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The Collisions of Law and of Fora: Focus on International Dispute Resolution at the 98th Annual International Law Weekend

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The 98th Annual Meeting of the American Branch of the International Law Association ("ABILA"), known as ABILA's International Law Weekend ("ILW"), took place in New York City on 10 – 12 October 2019. ILW, ABILA's premiere annual event, featured 35 panels covering a broad range of topics of international law.[1)]

This year, ILW had a renewed focus on international dispute resolution through the inclusion of a dedicated track of panels on that topic. From those panels, an important theme emerged: the collisions of law and fora that can occur in an ever-changing and ever-more-connected world. While most of the international dispute resolution panels touched on this theme in one form or another, it was front and center in the panels addressing international investment law and investor-State dispute settlement ("ISDS"). The ISDS panels considered this theme in relation to regional sovereignty, national security exceptions, climate change, human rights, which raised many cross-cutting questions, including what fora should address and resolve what sorts of claims and why certain fora are reluctant to address certain forms of law.

This post considers the answers panelists gave to those questions, in various contexts, during the course of ILW. Their answers made it clear that the response in the field when friction arises is far from uniform, and such friction will remain an important point of debate for the foreseeable future.

A. What fora should resolve apparent tensions between legal principles?

When legal principles are in tension, a major issue for ISDS is whether a given fora should have to take into account the (alleged) conflict of legal principles, and in particular whether ISDS should take heed of allegedly conflicting bodies of law. This issue received particular attention in the ILW panels on the relationship between ISDS and EU law and on environmental protection before international courts and tribunals. The views expressed by the panelists made clear that there is currently no single view

as to when ISDS should be impacted by bodies of law in tension with it.

1. **The Effect of *Achmea* on the Jurisdiction of ISDS Tribunals and Award Enforcement**

There is perhaps no better-known recent debate over the apparent collision of international norms than the one that erupted after the Court of Justice of the European Union's ("CJEU") controversial 2018 decision in the *Achmea* case. There, the CJEU determined that the Treaty on the Functioning of the European Union precluded a provision in a BIT between EU Member States that allowed for proceedings before an arbitral tribunal.

The major question raised in relation to *Achmea* is the extent to which the judgment affects the jurisdiction of ISDS tribunals. As **Viren Mascarenhas** (Partner, King & Spalding LLP) noted, the majority of the tribunals that have thus far confronted jurisdictional objections on this basis were constituted under the Energy Charter Treaty ("ECT"), not intra-EU BITs. He then observed that all tribunals that have issued public awards have overruled this objection (*i.e.*, see the most recent decision on this issue rendered by the tribunal in *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*). Mr. Mascarenhas nevertheless predicted that respondent EU Member States would likely continue to raise intra-EU objections, thus lengthening and increasing the cost of proceedings. However, in his view, tribunals would likely continue rejecting these challenges, although they might shift their opinions if the CJEU chose to extend the *Achmea* decision to cover the ECT.

An equally important question, and one receiving increasing attention as of late, is whether the *Achmea* judgment affects the enforceability of ISDS awards before the courts of non-EU member states. **Professor George A. Bermann** addressed this directly during ILW, taking the view that *Achmea* is relevant to non-EU enforcement courts when investors seek to enforce intra-EU BIT awards outside of the EU. For example, he noted that an EU Member State might argue that a US court could not hear a case to enforce an award because the State has sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"). But Prof. Bermann pointed out that, since the CJEU determined such arbitration agreements are *invalid* in *Achmea*, the exception for valid arbitration agreements to the FSIA would no longer apply.

2. **Is an ISDS Tribunal a Proper Forum for Environmental Claims?**

The same issue of the effect that ISDS tribunals should give to non-ISDS legal principles arose in connection to international environmental protection as well. As **Professor Lisa Sachs** (Columbia University; Columbia Center on Sustainable Investment) noted, investment protections for foreign investors can increase the risk of chilling State environmental regulations and stifle access to remedies for victims. Professor Sachs recently commented on the impact that ISDS cases have had in areas of environmental protection and environmental justice, particularly in those related to climate action, protection of water resources, environmental impact assessments, and

communities' rights to representation and access to justice.

Patricia Cruz Trabanino (Associate; Jenner & Block) observed that the issue of a proper forum for environmental claims may emerge when States raise environmental counterclaims before an ISDS tribunal. In her view, it was not clear whether an ISDS tribunal was the optimal forum to address such counterclaims. On the one hand, State counterclaims, as she explained, offer a way to balance the playing field in investor-State arbitration where the state is, for the most part, the respondent. On the other hand, she noted that succeeding on counterclaims is difficult and raises the (unanswered) question of whether ISDS is really the best forum for the types of relief States can and should seek. She observed, in this regard, that a State may actually prefer another fora, to seek injunctive relief against future harm, as ISDS tribunals typically award only compensation for past harm.

B. Why Are ISDS Tribunals Reluctant to Address Collisions Between Investment Law and Other Legal Regimes?

When ISDS tribunals fail to give weight to legal principles that are in apparent contradiction with investment protections, a further important question may arise as to why they are reluctant to do so. This issue received consideration at ILW in connection to both national security exceptions to investment treaties, as well as human-rights arguments in ISDS.

1. The Reluctance of ISDS Tribunals to Give Effect to National Security Exceptions

The issue of why ISDS tribunals may not give effect to legal principles limiting investment protections was first addressed at ILW in connection to national security exceptions. There, the focus was on why the WTO typically gives greater effect to national security exceptions than do ISDS tribunals.

Professor Jose E. Alvarez (New York University School of Law) observed that an ISDS tribunal might reach a different outcome than a WTO dispute when applying an identical national security exception. The main reasons for these varied outcomes, in his view, are the differences between trade and investment law regimes, including available remedies, negotiating history, existing checks and balances, notions of the roles of arbitrators, and stakeholders. For example, the WTO panel is limited by Article 3 of the Dispute Settlement Understanding to applying the covered agreements and customary law on treaty interpretation, whereas investment tribunals may address issues such as who caused the emergency (within the national security context) and what the State did to prevent it.

Professor Robert Howse (New York University School of Law) addressed the issue of national security exceptions as well, but focused on the differences in remedies available under trade and investment law regimes. Within the trade regime, he observed, the primary remedy is the removal of the offending measure, and the

national security exception serves the objective of providing a political safety valve for especially sensitive measures. By contrast, he noted that the consequence for a breach of international law within the investment regime is generally monetary, making it unlikely that a tribunal would order the removal of the national security measure—this eliminates the need for a political safety valve.

2. **ISDS Tribunals' General Lack of Receptiveness to Human-Rights Defenses**

The same issue, of the reasons for failing give effect to legal principles that potentially limit investment protections, also arose in connection to discussions of human rights and investment law. As **Professor Kristen Boon** (Seton Hall Law School) noted, human-rights arguments may enter into ISDS disputes in a number of ways, including as the basis of a defense that the state cannot comply simultaneously with its obligations to protect human rights and its obligations to protect foreign investment. Nevertheless, a number of ISDS tribunals (with notable exceptions) have been far from receptive to such human-rights defenses that have been offered by States.

Professor Jena Martin (West Virginia University) surmised that this ongoing tension could be because (1) international human-rights law and international investment law do not share a common language (*i.e.*, corporations want predictability, quantification, and measurement, whereas human-rights advocates find the value of a human life immeasurable); and (2) there is inconsistency in how corporations, as juridical persons, are treated and held accountable under international law. She pointed out that under international investment law, corporations have rights and powers, but under public international law, there is no mechanism for holding them directly accountable for human-rights violations. So, while corporations have power, they are not held responsible for misusing that power when they commit human-rights abuses.

As **David Attanasio** (Associate, Dechert LLP) observed, some ISDS tribunals have been reluctant to entertain human-rights defenses, even though the ISDS and human-rights systems could potentially be understood to reflect common values. He suggested that structural features might be one explanatory factor, as arbitrators in ISDS may be selected for their particular legal perspectives (which may not include expertise in human-rights law). He also observed that the views of potential or actual victims of human rights are not always presented in the arbitration, and that ISDS disputes are often presented in fact-specific contexts (isolated from broader social and political considerations), which may relieve pressure on tribunals to assess the impact of their rulings in that broader context.

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References

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