THE POTENTIAL IMPACT ON INVESTMENT ARBITRATION OF THE ILC'S WORK ON CUSTOMARY INTERNATIONAL LAW

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A primary goal of the International Law Commission's work on the identification of customary international law is to offer "guidance to those called upon to identify the existence of a rule of customary international law," particularly national court judges. The ILC report, however, should be no less useful to participants in international adjudication. The report's impact might be particularly significant in investment arbitration, which, given the field's growing importance and impact, could greatly facilitate the ILC's principal mandate[1] of promoting the "progressive development of international law."

Investment arbitration is proving hugely significant for the development of international law. The United Nations Conference on Trade and Development reported[2] that, at the end of last year, there were 568 known cases brought under international investment agreements, including 57 cases brought in 2013 alone. There have been 98 different State respondents, including the United States, which reportedly[3] is the ninth most frequent respondent State.

Many of these cases require tribunals to apply customary international law, including on expropriation, fair and equitable treatment, and full protection and security. The pleadings and awards increasingly are made public and are readily accessible online. These cases thus present a huge source of material concerning the existence and scope of customary international law. This trend is likely to increase, as many States, in their newer international investment agreements, are following the U.S. lead and tying certain substantive obligations to customary international law.

This trend presents some advantages for States, by giving them—through their pleadings, non-disputing Party submissions, and new international investment agreements—a direct hand in guiding the development of this dynamic area of law. But seeking to develop customary international law through investment arbitration also presents some challenges. Here are four.

Challenges to Developing Customary International Law Through Investment Arbitration

First, investment arbitration tribunals arguably are not ideally structured to play a primary role in developing customary international law. Investment arbitration awards and decisions are rendered by *ad hoc* tribunals, rather than by a single court or tribunal, such as the International Court of Justice or the Iran-U.S. Claims Tribunal. The arbitrators, who are chosen by the disputing parties, have varying levels of experience, and

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[1] Statute of the Int'l Law Comm'n, GA Res. 174 (II) (Nov. 21, 1947).

[2] United Nations Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement [ISDS]* 1, (Apr. 2014).

[3] *Id.*

investment tribunals do not always include arbitrators who are expert in public international law. Not surprisingly, the awards vary significantly in interpretive methodology and analytical rigor.

Second, many States litigate their investment disputes differently from how they litigate their other international disputes. At the International Court of Justice, for instance, States almost always appoint high-ranking government officials as their agents. In principle, this helps ensure that the State carefully considers the long-term legal and policy implications of its arguments. In investment arbitration, by contrast, most States turn their cases over to outside counsel. Some States may not be sufficiently attentive to the legal arguments being advanced on their behalf. These States, in particular, may argue opportunistically, without regard to legal and policy interests extending beyond that particular case. Given that pleadings before international tribunals generally constitute State practice, this can create difficulties for the proper development of customary international law.

Third, arbitral tribunals routinely rely on prior arbitral awards as persuasive authority. Some view these awards as a kind of *de facto* precedent, which contribute to the development of customary international law. Interestingly, at least one U.S. senator foresaw, and encouraged, this possibility nearly fifty years ago, when the Senate was asked for advice and consent to ratification of the ICSID Convention. During hearings before the Senate Foreign Relations Committee in 1966, Senator Wayne Morse informed the State Department Legal Adviser and a Treasury Department official that he "heartily" supported the Convention, asserting:[4] "[w]e do not have enough precedents of an international common law, and arbitration awards are part and parcel of a system of international law . . . ." He thus considered[5] the ICSID Convention "a step in the direction really of building up the common law of international law, which is so sorely needed in the whole field of international law."

Given the later explosive growth of ICSID arbitration, Senator Morse's observation proved prescient. But developing a "common law of international law" through arbitral decisions is not without risks. We now have hundreds of investment arbitration awards that are not directly opposable to a particular State but that may be cited against that State in its investment disputes. Sir Daniel Bethlehem has highlighted[6] this problem, albeit in a related context:

> What does one do if you are the UK or some other indirectly interested state in such circumstances, both to protect your own interests and to ensure that the development of the law stays on a sensible track? These statements or determinations are not directly opposable to you, but they nonetheless form part of a growing body of dispositive legal principles that in many cases is of very variable quality.

Investment arbitration arguably presents this problem most acutely, given the vast number, as well as legal impact, of awards and decisions currently being rendered.

Finally, the investment arbitration system itself is inherently asymmetrical. The cases involve a State and a private party, rather than two States. This has important consequences for the way in which the cases are pleaded and, potentially, decided. States are repeat players in international adjudication; they thus have interests that extend beyond any particular case. States also play different roles in international adjudication, acting in some cases as respondent and in other cases as claimant, including when espousing claims of their nationals. Further, many States today export and import capital and thus have foreign investors and domestic

[4] COMMITTEE ON FOREIGN RELATIONS, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES, S. EXEC. REP'T. NO. 2 (2d Sess. 1966), *reprinted in* 5 I.L.M. 646, 657 (1966).

[5] *Id.*

[6] Sir Daniel Bethlehem, *The Secret Life of International Law*, 1 CAMBRIDGE J. INT'L & COMP. L. 23 (2012).

prerogatives to protect. Even capital-exporting States increasingly find themselves acting as respondent in investment arbitration. These factors may produce inherent constraints on the arguments available to States in their international investment disputes.

Private parties are in a fundamentally different position. Companies generally hire counsel to win cases, not to promote the sound development of customary international law or a balanced interpretation of international investment agreements. As Vaughan Lowe observed[7] in his 2007 treatise *International Law*, private parties tend to have neither the breadth of interest nor the long-term views of States. There is, accordingly, much less of a restraint upon the manner in which companies and individuals pursue their interests in international law. For example, a company claiming compensation for the violation of its rights under an investment protection treaty has every reason to pitch its claim at the highest level. It has no fear that its words will later be cited against it, because it can never find itself in a position where it is called to account for the treatment of foreign investors.[8] "This asymmetry," he further observed, could "distort the development of international law."

The ILC Report's Potential Utility in Investment Arbitration

The ILC report might help lessen some of these risks, in at least two respects. First, the report clearly lays out the "methodology for determining the existence and content of rules of customary international law, making clear that the party seeking to establish a rule of customary international law must show "a general practice" that is "accepted as law."[9] This "two-element approach"—state practice and *opinio juris*—is "widely endorsed in the literature" and "generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice."[10]

In reality, investment arbitration awards rarely contain any in-depth analysis of customary international law. This contrasts, for instance, with the International Court of Justice's recent decision[11] in the *Jurisdictional Immunities* case between Germany and Italy, in which the court extensively canvassed State practice and *opinio juris* before pronouncing a rule of customary international law. In the future, we might expect to see States cite the ILC report to investment tribunals, to help guide identification of the existence of customary international law rules, as well as their interpretation and application.

In particular, the report should help tribunals distinguish customary international law-based standards from treaty-based standards. One perennial source of confusion concerns the "fair and equitable treatment" standard. Fair and equitable treatment forms part of customary international law, but it also may be included in a treaty as a freestanding, or autonomous, requirement. The United States has long argued[12] that the fair and equitable treatment provision in U.S. international investment agreements "articulates[s] a standard found in customary international law—*i.e.*, the law that develops from State practice and *opinio juris*—rather than an autonomous, treaty-based standard."

As such,[13] "[a]lthough States may decide, expressly by treaty, to extend protections under the rubric of 'fair and equitable treatment' and 'full protection and security' beyond that required by customary international

[7] VAUGHAN LOWE, INTERNATIONAL LAW (2007).

[8] *Id.* at 24.

[9] Second Rep. on Identification of Customary International Law, Int'l Law Comm'n, 66th Sess., May 5–June 6, July 7–Aug. 8, 2014, 7, UN Doc. A/CN.4/672 (May 22, 2014).

[10] *Id.*

[11] Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 ICJ REP. 99 (Feb. 3).

[12] Teco Guatemala Holdings LLC v. Republic of Guat., ICSID Case No. ARB/10/17, Award, (Dec. 19, 2013).

[13] *Id.*

law, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment."

Investment arbitration tribunals do not always recognize this distinction. In a recent case against Canada, for instance, an investment tribunal stated:[14] "[i]n the end, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness." Another investment tribunal dismissed[15] the distinction between the treaty standard and the customary standard as "dogmatic and conceptualist."

But as the ILC report makes clear, distinguishing between treaty and customary standards is far from dogmatic and conceptualist. The method for ascertaining and applying customary international law is different from the method for ascertaining and applying a treaty-based standard. The former looks to State practice and *opinio juris*. The latter, as the Vienna Convention on the Law of Treaties confirms, starts with the ordinary meaning of the treaty terms in context and in light of the treaty's object and purpose. The two interpretive methodologies thus are significantly different.

The second way that the report might assist in investment arbitration is by clarifying the effect arbitral awards may have on customary international law. There is no clear consensus among tribunals and commentators on this issue. The tribunal in *Glamis Gold v. United States*, for instance, stated in its award[16] that: [a]rbitral awards . . . do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation (para. 605).

Professor Reisman has criticized the *Glamis* tribunal's analysis in this regard. He suggested[17] in his recent Freshfields Arbitration Lecture that "public international tribunals may actually enjoy a formal law-making competence in the formation of customary international law." He thus asks:[18] "[i]n a system in which judicial and arbitral jurisdiction is entirely consensual, when states authorize a tribunal to resolve a matter in accordance with international law, cannot one take the decision of that tribunal as indicative of the state practice of those two states and, especially, of their *opinio juris*?"

The ILC report suggests otherwise. It states that "the decisions of international courts and tribunals as to the existence of rules of customary international law and their formation are not [State] 'practice.'" The report does note that such decisions—particularly ICJ decisions—"serve an important role as 'subsidiary means for the determination of rules of law.'" Perhaps the report should adopt the *Glamis* caveat, given that some decisions will be more useful than others in a tribunal's consideration of customary international law.

Conclusion

The ILC report should assist all participants in international investment arbitration—claimants, respondent States, non-disputing parties, and arbitrators alike. In particular, it should help focus States' attention on the crucial role their pleadings may play in developing customary international law. Given that so much law is being articulated through investment arbitration, and that individual claimants may not share States' long-

[14] Merrill & Ring Forestry L.P. v. Government of Can., ICSID Administered Case, Award (Mar. 31, 2010).

[15] SAUR International S.A. v. Republic of Arg., ICSID Case No. ARB/04/4, Award (May 22, 2014).

[16] Glamis Gold, Ltd. v U.S., ICSID, Award (June 8, 2009).

[17] W. Michael Reisman, *'Case Specific Mandates' versus 'Systemic Implications': How Should Investment Tribunals Decide?*: *The Freshfields Arbitration Lecture*, 29 ARBITRATION INT'L 131, 135 (2013).

[18] *Id.*

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term interest in the development of customary international law, it is imperative that States get it right in the first instance.

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