

Lis Pendens Arbitralis

Francisco Orrego Vicuña¹

Parallel Proceedings, Unwelcome.

Parallel and competing proceedings between international courts and tribunals, just as between international and domestic tribunals, is not a new phenomenon but certainly one that is gaining in recurrence. This in turn is the inevitable consequence of the proliferation of international courts and tribunals, on the one hand, and the lack of appropriate legal rules to deal with the matter, on the other hand. While there is little that can be done at present about the proliferation issue, there is much that can be done in respect of the governing legal principles and rules.

Like under the domestic legal systems of most countries, parallel proceedings should no doubt be discouraged.² This is certainly the common rule in connection with the courts comprised within a same judicial system, and only partial exceptions are permitted when involving, for example, state and federal courts. However, when the courts of a different country are involved the reaction is more cautious in the light of principles of comity, judicial deference and ultimately sovereignty. But even then, resort to the decline of jurisdiction, anti-suit injunctions and refusal to recognize a judgement which is the outcome of parallelism is not unknown, albeit rather exceptional.

The common law doctrine of *forum non-conveniens* has proven to be an effective supplementary approach to this question. As a recent resolution of the *Institut de Droit International* on the principles governing this doctrine has stated, “Parallel litigation in more than one country between the same, or related, parties in relation to

the same, or related, issues may lead to injustice, delay, increased expense, and inconsistent decisions”.³ As it is a shared understanding that these negative consequences must be avoided, *forum non-conveniens* has been gaining international acceptability, although many times the same objectives have been achieved under doctrines of *abus de droit*, closer to civil law jurisdictions, and *lis pendens* when applied as a general principle of law.

All these doctrines share a common background, which is to facilitate appropriate solutions to *bona fide* litigants and curtail the abuse that the parallel proceeding might entail with the purpose of frustrating the legitimate rights of another party.⁴

How far have these approaches advanced under international law, or even under civil and commercial law, is the question that must be answered so as to see whether an arbitral tribunal faced with the problem can rely on an accepted principle of law to find a solution.

Establishing the Principle of *Lis Pendens* in International Litigation.

The earlier decisions of the Permanent Court of International Justice seem to have provided a positive answer. In the *Certain German Interests* case,⁵ the Court retained its jurisdiction considering that the conditions for the application of *lis pendens* had not been met as the parallel proceedings before a Mixed Arbitral Tribunal concerned different parties and legal issues.

Other cases dealt with the related problem of choice of forum and only in part with *lis pendens*, having the Court decided in favour of its jurisdiction in spite of requests to decline in favour of some other jurisdiction. So was done in the *Mavrommatis* case,⁶ although only in respect of a preliminary issue, as was done in the *Chorzow Factory* case⁷ and in the *Rights of Minorities*.⁸ In the *Electricity Company of*

Sofia case, the Permanent Court took the view that new jurisdictional arrangements should not be understood as necessarily excluding earlier arrangements.⁹

Confusion in Arbitration.

The early practice of international arbitral bodies, or related thereto, on the question of parallel proceedings, however, seem to have added more to the confusion than to the solution. In the well-known case *Attorney General v. Mobil Oil NZ Ltd.*, the High Court of New Zealand stayed proceedings conducted in parallel under ICSID arbitration relying on discretion rather than on the observation of a legal obligation as to the exclusiveness of remedies under Article 26 of the ICSID Convention.¹⁰ The solution, however, was the right one. In respect of provisional measures there is a massive practice evidencing that ICSID tribunals insist on their exclusive jurisdiction to this effect and many domestic courts observe this requirement.¹¹

The Iran-United States Tribunal, after first ordering the stay of parallel ICC arbitration,¹² opted for the opposite solution in refusing to enjoin a parallel ICC proceeding.¹³ Also in the *SPP v. Egypt* case, while the ICSID Tribunal did not consider itself bound by the rule of *lis pendens*, it did rely on comity so as to suspend proceedings while parallel litigation was pursued before the Cour de Cassation in France;¹⁴ another ICSID Tribunal had previously not dismissed the rule but only found that the conditions for its application had not been met.¹⁵

But not all practice is as chaotic as it seems at first sight. Integration, deference and strict application of *lis pendens* acquire a more systematic character to the extent that more structured areas of the law come before different tribunals connected by their overall specialization in the field.

Integrating Legal Systems.

A first example relates to the field of human rights law and evidences a higher degree of integration. The UN Committee on Human Rights has held in several cases that *lis pendens* does not apply to cases submitted to another mechanism under the Optional Protocol before the actual entry into force of the Protocol, as it has also held that complaints before a separate body introduced by different complainants are not excluded by *lis pendens* even if the event giving rise to the claim is the same.¹⁶ A similar approach has been taken in respect of investigations pending before separate bodies.

The area of trade law offers another example where there appears to be a higher degree of integration of the dispute settlement mechanisms. The general WTO exclusive jurisdiction provision of Article 23 of the Dispute Settlement Understanding, does not seem to apply to arbitration as the very DSU allows the parties to resort to the settlement of disputes by arbitration.¹⁷

Organizing Judicial Deference.

Deference is illustrated in the operation of other mechanisms. Article 14 (3) (a) of the North American Agreement on Environment Cooperation also requires that the Secretariat be informed whether the matter is pending before a judicial or administrative proceeding, and if so no further action will be taken.¹⁸ This particular clause was instrumental in the *Methanex* case insofar the proceedings before the NAAEC were stopped in view of the parallel arbitration under a NAFTA Chapter 11 panel.¹⁹ To this end it was sufficient that the same legal arguments were used in both proceedings, in spite that the parties were different.

Lis Pendens recognized.

Thirdly, strict application of *lis pendens* can also be noted in other examples. The Committee established under the Optional Protocol to the International Convention on Civil and Political Rights is governed by the strict *lis pendens* rule of Article 5 (2) forbidding the examination of any communication from an individual unless it has ascertained that it is not being examined elsewhere.²⁰

The same approach seems to characterize dispute settlement in advanced mechanisms of economic integration. Article 47 (3) of the Statute of the European Court of Justice, for example, provides that the Court of First Instance may stay proceedings until the Court of Justice will have delivered judgment where both are “seized of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question”.²¹ Priority is usually given to the higher court.

Difficulties with less structured legal systems.

When the legal systems in which the parallel disputes occur do not offer the same structured nature or the same degree of integration, then it is still more likely that uncertainty will prevail in respect of *lis pendens*. The Inter American Court of Human Rights, for example, refused to defer to the International Court of Justice on advisory opinions sought in respect of consular assistance, relying to this effect on the general interest of the States parties to the Inter-American Convention to have the case examined under its own legal system.²²

Neither has the Law of the Sea Tribunal deferred to a domestic court conducting parallel proceedings in connection with the release of a vessel, but in this situation there is of course a parallelism involving an international and a domestic court where many times the latter will be on the weaker side of the option.²³ The complex situation arising

from the *SPP* case referred to above, also involving an international tribunal and a domestic court, resulted in the opposite solution as the ICSID tribunal differed to the French Cour de Cassation.

Still more difficult questions arise when parallel tribunals are seized of the same dispute by the same parties but emphasizing different angles of the controversy. In the *Swordfish* dispute, for example, Chile applied to the International Tribunal for the Law of the Sea in the belief that the dispute concerns the conservation of the living resources of the high seas, while the European Community applied to a WTO panel in the understanding that the dispute is about free trade.²⁴ A provisional agreement has kept the cases suspended in both fora for the time being.

Including the Choice of forum Dimension.

The discussion examined cannot be entirely separated from the question of the choice of forum, as in the period of the Permanent Court, and from the question of exclusive jurisdiction. Since the *Klöckner* case²⁵ there has been a continuing debate in the context of ICSID cases and parallel proceedings before other arbitration mechanisms or domestic courts on these issues, a debate that has recently deepened in the context of the distinction between contract-based and treaty-based claims. Tribunals have tended to favour their exclusive jurisdiction considering the claim to be treaty-based, but also the contract-based choice of forum has been a number of times upheld.²⁶

A number of recent law of the sea cases have also involved the question of the choice of forum, this being the case of the *Southern Bluefin Tuna*²⁷ and that of the *Mox Plant*.²⁸ Decline of jurisdiction in favour of a specialized forum and deference to the European Court of Justice have been some of the approaches followed in this context.

Dispersion of Arbitration.

Why arbitration has been so difficult to manage as a system in respect of *lis pendens* is a question that still needs to be addressed. It is quite evident that arbitration many times does not deal with a similar or even comparable body of law. Aspects connected to civil and commercial law, either domestic or international, interact with questions of international law, either public or private. International and domestic tribunals are also continuously interacting in the settlement of a particular dispute submitted to arbitration.

To the extent that there is less uniformity either in the system of law or the nature of the tribunals and their relationship, the likelihood of parallelism is greater and the ability of the tribunals to cooperate lesser. True, some cases where the uniformity is substantial have ended up with contradictory outcomes under parallel proceedings, *CME*²⁹ and *Lauder*³⁰ being the most recent example of this situation. Even though there were similar investment treaties involved, the subject matter of the dispute was the same and the UNCITRAL arbitration system was also the same, there was no possible consolidation in the context of a wholly decentralized dispute settlement mechanism. Sometimes consolidation can neither take place in the context of an integrated system of specialized dispute settlement, such as ICSID, because one or both parties will refuse to discuss this alternative.

Forum non conveniens as a Supplementary Guideline.

Lis pendens has quite appropriately been supplemented to some extent by the rule of *forum non conveniens*, which might guide both domestic and international arbitral tribunals dealing with transnational litigation in civil and commercial matters and related fields. A court or tribunal may refuse to exercise jurisdiction when a different court or tribunal is clearly more appropriate to decide the dispute. A decision

on appropriateness may take into account the adequacy of the alternative forum, the residence of the parties, the location of the evidence, the law applicable, the effect of limitation periods or the effectiveness and enforceability of any resulting judgement³¹, or a number of other factors.

Whether the first seized court should have jurisdiction is also a supplementary consideration to take into account, although exclusive jurisdiction clauses should be respected and enforced. It is also necessary to ensure that the seizure of the first court is not just a strategy to frustrate a different and more appropriate forum.³² The draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters of the Hague Conference on Private International Law has elaborated on the relationship between the first and the second seized court and the criteria to exercise or decline jurisdiction.³³

The fact that arbitration has been excluded from both the Brussels and the Lugano Conventions, has not resulted in a total separation as various decisions of the European Court of Justice have interpreted some interventions of national courts in favour of arbitration as compatible with the Conventions, as is the case of appointment of an arbitrator or the request for provisional measures in aid of arbitration.³⁴ *Lis pendens* and its variations have also been addressed by Article 22 of the Brussels and Lugano Conventions, Article 28 of EU Council Regulation 44/2001 and the International Law Association Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters.

Identifying Closer Connections.

A common denominator of all these legal developments is that jurisdiction should be localized in the country that has the most genuine connection with the dispute

except when special considerations intervene as an exception.³⁵ The same can be said of the possible approach by international courts and tribunals.

After having examined this varied practice, sometimes tending to uniformity some other to dispersion, the main issue is, as noted above, whether there is a general principle of *lis pendens* that can be applied by international courts or tribunals in a manner similar to what normally domestic courts do.

To the extent that the international community shares the objective of avoiding the abnormality of parallel proceedings and the injustice many times resulting from this practice, as it is positively the case, the availability of such a principle can indeed be ascertained. Just as with national courts, this is already quite evident in respect of dispute settlement mechanisms and arbitration dealing with structured areas of the law, particularly if the tribunals in question have a certain common specialization.

In respect of other areas not so structured, the progress is naturally slower, but anyhow perceptible. This in part relates to the principle of *lis pendens* itself, but it is also true, and perhaps more so, in connection with supplementary mechanisms, such as *forum non conveniens* in some matters, *res judicata* in other and the issues associated with choice of forum.

Bona Fide Requirements: First Step.

In order to properly apply this principle a court or tribunal will have to establish first whether the seizure of that tribunal or of a parallel tribunal is *bona fide* or just a pretext to evade obligations or frustrate other parties' legitimate jurisdictional rights. While this is not easy in some cases, in some other it is.

Resort to inter-State arbitration under ICSID, for example, in order to avoid the obligations the State has accepted in respect of an investor under the same Convention and bilateral investment treaties, constitutes an *abus de droit* sufficient for the inter-

State tribunal to decline its jurisdiction or for the first seized tribunal to reject any application for the stay of proceedings. This apart from the fact that the kind of disputes envisaged under the Convention for one and the other mechanism is entirely different and distinct.

Most Appropriate Forum: Second Step.

If *bona fide* is established, there can be next the consideration of whether the parallel mechanism is or not more appropriate, a matter that both tribunals should consider. The criteria for the operation of *forum non conveniens* and what elements must be taken into account to decide on appropriateness have developed at a rapid pace in respect of transnational litigation and there appears to be no reason why the same should not apply *mutatis mutandis* to parallel international litigation proper. Priority and deference have indeed a role in this connection in order to determine which tribunal has the closest connection with the required jurisdiction.

The Prospect of Consolidation: Third Step.

Insofar different tribunals might be equally appropriate, as in the *CME* and *Lauder* cases, and there is no room for priority, deference or other such solution, consolidation might be a reasonable alternative. This, however, requires the intervention of some higher body that will order the consolidation. While there is no established hierarchy among international tribunals, and the will of the parties must always be kept in mind, it is not difficult to envisage that in this connection highly institutionalized courts could play a meaningful role.

The International Court of Justice, for example, is one court that might have this sort of overall supervision of inter-State tribunals, not as an appeals body but as one that might be able to manage parallel cases from the point of view of what makes more sense in respect of jurisdiction. This also could apply where the situation does not call

for consolidation but for a decision about which tribunal ought to have precedence. Subsidiarity has been utilized as a mechanism to assign precedence in some dispute settlement arrangements.³⁶

It is equally possible to envisage a role in this connection for the ICC International Court of Arbitration, and a simple amendment of the arbitration rules might provide some guidance. This is still more the case if an International Court of arbitral awards is some day established.³⁷ Other arbitration institutions might resort to the same approach, as might the WTO panel and Appeals Board system of dispute settlement.

ICSID has repeatedly tried to avoid multiple proceedings within its specialized arbitration system. Although the cases might involve different parties, many times the issue disputed is the same. These initiatives have not materialized out of the opposition of one party, except rather marginally by way of auxiliary claims. In any event, again here, a simple amendment of the rules of arbitration might provide adequate alternatives, particularly in view of the current efforts to accommodate other concerns though such amendments.

While UNCITRAL is an entirely decentralized arbitration system, it might not be impossible to link it up for this purpose with some central body, such as the very International Court of Justice or the Permanent Court of Arbitration.

While the parties to an arbitration might always refuse any such consolidation or oppose given guidelines for priority and deference, there is certainly no harm in offering it. It is then up to them to live with the inconveniences the lack of rationally determined jurisdiction might cause.

The Concern About Proliferation.

Proliferation of international courts and tribunals will probably not stop because of the principle of *lis pendens* and related questions, but it might become manageable with a greater degree of certainty. A centralized-decentralized system of international dispute settlement is evidently here to stay, but this does not exclude the pertinent interactions between the two.

Judge Gilbert Guillaume has expressed the right concern:

“...the dangers for international law, resulting from the increasing number of judicial institutions in the modern world, should be stressed...it would be most regrettable if, on specific problems, different courts were to take divergent positions”.³⁸

So too has Judge Thomas Buergenthal:

“We are already witnessing certain developments which suggest that it is not unreasonable to be concerned about the conflicts some commentators see as threats to the unity of the international legal system...[a policy of judicial deference] would also avoid unseemly “*forum shopping*” by States seeking to file their cases with tribunals deemed by them likely to render decisions in their favor or to preempt specific outcomes”.³⁹

In the end, all these development point toward the control of abuse in the exercise of international jurisdiction.

¹ Professor of International Law at the Law School and the Institute of International Studies of the University of Chile. Membre de l'Institut de Droit International. Former President of the World Bank Administrative Tribunal. Arbitrator at 20 Essex Street Chambers (barristers), London.

² Yuval Shany: The Competing Jurisdictions of International Courts and Tribunals, 2003, at 157.

³ Institut de Droit International, Resolution on The principles for determining when the use of the doctrine of *forum non conveniens* and anti-suit injunctions is appropriate, Session de Bruges, 2003.

⁴ Shany, at 161-162.

⁵ *Certain German Interests in Polish Upper Silesia*, PCIJ (Ser.A) No. 6 (Jurisdiction), 1925, and discussion by Shany, at 239-240.

⁶ *Mavrommatis Palestine Concessions*, PCIJ (Ser.A) No. 2, 1924, and discussion by Shany, at 230-235.

⁷ *Factory at Chorzow*, PCIJ (Ser.A) No. 9 (Jurisdiction), 1927, and discussion by Shany at 230-235.

⁸ *Rights of Minorities in Upper Silesia*, PCIJ (Ser.A) No. 15, 1928, and discussion by Shany at 230-235.

⁹ *The Electricity Company of Sofia and Bulgaria*, PCIJ (Ser. A/B) No. 77, 1939 (Preliminary Objections), and discussion by Shany, at 235, and Hugh Thirlway: "The Proliferation of International Judicial Organs: Institutional and substantive questions –the International Court of Justice and other international courts", in Blokker and Schermers (eds): Proliferation of International Organizations, 2001, at 251.

¹⁰ *Attorney General v. Mobil Oil NZ Ltd.*, ICSID Reports, Vol. 4, 1987, 117.

¹¹ *Holiday Inns v. Morocco*, ICSID Case No. ARB/72/1, and discussion by P. Lalive: "The First 'World Bank' Arbitration (Holiday Inns v. Morocco)-Some Legal Problems", British Year Book of International Law, Vol. 51, 1980, p. 123, at 136 et seq; *AMCO v. Indonesia*, ICSID Reports, Vol. 1, 1993, p. 410, at 412; *MINE v. Guinea*, Decision of December 4, 1985, and discussion by Paul D. Friedland: "Provisional Measures and ICSID Arbitration", Arbitration International, Vol. 2, 1986, p. 335, at 346.

¹² *Reading and Bates Corp. v. Iran*, Iran-United States Claims Tribunal Reports, Vol. 2, 1983, at 401 (Interim Award), and discussion by Shany, at 41.

¹³ *Flour Corp .v. Iran*, Iran-United States Claims Tribunal Reports, Vol. 11, 1986, at 296 (Interim Award), and discussion by Shany, at 41.

¹⁴ *SPP v. Egypt*, ICSID Reports, Vol. 3, 1985, at 129.

¹⁵ *Benvenuti and Bonfant SRL. v. Congo*, ICSID Reports, Vol. 1, 1980, at 330, and discussion by Shany, at 243.

¹⁶ Shany, at 62-63, with reference to the cases before de Human Rights Committee.

¹⁷ Shany, at 183-185.

¹⁸ North American Agreement on Environmental Cooperation, 1993, International Legal Materials, Vol. 32, 1993, 1480.

¹⁹ Decision of the Secretariat of June 30, 2000, as cited and discussed by Shany, at 221-222.

²⁰ Shany, at 218-220.

²¹ Shany, at 222-223.

²² Inter-American Court of Human Rights, Advisory Opinion on the Right to Information on Consular Assistance, October 1, 1999, and discussion by Shany, at 241-242.

²³ International Tribunal for the Law of the Sea, *Camouco* case, 2000, International Legal Materials, Vol. 39, 2000, 666, at 678, and discussion by Shany, at 242.

²⁴ International Tribunal for the Law of the Sea, Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community), No. 7.

²⁵ *Klöckner v. Cameroon*, 1983, ICSID Reports, Vol. 2, 1983, 3.

²⁶ *Compañía de Aguas del Aconquija S. A. and Vivendi Universal v. Argentine Republic*, Decision on Application for Annulment, July 3, 2002, International Legal Materials, Vol. 41, 2002, 1135, para. 98; *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, Award on Jurisdiction, August 6, 2004, para. 89.

²⁷ *Southern Bluefin Tuna* case, 2000.

²⁸ *Mox Plant* case, Order No. 4, November 14, 2003, and discussion by Shany of various earlier jurisdictional options, at 235-239.

²⁹ *CME v. Czech Republic*, Partial Award of September 13, 2001.

³⁰ *Lauder v. Czech Republic*, Final Award of September 3, 2001.

³¹ Institut de Droit International, Bruges Resolution, cit., par. 2.

³² Institut de Droit International, Bruges Resolution, cit., par.4.

³³ Lawrence Collins and Georges Droz: “Preliminary Exposition on the Principles for Determining when the Use of the Doctrine of *forum non conveniens* and Anti-suit Injunctions is Appropriate”, Annuaire de l’Institut de Droit International, Vol. 70-I, Session de Bruges, 2003, 13, at 31-33.

³⁴ Collins and Droz, cit, at 37-38.

³⁵ Collins and Droz (Final Report), at 79.

³⁶ See generally Francisco Orrego Vicuña: International Dispute Settlement in a Global Society. Constitutionalization, Accesibility, Privatization, Sir Hersch Lauterpacht Memorial Lectures, Cambridge University Press, 2004.

³⁷ H. Holzmann: “A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards”, in M. Hunter et al.: The Internationalization of International Arbitration, 1995, 109-114; and Stephen M. Schwebel: “The Creation and Operation of an International Court of Arbitral Awards”, in Hunter, at 115-123, and discussion of both in Francisco Orrego Vicuña and Christopher Pinto: “Peaceful Settlement of Disputes. Prospects for the 21st Century”, Revised Report prepared for the Centennial of the First International Peace Conference, 1999, in F. Kalshoven (ed.): The Centennial of the First International Peace Conference, 2000, 261-416, at 288-289.

³⁸ Gilbert Guillaume: “The Future of International Judicial Institutions”, ICLQ, Vol. 44, 1995, 848, at 861-862.

³⁹ Thomas Buergenthal: “International Law and the Proliferation of International Courts”, in Jorge Cardona Llorens: Cursos Euromediterráneos Bancaja de Derecho Internacional, Vol. V, 2001, 31, at 38-39.