IS THERE AN EVOLVING CUSTOMARY INTERNATIONAL LAW ON INVESTMENT?

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THE DEMISE OF THE DIPLOMATIC PROTECTION OF INVESTMENT

Diallo Affair (Guinea v Democratic Republic of the Congo) (Preliminary Objections) [2007] ICJ Rep 582, (Merits) 30 November 2010
Barcelona Traction (Belgium v Spain) [1970] ICJ Rep 3

I. CUSTOMARY INTERNATIONAL INVESTMENT LAW–AN ESSENTIALLY CONTESTED CONCEPT?

1. The limiting effect of the process of diplomatic protection
   • No general substitution of investor for investment
   • Limited conception of direct rights of shareholder
   • No development of substantive law on treatment of investments of aliens

2. Twentieth-century dissent as to the content of the rights of alien investors
   • The legacy of Calvo
   • Failure to reach agreement on multilateral standards
   • International Law Commission–shift from primary to secondary rules

3. General shift of emphasis in international law from custom to treaty

II. INVESTMENT TREATIES AND THE APPEAL TO CUSTOM

1. Express reference to custom
   NAFTA Free Trade Commission (FTC), Interpretation of NAFTA Chapter 11 (31 July 2001) 6 ICSID Rep 567

2. Adoption of the language of custom

3. Choice of international law as part of the applicable law
   Art42 ICSID Convention
   MTD Equity Sdn Bhd v Chile (Decision on Annulment) ICSID Case No ARB/01/7 (ICSID, 2007)

4. Form and conclusion of investment treaties

5. Application of general rules of treaty interpretation
III. THE LIMITS OF CUSTOM

1. Distinction between jurisdiction and applicable law
   *Channel Tunnel Group Ltd v United Kingdom & France* (PCA, 30 January 2007)

2. The choice of law process in the determination of investment claims

3. The curative function of the treaty procedure
   Arts26 & 27 ICSID Convention

4. Inherently special promises

5. The primacy of the treaty language

IV. A PROCESS FOR THE ARBITRAL APPLICATION OF CUSTOM

1. Central function of interpretation
   *Asian Agricultural Products v Sri Lanka (Award)* 4 ICSID Rep 245, 265-6, Rule D
   Fauchald (2008) 19 EJIL 301
   Art31(3)(c) Vienna Convention
   McLachlan ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’(2005) 54 ICLQ 279

2. Developing the relationship between custom and treaty in practice
   • Functional equivalence of standards
   • Evidence for a general sense of obligation
   • Evolutionary standards
     *Iron Rhine Railway (Belgium v The Netherlands)* (PCA, 24 May 2005)
   • Development of content through arbitral practice
   • Relevance of human rights standards

3. Understanding and applying general principles of law
   Art52(1)(d) ICSID Convention—’a fundamental rule of procedure’

4. Reasoning from principle and analogy
   *Eastern Extension, Australasia and China Telegraph Co Ltd* (1923) VI RIAA 112

V. IMPLICATIONS FOR GENERAL INTERNATIONAL LAW