

Kluwer Arbitration Blog

Investment Arbitrations: Do Tribunals Take the Role of a Supra-National Appellate Court above National Courts?

Asaf Niemoj · Friday, July 27th, 2018

1. State Responsibility for State Organ's Conduct

The fact that a state can be held liable for its organs' conduct is part of a wider notion that sees states as responsible for their internationally wrongful acts. This notion was codified in the ILC Articles of State Responsibility. Article 1 states that "every internationally wrongful act of a State entails the international responsibility of that State". Article 4 continues by stating, *inter alia*, that "the conduct of any State organ shall be considered an act of that State under international law...".

In my previous post which can be found [here](#), I have reviewed an Israeli Supreme Court decision that declined a request to set aside a multi-million class action suit against foreign investors. Among other things, I mentioned that the Israeli Attorney General was a party to the proceedings and that in his submissions to the Court, he took the same position as the investors, namely: that the class action should indeed be set aside. I then noted that if an opposite approach was to be taken by the Attorney General (namely, one which sided with the public rather than with the investors) then in light of the fact that the Attorney General is a state organ then this could, potentially, be seen as a breach of the state's undertakings under the BIT, and hence could potentially also lead to arbitration proceedings against that state.

Recent cases and awards show that proceedings in national courts entail risks that could be greater than described above. In fact, recent developments show that proceedings in national courts could potentially *themselves* be the subject of international arbitration proceedings.

2. Eli Lilly and Company v Government of Canada

The award rendered in [Eli Lilly and Company v. Government of Canada](#) [ICSID Case No. UNCT/14/2] was already discussed in this blog [here](#), but in the context of judicial economy. The case concerned two patents which belonged to the Claimant and which the Canadian Courts invalidated because they did not meet certain requirements of Canadian law. The basis for the invalidation was a legal doctrine adopted by the Canadian Courts in the mid-2000s. The Claimant argued that the doctrine was radically new, arbitrary and discriminatory against pharmaceutical companies and products. It therefore initiated NAFTA arbitration proceedings against Canada and argued that the Court's decision can serve as a ground for Canada's liability.

The parties to the proceedings agreed that a state is responsible for the conduct of all of its organs, including the judiciary. They also agreed that a state is responsible for the acts of judicial authorities when they are a result of denial of justice. However, the question was whether a state can be liable for the conduct of its judicial authorities based on grounds other than denial of justice.

The Claimant argued that a judicial act that violates a substantive rule of international law can also serve as ground for state liability in international arbitration. In the context of expropriation, for example, the Claimant argued that judicial measures qualify as indirect expropriations when they result in a substantial deprivation and violate a rule of international law. In other words, according to the Claimant, judicial measures may constitute an expropriation, even in the absence of a denial of justice. A similar argument was raised by the Claimant in the context of alleged breach of minimum standard of treatment. The Claimant argued that denial of justice is not the only legal basis that offers protection to investors.

The Respondent, on the other hand, argued that the only substantive obligation under NAFTA with respect to judicial measures is to ensure that an investor is not denied justice. Therefore, according to the Respondent, denial of justice is the only basis on which a domestic court judgment on the validity of a property right could constitute an expropriation. It further argued, with regard to the minimum standard of treatment of aliens, that denial of justice is the only rule of customary international law applicable to state organs exercising an adjudicative function.

The decision of the Tribunal is quite interesting. It first noted, with regard to expropriation claims, that “it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation”. It then went on to say, with regard to the minimum standard of treatment requirement, that it “is unwilling to shut the door to the possibility that judicial conduct characterized other than as a denial of justice may engage a respondent’s obligations under NAFTA Article 1105”.

Despite those interesting remarks, the Tribunal was unwilling to sustain the claim because it had found that the necessary facts were not established.

3. GPF GP S.a.r.l. v. Republic of Poland

The second interesting case is GPF GP S.a.r.l. v. Republic of Poland [SCC Case no. V.2014/168] which was also discussed in this blog [here](#). Although the documents of this case (which is still pending) are not publicly available, an English High Court judgment delivered this year [2018] EWHC 409 (Comm)] reveals some of the factual background and the legal arguments.

Here the Claimant is a company based in Luxemburg named Griffin and the dispute concerns a property located at 29 Listopada Street, Warsaw, which was the subject of a Perpetual Usufruct Agreement (PUA) – an agreement the aim of which was to commercially develop the property.

In 2007, a recommendation was issued by the Warsaw Monuments Conservator supporting the development of the property. Based on that recommendation, the Claimant invested in the property and provided the financing required to obtain the ownership rights. However, thereafter the recommendation was reversed on the basis that the development was unacceptable from a conservation point of view. A permit to develop the property was therefore not granted.

Following legal proceedings, the PUA was terminated by the Warsaw Regional Court, for failure to develop the property within the time limits specified. Appeals to the Warsaw Court of Appeal and to the Supreme Court were dismissed.

In its judgment, the English High Court states that the Tribunal found that it had jurisdiction to rule upon one aspect of Griffin's claim in the arbitration, namely: whether the judgment of the Warsaw Court of Appeal, as confirmed by the Polish Supreme Court, constituted an "expropriation, nationalization or any other similar measures affecting investments" in violation of the BIT.

The Tribunal's award is, therefore, interesting. Although not dealing with the merits of the case, it found that it had jurisdiction to examine a judgment of the Warsaw Court of Appeal. This means, in practice, that the Tribunal is of the opinion that the judgment of the Polish court could be the subject of investment treaty arbitration. We do not know, however, whether in its award the Tribunal goes into discussing possible ground for review of national court judgments by an investment arbitration tribunal. If so then this discussion is highly interesting and important.

4. The Interface Between Decisions Rendered by National Courts and Investment Treaty Arbitrations

The cases discussed above demonstrate that tribunals are willing to attribute acts of the judiciary to the states in which they operate and, potentially, also hold states as responsible for the outcome of judgments rendered by their national courts.

At first glance it seems reasonable to argue that at least in certain circumstances arbitral tribunals should indeed have the power to examine judgments rendered by national courts, particularly because in some countries the legal system is not detached from the political system and the former can be influenced by the latter. However, such an approach also entails risks. Among them is the risk that arbitral tribunals will become a supra-national appellate court overseeing judgments rendered by national courts, including national supreme courts. Indeed the Eli Lilly Tribunal was aware of the risk and so it emphasized "that a NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciary". The Tribunal therefore noted that such intervention should be reserved only to rare circumstances.

The issue is therefore complicated. The first question that arises is whether tribunals should indeed be allowed to examine judgments of national courts. If not, then one can argue that common-law based countries will be placed in a better position because in those countries courts take a substantive role in shaping the legal system and because a court judgment in those countries may lead to a shift from the regular jurisprudence (indeed this was one of the arguments asserted by the Respondent in Eli Lilly).

If the answer is yes, then different questions may arise. For example, what are the circumstances in which decisions rendered by national courts can be the subject of an investment treaty arbitration? Even if denial of justice is the only legal basis from which liability can be drawn, then still there would be a need to define the term denial of justice and its limits.

Although these questions are yet to be answered, it is clear that more developments are expected in this area.

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