice. Although this approach was ultimately rejected following an objection from one of the parties, it was an interesting proposal that bears further consideration.

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19 See n. 4, above.

Circumstances in which parallel proceedings may not be brought

Certain treaties include provisions which are intended to prevent claims under the treaty from being brought in parallel with claims in domestic proceedings. They broadly fall into one of three categories, although the specific wording, and therefore the correct interpretation, of the provisions varies from particular treaty to particular treaty. Their effectiveness also varies substantially between the different types of provision. However, it is important for contractors to bear them in mind. Where they exist and are effective, they may impose a choice on the contractor as to the forum in which its claim is heard, and such choice may be made inadvertently if due caution is not exercised.

The first category of provision is commonly referred to as a "fork in the road" clause, and is found in some BITs.[20] Such clauses state that any dispute with respect to treaty rights shall be submitted, usually at the election of the investor, either to the national courts of the host state or to international arbitration. They then continue to state that, once an investor has submitted to either of those jurisdictions, the choice shall be final. In principle, therefore, they put the investor to an election for its claims, and prevent parallel proceedings being brought.

However, in practice these clauses have seldom been found to be effective. A study conducted in 2013 demonstrated that in 15 of 17 cases considered, arguments that an investor's treaty claim should be dismissed as a violation of a fork in the road clause were rejected.[21] The difficulty arises out of the different legal bases for domestic and treaty claims, noted above. Most fork in the road clauses are drafted to prevent an investor from submitting the same claim to both domestic proceedings and treaty

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20 For example, Article 8(2) of the France – Argentina BIT; Article VII(2) of the USA – Argentina BIT.

21 *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration*, G. Van Harten (Oxford University Press, 2013)

arbitration. This restriction is easily side-stepped, however, when the claims brought in each forum are distinct, even if they rely upon similar factual bases.[22]

The second category of provision is a mandatory waiver of alternative forums. These clauses stipulate that, as a pre-condition to submitting any treaty claim to arbitration, the investor must first waive its right to initiate or continue any domestic proceedings with respect to the "measure" or state action that is alleged to be a breach of the state's treaty obligations.[23]

Such mandatory waiver clauses are manifestly broader than typical fork in the road provisions. They avoid the difficulty of distinct legal claims by referring to proceedings brought "with respect to" the "measure" that is alleged to constitute a breach of the treaty, which is sufficiently wide in scope to encompass many claims in domestic proceedings arising out of the same facts as the intended treaty claim. The effectiveness of these provisions was confirmed in *Waste Management Inc v United Mexican States*.[24]

In principle, depending on the wording of provision in the relevant treaty, it may be possible to demonstrate a sufficient degree of separation between the subject matter of the domestic proceedings and a treaty claim to fall outside the ambit of the words "with respect to". However, investors would need to consider carefully attempting to run domestic and treaty claims in parallel if such a clause is present in the treaty.

Finally, a treaty may provide that, as a pre-condition to commencing a treaty claim in arbitration proceedings, an investor must first pursue such claim through recourse to

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22 *Vivendi v Argentina*, ICSID Case No. ARB/97/3, Award 21 November 2000; *Salini Construttorio S.p.A. v Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001; *SGS Societe Generale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003

23 For example, Article 1121 of the North American Free Trade Agreement (NAFTA).

24 *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB/98/2, Award, 2 June 2000

the national courts of the host state for a minimum period of time.[25] Such clauses have generally been upheld, and tribunals have declined jurisdiction to hear treaty claims where the investor has failed to comply with such prior recourse provisions.[26] A potential exception exists where an investor can demonstrate it cannot submit its claims to the local courts, or that doing so would be futile (because it would not receive a fair hearing of its claims).[27] However, it is the investor that bears the burden of proving such inability or futility, and it is unlikely that a tribunal will make such a finding lightly.

Such a prior recourse provision does not prevent the contractor from ever bringing its treaty claim: it need only wait until the expiry of the specified period. However, the length of the recourse period makes it less likely that any treaty proceedings will take place in parallel with domestic proceedings.

Advantages of parallel proceedings

Given these considerations, the question arises as to what advantage a claimant might gain by pursuing parallel claims in domestic proceedings and in treaty arbitration.

The reasons why a contractor might choose to pursue parallel claims are largely tactical. Parallel proceedings offer a contractor the ability to seek to vindicate all of its treaty rights and its contract rights simultaneously. In doing so, they potentially offer the contract two forums in which two succeed, and therefore potentially two "bites at the cherry". A victory in one forum may lead to a swift settlement of related issues; and a loss in one forum may potentially be negated by a victory on a different basis in the other. For example, a state planning authority may deny a contractor the

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25 The Spain - Argentina BIT, for example, requires that a claimant pursue its treaty claims through the domestic courts of the host state for a period of 18 months before commencing arbitration; the Turkey – Turkmenistan BIT requires submission to the local courts for a minimum of one year.

26 *Kilic Insaat Ithalat Ihracat Sanayi Ve Ticaret Anonim Sirketi v Turkmenistan*, ICSID Case No. Arb/10/1, Award, 2 July 2013. The tribunal in *Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000 and Award, 13 November 2000 similarly opined, although *obiter*, that such clauses should be respected.

27 *Sanayi Ve Ticaret v Turkmenistan*, n.21 above.

planning permits necessary to undertake an urban development project, in circumstances where that denial prevents the contractor from fulfilling a development contract with the state and is contrary to assurances given by the state to the contractor prior to entering into the contract.[28] In such case, the contractor may fail in a claim under the development contract, particularly if the obligation to obtain necessary permits was for the contractor. However, it may succeed instead in a treaty claim against the state for breach of the FET standard, in failing to meet the contractor's legitimate expectations that the state would ensure the permits were given.

Where the respondents in the proceedings are the same or closely connected entities, parallel proceedings may also increase the pressure to which the respondents are subjected. Parallel treaty claims may have the effect of elevating the dispute to the state-level more rapidly, which may help to focus the minds of decision makers and allow a negotiated settlement to be reached sooner.

Parallel proceedings may also bring benefits in terms of efficiency. They avoid the sequential re-litigation of essentially the same points under different legal guises. It enables factual witness evidence to be heard over a shorter period, meaning that the effects of the passage of time and fading memories do not unduly prejudice later proceedings. Costs may also be minimised in certain respects, as experts and legal teams (both within and external to the investor) will not need to re-familiarise themselves with the facts and arguments some time after the first case.

Disadvantages of parallel proceedings

These potential advantages for a contractor are, however, balanced by certain disadvantages.

The primary disadvantage of parallel proceedings is the risk of inconsistent decisions on the same issues of fact or law. Contradictory findings from the proceedings may

[28] This was largely the fact pattern in *MTD Equity Sdn Bhd and MTD Chile S.A. v Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

cause difficulties with enforcing the decision from either proceeding. Instead of being able to benefit from the relatively straightforward process for enforcement of an arbitral award available under the New York Convention, a contractor may find that any attempt to enforce an award is delayed and complicated by the need for an enforcing court to determine which of the two conflicting decisions it should uphold. It may be necessary for the contractor to pursue annulment of the decision against it in order to secure smoother enforcement of the decision in its favour, but the bases upon which an award can be annulled (or a judgment appealed) are limited.

Similarly, even in circumstances in which both proceedings produce results in the contractor's favour, enforcement of either of those outcomes may be delayed by a need for the enforcing courts to guard against double recovery.

Equally, while parallel proceedings may lower the costs of proceedings for the contractor in some areas, additional or duplicative costs may arise elsewhere. Depending on the fora chosen for the dispute, an investor may find itself juggling with inconsistent rules regarding matters such as document disclosure and permitted evidence. Different hearing schedules may be an issue for both witnesses and legal teams in concurrent proceedings, and the degree of work needed to run two parallel claims is higher than is needed to run only one.

Parallel proceedings may also in certain circumstances make it more difficult to reach settlement. If the parties in the two proceedings are not the same, conducting parallel proceedings may introduce more actors into any settlement negotiations. That will complicate those negotiations, and potentially impair the ability to reach a deal.

IV Practical guidance on taking advantage of treaty protections

Contractors seeking to engage in construction projects in foreign jurisdictions would be well advised to consider structuring their involvement in the project to take advantage of any treaty protections that are available. The nature of construction projects, routinely involving long-duration contracts, substantial sums of money, and

immovable physical assets that may be vulnerable to state actions, means that the benefits offered by investment treaties to wise investors are potentially more important than in many other sectors. In this final section, we note the practical steps that contractors should take in structuring their participation in projects and in their operations to take full advantage of these protections.

Structuring of investments

The first step for any contractor should be to consider the range of treaties to which the host state for the project is a party. Not all BITs or MITs are created equal, and there may be significant differences in the protections available to investors from different countries. Due diligence on the treaties in force, with the assistance of legal advisers as required, will establish the best protections available.

Contractors should also consider the criteria to be met to qualify for a treaty's protections. A treaty that offers slightly less favourable substantive protections, but which allows the contractor to qualify for protection more readily through the use of a holding company, or which allows a contractor to incorporate in a jurisdiction which is favourable for other reasons (such as tax advantages or access to qualified staff), may be preferable.

Although structuring to take advantage of treaty protections is best done at the outset of a project, it is possible for contractors to take advantage of treaties after a project has commenced. A contractor can alter its corporate structure to meet the qualifying criteria of a treaty at any time, for example by changing its group structure to include a holding company in the relevant jurisdiction. The exception to this principle is that a contractor cannot claim the benefit of a treaty right if the change in its structure occurred after a dispute has arisen with the host state, or after it has become foreseeable that such a dispute will arise. A change in structure at that late stage is regarded as an abuse of the investment treaty system, and tribunals have routinely refused protections in such cases.

Practical guidance during the life of the project

Once a project has commenced, there are a number of practical steps that contractors can take to ensure that they are well-positioned to enforce their treaty rights, alongside contractual rights, if it becomes necessary to do so. Most of these steps are common sense and extensions of work that contractors will likely perform in an event, but surprisingly often they are neglected by parties, which can lead to difficulties in later bringing claims.

First, contractors should consider including at least one member in the project team who is familiar with the treaty that protects the contractor's investment in the project, and who will therefore have an understanding of the key issues to monitor. In particular, anyone who will have responsibility for taking decisions with respect to potential claims under the project contracts should be made aware of the potential overlap with treaty protections, and of the potential pitfalls identified above, so that potential claims are not inadvertently waived or lost.

Equally, contractors should consider establishing a reporting function covering any employees or officers of the company that have dealings with state entities, to be included in the weekly or monthly project reports. This allows any issues that arise to be spotted early and tracked, and input sought from senior management or lawyers as required.

For long-running construction projects, this approach also creates a central repository of information that helps to guard against any loss of knowledge that might otherwise result from staff changes or fragmentation of correspondence and documents among individual employees. In the author's experience, this problem arises particularly frequently in international construction contracts. Claims are often brought after the conclusion of a project (whether on completion or following termination), when the project team has dispersed to begin work on new projects. Collecting disparate documents and information from former team members then becomes logistically challenging.

Finally, contractors should bear in mind the nature of different treaty rights available to them, and aim to ensure that they keep written records of all potentially relevant facts. In cases of potential expropriation, much of the evidence required for a claim will be obvious and readily available, particularly in the case of a direct expropriation.

With respect to the FET standard, however, contractors should take care from the outset to record the basis for any decisions made to pursue the project. Records should particularly be kept of any inducements or promises made by the host state that could later form the basis of a claimed legitimate expectation. This may include, for example, any assurances given with respect to the provision and maintenance of infrastructure surrounding a project site, indications that the contractor will be granted any necessary licences or permits for carrying out work as it has planned, or representations that key staff will be granted work visas. If possible, written confirmation of such statements should be requested from the state at the time.

As the project progresses, records should be kept documenting any state actions that are contrary to the investor's expectations or the state's previous assurances, any requests the contractor makes for support from the state, and details of any steps the contractor is required to take to protect and maintain its positions in the light of state actions.

Contactors should also consider establishing news update services (basic updates are available free from several sources online) to monitor news reports and market intelligence for information about the host state's treatment of competitors or operators in the same field, to monitor for any signs of discrimination.

V Conclusion

There are clear benefits to a contractor wishing to engage in infrastructure projects in foreign jurisdictions of structuring its participation to take advantage of any treaty protections that may be available. By following a process that in most cases is relatively straightforward to qualify as an "investor" under an identified treaty, the contractor is able to enjoy the benefit of additional protections from capricious, discriminatory or inequitable state actions, against which the contractor might not

otherwise have any remedy. Particularly in contracts where a state or state entity is the counterparty, these additional protections can be of great importance.

Having taken advantage of treaty protections, a contractor then potentially opens up a range of new tactical opportunities in the event that disputes do arise. The prospect of parallel proceedings, while involving some drawbacks that the contractor should bear in mind, potentially allow contractors to apply pressure to the state entity, better protect its own position and vindicate its rights. Further, by taking a number of simple steps to ensure appropriate gathering and recording of information throughout the project, a contractor can ensure that it is well-positioned to mount claims, and to respond quickly to any threats as they arise.