Public International Law Issues in Arbitration

Daniel Costelloe

19 June 2024

Public International Law Issues in Investor-State Arbitration

- Sources of International Law
- Law of Treaties
- State Responsibility
- Nationality
- Territory

Sources of International Law

Statute of the International Court of Justice, Article 38

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Sources of International Law – General Principles

Hulley Enterprises Limited v. Russian Federation, PCA Case No. 2005-03/AA226 (Final Award), paras. 1357-1359

(b) Does the "Clean Hands" Doctrine Constitute a "General Principle of Law Recognized by Civilized Nations"?

1357. Since the Tribunal will not read into the ECT any legality requirement with respect to the conduct of the investment, it must consider Respondent's more general proposition that a claimant who comes before an international tribunal with "unclean hands" is barred from claiming on the basis of a "general principle of law."

1358. The Tribunal is not persuaded that there exists a "general principle of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called "unclean hands."

1359. General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law.

Sources of International Law – General Principles

El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15 (Award) (31 October 2011), paras. 622-623

622. Volumes have been written on the subject of "general principles." Some authors consider that the latter must meet requirements similar to those applied to customary rules (general practice and *opinio juris*), which suggests that in reality this category is not an autonomous one.[562] The mainstream view seems to be, however, that "general principles" are rules largely applied *in foro domestico*, in private or public, substantive or procedural matters, provided that, after adaptation, they are suitable for application on the level of public international law.[563]

623. That there is a general principle on the preclusion of wrongfulness in certain situations can hardly be doubted, as is confirmed by the UNIDROIT Principles on International Commercial Contracts, a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems.[564] Article 6(2)(2) of these Principles, dealing with

Law of Treaties – Definitions

Vienna Convention on the Law of Treaties, Article 1

(*a*) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*f*) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(*g*) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

Law of Treaties – Entry into Force

UK-Colombia BIT, Article III(1)

1. This Agreement is applicable to existing investments at the time of its entry into force, as well as to investments made thereafter in the territory of a Contracting Party in accordance with the law of the latter by investors of the other Contracting Party.

Law of Treaties – Entry into Force

Vienna Convention on the Law of Treaties, Article 24

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

Law of Treaties, Contracting States

ICSID Convention, Articles 67, 68, 71

Final Provisions

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Law of Treaties, Contracting States

ICSID Convention, Articles 67, 68, 71

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Law of Treaties – Entry into and Remaining in Force

UK-Colombia BIT, Article IV(1)

Final Provisions

1. The Contracting Parties shall notify each other of the compliance of the internal requirements of each of the Contracting Parties in connection with the entry into force of this Agreement. This Agreement shall enter into force sixty (60) days after the receipt of the latter notification.

2. This Agreement shall remain in force for a ten (10) year period and shall be extended indefinitely thereafter. After ten (10) years, this Agreement may be denounced at any time by any of the Contracting Parties, by serving a twelve (12) month prior notice, sent through diplomatic channels.

3. With respect to investments admitted before the date on which the notice of termination of this Agreement becomes effective, the provisions of this Agreement shall remain in force for an additional term of fifteen (15) years from such a date.

Law of Treaties – Internal Law, Retroactivity, Territory

Vienna Convention on the Law of Treaties. Articles 27-29

Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29

Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Law of Treaties – Interpretation

Vienna Convention on the Law of Treaties, Article 31

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Law of Treaties – Applicable Law

ICSID Convention, Article 42(1)

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Law of Treaties – “Intra-EU” Cases (illustrative list)

- *European American Investment Bank v. Slovakia*, PCA Case No. 2010-17 (Award on Jurisdiction) (22 October 2012)
- *Anglia Auto Accessories Limited v. Czech Republic*, SCC Arbitration Case V 2014/181 (Award) (10 March 2017)
- *I.P. Busta & J.P. Busta v. Czech Republic*, SCC Arbitration Case V 2015/014 (Award, 10 March 2017)
- *Magyar Farming Co Ltd and others v. Hungary*, ICSID Case No ARB/17/27 (Award, 13 November 2019)
- *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No ARB/15/16 (Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019)
- *Addiko Bank AG and Addiko Bank d.d. v. Croatia*, ICSID Case No ARB/17/37 (Decision on Croatia’s Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020)
- *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Croatia*, ICSID Case No ARB/17/34 (Decision on Respondent’s Jurisdictional Objections, 30 September 2020)

State Responsibility – State of Necessity

LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1 (Decision on Liability) (3 October 2006), para. 248

248. The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its Draft Articles on State Responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.[65]

State Responsibility – State of Necessity

Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01 (Decision on Liability) (27 December 2010), para. 345

10. Argentina's State of Necessity Defence

345. Before concluding, the Tribunal must address the plea of Argentina based on the defence of "state of necessity" under customary international law in order to excuse its breaches of the BIT found by the Tribunal in respect of Total's investments in power generation. The Tribunal recalls in this respect its analysis of the issue in respect of Total's TGN claim, and specifically the rigorous conditions that are required to sustain such a defence in light of Article 25 of the ILC Articles on State Responsibility.[462] In respect of Total's claim concerning its investments in power generation, the Tribunal has found the pesification of capacity payments, spot price and any other parameters and/or values prescribed in the electricity system not to be in breach of the BIT. On the contrary, the Tribunal has found the alteration of the uniform marginal price mechanism (discussed at paragraph 325 ff. above) and the refusal to pay power generators their receivables and their conversion into a stake in FONINVEMEM (discussed at paragraph 336 ff. above) to be in breach of the fair

Nationality – ICSID Convention

ICSID Convention, Article 25

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Nationality – General Considerations

- Nationality is central to the law of diplomatic protection and access to international adjudication.
- Generally, it is a state's prerogative to confer or withdraw nationality in accordance with its domestic law. Most states confer nationality on the basis of descent or place of birth, or through some other tie.
- *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion of 7 February 1923, PCIJ Ser. B, No. 4. Questions of nationality have historically been in the reserved domain of domestic law.

Nationality – Natural Persons

International Law Commission, Draft Articles on Diplomatic Protection, Article 4

Article 4
State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.

Nationality – Corporations

International Law Commission, Draft Articles on Diplomatic Protection, Article 9

Article 9
State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Nationality – Dual Nationals

- Historically, a national of a State was not permitted to bring an international claim against his or her State of nationality, even if he or she was dual national.
- A dual national could now likely bring an international claim against a State of nationality provided the host State nationality is not the dominant nationality and provided there is no specific prohibition on claims by dual nationals (such as in the applicable treaty).
- The result is an expansion of the personal jurisdiction of international tribunals.

Territory – Prohibition of Use of Force and Acquisition of Territory by Force

UN Charter, Article 2(4)

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Territory – Prohibition of Use of Force and Acquisition of Territory by Force

UN General Assembly Resolution 68/262 (27 March 2014)

1. *Affirms* its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders;

2. *Calls upon* all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means;

3. *Urges* all parties to pursue immediately the peaceful resolution of the situation with respect to Ukraine through direct political dialogue, to exercise restraint, to refrain from unilateral actions and inflammatory rhetoric that may increase tensions and to engage fully with international mediation efforts;

4. *Welcomes* the efforts of the United Nations, the Organization for Security and Cooperation in Europe and other international and regional organizations to assist Ukraine in protecting the rights of all persons in Ukraine, including the rights of persons belonging to minorities;

5. *Underscores* that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol;

6. *Calls upon* all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.

Territory – Situation in Crimea

Stabil LLC and Others v. Russian Federation, PCA Case no. 2015-35 (Award on Jurisdiction) (26 June 2017), para. 127

127. The Claimants have emphasized that the exercise of jurisdiction under the BIT does not require the Tribunal "to resolve the controversy between Russia and the international community over the legality of the Russian Federation's Annexation of Crimea." [147] The Claimants do not ask the Tribunal to find that "the Russian Federation's invasion and Annexation of Crimea were legal or to recognize the Crimean referendum as legitimate"; nor do they ask it "to find the opposite."[148]

128. The Tribunal has noted the Claimants' observations. It deems its mission limited to assessing whether it has jurisdiction under the BIT. Therefore, in the analysis that follows, it expresses no view on the legality of Crimea's incorporation into Russia or on the legitimacy of the sovereignty claims over this territory.[149]

129. Before embarking on the interpretation and application of the BIT, it may be worthwhile to stress the obvious: the Treaty is in force. Neither Contracting Party has sought to terminate, suspend, or amend the Treaty; nor have they taken any steps to terminate its application with respect to investments in Crimea.[150]

Territory – Situation in Crimea

Stabil LLC and Others v. Russian Federation, PCA Case no. 2015-35 (Award on Jurisdiction) (26 June 2017), para. 175

(c) Conclusion

175. In sum, and particularly with due regard to the Respondent's statement in these proceedings and elsewhere that Crimea now "forms an integral part of the territory of the Russian Federation,"[220] the Tribunal construes the term "territory" for purposes of the Treaty to include territory over which a State exercises *de facto* control and jurisdiction. Any other interpretation would, to borrow the words of the Russian Federation, "contradict objective reality".[221] The Tribunal thus finds that the Treaty became opposable to Russia with respect to Ukrainian investments in Crimea upon Russia's incorporation of Crimea in its territory no later than 21 March 2014 when Russia ratified the Incorporation Treaty and passed the Crimean Integration Law which formally incorporated Crimea as a subject of the Russian Federation in accordance with its Constitution.[222]

Territory – Situation in Crimea

Oschadbank v. Russian Federation, PCA Case No. 2016-14 (Award) (26 November 2018), paras. 201, 218

201. The present situation is not a case of extending a treaty with a third party to a new area acquired by the State in question. Here, the territorial coverage of the Treaty has not changed. It is simply a matter of determining whether there has been a change in the State that owes the duties under the Treaty and a consequent change in the investors to which such duties are owed. For this reason, the Tribunal focuses its analysis on the text of the Treaty.

218. The Tribunal finds, for all the reasons set out above,[293] that the Crimean Peninsula falls within the territory of the Respondent for the purposes of the Treaty. Accordingly, there is no need to consider the Claimant's alternative submissions on the meaning of "territory" as it is used more broadly in public international law.[294] Indeed, the Tribunal's interpretative exercise is limited to the principles enunciated in Article 31 of the VCLT. The meaning of "territory" as it is used more broadly in public international law does not necessarily constitute relevant rules of international law applicable in the relations between the Ukraine and the Respondent (Article 31(3)(c) of the VCLT).

Territory

UK-Colombia BIT, Article I(4)

The term "territory" means:

(a) In respect of the United Kingdom: Great Britain and Northern Ireland, including the territorial sea and maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with international law as an area within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of Article XIV; and

(b) In respect of the Republic of Colombia: In addition to its continental territory, the archipelago of San Andres, Providencia and Santa Catalina, the Island of Malpelo, and all the other islands, islets, keys, headlands and shoals that belong to it, as well as airspace and maritime areas over which it has sovereignty or sovereign rights or jurisdiction in accordance with its domestic law and international law, including applicable international treaties.

Territory

UK-Colombia BIT, Article XIV

Territorial Extension

At the time of entry into force of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for the international relations of which the Government of the United Kingdom is responsible as may be agreed between the Contracting Parties in an Exchange of Notes, provided that the Contracting Parties shall not agree to extend the provisions of this Agreement in accordance with this Article unless they have complied with their applicable internal constitutional requirements.

State Succession

Sanum Investments Limited v. Lao People's Democratic Republic, UNCITRAL, PCA Case No. 2013-13

219. It is common ground that both the PRC and Laos are parties to the VCLT. It is also common ground that neither the PRC nor Laos are parties to the VCST. The customary nature of Article 15 is controversial between the Parties: they both accept that the general rule of the "moving treaty frontiers" of Article 15 of the VCST is customary, but the Claimant argues that the exceptions to Article 15 are not customary.

i) Both Article 29 of the VCLT and Article 15 of the VCST are rules of customary international law

220. It is undisputed by the Parties that Article 29 in its entirety has the force of binding customary international law.[388] As this is not controversial the Tribunal does not consider that it needs to make lengthy developments to support this statement of law.

221. By contrast, although there is unanimity or "quasi-unanimity" among the doctrine to consider that Article 15 also represents customary international law, in view of the diverging analyses presented by the Parties, the Tribunal will elaborate at some length on this question.