Kluwer Arbitration Blog

Washington Arbitration Week 2022: The Influence of Public International Law in Investment Arbitration – Not to be Taken for Granted

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On 30th of November 2022, Washington Arbitration Week 2022 continued with several panels held in hybrid format. This post presents some highlights of the panel titled 'The Influence of Public International Law in Investment Arbitration,' which featured as moderator Mr. Lee M. Caplan (Arent Fox) and as panelists Prof. Dr. Yannick Radi (UC Louvain), Ms. Kiran Nasir Gore (George Washington University Law School), Mr. Josh Simmons (Wiley Rein), and Dr Jose Antonio Rivas (Xtrategy).

Although public international law (PIL) may sometimes be taken for granted in international investment disputes, its role is of paramount importance: PIL principles support determination of State responsibility (i.e. attribution to the State) and determination of a breach under the relevant treaty instrument, often with reference to customary international law (CIL) and/or the law of treaties (the 1969 Vienna Convention on the Law of Treaties).

However, as Mr. Caplan noted in his opening remarks, more discrete but equally paramount issues lie in determination of the international law sources that tribunals select to guide their interpretation and application of law, as reflected in the decisions issued by such tribunals. The panel thus explored the complex interplay between the regimes of PIL broadly, and international investment law (IIL) in particular (a topic previously covered in depth on KAB here). The discussion ranged from sources of such law to rationales and quantifications to guide the awarding of damages. Each of the panelists focused their remarks on the different "sources" of PIL that have relevance to the practice of international investment arbitration.

Customary International Law & General Principles of Law: the Paradigmatic Sources of PIL

Starting the panel, Prof. Dr. Radi highlighted the importance of CIL and general principles of law as sources of PIL. He explained that, not only are such sources relevant whenever investor-State relations are not covered by any international investment agreement (IIA), but also when such IIAs are not self-sufficient (e.g. when they display normative vagueness) and tribunals rely on these sources to support the interpretation and application of the relevant agreement's provisions.

Starting with the discussion of CIL, Prof. Dr. Radi focused successively on the interplay between (i) CIL and treaties and, (ii) CIL and arbitral practice.

As to the former, he recalled that while some arbitral tribunals have suggested that IIAs can develop CIL on their own, others have argued that IIAs only contribute to the CIL process. He linked that latter approach to the ICJ judgment in the North Sea Continental Shelf case in which the Court set out conditions for treaties to play such a role. In this regard, he stressed that the Court discussed therein the interplay between CIL and a multilateral treaty. As a result, when analyzing each of these conditions in relation to IIAs, he insisted that one shall be cautious given the frequent bilateral dimension of these agreements.

As for the interplay between CIL and arbitral practice, Prof. Dr. Radi noted that arbitral tribunals have a strong tendency to refer, not to State practice, but to past arbitral awards when they discuss CIL. Stressing that those past arbitral awards themselves often do not either review State practice and *opinio juris*, he suggested that this tendency amounts to a self-referential practice where CIL is being replaced by "*jurisprudence constante"*.

Further, Prof. Dr. Radi discussed CIL in relation to burden of proof, explaining the different views adopted by arbitral tribunals in this regard. As regards the parties, he referred to two main approaches that co-exist in arbitral practice. The first approach puts the burden of proof on the Claimant. The second approach, based on a distinction between CIL existence and CIL content, puts the burden of evidencing CIL existence on the Claimant, but that of evidencing its content on both disputing parties. Prof. Dr. Radi also discussed the role assigned to tribunals themselves, linking this discussion to the *iura novit curia* principle.

Turning to general principles, Prof. Dr. Radi focused on general principles deriving from domestic legal systems, i.e. on "general principles of law recognized by civilized nations" (GPLRCN) as they are referred to in Article 38 of the ICJ Statute. He pointed out that arbitral tribunals are often criticized when discussing domestic legal systems for two main reasons: (i) the lack of methodology, for instance in determining the content of domestic laws or their degree of similarity, and (ii) their selectivity in picking domestic legal systems. To make sense of these criticisms and appraise their relevance, Prof. Dr. Radi introduced and discussed a trifold distinction: (i) a distinction between those situations where tribunals rely on GPLRCN *and* those where they rely directly on domestic law; (ii) a distinction between those situations where the reliance plays a gap feeling role *and* those where it is intended to confirm an interpretation reached on another basis, and (iii) a distinction between legality *and* legitimacy as a ground for criticism.

The VCLT in the Context of Investor-State Disputes: A Slow but Consensual Process

Ms. Gore put into context the the Vienna Convention on the Law of Treaties (VCLT), which finds its roots in the very early days of the International Law Commission (ILC) of the UN. When the ILC was first formed in 1948, one of its first tasks was to establish a list of the essential topics of international law to be considered and advanced by the ILC, and the law of treaties was selected from that list as one of the first projects to be undertaken.

The VCLT thus is the result of the ILC's nearly 20-year process of codifying the law of treaties, during which time the ILC's work on this topic was led by four successive Special Rapporteurs. The ILC's efforts throughout this period focused on those principles which were widely accepted,

including those considered reflective of CIL, and therefore appropriate for codification. In 1969, when the VCLT opened for signature, it did not seem that its substantive provisions were considered controversial as many UN Member States signed without objection to its terms. It took a further 11 years, until 1980, for the VCLT to enter into force for signatory States. It is worth noting that principles embodied in the VCLT have broader relevance as many non-signatory States accept many of the VCLT's provisions as reflective of CIL, see e.g. the Q&A of the U.S. State Department here. As such, in the investment arbitration field, the VCLT's rules are relied on extensively, in particular the VCLT's rules on interpretation, in Articles 31 through 33, which are frequently referred to by counsel and tribunals.

In Ms. Gore's view, the work of the ILC to develop the VCLT was particularly productive as the mandate of the ILC was to codify *existing* practices on the law of treaties, and not to develop new or controversial principles. However, Ms. Gore highlighted that today's world is very different compared to when the iterative work to develop the VCLT took place, in particular because there are more actors (e.g. there are more States in today's post-colonial world as compared to when the UN was formed), as well as increasing numbers of international treaties. This multitude leads to the potential for treaty overlap, among other challenges.

For Ms. Gore, the VCLT primarily offers solutions: it offers default guidance on how treaties enter into force, how States leave treaties (a topic that is quite relevant in light of current ECT terminations), and how to interpret and apply treaties. It is likely that the VCLT will remain relevant for investment arbitration practice into the future. For example the Kyrgyzstan-Hungary BIT that entered into force in 2020, includes a rare express provision at Article 9.7, that the treaty is to be interpreted using the rules of the VCLT.

Moreover, the VCLT presents a flexible framework that allows States to deviate from its rules to suit their treaty-making goals. Some IIAs contain specialized guidance, for instance, the USMCA provides for a three-year sunset period for termination and winding down of its predecessor, NAFTA (see a prior detailed discussion on KAB here).

Attribution by the ILC Articles on State Responsibility

In line with Professor Pierre Marie Dupuy's opinion (as reflected in the recently published *ICSID Review* Special Issue on the 20th Anniversary of the ILC Articles), paying tribute to Professor James Crawford, the assessment of the law of State responsibility is aimed at the relation between two States. Intended to be applied solely within the framework of PIL, it is not, in itself, conceived to serve in the context of an investor-State dispute.

There is a fundamental and often misunderstood difference between the three substantive parts of the ILC Articles. Notably as regards the second part of the ILC Articles which defines the consequences for a State having violated one of its obligations in relation to other States, and not in relation with the foreign investor – a national of another State.

Mr. Simmons responded to these ideas by discussing the link between parts 1 ("The Internationally Wrongful Act of a State") and 2 ("Content of The International Responsibility Of A State") of the ILC Articles. He noted that Article 33.2 on the "Scope of international obligations"[1] recognizes not only a "*State to State*" application but also that rights "may accrue directly to any person or entity

other than a State," such as in international human rights law.

Mr. Simmons explained that there is no distortion in investment arbitration tribunals calling upon the principles set forth in the ILC Articles. However, at times it should be clarified that it is a matter of CIL's application "by analogy", rather than its direct application.

Adjudicatory Bodies' Influential Role on PIL and IIL

Dr Rivas provided a general overview of how relevant decisions of international courts, tribunals and binational commissions have been to PIL and international investment law. He explained that PIL, including practice and decisions of the ICJ and PCIJ, have significantly influenced investment arbitration practice. He referred to three specific substantive obligations as examples related to most favoured nation (MFN) treatment, fair and equitable treatment (FET), and expropriation to demonstrate the point.

With respect to MFN, some earlier cases addressed whether a State (and not an investor) could rely on the MFN to import substantive provisions or dispute settlement provisions from other cases. Thus, in the early days of investment arbitration some State counsel would argue that the *ejusdem generis* principle[2)] prevents importing FET via the MFN clause from a third treaty into the treaty, if FET is not the in the treaty by relying on *Ambatielos*. However, when that case (based on a bilateral commercial treaty) is read closely, it becomes clear that *Ambatielos* clarified the protections pertaining to the "administration of justice" when read in conjunction with "commerce and navigation" where meant to encompass the rights of traders. By analogy, in investment disputes the "Treaty type" is investment, thus allowing importing substantive provisions from a third treaty not included in the applicable treaty. There has thus been a notable evolution in the MFN, now allowing to import substantive provisions leaving aside the unsettled importation (also known as application by reference) of procedural provisions.

With respect to FET, an early standard for FET was set in Neer v. Mexico of US-Mexico Claim's Commission (1926). That case focused on whether there was a denial of justice or a significant flaw in the Mexican system of justice. The binational Mexican-US commission's decision although "without attempting to announce a precise formula", ultimately became a reference point for FET. It based its decision on the standards of "outrage, bad faith, willful neglect or duty or insufficiency of governmental action".

With respect to expropriation, Dr Rivas explained that PIL, by nature, evolves and is influenced by State and tribunal practice, as further demonstrated by decisions of the Iran-US Claims Tribunal, which developed various notions and standards related to expropriation in its decisions: the notions of creeping expropriation, regulatory expropriation, and the standard of substantive (as opposed to ephemeral) deprivation for regulatory expropriation, among others.

"Full Reparation": an Easy Concept with a Difficult Application

The issue of damages in international arbitration is often controversial, as it requires application of a well-established principle that can be particularly difficult to apply. International law requires that a State that is held responsible for an unlawful act must provide full reparation (ILC Articles

on State Responsibility).The Chorzów Factory case is the prime example and often is referred to by counsel and tribunals in investment arbitrations, but Mr. Simmons presented a more nuanced perspective by explaining that this jurisprudence should be read as a restatement of CIL, rather than a source in itself (quoting the Teinver v. Argentina case).

He also pointed out that the debate should be focused on whether and how the tribunals should use *ex post* expropriation information. As noticed in her Partial Dissent Professor Stern in Quiborax v. Bolivia (quoted by Mr. Simmons) tribunals could have a tendency to "pick and choose" in regard to the information they will use after the expropriation takes place. The tide might be changing, as seen in the damages award of ConocoPhillips v. Venezuela, with the *ex post* analysis focusing on causation and proportionality principles derived from the ILC Articles on State Responsibility.

Mr. Simmons concluded that the key issue with reparation is not the concept (which is clear and simple to understand) but rather its application. In his view, investment arbitration plays an important role in clarifying and developing how to apply the principle of full reparation under international law.

Conclusion

As put by Xue Hanqin, Judge at the ICJ and former ILC Member, Article 31(3)(c) VCLT functions as a master key to the house of international law, but one could ask – as did Prof. Dr. Radi – what guidance this article really offers as it is unclear what the reference it makes to "take into account" means.

The VCLT, the Articles on State Responsibility and decisions by international adjudicatory bodies offers a treasure trove of source for rules that could be mined, despite discrepancies in the interpretation of arbitral tribunals. Thus, the landscape of sources of PIL remains fertile for rigorous interpretation and application by investment tribunals.

Kluwer Arbitration Blog's full coverage of Washington Arbitration Week (WAW) is available here.

References

?1 Article 33.2, ILC Articles: “2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”.

?2 The principle provides that where general words or phrases follow a number of specific words or phrases, the general words are specifically construed as limited and apply only to persons or things of the same kind or class as those expressly mentioned, see Cornell Legal Encyclopedia.

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