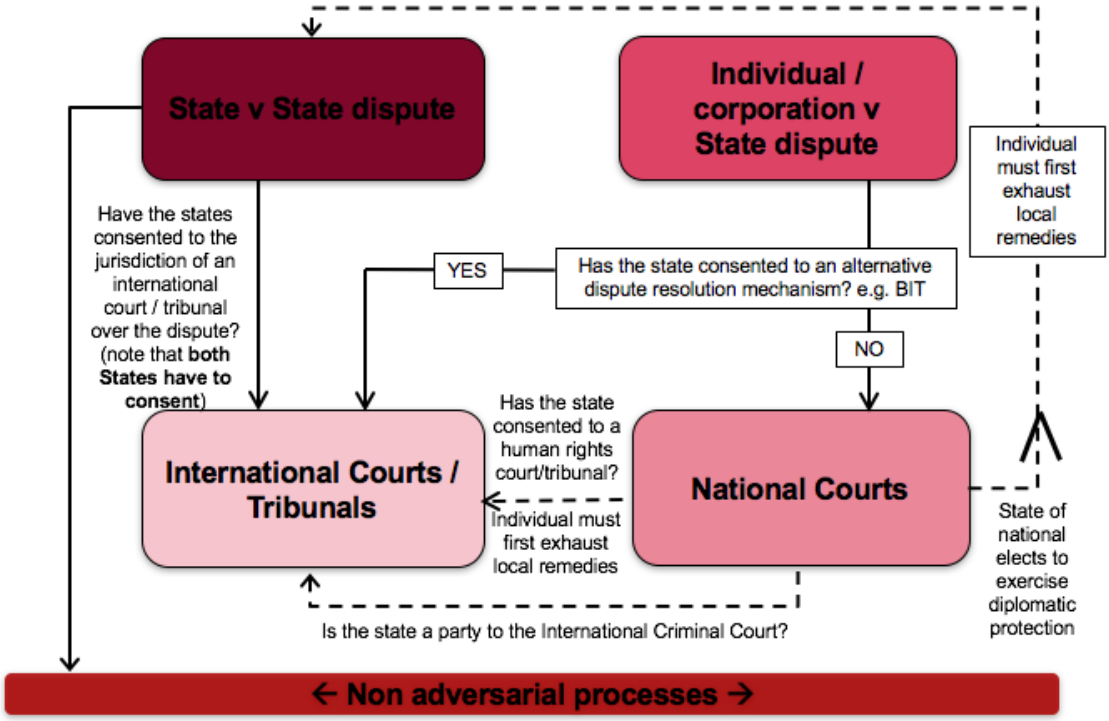
WEEK 9- INTERACTION WITH NATIONAL COURTS

Overview

1. Introduction
2. Exhaustion of local remedies
3. Consequences of multiple courts exercising jurisdiction
4. Interaction of national and international courts: international criminal responsibility

Issue: ***when*** *can national or international courts and tribunals exercise jurisdiction?*



This diagram provides a general visual overview of relationships in international dispute settlement. It does not conclusively address all situations in international dispute settlement or address complex questions of jurisdiction and admissibility

Note that each court or tribunal has its own rules on jurisdiction, admissibility and procedure

Exhaustion of local remedies

- The right of diplomatic protection
  "A State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question." Cançado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law, CUP, 1983, p.1.
- The purpose of the doctrine
  - State sovereignty
  - Complement national legal systems
  - More expeditious
  - Prevents proliferation (of small claims in international forums)
  - Allows for multiple parties (which isn't always available in an international level)

- *Interhandel Case* (Switz. v. US), 1959 ICJ 6
  - Washington Accord, 1946
  - Treaty between US and Switzerland, 1931
  - Was Swiss claim admissible before ICJ? Had Interhandel exhausted local remedies?
    "Before the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated. This principle informs all systems of law-civil as well as criminal, local as well as international.
    A State may not even exercise its diplomatic protection, and much less resort to any kind of international procedure of redress, unless its subject has previously exhausted the legal remedies offered him by the State of whose action he complains". Sep Opinion, Judge Cordova, page 46.

- **ILC's Draft Articles on State Responsibility, Art 44**
  The responsibility of a State may not be invoked if:
  (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;
  (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

- **ILC's Draft Articles on Diplomatic Protection**
  Article 14(1): *A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.*
  Article 14(3): *Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.*

Exhaustion of local remedies also forms part of customary international law. – Draft articles have codified this requirement

- MV Saiga (No 2) Case (*Saint Vincent and the Grenadines v Guinea*) Judgement, ITLOS Rep (1999) 10
  - **Art 295, UNCLOS** – exhaustion of local remedies

  Saiga was a supply vessel- giving fuel to other vessels. Entered exclusive economic zone of Guinea. Convicted of criminal offences in the domestic courts in Guinea. Then brought a claim to ITLOS- Guinea objected on the ground that local remedies had not been exhausted.
  Characterised the act of Guinea- as an injury to the State not the ship (the master of the ship). All direct violations of st vincent. So those claims were not subject to the rule that local remedies must first be exhausted. (conviction was to the State not the individual- although the individual still indirectly suffered loss)

- **What constitutes local remedies?**

Article 14(2) DADP: *"Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.*
See also *DASR Art 44*

- **Remedies must be "available and effective"**
  - *Norwegian Loans Case (France v Norway)* ICJ Rep 1957 9 (an effective remedy must be available as a matter of reasonable possibility. To be effective there must be a reasonable possibility that the person can access the remedy- only those that will be considered for the exhaustion of local remedies)
  - *Finnish Ships Arbitration* (Finland v UK) (1934) 3 RIAA 83 (not required to exhaust every last avenue, if to do so would be futile in terms of achieving the remedy sought) in this case seeking an appeal would have been futile - this did not amount to an effective remedy- so did exhaust all remedies
  - *Ellettronica Sicula SpA (ELSI) Case (US v Italy)* 1989 ICJ Rep 15 (claimants don't need to have presented every conceivable argument before the domestic court to fulfil the requirement to exhaust local remedies- It is sufficient if the wronged individual attempted to seek redress for the main substance of the claim and pursued it so far as it reasonable could have under the local system)
  - Administrative remedies? *Ahadou Sadio Diallo (Guniea v Congo) (Preliminary Objections) ICJ Rep (2007) 3 (found that the local remedies include not only judicial relief but also administrative procedures that are there to indicate a right- ICJ held that administrative remedies can only be taken into consideration for the exhaustion of local remedies if there are aimed at indicating a right not a indicating a favour.)*

- **Burden of proof? (depends on the court or tribunal)**
- *Norwegian Loans Case (France v Norway)* ICJ Rep 1957 9, Separate Opinion of Judge Lauterpacht, at page 46

(1) Plaintiff (State) to show no effective remedies (For the State to show that their national has exhausted all local remedies)
(2) Legislation is demonstrative
(3) In that case it is for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed
(4) the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting.

Waiver and exclusion, Article 15, DADP

Local remedies do not need to be exhausted where:
(a) *there are no reasonably available local remedies to provide* ***effective redress,*** *or the local remedies provide no reasonable possibility of such redress;*
(b) *there is* ***undue delay*** *in the remedial process which is attributable to the State alleged to be responsible;*
(c) *there was no* ***relevant connection between the injured person and the State*** *alleged to be responsible at the date of injury;*
(d) *the injured person* ***is manifestly precluded from pursuing local remedies****; or*

(e) *the State alleged to be responsible has waived the requirement that local remedies be exhausted.*

Multiple courts exercising jurisdiction (Parallel proceedings)

Multiple courts exercising jurisdiction

- UNCITRAL Secretariat has defined parallel proceedings as:
  - *"situations where two or more investment-related claims against a State are, or can be, filed before different forums, and where such claims involve substantially related parties, irrespective of their location, in relation to the same measure or substantially identical measures taken by that State."*

- **Problems with parallel proceedings**
  - Undermine legal certainty (consistency of decision-making)
  - Waste money and resources
  - Create issues with the use of material across multiple proceedings
- **Why do parallel proceedings still occur?**
  - Courts and arbitral tribunals like to retain jurisdiction
  - Local respondents tend to prefer their national courts, while foreign investors tend to prefer international fora
  - Some litigants want to maximise their chances of success
  - Investors may legitimately have two different causes of action on the same facts in international and domestic law

Legal mechanisms for dealing with parallel proceedings

- ***Lis pendens* and *res judicata*** → triple identity test
  - Subject matter
  - Legal grounds
  - Parties
- *Case Concerning Certain German Interests in Polish Upper Silesia Germany v. Poland* (PCIJ, Judgment No 6, 1925) (doctrine of lis pendens invoked- argument rejected- it is clear that the elements that constitute lis pendent were not all present- actions still pending sought the restitution to the private company of the factory- while other court was being asked to interpret certain clauses of a different convention– although subject matter was the same- the legal grounds were different – so you need a full fulfilment of the triple identity test)
- **Anti suit injunctions (order issued by a court or tribunal that prevents a party from commencing or continuing a proceeding in other jurisdiction or forum)**
  - They can be generally issued in 3 situations.
  - 1) When an arbitration is on foot and then a party commences domestic court action in relation to a dispute that is being covered by the arbitration agreement
  - 2) when a domestic court that is improperly ceased of jurisdiction nevertheless decides that it has jurisdiction to hear the dispute

- 3) when a domestic court, having improperly decided its jurisdiction, tries to enjoin the other party from initiating arbitration or pursing ongoing proceedings

Res judicata: If a dispute is decided- then the judgment of that court is final and binding – bar as a jurisdiction to another court to hear the case

- **Convention based remedies**
  - Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ('New York Convention'): Article II(3) (says that national courts should decline jurisdiction when parties bring actions in violation of the arbitration agreement- unless the agreement is null, void, incorporative or incapable of being performed)
  - Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965) ('ICSID Convention'), **Articles 26 and 27**
  - Article 26: Consent to arbitration by the parties shall be to the exclusion of all other remedies- but there is an exception that gives the States to opt out of this.
  - Article 27: No contracting State shall exercise diplomatic protection where its nationals are covered by an arbitration agreement.

- **Exclusive choice of court clauses**
- (usually in investment contracts) Parties agree to submit to all disagreements arising out of the contract to a particular forum
- But generally only cover claims arising out of the particular contract in question – so sometimes parties try to base the dispute around a treaty or convention instead to get around these types of clauses.

Essential or fundamental basis of a claim test established in *Vivendi* case- where essential basis of a claim takes precedence over an exclusive choice of forum clause.

- **Bilateral Investment Treaty Remedies**
  - **Treaty vs contract claims**
    - *Vivendi Universal v Argentine Republic (Award)* (ICSID Case No ARB/97/3, 21 November 2000) [102] → **'essential basis' (relevant standard is the essential basis of a claim to determine whether it is a treaty or contract based claim**)
    - A breach of contract occurs where a state does something acting in its capacity as a party to the contract. A breach of treaty occurs where the state does something outside of its capacity as a contracting party. e.g. If a state fails to pay money due under a contract (breach of contract) if a state expropriates property without compensation (likely to be done in state's capacity as a state not contracting party- more likely to give rise to a treaty based claim)
  - **Umbrella Clauses** (tries to catch all obligations under the treaty provision- so that any contractual claims will be caught up as a violation of the BIT)

- *E.g. Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party*
    - *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13 (*tried to make any breach of contract as a breach of the treaty- ruled that it had jurisdiction of the treaty claims not contract claims- article 11 of the BIT would have to be more specifically worded before it can reasonably be read in the extraordinary expansive manner- that all breaches of the states contracts with the investors were converted into breaches of the BIT. Can constitute the violation of an umbrella clause only in exceptional circumstances.
    - *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 (ruled that it had jurisdiction over treaty and contract claims- held that the relevant article under the treaty makes it a breach of the treaty for the host state to fail to observe binding commitments including contractual commitments which it has assumed with regards to specific investments. Said that the analysis in the above case was unconvincing and failed to give any clear meaning to the notion of the umbrella clause.*
    - No uniformity of approach at the moment

- **Waivers** e.g. NAFTA (waive any domestic court proceedings prior to going to arbitration)
- **'Fork in the road' clauses** (where an investors are given a choice to litigate the dispute in the state domestic court or international arbitration- choice is final and binding on the investor)
    - *Pantechniki SA Contractors & Engineers v Republic of Albania (ICSID Case No ARB/07/21)* - Test for fork in the road clause is whether or not the fundamental basis sought to be brought before the international forum is autonomous of claims to be heard elsewhere- key is to assess whether the same dispute has been submitted to both the national and international forum.
    - H&H Enterprises Investments, Inc. v. Arab Republic of Egypt (ICSID Case No. ARB/09/15)-tribunal considered that the fork in the road provision of the BIT had been triggered when it submitted its claims with the same fundamental basis to domestic arbitration and litigation.

- **Prompt release cases under UNCLOS (Art 292)** – to provide an interim measure for the release of a vessel while domestic legal processes are concluded (ie where a state party has detained a ship- and fails to release the ship after the party has paid a bond for its release)
- "Camouco" Application for Prompt Release (Panama v France) ITLOS Case No 5, ICGJ 338 (ITLOS 2000)- found that considering prompt release cases under UNCLOS while domestic proceedings on foot is not an abuse of process fail of the requirement under 292- so international tribunal can only deal with the question of release without prejudice to the merits of the case before the appropriate domestic forum that is considering what to do with the vessel.

- *Lis pendens?* Abuse of process?

Interaction of national and international courts: international criminal responsibility

National / international criminal jurisdictions

- Primacy (ICTY and ICTR)- where international court has primacy over a national jurisdiction claim
- Limited primacy (SCSL and STL)
- Complementarity (International Criminal Court) - **ICC Doesn't have primacy over national courts- there to supplement**
- Article 17(1) of the ICC Statute:

... the Court shall determine that a case is inadmissible where:

(a) *The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is **unwilling** or **unable genuinely** to carry out the investigation or prosecution;*

(b) *The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*

(c) *The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;*

(d) *The case is not of sufficient gravity to justify further action by the Court.*

- "**Unwilling" (Art 17(2))**
- **"Unable" (Article 17(3))**
- **"Genuinely"-** looking at the motivations of States to carry out investigations for the crimes concerned.
- Other forms of cooperation between national and international systems:
  - arrest or surrender
  - investigations
  - enforcement of subpoenas
  - enforcement of sentences
- Primacy (better resources to prosecute- better for senior leaders to be prosecuted on an international forum- to alleviate crimes to the capacity that they desire) or complementarity (tries to strengthen domestic systems- hopefully get more uniform observation of the rule of law and international criminal responsibility) – the better model of interaction between national and international systems?

Article 17(2): In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Article 17(3): In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.