

Parallel proceedings in arbitration and international law: reflections from practice

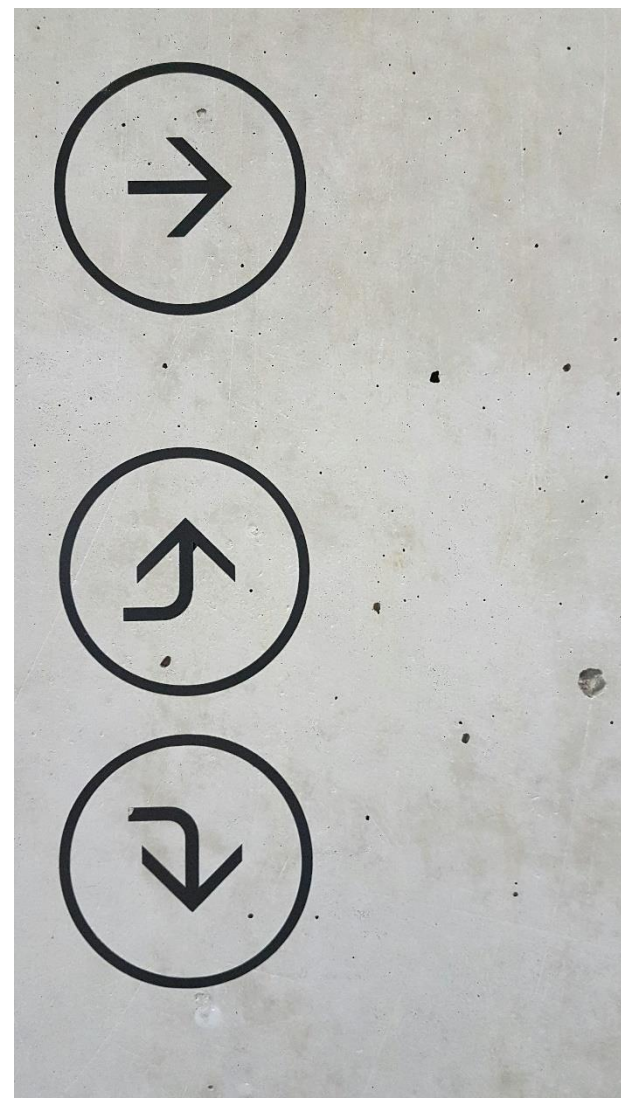
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Parallel proceedings

- No official or formal definition of “parallel proceedings”
- Usually used to refer to situations involving:
 - Same or related parties
 - Same or connected subject matters
 - Pursued simultaneously before multiple, potentially competing fora
- Often involving overlapping (sometimes identical) legal claims



The mischief of parallel proceedings

- Possible abuse of process (e.g., abusive forum shopping)
- Delaying tactics that might be exploited to interfere with proceedings
- Increased time and cost burden for parties (especially respondent party)
- Waste of finite court resources
- Risk of inconsistent rulings and outcomes on the same facts, law and evidence

Parallel proceedings in practice: *MOX Plant*

- Same parties and subject matter: Ireland and United Kingdom; MOX plant radioactive waste discharge
- UNCLOS Annex VII arbitration commenced (2001) – but suspended in deference to European Court of Justice (2003)

11. The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them.

MOX Plant (Ireland v. United Kingdom), PCA Case No. 2002-01, President's Statement of June 13, 2003. *See also* Procedural Order No. 3, 24 June 2003.

Parallel proceedings and international law: gaps in the legal toolkit

Overlapping jurisdictions have a second worrying consequence. In effect, they not only create a choice of courts — not to say a market — for the parties concerned, but they also increase the risk of conflicting judgments. Thus two courts may be seised concurrently of the same issue and render contradictory decisions. Systems of national law have for long had to deal with such problems. They have solved them by two methods: on the one hand, the development of a clear hierarchy among courts, on the other, the formulation of rules on litispendency and *res judicata*. **By contrast, the international system is sadly lacking in this regard.**

“The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order”, Speech by H. E. Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 27 October 2000, pages 3-4.

Additional domestic law solutions to parallel proceedings

- Stays of action: ruling by court halting any further proceedings
 - *See* Arbitration Act 1996, section 9 (“shall grant a stay”); New York Convention, Articles II(1), II(3)
- Anti-suit injunctions: restraining a private party from starting or pursuing proceedings in *another* jurisdiction, e.g.:
 - To prevent frustration of agreements to arbitrate
 - To restrain abusive “torpedo” actions

Arbitration Act 1996, s 9

Section 9 – Stay of legal proceedings

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. ...

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

1958 New York Convention, Article II

1. Each contracting party shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. ...

3. The court of each contracting State, when seized of an action in a matter in respect of which parties have made an agreement within the meaning of this article, at the request of one of the parties, shall refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Parallel proceedings in practice: *Qatar v UAE*



Parallel proceedings in practice: *Qatar v UAE*

- Same parties: claims by Qatar against the UAE
- Same subject matter: alleged CERD violations arising out of the UAE's termination of diplomatic relations with Qatar, including alleged discrimination against persons of Qatari national origin
- Simultaneous proceedings between two different fora:
 - CERD Article 11 Communication (CERD Committee / Conciliation Commission proceedings): filed March 2018
 - Separate ICJ litigation, also under CERD: filed June 2018

Outcome

- June 2019:
 - ICJ declines to restrain parallel proceedings
 - ICJ remains seised of preliminary objections to jurisdiction
- August 2019: CERD Committee finds in favour of Qatar on jurisdiction and admissibility
- February 2020: CERD Conciliation Commission appointed
- August/September 2020: ICJ holds hearing on jurisdiction and admissibility
- February 2021: ICJ dismisses the proceeding for lack of jurisdiction *ratione materiae* (nationality \neq national origin)

Treaty-based solutions to parallel proceedings? Fork in the road or *electa una via* provisions

2. If the dispute cannot be settled through negotiations within six months, the either Party to the dispute shall be entitled to submit the dispute to the competent court to the Contracting Party accepting the investment.

3. If a dispute cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article it may be submitted at the request of either Party to an ad hoc arbitral tribunal. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.

2001 China-Nigeria BIT, Article 9

Treaty-based solutions to parallel proceedings? Waiver provisions

No claim may be submitted to arbitration under this Section unless:

- (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
- (b) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
 - (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

Treaty-based solutions to parallel proceedings?

Consolidation of proceedings

- CPTPP allows consolidation of proceedings, even over a party’s objection, “in the interest of fair and efficient resolution” (Article 9.28)
- Proceedings must: (i) share a common question of law or fact; and (ii) arise out of the same events or circumstances
- New Article 9.28 tribunal empowered to determine:
 - Whether to consolidate claims in whole or in part
 - Which tribunal should hear the consolidated claims
 - Whether to stay proceedings of an existing tribunal pending a ruling on consolidation

Parallel proceedings: solutions to the chaos?

- “Chaos” of parallel proceedings can risk undermining orderly dispute resolution
- Likely to increase: rise in transnational disputes and institutional diversity of international law
- Domestic law offers established solutions to chaos: hierarchy of courts, *lis pendens*, *res judicata*, stays of action, anti-suit injunctions
- In contrast, significant gaps in international law and shortcomings in protection: but emergence of (some) innovative treaty solutions

