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2023 Washington Arbitration Week Recap: The Interplay Between ICJ and ISDS, the Eyes of International Adjudication Are Humanized

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On 29 November 2023, Professor **Kiran N. Gore** (The George Washington University Law School) moderated the "signature panel" of the Fourth Washington Arbitration Week ("WAW"), which focused on the interplay between judgments of the International Court of Justice ("ICJ")/ Permanent Court of International Justice ("PCIJ") and investor-State dispute settlement ("ISDS"). The program bridged and expanded the discussion that took place at a highly popular program featured in the 2022 edition of WAW on the influence of public international law ("PIL") on ISDS (read the prior KAB coverage here). The program featured a globally-inclusive panel of experts, including Dr. Reza Eftekhar (Iran-United States Claims Tribunal), Professor **Hélène Ruiz Fabri** (Sorbonne Law School), Professor **Yannick Radi** (UC Louvain Faculty of Law), Professor **Jose Antonio Rivas** (WAW Co-Founder, Xtrategy LLP / Georgetown Law), and **Clara Brillembourg** (Foley Hoag LLP). This post captures some highlights from the discussion.

The Impact of ISDS Case Law on the ICJ's Decision-Making

Dr. Eftekhar began by analyzing the current impact of ISDS jurisprudence on the ICJ's decision-making through the lens of citation as a yardstick to measure the level of influence. He explained that the ICJ (or "World Court") has referred to ISDS cases only in very few instances. When it has done so, it has been primarily with reference to the parties' pleadings and in order to distinguish those cases from the case at hand.[1)] Indeed, the only reference to an ISDS decision with approval was quite recent in *Certain Iranian Assets* on the issue of states' right to regulate (as discussed further below in the discussion on the qualitative dimension of citations).[2)]

Nevertheless, Dr. Eftekhar explained that ISDS has a *de facto* influence on the ICJ's decision-making, particularly due to the role of "repeat players." ICJ members that concurrently sit, or have previously sat, as arbitrators in ISDS cases could be influenced by their practice in ISDS when contributing to the work of the World Court. This impact is sometimes more visible when ICJ Judges include citations to ISDS decisions in their individual ICJ opinions. However, Dr. Eftekhar noted that the influence of "repeat players" may be limited on a going-forward basis, as the ICJ Statute (Art. 16.1) as well as the internal resolution of the ICJ adopted as of September 2018 which

bar current ICJ Judges from "double hatting" and as such would be expected to limit ICJ members' involvement in ISDS cases going forward.

Looking ahead and analyzing the potential impact of the ISDS jurisprudence on the ICJ's future decision-making, Dr. Eftekhar considered four key elements:

1. The lynchpin of the ISDS system is "investment". "Investment" disputes do not arise systematically in cases brought before the ICJ (putting aside the exceptions of *Certain Iranian Asset*s, *Barcelona Traction*, and *ELSI* cases, which concerned disputes about foreign investments). This factor confines the occasions on which the ICJ might be able to issue pronouncements relevant to issues of international investment law;
2. There are very few enforceable instruments regarding international economic law issues that confer jurisdiction upon the ICJ, thus making the ICJ less exposed to issues that commonly arise in ISDS cases. Even the prolific Treaty of Amity of 1955, which was the "consent instrument" relevant for five ICJ cases, was terminated in 2018, thus making it even less likely that the ICJ would encounter issues that typically arise in ISDS cases;
3. The criticisms against the institutional and inherent legitimacy of the ISDS system will probably continue to dissuade the ICJ from referring to ISDS decisions in its future judgments; and
4. Practical and academic experiences of ICJ Judges involving international investment law may influence collective deliberations and/or the drafting of judgments or individual opinions.

While the first three factors tend to portray a dim prospect regarding the influence of ISDS on ICJ's decision-making in the future, the fourth element appears to speak in favor of a meaningful impact by ISDS on future ICJ judgments.

Citations and Incrementalism in ISDS

On the other side of the coin, Professor Ruiz Fabri asked the fundamental question of *why* courts would cite to other courts in the context of international law fragmentation. Precedent is particularly important in ISDS practice because its ongoing reform is a focus of the international law community, and citation to other forms of jurisprudence may be a way for ISDS to "borrow" legitimacy from other less contested regimes. Yet, the diagnosis regarding ICJ citation must be put into perspective and contextualized. Citations can be a double-edged sword in their quantitative and qualitative dimensions: the quantitative aspect is misleading as there is incrementalism in citations, stemming from the parties' submissions and the *ulta petita* bias against arbitrators citing to authorities not on file. The critical qualitative approach to quotations of the ICJ might arise in procedural issues such as reparation. Nevertheless, in this regard, citations do not mean engagement. *Chorzow* is a hallmark example of this paradigm of systemic citation, whereby the initial citation on full reparation of damages is quoted repeatedly in ISDS cases, but the underlying principles are not necessarily interpreted or applied by arbitrators in their original sense.

Looking Beyond the Citations: Adjudicators' Rationale

Looking beyond the citations, Professor Rivas analyzed two questions through ICJ judgments that reflect the general principle of law of proportionality already present in other international forums, and contemporary ICJ rulings that might have significant impact in investor-State arbitration in

particular concerning legitimate expectations.

First, he considered how as the principle of proportionality, which is relied upon in ICJ judgments is also reflected in ISDS decisions. In the 2023 *Iranian Assets judgment*, reflecting the application of the principle of proportionality, the World Court concluded that a measure is unreasonable, among other reasons, "if its adverse impact is manifestly excessive in relation to the purpose" (para 149). The requirement of proportionality was also identified as part of fair and equitable treatment (FET) in the 2012 award in *Occidental v Ecuador*, where the tribunal determined that the price imposed by the host State—the absolute loss of the investment—on the investor for its failure to observe domestic regulations was disproportionate and in breach of FET (see paras 450-52). Professor Rivas pointed out that even if not citing ISDS decisions, the ICJ may rely on general principles of law that may have been recognized in ISDS decisions and various national legal traditions.

Second, Professor Rivas addressed the potential direct influence of new ICJ judgments on ISDS decisions. In particular, in its *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* 2018 judgment, the ICJ acknowledged that references to legitimate expectations may be found in ISDS decisions, however:

> "it does not follow *[…]* that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation" (para 164).

Without committing to any conclusion, Professor Rivas asked whether this contribution from the ICJ may be relied upon by counsel for respondent states in ISDS advocacy, thereby influencing understandings of whether FET includes, among other obligations, the obligation to not affect the investor's legitimate expectations.

As noted by Professor Rivas, the presence of certain general principles—such as proportionality—is sufficiently robust to ensure its use by the ICJ even without citing ISDS tribunals. In addition, as new judgments of the ICJ come out with conclusions on relevant topics of investment arbitration (such as legitimate expectations), counsel are likely to pay close attention to later construct arguments of general international law.

Contextualizing the Dialogue: Sociological and Institutional Dimensions

Professor Radi emphasized that the foundational question on the interaction between the two fields is one of relevancy. The dialogue between the PIL and ISDS regimes is only relevant if they are considered to belong to the same universe. Digging deeper into the reasons for the scarcity of references to ISDS decisions in ICJ judgments, there is an objective element found in the "treatification" of the field, as ISDS has been attached to the field of PIL since the very first BIT between Pakistan and Germany of 1959, implicating that BITs cannot be interpreted in isolation from PIL and its principles (*Phoenix v Czech Republic*, para 9). However, some experts who are active in both regimes are cautious in considering ISDS and PIL as belonging to the same universe. For example, in the 2006 ILC Report on Fragmentation, Martti Koskenniemi used the term "exotic" to refer to international investment law (p. 10), whilst Jan Paulsson argued the ISDS field

is dramatically different than other regimes in the international scene. The dialogue paradigm is not a theoretical issue, as it influences whether fragmentation is a pertinent concern.

Echoing the opinion expressed by Dr. Eftekhar, Professor Radi expounded that (i) the ICJ perceives itself not only as the principal international judicial organ (Art. 92, UN Charter) but as the "supreme PIL tribunal" (see in this respect the *Corfu Channel* case) and (ii) the ICJ might not see ISDS as a system at all, but as a mere collection of specific regimes in isolation (see the *Diallo* case whereby the ICJ explicitly contemplated the ISDS decisions that Guinea cited to in its memorial, paras 88-90). Professor Radi also discussed the impact of heterogeneity on "knowledge and argumentation" in ISDS. In particular, he stressed that the diverse backgrounds of counsel, arbitrators, and their audience explain to some extent the argumentation "à géométrie variable" that characterizes awards and decisions. He concluded by discussing the "human factor" in ISDS, looking at the individuals who act as counsel before the ICJ and concurrently as arbitrators in ISDS as agents for cross-pollination.

Cross-Pollination in Practice through Advocacy

An analysis of cross-pollination between ISDS and ICJ practice was presented by Ms. Brillembourg. She identified three ways in which the interplay is a uniting force:

- **The (cross) examination of witnesses and experts:** The ICJ has become progressively more open to cross-examination, which is prevalent in ISDS in the context of mixed common and civil law systems involving disputes with States. Much has changed since the joint dissenting opinion regarding the examination of experts in the *Pulp Mills (Argentine v Uruguay)* That joint dissent concerned the ICJ's reluctancy to appoint experts or to allow the parties to have their own experts subjected to cross-examination regarding complex scientific evidence.
- **Presentations in oral arguments:** The ICJ historically has required formal oral hearings involving the translation of arguments in French and English and facilitation of the speech to the Court in advance. On the other hand, ISDS hearings are generally more flexible with ad-hoc oral advocacy. The ICJ is moving toward a less rigid presentation and permitting the use of other languages in the hearings. For example, in *Guyana v Venezuela*, the ICJ permitted hearings in Spanish.
- **Culture and collegiality:** The approach of counsel appearing before the ICJ has generally been "white gloved" due to an institutional human factor of a small group of academics and practitioners repeatedly interacting. ISDS was similar although it had more room for broader engagement. Over time, ISDS has become more inclusive and the pool of counsel appearing before the ICJ has also slowly expanded from an initially small group of practitioners. Greater inclusivity and diversity are needed and welcome, but that expansion also carries a negative spill-over effect. The culture and collegiality have become more variable. In some instances, the "white gloves have come off and the boxing gloves have come on."

Ms. Brillembourg also analyzed the external pressures driving the fields of ISDS and PIL in opposite directions:

1. The use of evidence in written pleadings: ISDS cases today include more evidence and complexity, with pleadings expanding to thousands of pages of exhibits. By contrast, the ICJ is now limiting its pleadings to 750 pages, leading to a highly conservative use of support and

evidence.

2. The use of evidence in hearings: ISDS hearings do not usually allow the use of new evidence at the hearing unless under exceptional circumstances, whereas in the ICJ a source that is publicly available can be raised for the first time in oral argument, resulting in interesting surprises;
3. The issuance of provisional measures: The ICJ is responding more frequently to requests for urgent provisional measures, often in the context of inter-state aggression. This has led to the trade-off of less due process opportunities, as the World Court allows the applicant to present a request with no written response by the respondent up until the day of the hearing where the first counter-argument is raised. In ISDS there is greater opportunity for parties to present and respond to requests for provisional measures in writing and orally due to greater flexibility in the system.

Conclusion

This program highlighted various features of ICJ and ISDS practice that confirm that ISDS should not be catalogued as a self-contained regime, instead it should be viewed as part of PIL. All speakers concurred that the inherent human element in adjudication is essential to dispute resolution. Pertinent in times where some warn of the rise of AI as the fourth arbitrator, thereby replacing adjudicators' decision-making by technology, Dr. Eftekhar evoked the movie "A Time To Kill" with a pertinent quote: "The eyes of the law are human eyes." One can hope that the eyes of international adjudication – the ICJ and ISDS tribunals – remain human eyes. The increased demand for and use of both regimes indicates that the interplay will increase over time, making the topic of the "signature panel" a recurring theme for future editions of WAW.

References

?1 *Diallo (Republic of Guinea v Democratic Republic of the Congo)* preliminary objection, para 90, citing *Biloune v Ghana*, where the court inaccurately referred to the ICSID as an "Investment Center"; in *Certain Iranian Assets*, Judgment of 30 March 2023, para 53, citing *CSOB v The Slovak Republic and Paushok et al. v Mongolia*, yet stating that these decisions are of little relevance to the issues at stake.

?2 *Certain Iranian Assets (supra)*, Judgment of 30 March 2023, para 185, citing the 1903 case *Bischoff*, German Venezuelan Commission*; Sedco v Iran*, Interlocutory Award No. ITL-55-129-3, 17 September 1985; and the ISDS case of *Saluka v Czech Republic*, PCA Case no. 2001-4, Partial Award, 17 March 2006.

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