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Problem with Parallel Proceedings and Need for Embodying the Principles of Lis Pendens and Res Judicata in International Investment Arbitration

SALONI BUNG[1]

ABSTRACT

Parallel proceedings in investor-state Arbitration is an issue that is emerging at large and creating hindrance in the dispute resolution process. Parallel proceedings in the international regime are possible because the international laws do not provide for the applications of the principles of Res Judicata and Lis pendens as compared to domestic laws. Most countries are able to deal with the problem of parallel proceedings by restricting the parties to bring the same case in two different forums by applying the principles of Res Judicata and Lis pendens. The emerging cases dealing with parallel proceedings has now necessitated an urgent need to embody these principles in the international investment era as well. Apart from the principles, consolidation of the two simultaneous arbitration proceedings is also a convincing solution to prevent multiple proceedings on the same subject matter. In this paper, I have dealt with the causes and problems of parallel proceedings. The preventive and procedural measures to be taken to avoid parallel proceedings are suggested in this paper.

Keywords: *Parallel Proceeding, International arbitration, dispute resolution, Res judicata, Lis pendens, Arbitration*

I. INTRODUCTION

The term "Parallel Proceeding" is not defined universally. The definition varies depending upon the legal aspect, applicable laws and doctrines. Parallel proceedings can be defined as proceedings which is pending before another tribunal or court involving the same parties in which one or more issues are the same as the one before the current arbitral tribunal.

In the investment dispute category, UNCITRAL has used a substitute term for parallel proceedings as "concurrent proceedings". While the concept of parallel proceedings was prone to international commercial Arbitration, it is now prone to investor-state Arbitration as well.

[1] Author is a Junior Legal Officer at Apollo MedSkills Limited, Hyderabad, India.

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To decide what sorts of proceedings can be termed as parallel proceedings, tribunals have taken into consideration the fact "if the same or related parties and same or similar issues are in dispute".

Parallel proceedings may occur between arbitral tribunal and national courts or two different arbitral tribunals. The procedural aspect of both the proceedings may differ; however, both of them give rise to serious issues in the international investment era. Parties may initiate parallel proceedings to seek legal protection in the widest way possible and to increase their probability of succeeding in a dispute.

In international investments, the investors invest in the host state for their own benefit. In case of dispute, the investors might sometimes have more than one option for adjudicating their claim. There may be several other circumstances in which parallel proceedings may occur in International investment arbitration. Some of the situations are

1. Different unrelated investors may bring several disputes against a particular state due to the measures taken by the state affecting their legal rights. For example, when Argentina privatized several government-run industries, multiple cases were filed against the Argentinian government by several investors relating to the same subject matter. (*Sempra vs Argentina, Enron vs Argentina, LG& E vs Argentina and CMS vs Argentina*)

2. Claims may be brought by different but related entities such as shareholders and their company against a state. Such parallel proceedings are possible only because the investment is structured through multiple legal entities giving rights to more than one person to bring a claim against the state.[2] The most popular example of this type of proceedings are the cases of *CME Czech Republic BV vs The Czech Republic* and *Ronald S. Lauder vs the Czech Republic*, wherein the claims against the Czech Republic media council were brought by both the company and its shareholder.

3. A single person may bring a claim against the same state with the same set of facts in multiple fora. This is caused when several dispute resolution procedures may be applicable to a single investor whose right is being infringed by the state's action.[3]

The above circumstances will give rise to parallel proceedings with regard to either the same facts, same parties or same cause of action.

[2] UNITED NATIONS GENERAL ASSEMBLY, Fiftieth session, United Nations Commission on International Trade Law, Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration, 3-21 July 2017, PDF.PDF, https://undocs.org/pdf?symbol=en/A/CN.9/915 (last visited Apr 4, 2021).
[3] JUS MUNDI: WIKI NOTES FOR INVESTMENT LAW & ARBITRATION, https://jusmundi.com/en/document/wiki/en-parallel-proceedings (last visited Apr 4, 2021).

II. CAUSES OF PARALLEL PROCEEDINGS

In investor-state Arbitration, the foreign investors enter into a contract with the state for their investment. Apart from the contract, which prescribes their rights and liabilities for the specific investment, the treaty-based rights will also be prescribed in the Bilateral Investment Treaty("BIT") signed by the investor's country and the host state. These rights include a dispute resolution clause allowing the investor to approach for court adjudication or Arbitration in case of a dispute. Thus, the ultimate choice for the adoption of a dispute settlement mechanism (court or Arbitration) vests with the investor. The investor may opt for the contract's arbitration clause and initiate arbitration proceedings which will be decided through contractual rights and obligations of the parties. Alternatively, the investor may opt for invoking the BIT, which confers right on the investor and initiate arbitration proceedings which will be decided by applying substantive standards of the BIT. Investors may sometimes exercise both the contract and treaty rights simultaneously, giving rise to parallel proceedings.[4]

Investors may bring a claim against a single state under different BITs with the same subject matter. This situation arises because the BITs protect not only the investments which are directly made by the nationals of contracting states but also the investments indirectly made by the shareholders of the investor's company who reside in different states.

The cause of parallel proceedings is due to the features of investment operations that are carried out by different investors in different countries. The features of investments operations which affects the jurisdiction of the investor-state arbitral tribunal and subsequently give rise to parallel proceedings are prescribed below-

(i) **The difference between contract and treaty claims**: Before BITs came into the regime of international laws, for foreign investments, there used to be a contract between the investor and host state, and any dispute with regard to such contract will be adjudicated in the host state country by exclusively applying the host state laws. However, after the proliferation of BITs in the international investment law regime, two states enter into the treaty in which the investors of one country can invest into the host state country, and the dispute is adjudicated by the arbitral tribunals is according to general principles of international laws. There exists a possibility that a breach of contractual terms between investor and state will also result in a breach of treaty provisions. This is possible when the BITs contain the "*umbrella clause*", which states that the violation of contractual terms between investor and state will also result

[4] Bernardo M. Cremades & Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24 ARBITRATION INTERNATIONAL 507–540 (2008).

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in violation of treaty claims. Thus, when a dispute arises, the investor will have an option to go for either contract claim or the treaty claim or both. This dualist option will then increase the risk of parallel proceedings.

(ii) **Entitlement of company and its shareholders to bring a claim**: The term *investment* is generally very broad in its interpretation as envisaged in several BITs. This may include the direct realization of an enterprise, including the shareholding in the enterprise incorporated in the host state for investment. Thus, not only the company has the right to bring up a claim against the state but also the shareholders of the company. The tribunals in the past have accepted the claims brought by the majority as well as minority shareholders. There may be cases where the company and shareholders individually initiate a claim either directly or indirectly, resulting in parallel proceedings.[5]

(iii) **Forum shopping**: There may be multiple forums available with the investors for initiating its claim. The international investment agreement allows the investor to initiate a claim against the host state before several forums. This leaves the entire discretion with the investor's forum selection option. The forum selection option leads to the transfer of jurisdiction to the chosen forum. Such a transfer may relate to only certain claims, whereas the other claims will be subjected to the original forum.

The above-stated situations may give rise to parallel proceedings because of the structure of international investment operations.

III. PROBLEMS WITH PARALLEL PROCEEDINGS

Parallel proceedings are mainly problematic because it gives rise to inconsistent and conflicting legal decisions. Parallel proceedings violate the rule of law, fundamental principles of procedure and the due process of law. It also affects the rights and liabilities of the parties their claims and denies them effective legal remedies.[6] The problems and risks posed in the case of parallel proceedings are elaborated below-

- **Cost burden and time consumption**: Two proceedings for the same subject matter will increase the cost of bringing the claim. The host states against whom two different proceedings are initiated are the ones most vulnerable. The developing and poor countries whose financial conditions may be poor will have to spend their money unnecessarily in the

[5] Giovanni Zarra, *Parallel proceedings in investment arbitration*, 26

[6] PARALLEL PROCEEDINGS IN INVESTOR-STATE TREATY ARBITRATION: RESPONSES FOR TREATY-DRAFTERS, ARBITRATORS AND PARTIES ON JSTOR, https://enalsar.informaticsglobal.com:2125/stable/40865464 (last visited Apr 4, 2021)

different proceedings for no fault of theirs. Not only the cost burden of the parties, but it will also consume the time of the Arbitration by unnecessarily bringing the same claim resulting in sheer waste of resources.

- **Conflicting outcomes and inconsistency**: If an investor chooses to bring the same claim in different forums, then there are high chances that both the forums will give opposite or conflicting awards. Such conflicting awards are possible because the Arbitration is chosen by the parties, and there are no specific laws on which the arbitrators rely upon and base their decision. The arbitrators may apply their own interpretations of the international laws and come to the conclusion which is in conflict with other arbitration proceedings. Another major problem for having inconsistent outcomes in parallel proceedings is that the doctrine of ***Stare Decisis*** is not followed by international Arbitration. Thus, the arbitrators are not forced to look at the precedents before passing an award which gives rise to conflicting decisions.

- **Lack of Legal security:** Parallel proceedings will infringe the fundamental legal principles. The legal procedural aspects for safeguarding a person's right and not giving him an opportunity to abuse the process of law is affected. The basic principles of the rule of law, due process and legal certainty will be severely affected in case of concurrent proceedings.

- **Risk of double recovery:** There is a possibility that the claimant may claim damages/costs from both the adjudicating forums, which will doubly benefit the claimant. Thus, the claimant has the potential to harass one single state by bringing a claim against it in various forums.

- **Probability of success of claimant's claim:** Parallel proceedings gives undue advantage to the investor to try their luck in multiple forums. Investors' chances of succeeding in at least one of the forum increases, and thus the investor abuses the process of law and initiate proceedings in two different adjudicating forums.

One of the biggest problems for initiating parallel proceedings, as stated above, is that there is no doctrine of precedents or stare decisis applied in international investment law. When there is no principle or regulation for looking back at what the courts/tribunals have decided previously, another tribunal is not obliged to reject the applications of the party on the basis that it has been already decided by the court/tribunal and a precedent has been set.

IV. MEASURES TO PREVENT PARALLEL PROCEEDINGS

Certain preventive measures can be taken to narrow down the possibility of the occurrence of parallel proceedings. Parallel proceedings can be regulated and be avoided in the first place

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instead of dealing with the problem later on. Some of the measures are the use of waiver clause, fork in the road clause, exhaustion of local remedies or exclusive remedy clause. By including these clauses in the BITs, the claimant has to select a single forum to initiate its proceedings. The clauses have been discussed in detail-

- **Fork in the road clause**: According to this clause, the investor has two paths to choose for adjudication of its dispute. It has the option to either go for state domestic court or international Arbitration for adjudication of its claim against the state. The choice made by the investor will be final, and he cannot change his decision later on. This clause is incorporated to seek avoidance of duplication of proceeding in both court and tribunals.

- **Exhaustion of local remedies**: According to this clause, the investor shall first submit the dispute to the local courts and exhaust all the remedies available in the state courts before initiating international Arbitration. Such clauses are mentioned in the BITs specifically, and it depends upon each state whether to include this clause in the BIT or not. Article 26 of the ICSID convention[7] expressly states that a state may require the exhaustion of local remedies as a condition of consent to Arbitration. However, in recent times, this clause has faded away.

- **Waiver Clause**: The waiver clause limits the investor's claim against the state to one single forum. The claimant has to waive all other claims before starting the investment arbitration. Article 1121 of NAFTA[8] provides for certain conditions which the claimant has to fulfil prior to submission of a claim to the arbitral tribunal in which waiver is specified. It states that the claimant has to waive any state court proceedings which is based on the same claim before submitting the claim to the Arbitration.

Other than the above-mentioned preventive measures, the definition of investor and investment can be interpreted narrowly. The *denial-of-benefit* clause can address a situation where various claimants make claims with respect to the same loss. The denial of benefits clause prevents the investors who do not have a real economic connection with the state to initiate a claim. This clause will help in restricting treaty shopping by the investor.

The above-mentioned clauses can be relied upon by the state while challenging the jurisdiction of the adjudicating authority and admissibility of the claim before other fora in which parallel proceedings has been initiated.

[7] ICSID CONVENTION ENGLISH.PDF, https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf (last visited Apr 12, 2021)
[8] Article 1121, North American Free Trade Agreement.

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V. PROCEDURAL ASPECTS OF MITIGATING THE EFFECTS OF PARALLEL PROCEEDINGS

If one tribunal/court is already adjudicating a matter with the same parties and the same dispute and a parallel proceeding have been initiated by the investor in another tribunal, then certain measures can be taken by another tribunal to avoid such duplication of proceedings. The tribunal has to determine its jurisdiction to entertain the matter and look into a certain procedural requirement to ensure there is no duplication of proceedings. The Court/Tribunal can dismiss the claim by applying the Principles of Lis pendens or forum non-conveniens and Res judicata.

(A) Principle of Lis Pendens

Lis Pendens is a situation in which parallel proceedings, with the same cause of action, and the same parties, are continuing in two different forums at the same time. The Lis Pendens principle is applied to avoid concurrent proceedings between the same parties and the same dispute; preference to one proceeding should be accorded over the other.[9] The proceedings over the same subject matter cannot be commenced in another forum if the action (lis) is already pending (pendens) in one adjudicating forum. Thus, the application of Lis Pendens avoids conflicting decisions by preventing similar subject matter before different forums. For the application of Lis Pendens rule in international investment arbitration, the Triple Identity Test has to be met with, according to which the second tribunal may stay the proceedings. The triple identity test is mentioned below-

1. Triple identity test

i. Commonality of parties: The investor who is initiating two different proceedings must be the same, including the investor of the same constructive identity as identified by a control test. The parties may also adopt a reversed position in the next proceeding.

ii. Commonality of the cause of action: The ground on which the claim of the investor is based should be the same. The facts cause of action in both proceedings needs to be similar.

iii. Commonality of relief: The relief that the investor is seeking must be the same in both proceedings. The common relief seeking may be easily met within the investment laws since the claims are usually monetary claims.

[9] Douglas D. Reichert, *Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Arbitration*, 8 ARBITRATION INTERNATIONAL 237–256 (1992).

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James Fawcett[10] prescribes four ways in which a court may deal with a lis pendens situation:

i. The court may decline its jurisdiction or stay the proceedings;

ii. The court may restrain the foreign proceedings;

iii. Both the proceedings may be allowed, and the doctrine of res judicata may be applied to avoid two different judgments;

iv. Certain mechanisms can be adopted to encourage the parties to choose one forum.

Apart from the fact that the court can reject the application of the claimant if a case is pending before the court on the jurisdictional issue, there may be cases where both the arbitral tribunal and court or two arbitral tribunals may have jurisdiction upon the same subject matter. Such a case is discussed below-

Case study- The cases of ***Ronald S. Lauder vs the Czech Republic***[11] and ***CME Czech Republic BV vs the Czech Republic***[12] are the most fundamental cases relating to parallel proceedings.

In the case of ***Ronald S. Lauder vs the Czech Republic***, the claimant, i.e., Lauder, initiated a claim against the Czech Republic under US-Czech Republic BIT in August 1999, alleging that his investment had been expropriated by the state which was with regard to the operation of the commercial television station. After six months had passed, a company controlled by Lauder, i.e., CME Czech Republic BV, brought a claim against the same state, i.e., Czech Republic under the Netherlands-Czech Republic BIT. The claim under the second case was exactly the same as it was in the first case.

Although both the claims were the same, against the same state and same investors, the arbitral tribunals came to different conclusions. In the first case, the tribunal dismissed the investor's claim for damages, whereas in the second case, the tribunal decided that the Czech Republic had breached the BIT and should compensate the investor an amount of US$360 million.

The award given by the second tribunal was then challenged before the Svea Court of Appeal in Stockholm. However, the Swedish court dismissed the Republic's plea for annulment of award and held that the principle of *Lis alibi pendens* didn't apply in these cases because the applicable laws and parties weren't identical.[13]

[10] James Fawcett (ed.), *Declining Jurisdiction in Private International Law*, Report to the XlVth Congress of the International Academy of Comparative Law, Athens, 1994, OXFORD UNIVERSITY PRESS, OXFORD, 1995 at 27.
[11] Ronald S. Lauder v. Czech Republic, final award, 3 September 2001.
[12] CME Czech Republic BV v. Czech Republic, partial award, 13 September 2001.
[13] Decision given by the Court of Appeal of Svea on 15 May 2003.

The above 2 cases prescribe how parallel proceedings can lead to inconsistent awards and give a chance to the investor to try his luck in different jurisdictions. The triple identity test, although on paper, was not qualified because the parties were not exactly the same; in substance, the investor was one and the same who under the garb of a company's identity had initiated a claim. Also, the strict application of the principle of lis pendens in the international investment era is not possible because different laws apply.

To overcome the issue of parallel proceedings, certain recommendations were given by the International Law Association in its final report on Lis Pendens and Arbitration.

The first recommendation was to embody the principle of *competence-competence* in Arbitration. This principle of competence-competence states that the arbitration tribunal shall determine its jurisdiction to hear the case irrespective of the fact that the jurisdictional issue is being considered by a court or the tribunal.[14] The application of the competence-competence principle determines the legitimate jurisdiction of the tribunal, thus avoiding frivolous or double proceedings.

Case management should be effectively done by the arbitral tribunal in case a concurrent proceeding is pending. The committee had also denied providing a deadline for bringing up the issue of parallel proceedings before a tribunal by the parties, although it stressed that the parties should bring the same to the notice of the tribunal as soon as possible.[15]

(B) Principle of Res Judicata

The term Res Judicata refers to the matter which has been decided by the competent court, and the same matter cannot be again pursued by the parties in another court. Generally, the principle of Res Judicata applies in most of the countries in the situation where the parties, subject matter and the cause of action in the dispute are the same, and the dispute is already decided by the court having competent jurisdiction, then another court cannot entertain the same matter as it will result in double adjudication which is forbidden by law. In investment treaty arbitration under the ICSID convention, the tribunals are not bound by the previous awards rendered in related matters.[16] The international investment regime doesn't recognize the concept of Res Judicata, due to which there are chances of duplicate/parallel proceedings. Thus, there is an urgent need to embody the principle of Res Judicata.

[14] Filip de Ly (Chairman) & Audley Sheppard, ILA FINAL REPORT ON LIS PENDENS AND ARBITRATION* | ARBITRATION INTERNATIONAL | OXFORD ACADEMIC, https://enalsar.informaticsglobal.com:2349/arbitration/article/25/1/3/208210?searchresult=1 (last visited Apr 9, 2021)
[15] Ibid.
[16] Cremades & Madalena, Supra note 3.

Before the principle of Res Judicata is applied, there must be the finality of the decision of the first tribunal. For an arbitral award to have conclusive and preclusive effect, certain conditions have been identified by the International Law Association final report on Res Judicata and Arbitration[17], they are:

- The previous award must be final and binding. The award must be capable of recognition in the country where the subsequent arbitral tribunal has its seat.
- The issue of res judicata must be related to the same legal order as the previous award.
- Identity of claim, cause of action and parties (Triple Test). Conversely, if the claim, cause of action or relief are different, then the prior award will not have conclusive effects.

The arbitral award, once declared, is final, binding and non-triable. Thus, the same matter with the same parties and the same dispute cannot be re-tried in another tribunal or court of law. There are scholars who have critiqued the existence of Res judicata in international investment arbitration for the simple reason that the tribunals are constituted through different legal orders which are separate from the domestic legal system.[18]

As discussed earlier, In the Lauder and CME cases, the first award had no res judicata effect on the second award because the parties to the dispute were not exactly the same, and the applicable law wasn't identical as decided by the Swedish court.

The two principles of res judicata and lis pendens are said to be more effective in mitigating the risk of parallel proceedings in domestic courts of various countries. However, in international investment jurisprudence, these principles are difficult in their application. Apart from these two principles, two arbitral proceedings can be joined together to avoid parallel proceedings.

VI. JOINDER OF ARBITRAL PROCEEDINGS

One way of mitigating the issue of parallel proceedings is by consolidating different proceedings related to the same subject matter. There are situations in which consolidation of proceedings can be taken into consideration - One, where two different arbitration proceedings are carried out between the same parties under the same contract and arbitration agreement, Another, where two arbitration proceedings are carried out between the same parties under

[17] Filip de Ly (Chairman) & Audley Sheppard, *ILA Final Report on Res Judicata and Arbitration*, 25 ARBITRATION INTERNATIONAL 67–82 (2009).

[18] AMAN PRASAD, RES JUDICATA- A BOON OR A BANE FOR INTERNATIONAL INVESTMENT TRIBUNALS? (Social Science Research Network) (2020), https://papers.ssrn.com/abstract=3585482 (last visited Apr 9, 2021)

different contract and arbitration agreement. Sometimes, there may be a situation where multiple claims arise from the same facts due to the measures taken by the state. So, when the state implements certain measures in its country due to which a particular sector is affected, the investors who have invested in that sector will bring a claim against the state. To avoid multiple proceedings with the same cause of action against the same state, all the proceedings can be consolidated into one proceeding.

However, most of the BITs doesn't provide a mechanism of consolidation of proceedings.[19] The ICC Rules of Arbitration[20] enforced on 1st Jan 2021 has various provisions for consolidation of proceedings and claims between multiple parties. Article 10 of ICC Rules deals with consolidation of Arbitration which provides that if the parties to the arbitration request, then two or more arbitrations that are pending can be consolidated into a single arbitration. There are certain conditions that need to be fulfilled before the consolidations-

(i) The parties shall agree for consolidation;

(ii) All the claims shall be made under the same arbitration agreement;

(iii) The claims are not made under the same arbitration agreement, but the parties are the same, and the dispute is in connection with the same legal relationship.

While consolidating the proceedings, the court may take into consideration all the relevant matters and procedural requirements. When the arbitrations have been consolidated, the issue shall be arbitrated in the first commenced arbitral tribunal unless otherwise agreed by all the parties to the Arbitration.

Article 1126(2) of NAFTA[21] provides that the tribunal, if satisfied that different claims have the same or similar question of law/facts, then it is in the interest of fair and efficient resolution of claims to consolidate them and hear them altogether after hearing the disputing parties.

Joinder of the claim will ensure uniform application of law and will save cost and time. However, there is an issue with confidentiality and effective administration in such consolidation. All the issues may not be administered effectively to the satisfaction of each party, and the parties have to compromise with the other parties. Also, when several parties are involved in a particular Arbitration, there may be a lack of confidentiality.

[19] Cremades & Madalena, supra note 3

[20] 2021 ARBITRATION RULES ICC - INTERNATIONAL CHAMBER OF COMMERCE, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last visited Apr 13, 2021)

[21] NORTH_AMERICAN_FREE_TRADE_AGREEMENT-NAFTA.PDF, http://idatd.cepal.org/Normativas/TLCAN/Ingles/North_American_Free_Trade_Agreement-NAFTA.pdf (last visited Apr 12, 2021).

Apart from the measures stated above, some scholars have suggested regulating the occurrence of parallel proceedings beforehand itself.

Mr Hanno Wehland, in his paper,[22] has suggested certain mechanisms to regulate parallel proceedings. He divided the mechanism into 5 groups in order to avoid and, if necessary, parallel coordinate proceedings.

(i) Regulation of jurisdiction: The first step is to determine if the forum has the jurisdiction to entertain the investor's claim. If, in fact, only one forum has jurisdiction, then the jurisdiction of other forums will be automatically ousted. The tribunal has to determine whether the dispute resolution mechanism is limited to claim arising under the instrument containing it or it can extend to other instruments. Another issue that needs to be looked into by the tribunal is whether the forum designated in the contract can extend its claim to treaty claims.

(ii) Agreed Coordination: The parties can agree to submit their claim under one forum if two forums have jurisdiction over the same matter. Under the principle of party autonomy, an agreement will preside over other mechanisms for coordination. The disputing parties must be encouraged to coordinate the proceedings by mutual agreement to avoid parallel proceedings.

(iii) Hierarchy: The vertical coordination mechanism will be applied where there will be hierarchical relations amongst parallel treaty and non-treaty proceedings. BIT provides exhaustion of local remedies clause, prior recourse to courts clause etc., wherein the investors have to first assert their claim in the courts and then come up to the treaty forum. The decision of the host state courts cannot be made binding on the treaty tribunals, as it would prejudice the investors because the host state may potentially abuse the process in its own courts and reject the investor's claim. For this reason, the decision of the treaty tribunals can be made binding on the non-treaty forums and not vice-versa.

(iv) Application of first-in-time rule: When vertical coordination is not possible because two forums are situated in hierarchical level, horizontal coordination mechanism shall be applied wherein, first-in-time claim in the very first forum shall be considered. In this case, the principles of *res judicata* and *lis pendens* will apply to the second forum if the matter has been decided or is pending respectively in the second forum. However, the principles of *res judicata* and *lis pendens* cannot be applied to a vertical coordination mechanism where the hierarchy already exists.

(v) Principle of comity and prohibition of abuse of process: One way of coordination in

[22] Hanno Wehland, *The Regulation of Parallel Proceedings in Investor-State Disputes*, 31 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 576–596 (2016).

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case of parallel proceedings is one tribunal respecting the decisions of another tribunal. The tribunal has to defer to other courts and respect their procedures and decisions with due respect and courtesy. Thus, one tribunal can stay or suspend its proceedings temporarily if, in its knowledge, there exist parallel proceedings by respecting the decision of another tribunal. On the other hand, the investors shall refrain from initiating similar claims in various forums. The investors shall not abuse the process and initiate multiple proceedings for the same subject matter in a whimsical manner.

Authors Dmitry Bayandin and Sergey Alekhin, in their paper[23], observe that there may be a possibility where the parallel proceedings in the international investment regime may be permissible. They have identified two circumstances wherein such parallel proceedings may be allowed-

(i) Proceedings, where the facts are same or similar but are brought under different jurisdictional basis, can be permitted unless they constitute an abuse of rights;

(ii) Proceedings where the facts are the same or similar and are brought under the same jurisdictional basis, but they deal with different claims wherein the claims have not been addressed in the original proceedings.

Thus, genuine subsequent proceedings initiated by an investor, where their claims were not considered in the original proceedings, can be allowed. Before allowing the subsequent proceedings, it should be examined if the investor is not abusing the process of law and maliciously without any substance has initiated the proceeding to harass the host state country.

VII. CONCLUSION

Parallel proceedings will create inconsistency in the international investment laws. The above-stated measures, especially the principles of Res Judicata and lis pendens, need to be embedded in international investment arbitration to maintain certainty. However, to embody these principles in international Arbitration can be challenging because the applicable rules are different in international law. Even though the problem of parallel proceedings cannot be mitigated fully, the Courts/Tribunals have the power to stay the proceedings or, alternatively, take into account the decision of the other fora and decide the matter to bring certainty in the same dispute.

[23] Dmitry Bayandin & Sergey Alekhin, *Cherry-Picking or Cherry-Biting? The Res Judicata Doctrine and the Limits of Permissible Parallel and Consecutive Proceedings in Investment Arbitration*, NEW HORIZONS OF INTERNATIONAL ARBITRATION, https://www.academia.edu/38629534/Cherry_Picking_or_Cherry_Biting_The_Res_Judicata_Doctrine_and_the_Limits_of_Permissible_Parallel_and_Consecutive_Proceedings_in_Investment_Arbitration (last visited Apr 13, 2021).

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The triple identity test should not be strictly applied in all cases because it may happen that any one of the similarities might be missing, and on the basis of the same, the tribunals will not be able to stay in its proceedings. The strict application of triple identity test may become challenging in the complex international business operations because sometimes a person himself and on behalf of his company may initiate two different proceedings by stating that there are two different parties and triple identity test cannot be fulfilled due to which the tribunal may not be able to apply the principle of lis pendens and res judicata to avoid the parallel proceedings, as happened in the cases of *Lauder* and *CME*.

The tribunals shall always follow the *competence-competence* principle to determine their jurisdiction. Provisions relating to joinder of proceedings having common parties and cause of action shall be embodied in BITs so as to avoid multiple proceedings. Tribunals shall be obliged to respect the decision of the previous court/tribunal and stay their own proceedings.

Apart from tribunals, the investors shall at all times refrain from initiating parallel proceedings. Investors shall not abuse the process of law and exploit the state. The situation in which parallel proceedings are allowed and in which it is stated as abuse of process should be clearly identified.

There is an urgent need to embody the measures such as principles of *res judicata* and *lis pendens* and joinder of proceedings in BITs so as to prevent the investors from exploiting the state countries by initiating the parallel proceeding. Even after taking the preventive and regulatory measures to prevent parallel proceedings, if in case the second proceeding is initiated, then certain remedial measures can be enforced by the tribunals to stay/dismiss the subsequent proceeding. The measures stated above, along with recommendations given by the International Law Associations, can be implemented in the investor-state Arbitration to mitigate the risk of parallel proceedings.

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