A CASE FOR INVESTMENT TRIBUNAL JURISPRUDENCE BEFORE COURTS OF PUBLIC INTERNATIONAL LAW

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INTRODUCTION

Can investment tribunal jurisprudence[1] legitimately be relied upon by courts of public international law[2] to discern the current status of customary international law? The answer is unclear. Part of that uncertainty may be due to the fact that the International Court of Justice ("Court") has never acknowledged decisions of investment tribunals as evidence of customary international law.[3] Nevertheless, investment tribunals consistently apply customary international law in resolving the disputes before them, and often do so in novel contexts not encountered by courts of public international law.

This piece briefly posits that investment tribunal jurisprudence should be seen as a valuable tool in the contemporaneous application of customary international law. To reach that conclusion, I discuss three factors: (1) the origination of customary international law as differentiated from its recognition and application by courts; (2) the Court's treatment of investor-state decisions in two cases; and (3) the status of investor-state jurisprudence under Article 38(1) of the Court's Statute.[4]

I. THE CREATION, RECOGNITION AND APPLICATION OF CUSTOMARY INTERNATIONAL LAW

The decisions of the Court are particularly instructive when considering the proper application of customary international law.

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[1] The scope of this piece is limited to treaty-based investor-state arbitration. Within this piece, investment tribunal "jurisprudence" refers to an admittedly narrow set of well-established approaches that have been developed and applied by investment tribunals in a widespread, consistent manner. The term does not refer to an overall corpus of case law. *Cf.* Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. – FOREIGN INV. L. J. n.2 223, 224 (2013) (acknowledging the existence of certain "*jurisprudences constantes*" but distinguishing such from an overarching "ICSID jurisprudence.").

[2] The term "courts of public international law" refers to international organizations established to function solely as judicial adjudicatory bodies that regularly apply public international law to resolve the disputes that arise before them.

[3] *See* Pellet, supra note 1. at 225 ("[T]he ICJ simply does not refer to ICSID decisions or awards.").

[4] Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 933.

However, it is important to distinguish the Court's role in recognizing and applying customary international law from the creation of customary international law itself. By definition, customary international law is created only by *states* insofar as it is reflected in state practice.[5]

Consequently, a customary norm may exist without the Court's acknowledgement of the same. In fact, logic requires that: first, a customary norm exist prior to reaching the Court in order for the Court to recognize it; and, second, the possibility that more norms may exist beyond those that have been pronounced upon by the Court since its docket is limited. Although it is true that the Court has recognized the existence of customary international law many times throughout its history,[6] the Court is not the only actor involved in evaluating customary norms. Other courts of public international law such as the International Criminal Tribunal for the Former Yugoslavia[7] and the International Tribunal for the Law of the Sea deal directly with matters of customary international law.[8] Even beyond courts, entities such as the International Law Commission and the International Law Association, among others, are consistently engaged in "codification" projects aimed at identifying the current status of customary norms.

Thus, the state-driven nature of customary international law necessarily entails a de-monopolization of its recognition and application on the global scale. That fact has strong implications for the capacity of *all* international adjudicatory bodies to recognize and apply customary international law in particularized instances. The corollary is that – in theory – investment tribunals are fully capacitated to legitimately recognize and apply customary international law in the same way any other international adjudicatory body can. Indeed, in certain cases,

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[5] *See, e.g.*, North Sea Continental Shelf Cases (Fed. Rep. of Germ./Den.; Fed. Rep. of Germ./Neth.), 1969 I.C.J. 3, 44, ¶ 77 (Feb. 20) (describing customary international law as the result of state practice); Asylum Case (Colombia/Peru), Judgment, 1950 I.C.J. 266, 277-78 (Nov. 20) (contemplating the notion that a regional customary international law may also develop by virtue of state practice in a particular contiguous are of the globe, which would only be binding on consenting states of that region).

[6] *See, e.g.*, Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, 55 ¶ 101 (April 20) (expressing that the prevention principle represents "a customary rule"); Case Concerning the Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, 38, ¶ 46 (Sept. 25) (noting that the Court had held portions of the Vienna Convention on the Law of Treaties to reflect "existing customary law" several times) [hereinafter *Gabčíkovo-Nagymaros*].

[7] Note the International Criminal Tribunal for the Former Yugoslavia was dissolved in 2017.

[8] *See, e.g.*, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, ¶¶ 110–11 (discussing customary duties of conduct and result); Prosecutor v. Duško Tadic, Case No. IT-94-1-A, Appeal Judgment, (Int'l Crim. Trib. For the Former Yugoslavia July 15, 1999) (establishing the overall control test in interpreting the customary law governing attribution of wrongful conduct to states).

investment tribunals have pioneered the application of customary international law to contexts not contemplated by other international adjudicatory bodies. Yet, investment jurisprudence does not seem to have much of an impact in the public international law arena.

II. THE COURT'S INTERACTION WITH INVESTOR-STATE DECISIONS

In the *Case Concerning Ahmadou Sadio Diallo*[9] ("*Diallo*"), the Court indicated some willingness to consider the role of investment tribunals in informing the application of customary international law. At the jurisdictional stage, one of the Court's considerations was whether a state could exercise diplomatic protection over injuries suffered by a foreign entity owned by one of its nationals.[10] Guinea effectively contended that the rise of investor-state arbitration, which focuses on the nationality of investors and not the paper nationality[11] of the entity, marked a shift in international custom in matters concerning diplomatic protection.

In evaluating Guinea's claim, the Court explicitly contemplated the investment tribunal decisions that Guinea cited to in defense of its position.[12] Nevertheless, the Court disagreed and upheld *Barcelona Traction*'s[13] paper nationality approach by reasoning that it conceived of investor-state arbitration's divergence from the paper nationality approach to be of an exceptional nature:

> The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.[14]

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[9] Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of the Congo), Preliminary Objections, Judgment, 2007 I.C.J. 582, 614, ¶ 90 [hereinafter *Diallo*].
[10] *See id.* at ¶¶ 76–85.
[11] *See id.* at ¶¶ 86–87.
[12] *See id.* at ¶¶ 88–90.
[13] Case Concerning Barcelona Traction, Light, and Power Co., (Belg. v. Spain), 1970 I.C.J. 1 (Feb. 5).
[14] *Diallo*, 2007 I.C.J. at 614, ¶ 90.

In *Bolivia v. Chile*,[15] the Court recently referenced investment arbitration when it rejected Bolivia's claim that a "doctrine of legitimate expectations" exists as a binding principle in general international law. Bolivia substantiated that claim by citing to the doctrine's wide application in investment arbitration. The Court responded by "not[ing] that references to legitimate expectations may be found in [investment] arbitral awards," while concluding that "[i]t does not follow from such references that there exists in general international law a principle…" that espouses the doctrine of legitimate expectations.[16]

Some may interpret these dicta as a blow to the relevance of investment tribunals' jurisprudence before courts of public international law. However, the Court's reasoning in neither case abrogates the potential utility of investor-state jurisprudence in discerning the current status of customary international law. In *Diallo*, the Court simply recognized a distinction between diplomatic protection and the notion of "protection by substitution," which allows investors to bring claims against states in the realm of investor-state disputes.[17] In other words, the Court simply noted that the latter allows tribunals to effectively "pierce the corporate veil" for purposes of determining jurisdiction *rationae personae* on the basis of written agreements.[18] In *Bolivia v. Chile*, the Court was not evaluating the status of customary international law but Bolivia's assertion of the existence of a "principle in international law."[19] The Court's willingness to take note of arbitral decisions in both cases is far more important than its contextual non-reliance on the same. Indeed, *Diallo* can be said to have substantiated the potential relevance of investment tribunals' jurisprudence when considering whether customary international law has shifted.[20]

Investment tribunals constantly and consistently apply international law to a diverse array of contexts. Since the 1970s, states

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[15] See Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, Gen. List No.153 (Oct. 1, 2018).
[16] *See id.* at ¶¶ 161–62.
[17] *See Diallo*, 2007 I.C.J. at 614, ¶¶ 88–90 (noting that in investment disputes "the role of diplomatic protection somewhat faded.").
[18] *See id.* at 90.
[19] *See* Bolivia v. Chile, Judgment, Gen. List No.153, ¶¶ 161–62. General principles of international law represent a separate source of law per the Court's statute under Article 38(1)(b). Bolivia represented the "doctrine of legitimate expectations" as a counterpart to the doctrine of estoppel, which is considered to be a general principle of international law. See Thomas Cottier & Jörg Paul Müller, *Estoppel*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (April 2007) ("Most authors consider the doctrine to be a general principle of law, founded on the broad concept of good faith….").
[20] *See Diallo*, 2007 I.C.J. at 614, ¶ 89 (noting that the Court "carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection" to deduce whether the law governing diplomatic protection had shifted).

have concluded over 2,000 bilateral investment treaties.[21] By 2017, investment tribunals had heard 855 cases related to those treaties over the span of twenty years.[22] Stephen M. Schewbel, a former President of the Court, posited that the very existence of thousands of bilateral investment treaties had "reshaped" a portion of customary international law "to embody the principles of law" found in those treaties.[23]

The tribunals tasked with addressing the disputes arising under those treaties are composed of many of the sharpest minds in international law, including judges of the Court itself.[24] The United Nations Conference on Trade and Development indicates that in 2017 alone, investment tribunals addressed questions surrounding "the standing of State-owned enterprises, multiple ISDS [investor-state dispute settlement] claims, concurrent treaty arbitration and domestic court proceedings, corporate 'seat' and abuse of rights, denial of benefits, and legislative reforms in the renewable energy sector."[25] For these reasons, investor-state arbitral jurisprudence can be a useful tool when examining shifts in international custom and should not be ignored.[26]

In fact, the Court has established that it is to consider the entirety of *current* law applicable to a case beyond the jurisprudence put forth by the contending parties.[27] In the *Case Concerning the Continental Shelf*

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[21] Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC. OF INT'L L.) 27, 28 (2004), https://www.jstor.org/stable/25659890.

[22] *Investor-State Dispute Settlement: Review of Developments in 2017*, U.N. CONF. ON TRADE & DEV. (June 2018), https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf.

[23] *See* Schwebel, *supra* note 21at 27 ("Customary international law governing the treatment of foreign investment has been reshaped to embody the principles of law found in more than two thousand concordant bilateral investment treaties.").

[24] *See* Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *Is "Moonlighting" a Problem? The role of ICJ judges in ISDS*, INT'L INST. FOR SUSTAINABLE DEV. (Nov. 2017), https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf (noting that I.C.J. judges had served on 10% of all investment tribunals as of mid-2017).

[25] *See* U.N. CONFERENCE ON TRADE & DEVELOPMENT, *supra* note 22.

[26] *See generally* Rudolf Dolzer & Christoph Schreur, *History, Sources, and Nature of International Investment Law*, *in* PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 1, 15 (2d. ed. 2012) ("some general rules of international law find their major practical expression in foreign investment law . . . [as such,] a full contemporary understanding of these rules requires knowledge of their interpretation and application in foreign investment law cases.").

[27] *Cf.* Fisheries Jurisdiction Case (U.K. v. Iceland), Judgment, 1974 I.C.J. 3, 9, ¶ 17 (July 25) ("The Court . . . is deemed to take judicial notice of international law, and is therefore required . . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute."); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31, ¶ 53 (June 21) (*"*Moreover, an international instrument has to be

(Tunisia/Libyan Arab Jamahiriya), the Court indicated that it has to consider *proprio motu* the rise of new legal trends and "emergent rule[s] of customary law" applicable to a case.[28] By the very nature of the field, investor-state tribunals are positioned to deal with novel matters of international law before courts of public international law and thus signal shifts in customary international law before them.

For example, in recent years the international community has made an important shift toward increased state responsibility in areas concerning environmental law[29] and human rights.[30] Investment tribunals began analyzing the impact of that shift on the law on state responsibility and the status of multi-national corporations under international law years ago. In late 2016, the tribunal in *Urbaser v. The Argentine Republic* found that "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law,"[31] thereby possibly marking a new legal trend. In contrast, courts of public international law have yet to make such a pronouncement on the applicability of international law to corporations in the human rights context.

III. THE STATUS OF INVESTMENT JURISPRUDENCE UNDER THE COURT'S STATUTE

Assuming then the relevance of investor-state arbitral jurisprudence to the contemporaneous application of customary international law, an additional question arises: To what extent should public international tribunals treat the decisions of investment tribunals as relevant guidance? That question prompts a consideration of Article 38 of the Court's statute, which is widely considered to delineate the major sources of international law.[32] Article 38 lays out three direct sources of

interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.").

[28] *See* Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 38, ¶ 24 (Feb. 24).

[29] *See, e.g.*, *Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction*, UNITED NATIONS, https://www.un.org/bbnj/.

[30] *See, e.g.*, *UN "Protect, Respect and Remedy" Framework and Guiding Principles*, BUSINESS & HUM. RTS. RESOURCE CTR., https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles.

[31] *See Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic,* Award, ICSID Case No. ARB/07/26 ¶¶ 1194–95 (Dec. 8, 2016).

[32] *See* Aldo Zammit Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of International Criminal Courts and Tribunals*, 24 EUR. J. INT'L. L. n.2 649, 652–53 (2013).

international law: treaties, customary international law, and the "general principles of law recognized by civilized nations."

Notably, though, Article 38(1)(d) also acknowledges "judicial decisions" and "the teachings of the most highly qualified publicists" as "subsidiary means for the determination of rules of law." Although much scholarly work exists on the precise meaning of Article 38(1)(d), many interpret the term "judicial decisions" broadly.[33] On that ground, Article 38(1)(d) may be read to encompass investor-state arbitral jurisprudence as a "subsidiary means" for determining the current status of customary international law. In fact, in its 1988 *Headquarters Agreement* advisory opinion, the Court noted referred to the arbitral award in the *Alabama Claims* case as a "judicial decision":

> It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the Alabama case between Great Britain and the United States, and has frequently been recalled since….

Indeed, the Court has on several occasions referred to the decisions of inter-state arbitral tribunals to determine states' obligations under international law. In the *Application of the Interim Accord of 13 September 1995*, the Court cited the *Lake Lanoux* arbitral award to explain the principle that "States must conduct themselves so that the 'negotiations are meaningful.'"[34] In the *Gabčikovo-Nagymaros* case, the Court referred to the arbitral award handed down in the *Air Service Agreement of 27 March 1946*[35] case as a source for asserting that international law requires a countermeasure to "meet certain conditions" in order to be "justifiable."[36] In fact, the practice of citing arbitral awards extends beyond the Court. In a 2011 advisory opinion, the Seabed Disputes Chamber for the International Tribunal for the Law of the Sea cited

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[33] *See id.* at 657; Alain Pellet, Former Chairperson of the U.N. International Law Commission, Decisions of the ICJ as Sources of International Law?, Morelli Lecture, § 3.1.1, https://www.scienzegiuridiche.uniroma1.it/sites/default/files/varie/GML/2015/GML_2015-Pellet.pdf (noting that the term encompasses "the jurisprudence of the Court and other judicial or arbitral bodies").

[34] Application of the Interim Accord of 13 September 1995 (the former Yugoslav Rep. of Maced. v. Greece), Judgment, 2011 I.C.J. 644, 685, ¶ 132 (Dec. 5).

[35] Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, 18 R.I.A.A. 443 (Dec. 9, 1971).

[36] *Gabčíkovo-Nagymaros*, 1997 I.C.J at 55, ¶ 83.

directly to the *Rainbow Warrior Arbitration*[37] as its source for asserting that "a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations."[38]

IV. CONCLUSION

Both inter-state and investor-state arbitration are fundamentally the byproduct of international agreements between states.[39] The Court's reliance on the former but hesitation toward the latter therefore seems asymmetric. The parties and matters involved in investor-state disputes are, of course, distinct from those involved in inter-state arbitration. Yet, both forms of arbitration draw from the single corpus of international law. In fact, some inter-state arbitration tribunals have looked to investor-state decisions for support in resolving matters before them.[40]

The Court's references to inter-state arbitral awards conclusively support the assertion that arbitral jurisprudence may be instrumental in discerning the contemporaneous status of international law. By extension, – in the language of the Court's statute – investment tribunal jurisprudence should be deemed to fall within the scope "judicial decisions," which serve as a "subsidiary means for the determination of the rules of law." Conceiving of investment tribunal jurisprudence in that light would provide the Court and other international adjudicatory bodies with a useful tool for examining shifts in customary international law and/or considering its application to novel contexts.

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[37] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, 20 R.I.A.A., 215 (Apr. 30, 1990).

[38] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, ¶ 178.

[39] See note 1 above concerning the scope of this piece.

[40] *See, e.g.*, Rep. of Croatia v. Rep. of Slov., PCA Case No. 2012-04, Partial Award, 1, 46, ¶ 180–83 (June 30, 2016) (invoking Victor Pey Casado et al. v. Chile, ICSID Case No. ARB/98/2 in resolving a matter relating to allegations of tainted proceedings); Islamic Rep. of Pak. v. Rep. of India, PCA Case No. 2011-01, Order on Interim Measures, 1, 40, ¶ 132 n.208 (Sept. 23, 2011) (citing Plama Consortium Ltd. (Cyprus) v. Bulgaria, ICSID Case No. ARB/03/24, to support the tribunal's approach to treaty interpretation).