The Interaction between National Judicial Systems and ICSID: An Optimization Problem

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**Motivation**

- Two puzzles:
  - Why do states refrain from exhaustion of local remedies in IIL, although not in other issues areas of PIL?
  - Why do states go along with paying damages without resorting to primary remedies first (in contrast to national law)?

- One question:
  - How can we use the interaction between national and international law in an optimal way? (Why still ICSID?)
Outline

- First Puzzle
- Second Puzzle
- The question put differently
  - The rationale of using national procedures
  - The rationale of using an international safeguard
- Solving the optimization problem
- Why still ICSID?

First Puzzle: why no local remedies in IIL?

- Rationale of local remedies rule in PIL:
  - have local courts control first: sovereignty issues
  - Local courts are closer to the problem

- In IIL:
  - strong competition for capital: opt-out of the national system as a carrot for investors (lower political risk, lower expected return needed for investment)
Second Puzzle: Why Damages? (I)

- Primary remedies are preventive or restorative (action of rescission, declaratory actions, mandatory injunctions, order of mandamus), whereas secondary remedies are pecuniary damage claims, granted *ex post*
- Equate primary remedies with national law and secondary remedies with IIL
- In national law: most legal systems require the use of primary remedies before any cent would be paid: damages last form of redress (unless direct taking)
- Arguments:
  - too costly, incentive for right holder to refrain to take action against act as such, control within the admin/judicial system

Second Puzzle: Why Damages? (II)

- IIL most heavily relies on *ex post* secondary remedies
- Arguments:
  - Tribunals can only award what they are asked for
  - State view:
    - Primary remedies infringe state sovereignty
      - but is this more true than for high damage awards?
      - And is it more true than in human rights law?
      - Probably true for parliamentary laws: no change to be expected
Second Puzzle: Why Damages? (III)

– Investors view:
  • Only pecuniary awards can be easily enforced under the ICSID Convention (Art. 54)
  • Quick remedy
  • Exit option if investment went wrong (correct incentives since this invites moral hazard?)

The Question put differently (I)

n IIL creates an international level of review for (illegal) national regulations and laws and the conduct of administrative entities for foreign investors
n It is state liability law for foreign investors (≈ Global Administrative Law)
n But should the advantages of primary remedies get lost on the way?
n Rather: an optimization problem: find ways of combining the two levels in an adequate way
The Question put differently (II)

The advantages of national procedures
- primary remedies are in principle the stronger protection of a right (L&E)
- self control of government
- maybe quicker
- also national procedures can be unbiased and judicial institutions independent
- primary remedy might be the thing to go for (e.g. issuing or giving back a license or permit)

The Question put differently (III)

The advantages of international procedures
- Review mechanism
- Binds governments stronger (credibility of commitment to investor)
- National procedures take place in the shadow of international procedures: may change behavior of local justice system (tying to the mast of national judicial governance systems)
- May give more easily enforceable remedy
Solving the optimization problem (I)

- A combination of those advantages could be achieved if national procedures are taken more seriously.
- Waiting periods:
  - allow for self-control of government and negotiation/mediation
  - Discarding them takes incentives of the investor away to negotiate seriously
- ‘national-court-first-provisions’
  - Maffezini and Plama: non-sensical, but empirical research (lexmundi) shows that national court procedures stay well within the usual 18-month

Solving the optimization problem (II)

- Alternatively: investors need to ask for primary remedies on the international level and only if not fulfilled within certain time frame: damages (≈ WTO law), e.g. Goetz v. Burundi (license)
- Exceptions:
  - Fork-in-the-road provisions: they incentivize investors to chose directly the international level
  - Denial of justice: jumping possible (as in human rights law)
  - Parliamentary laws
Why still ICSID?

- In interaction with national legal systems (not in clinical isolation) it gives the optimal amount of legal protection!
- And it might be used as a good governance tool in host countries (shadow of international arbitration)

Thank you!

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