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The Role of Precedent in ISDS: Can Decisional Law Contribute to the Creation of Customary Norms?

Rebecca Meyer · Saturday, January 18th, 2020 · Young ICCA

ISDS is a fragmented field, consisting of a few thousand bilateral investment treaties ("BITs") and treaties with investment chapters – such as the Energy Charter Treaty ("ECT") or the North American Free Trade Agreement ("NAFTA"). These instruments that regulate foreign investment are often similar but are not the same. Yet, even where different bilateral relationships are governed by technically distinct obligations, there is often a level of consistency among ISDS decisions. This coherence results from the precedent-like reliance on earlier ISDS decisions.

Even though ISDS decisions are non-binding on investment tribunals, reliance on other awards to substantiate a ruling is logical practice. If a dispute is well-reasoned and concerns similar factual or legal issues, it makes sense to reference it. After all, justified reliance on precedent can further the goals of arbitration, such as fostering judicial economy. Additionally, it is useful when arbitrators tout approval for the rationale behind a particular treaty interpretation or for the application of treaty language to the facts of a given dispute. This is helpful to both states and investors, considering regulatory and investment decisions, respectively.

Although the above-mentioned practice is sound, the rationale for reliance on other arbitral awards has been distorted in certain circumstances. Some practitioners and scholars who support the use of precedent have stated that precedent is a primary source of law in ISDS.[1)] Specifically, certain authors argue that traditional sources of public international law – particularly custom – are overly formalistic and not workable as applied to ISDS.[2)] Hence, the argument often proceeds that decisions of ISDS tribunals are of heightened importance in the field in comparison to customary international law. In fact, some advocates of this view advance that ISDS decisions not only contribute to, but generate the best statement of, customary law in the field.

ICJ Statute – Hierarchy of Sources in International Law

According to the Statute of the International Court of Justice (the "ICJ Statute"), courts and tribunals "shall apply" three primary, co-equal sources in deciding international disputes: treaties, customary international law and general principles of law. In addition to these three sources, Article 38(d) of the ICJ Statute indicates that judicial decisions and opinions rendered by the most preeminent scholars may be used as a "*subsidiary* means for the determination of rules of law." (Emphasis added.) It is possible to argue that ISDS decisions qualify as judicial decisions under

Article 38(d). If that is the case, then ISDS decisions would appear to be a mere subsidiary means for the determination of rules of law in ISDS. The primary sources continue to be the principal means for determination.

ISDS Decisions' Relationship to Custom

Customary international law is evidenced by "general practice accepted as law," and therefore, it has two constituent elements: state practice and *opinio juris*. (Statute of the International Court of Justice, art. 38, ¶ 1.) Both of these elements must be assessed independently, and evidenced affirmatively, in order to indicate that a customary norm exists. Evidence of the constituent elements is gleaned from state action.

Possible Contribution to the Elements of Custom

As noted, one argument sometimes advanced is that ISDS decisions contribute to custom. Simply put, ISDS decisions do not supply evidence of either state practice or *opinio juris*. Importantly, tribunals' decisions are not made by or on behalf of a state actor, so there can be no question as to whether state practice or *opinio juris* can be gleaned from the decisions themselves. However, this does not render ISDS decisions completely irrelevant regarding the identification (as opposed to formation) of customary international law.

There are at least two circumstances where ISDS decisions can have an impact on the creation of customary norms. First, ISDS decisions can *stimulate* state practice. For instance, if an ISDS ruling causes a state actor to reform its domestic legislation in order to comply with its international obligations, then the ruling has stimulated some state practice.

Second, it is possible to argue that a state's submission to an ISDS tribunal contributes to the identification of customary international law because it supplies evidence of *opinio juris*. However, this argument must be viewed more critically. In recent years, the International Law Commission (the "ILC") considered the identification of customary international law and prepared its draft conclusions. (UN/GA/res/A/73/10.) The ILC's draft conclusions indicate that statements made in pleadings, on behalf of a state, can contain evidence of *opinio juris*. However, the same draft conclusions emphasize that "extralegal" motives for an action must be carefully assessed and distinguished from *opinio juris.* Thus, it is necessary to consider how much weight can be given to ISDS submissions, which are made by private law firms on behalf of a government. This is significant for a number of reasons, one being that law firms that have an ISDS practice can often represent both investors and states. Hence, for the purpose of identifying customary international law, a case-by-case analysis needs to be undertaken to determine the weight that can be given to statements in ISDS submissions. This analysis should focus on the motives of both the government and its legal representatives in making various submissions.

Possible Superior Role

Some posit that ISDS decisions generate the best statement of what is customary in the field. Thus,

the argument proceeds that the decisions effectively do, and should, replace the need for identifying custom through the more difficult practice of finding evidence of state practice and *opinion juris*.

Despite arguments to the contrary, ISDS decisions neither replace nor occupy a more important position than customary international law. It is worth recalling that the ICJ Statute creates a hierarchy between the sources of international law: (1) primary sources, including custom and (2) subsidiary sources, including judicial decisions and scholarship. Judicial decisions may include ISDS decisions, making them an inferior means for determination as compared to custom. Although beyond the scope of this piece, it is worth considering in the first instance whether ISDS decisions are the type of judicial decisions envisioned by Article 38(d) of the ICJ Statute.

In any case, even if ISDS decisions qualify as judicial decisions under Article 38(d) of the ICJ Statute, it cannot be stated that they have special force vis-à-vis the primary sources – especially custom – in ISDS. In practice, ISDS tribunals are typically careful to note that other decisions are not binding on them. This alone is seemingly enough to refute the idea that decisional law contributes to the creation of custom. Yet even more important is the consideration of state consent, since the identification of a new custom obliges states to act in compliance with it. Accepting the argument that ISDS tribunals create custom through decisional law completely negates the essential element of custom: state consent (as evidenced by the constituent elements). This is because ISDS decisions are imposed on states, not agreed to by states. Moreover, such decisions are binding, and yet a state will invariably disagree with a ruling against it in ISDS. Hence, it is not possible to say that a state consents to the unfavorable award, let alone to its contribution to customary law.

Conclusion

Reliance on previously rendered ISDS decisions benefits players in the field. However, the function of precedent in ISDS should not be overstated. The difference between, on the one hand, creating customary international law and/or providing direct evidence of the elements of custom and, on the other hand, providing a forum where evidence of custom is likely to be gleaned, is a technical one. Nonetheless, it is an important difference with potentially significant consequences for states, and investors. Thus, it is important to adhere to traditional sources of law, and to respect the hierarchy between those sources, as espoused in the ICJ Statute. This is especially true today, where the continued vitality of the ISDS system is being called into question.

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References

See e.g., Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J
?1 TRANSNAT'L L. 123, 129 (2003); E. Alvarez, *A BIT On Custom*, 42 J. OF INT. L. & POL. 17, 54 (2011).

?2 *See id.*

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