

How To Deal With Zeus — Advocacy Of Parallel Proceedings from an Investor’s Perspective

By
Haig Oghigian
and
Mami Ohara

[Editor’s Note: Haig Oghigian is a partner and co-chair of the Litigation and Dispute Resolution Group at Baker & McKenzie, Tokyo Office. Mr. Oghigian is considered one of the leading international commercial arbitration practitioners in Japan, and has appeared in numerous arbitration cases representing companies in disputes both in Japan and overseas. In addition to his work in dispute resolution, Mr. Oghigian also leads Baker & McKenzie’s pharmaceutical and life science practice in Tokyo. Mami Ohara is an associate in the Litigation and Dispute Resolution Group at Baker & McKenzie, Tokyo Office. Ms. Ohara focuses her practice on international dispute resolution. Copyright 2010 by Haig Oghigian and Mami Ohara. Replies to this commentary are welcome.]

1. Introduction

a. Need For Protection Of Foreign Investment By And Against The Host State

Foreign investment is a long term financial engagement in another nation and, as a consequence, it involves exposure to the different and less known environment of the host state with its different cultures, customs, mentalities, bureaucracy, legal system and political infrastructure, not to mention potential corruption, and above all, specific vulnerability to interference by the host state.¹ The investor is vulnerable to the pernicious omnipresent (at least within its borders) strength of the sovereign, Zeus of Mount Olympus. The sovereign is the almighty king. The problem of inequality of the parties involved — the sovereign host state and the foreign private investor, typically a foreign company or a domestic company controlled by foreign investors — must be dealt with in considering the means for investor protection.²

b. Parallel Proceedings As A Means For Investor Protection

If a sovereign state has not complied with applicable contractual obligations or treaty obligations, for example under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), North American Free Trade Agreement (“NAFTA”), the Energy Charter Treaty (“ECT”), relevant Bilateral Investment Treaties (“BITs”), Free Trade Agreements (“FTAs”) or the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), the thwarted investor may initiate multiple arbitration proceedings (as well as court proceedings) against the recalcitrant state to exert pressure to honor such obligations.

An investor may commence an arbitration under a contractual arbitration clause providing for arbitration under the arbitral rules of, for example, the International Chambers of Commerce (“ICC”) or the UNCITRAL Arbitration Rules (“UNCITRAL Rules”), against a sovereign (or perhaps under certain circumstances against a state-owned company) may also be able to initiate an investment treaty arbitration against the sovereign to obtain declaratory relief that

the sovereign is in breach of its international obligations either to honor the award or for a denial of justice if its courts improperly refuse to enforce the award.³

In this paper, the author will focus on how the investor can exert pressure on the sovereign state by making use of different fora in arbitration.

2. Parallel Proceedings In International Arbitration

In arbitration, parallel proceedings relates to the search for one or more seats and/or rules of arbitration (and their corresponding curial law) where multiple options exist based on privity or other grounds; where the parties have not specified a single seat and/or rules; where there may be a basis for assertion of arbitral jurisdiction at another seat (or under other rules); or, where an arbitral tribunal may assert jurisdiction notwithstanding that a choice of forum other than arbitration may exist.⁴

3. *Lis Pendens* In International Arbitration

No dominant view concerning legal rules for parallel proceedings exists, and no relevant rules are provided in the ICSID Convention.⁵ It appears that all arbitral and court precedents concerning parallel proceedings, including the *Lauder v. CME* case discussed below, dictate that in order for a court or tribunal to prevent the commencement of the second proceedings, the *lis pendens* principle and the triple identity test have to be met.⁶

The principle of *lis pendens* is a procedural mechanism which serves to avoid conflicting decisions when the same dispute between the same parties and regarding the same subject matter or relief (*petitum*) and the same legal grounds (*causa petendi*) is brought to another forum.⁷ Under this principle, proceedings over the same dispute cannot be commenced in a second forum if the action (*lis*) is already pending (*pendens*) in another forum.⁸

For the principle of *lis pendens* to apply, a triple identity test has to be met: (i) the parties must be the same, (ii) the relief sought must be identical; and (iii) the same grounds or set of facts must be alleged by the claimant (thus, subsequent or parallel proceedings may be brought if the claimant chooses to litigate the case on a different basis).⁹

The possibility of consolidation of proceedings has become a necessary feature to achieve legal certainty, but it usually requires the consent of all parties. A few national laws, arbitration rules and international agreements already provide mandatory joinder or consolidation provisions.¹⁰ Neither the UNCITRAL Model Law nor the UNCITRAL Rules contain provisions on the consolidation of arbitration proceedings. In the context of investor-to-state arbitration, however, a new generation of BITs and FTAs has been refined to include the possibility of creating an appeal mechanism and the possibility of mandatory consolidation.¹¹

Much of scholarly work that has been done on parallel proceedings deals with the risk of parallel proceedings and possible solutions to overcome such risks.¹² However, such issues are not particularly (or at least directly) relevant to the investor. From a practitioner's point of view, the investor should take advantage of the confusion and the absence of dominant views concerning legal rules of parallel proceedings.

4. **The Proliferation Of Bits And Multiple Arbitration Proceedings — The Ronald S. Lauder And CME Czech Republic BV Cases**¹³

International investment agreements include over 2,400 BITs and FTAs incorporating investment protection provisions.¹⁴ These treaties confer upon an indefinite number of individuals and different international fora in which to claim state responsibility for the treatment of investments.¹⁵ Under the auspices of this treaty framework, investors may benefit from the substantive and procedural provisions of more than one BIT regarding the same dispute, against the same state.¹⁶

The awards rendered in the *Ronald S. Lauder and CME Czech Republic BV cases* against the Czech Republic, under UNCITRAL Rules, illustrate how a single investor may strategically initiate two parallel proceedings against the same state, under two different BITs, with regard to the same dispute.

Proceedings against the Czech Republic were commenced by Mr. Ronald Lauder under the US-Czech Republic BIT in London in August 1999, alleging that his investment in connection with operation of a commercial television station had been expropriated (the “First Proceedings”). Six months later, a company he controlled, CME Czech Republic BV, commenced proceedings under the Netherlands-Czech Republic BIT in Stockholm, making the same allegation, based on the exact same facts (the “Second Proceedings”). In addition, there were various other court and arbitral proceedings also taking place. As ad hoc arbitrations under the UNCITRAL Rules, and being pursued by different claimants with different treaties, there was no fixed procedure for consolidating the cases. The Czech Republic rejected the claimant’s various proposals to join the two cases by one means or another, including formal consolidation, appointing the same tribunal to hear both cases, agreeing to treat the finding in one case as binding in the other, and the like. The result was that two BIT arbitrations, involving substantially overlapping facts, proceeded simultaneously.

The Czech Republic sought to resist the parallel BIT claims on the basis of, *inter alia*, *lis pendens* and abuse of process.

The Tribunal for the First Proceedings denied the Czech Republic’s claim on the basis of *lis pendens*:

This Arbitral Tribunal considers the Respondent’s recourse to the principle of *lis alibi pendens* to be of no use, since all the other court and arbitration proceedings involve different parties and different causes of action. . . .

Therefore, no possibility exists that any other court or tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal, *i.e.* that the Czech Republic breached or did not breach the Treaty, and is or is not liable for damages towards Mr. Lauder.¹⁷

The Tribunal for the Second Proceedings denied the Czech Republic’s claim on the basis of the abuse of process:

There is also no abuse of the Treaty regime by Mr. Lauder in bringing virtually identical claims under two separate Treaties . . . should two different Treaties grant remedies to the respective claimants deriving from the same

facts and circumstances, this does not deprive one of the claimants of jurisdiction, if jurisdiction is granted under the respective Treaty. A possible abuse by Mr. Lauder in pursuing his claim under the US Treaty as alleged by the Respondent does not affect jurisdiction in these arbitration proceedings.¹⁸

Notwithstanding the fact that both the First Proceedings and the Second Proceedings were based on the same dispute, with regard to the same investor, the arbitral tribunals reached different conclusions. Subsequently, the award rendered by the Tribunal for the Second Proceedings was challenged before the Svea Court of Appeal in Stockholm.¹⁹ The Swedish courts dismissed the Czech Republic's action for annulment of the award, as the parties and the applicable law in both arbitrations were not identical, and therefore, the principles of *lis pendens* and *res judicata* did not apply.²⁰

5. Arbitration Proceedings Based On Contract And Treaty Claims

Investors may have different available remedies against host states, both under the contract entered with the state authorities and under the applicable BIT. Nothing prevents both contract and treaty claims being brought simultaneously by the same investor, in different proceedings.²¹

In the case of a contractual agreement to pursue local arbitration and where both commercial arbitration proceedings and a BIT-based international arbitration have been commenced and are in competition, the arbitral tribunals face the question of whether a prior contractual agreement to use local arbitration for "all disputes" is the exclusive forum for contractual claims, or whether the ICSID Tribunal may adjudicate both BIT-related claims and the contractual claims together.²²

In the interim decision in *SGS Société Générale de Surveillance v. The Islamic Republic of Pakistan (SGS v. Pakistan case)*, the ICSID Tribunal held that contractual claims in the applicable circumstances could not be brought before it, but rather, they had to be brought before the parallel commercial arbitration tribunal agreed to between the parties, with the BIT-based claims of SGS against the host state proceeding simultaneously before the ICSID Tribunal.²³

The concern expressed by the ICSID Tribunal in the *SGS v. Pakistan* case that the benefits of a contractual dispute resolution clause with a state which is also a party to a BIT "would flow only to the investor" and the investor "could always defeat the State's invocation of the contractually specified forum" at the investor's whim might be, in fact, true. To be frank, this is nonsense: that is precisely the purpose of a BIT — namely, to provide the investor with protective and even preferential treatment, particularly in those cases where the BIT entered into force after the private contract.²⁴

The host state who agrees to such a BIT after entering into private contracts with investors containing commercial dispute resolution clauses knows or should have contemplated the consequences of such a decision, and the expectation of the investor to be able to avail itself of the BIT-based dispute resolution mechanism.²⁵ The purpose of the BITs is to protect the investor from the pernicious strength of the sovereign. BITs are designed to "encourage and create favourable conditions for investors of the other contracting party to make investment in its territory."²⁶ The sovereign may otherwise impose export or import controls, tariffs and other various measures to ultimately drag the investor out from the state. It is not so much a

question of balancing the benefits of different agreements located in different legal orders, but rather, that the state entered into an arm's length choice of agreeing to the BIT subsequent to its private contracts with foreign investors.²⁷

6. Means Other Than Arbitration To Exert Pressure On A Sovereign State

An excellent article written by Lucy Reed and Lucy Martinez²⁸ lists five theoretically possible options as means other than arbitration to exert pressure on a sovereign state: (i) for cases involving unpaid ICSID awards, the investor may ask the World Bank to apply pressure on the respondent state, for example by withholding certain benefits; (ii) the investor may ask its state of nationality to exert diplomatic pressure on the recalcitrant state; (iii) the investor may ask its state of nationality to file an action on its behalf before the International Court of Justice (“ICJ”); (iv) if the dispute relates to an ICSID award, the investor may ask an interested state, other than its own state of nationality, to file an action on its behalf before the ICJ;²⁹ and (v) an investor may be able to file an individual complaint before the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).³⁰

Although this article primarily focuses on how to exert pressure on sovereigns who refuse to honor an award made against it, it is nevertheless useful for enumerating other forms of action to be brought against the sovereign. Among the means mentioned above, the author will explore the viability of the two relatively practical options: diplomatic protection and obtaining a judgment from the ICJ.

The investor may ask its state of nationality to exert diplomatic pressure on the recalcitrant state, such as demarches and possibly sanctions or other forms of economic pressure.³¹ However, in my previous career as a diplomat (whose primary role is to act as lobbyists for their governments), it would not come as a surprise to most of us that diplomacy is rather a 19th century blunt instrument to achieve agreement by a recalcitrant sovereign. The fact of the matter is that the Ministry of Foreign Affairs of those countries which are indifferent to diplomacy are usually simply mirroring the deafness of their national courts.

In addition, diplomatic protection is not the most effective means of protection for an investor as it may only be exercised between sovereign states — the injured national does not become a party to the legal relationship.³²

In fact, in the context of foreign investment, the traditional law of diplomatic protection has, to a large extent, been replaced by investor-initiated, treaty-based dispute settlement procedures, until the enforcement stage of those procedures.³³ In principle, if an investor had a dispute with a state-owned entity, the investor could petition its government into negotiation for redress with the state owning the entity through normal diplomatic channels. In that sense, what the BIT does is that it narrows the focus and creates a regime for a more established and pre-recognized method of accomplishing a request for redress rather than on an ad-hoc basis. Article 27 of the ICSID Convention,³⁴ for instance, excludes the exercise of diplomatic protection once consent to arbitration has been given under a treaty or in a contract, but revives diplomatic protection once the host state fails to comply with the award.³⁵ Many BITs also suspend the right of either state party to pursue claims through diplomatic channels if an investor has instituted arbitration proceedings, unless and until the host state fails to abide by the award.³⁶

The investor may also ask its state of nationality to file an action on its behalf before the ICJ on the basis of the respondent state's breach of its treaty obligations. The states in question must both be parties to the Statute of the ICJ ("ICJ Statute") and, in accordance with Article 36 of the ICJ Statute, there must be mutual consent to submit their contentious issues to the ICJ. If such consent cannot be evidenced from the treaty on which the claim is based, states may still accept the jurisdiction of the Court on an ad hoc basis³⁷ or the states may recognize the Court's jurisdiction as compulsory "in relation to any other State accepting the same obligation."³⁸

However, a case before the ICJ takes many years to prosecute, and there is no guarantee that the recalcitrant state would comply with an ICJ decision after refusing to comply with an investment treaty award.³⁹ Further, it is not at all clear that an ICJ judgment against the host state would lead to actual enforcement, as the Statute of the ICJ does not authorize orders of specific performance, but only "recommendations."⁴⁰

7. Conclusion

A skilled advocate can use parallel proceedings to maximize pressure on the sovereign state to enforce treaty and/or contractual obligations. The author does not recommend the investor to engage in a long drawn-out battle with the sovereign state; rather, the more preferable approach is to make use of parallel proceedings (and all other means at the investor's disposal) to reach settlement, and to secure protection of foreign investment against the sovereign state.

Endnotes

1. Norbert Horn, *Arbitration and the Protection of Foreign Investment: Concepts and Means in Arbitrating Foreign Investment Disputes*, 7 (Norbert Horn and Stefan Michael Kroll eds., 2004).
2. *Id.*
3. Lucy Reed and Lucy Martinez, *Chapter 2 Treaty Obligations to Honor Arbitral Awards Against Sovereigns in Enforcement of Arbitral Awards Against Sovereigns*, JurisNet, LLC (2010).
4. Richard H. Kreindler, *Part II Chapter 6: Parallel Proceedings: A Practitioner's Perspective* in Michael Waibel, Asha Kaucshal, et al., *The Backlash against Investment Arbitration* 128 (2010).
5. *Id.*
6. *Id.*
7. Bernardo M. Cremades and Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24 *Arbitration International* 509 (2008).
8. *Id.*
9. *Id.*
10. *Id.*, at 518.
11. *Id.*

12. E.g., August Reinisch, *Part II Chapter 5: The Issues Raised by Parallel Proceedings and Possible Solutions* in Michael Waibel, Asha Kaushal, et al. (eds.), *The Backlash against Investment Arbitration*, 114 (2010). (In this article, August Reinisch indicates that there are three central risks of multiple arbitration proceedings: “First, where the same issues are litigated in different fora the costs of proceedings multiply and dispute settlement resources are wasted. Second, defendants may have to respond to harassing and oppressive litigation tactics of overly zealous claimants. Finally, the greatest risk of multiple proceedings lies in the potential of conflicting decisions and awards. As the success of dispute settlement systems depends upon the confidence of the users in the system, the risk of conflicting decisions and awards is particularly harmful. Where investment tribunals produce inconsistent or even conflicting awards, one of the central values of any rule-based system of law; that is, predictability, is lost.”)
13. *Lauder v. Czech Republic*, Final Award of September 3, 2001; *CME Republic B.V. v. Czech Republic*, Partial Award of September 13, 2001 and Final Award of March 14, 2003; Svea Court of Appeal, Judgment of May 15, 2003 are available at www.investmentclaims.com.
14. *Supra* note 9, at 514.
15. *Id.*
16. *Id.*
17. Filip de Ly and Audley Sheppard, *ILA Final Report on Lis Pendens and Arbitration in 25 Arbitration International*, 19 (2009).
18. *Id.*, at 20.
19. Charles N. Brower and Jeremy K. Sharpe, *Multiple and Conflicting Arbitral Awards* in 4(2) *Journal of World Investment*, April 2003, at 211 cited in *Supra* note 9, at 514.
20. Campbell McLachlan, QC, Laurence Shore and Mathew Weiniger, *International Investment Arbitration*, 120-121 (2007).
21. *Supra* note 9, at 516.
22. *Supra* note 6, at 142.
23. *Id.*
24. *Supra* note 6, at 143-144.
25. *Id.*, at 150.
26. *Supra* note 3, at 6, citing a standard provision from the agreement between Japan and the Islamic Republic of Pakistan concerning the promotion and protection of investment as of April 29, 2002, Article 2.
27. *Id.*
28. *Supra* note 5.
29. *Id.* Reed and Martinez quote Christoph H. Schreuer, *The ICSID Convention: A Commentary* 1090 (2001): “Every State party to the Convention may demand that other States parties meet their obligations under the Convention and in the compliance with awards. To the extent that a third State is able to show a legal interest in the compliance with an award, it may also rely on Article 64 to bring the resulting dispute before the ICJ.”

30. *Supra* note 5. Reed and Martinez note that such a claim could only be made against ECHR Contracting Parties (although the investor does not need to be a national of an ECHR Contracting Party) and the investor must have exhausted its remedies in the host state.
31. *Id.* Reed and Martinez quote Christoph H. Schreuer, *The ICSID Convention: A Commentary* 1079 (2001), at 1089: “. . . the protecting State may threaten to take or may actually take countermeasures such as withholding payments due to the recalcitrant award debtor, offsetting the claim arising from the award against claims that the award debtor may have against the protecting State of the freezing of assets that belong to the award debtor . . .”
32. *Id.*
33. *Id.*
34. Article 27 of the ICSID Convention states: “(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. (2) Diplomatic Protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.”
35. *Supra* note 5.
36. *Id.*
37. ICJ Statute, art. 36(1).
38. *Id.*, art. 36(2).
39. *Supra* note 5, quoting Edward Baldwin, *et al.*, *Limits to Enforcement of ICSID Awards*, 23(1) J. Int’l Arb., 21 (2006).
40. *Id.*