



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

Anne van Aaken
BIICL 2011

Motivation

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



Outline

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

First Puzzle: why no local remedies in IIL?

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

- n 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*
- n Equate primary remedies with national law and secondary remedies with IIL
- n 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)
- n 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)

- n IIL most heavily relies on *ex post* secondary remedies
- n 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 (\approx 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)

- n 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)

- n 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)

- n A combination of those advantages could be achieved if national procedures are taken more seriously
- n Waiting periods
 - allow for self-control of government and negotiation/mediation
 - Discarding them takes incentives of the investor away to negotiate seriously
- n ‘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)

- n Alternatively: investors need to ask for primary remedies on the international level and only if not fulfilled within certain time frame: damages (\approx WTO law), e.g. Goetz v. Burundi (license)
- n 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?

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

Thank you!

anne.vanaaken@unisg.ch