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APPLICATION OF THE RULES OF CUSTOMARY INTERNATIONAL LAW IN THE PRACTICE OF INVESTOR–STATE ARBITRAL TRIBUNALS

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The subject. At the beginning of the 21st century the growing interest of the parties to the dispute and the arbitral tribunals in the rules of customary international law became apparent. This has raised doctrinal and practical questions about the relationship between treaty norms and rules of customary international law in the field of foreign investment protection. The most discussed of them were the issues of filling the gaps in international treaties through the application of the rules of customary international law and the establishment by the arbitral tribunals of the content of the customs they need to apply during dispute resolution.

Materials and methods. This research carried out a scientific analysis of the practice of investor–state arbitral tribunals regarding the interpretation and application of the rules of customary international law in settlement of investment disputes.

Discussion. Numerous investor-state arbitration awards show that arbitration tribunals constantly use the rules of customary international law in dispute resolution. Moreover, arbitrators often refer to the rules of customary international law as a separate legal basis for their conclusions. As modern practice shows, in most cases arbitrators are not inclined to consider the existence or the absence of State practice or opinio juris, instead relying on the conclusions about the existence of a customary rule made earlier by the ICJ, the PCIJ and other arbitration tribunals, as well as international treaties, reports of the International Law Commission and doctrine.

The main results and conclusions. The rules of customary international law are applied by the arbitral tribunals when considering a wide range of issues (jurisdiction, organization of arbitration, applicable substantive law and liability issues). A vivid example of the use of the rules of customary international law in the settlement of investment disputes to fill the gaps in international treaties was a reference by arbitral tribunals to the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission as a codification of existing rules of customary international law in this area. However, the peculiarity of the use of the Articles by the arbitral tribunals is that the arbitrators consider it as a document containing formulations identical in content to existing rules of customary international law. This leads to the "automatic" application by the arbitrators of the provisions of the Articles to the facts of the case without analysing State practice. Moreover, application of the provisions of the Articles by the arbitral tribunals seems inconsistent, especially in such sensitive issues for the States as the amount of compensation awarded to an investor and contributory fault by an investor. In addition, the high creativity of investors suggests the emergence of claims based solely on the rules of customary international law, and not the provisions of international investment agreements.

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1.Introduction

According to the researchers, until the middle of the twentieth century, the main source of international investment law was customary international law, since certain provisions in international treaties on the protection of foreign property were rare and vague [1, p. 159]. All attempts made to develop a universal multilateral agreement on the protection of foreign investment ended in failure due to the conflict of positions of developed and developing countries, which often had diametrically opposite views on key issues [2, p. 1049–1050]. Against this background, the rapid growth in the number of bilateral investment treaties concluded by the States[1] was unexpected, and it was also one of the most notable events of international law at the end of the twentieth century [1, p. 157].

Today, the legal protection of foreign investors is mainly provided by the norms of bilateral investment treaties — the applicable law for arbitral tribunals in resolving the vast majority of investment disputes [3, p. 10]. This dominance of treaty norms has led to a certain oblivion of the rules of customary international law, which have faded into the background [4, p. 261; 5, p. 157]. However, at the beginning of the XXI century, states, international courts and tribunals, as well as scholars faced an increasing interest in customary international law for the purpose of resolving international disputes (including disputes between the states and foreign investors) [6, p. 78], which in relation to investment disputes gave rise to many doctrinal and practical questions about the relationship between the treaty norms and rules of customary international law in the field of foreign investment protection. Perhaps, the most discussed issues are filling the gaps in international treaties by applying the rules of customary international law and establishing the content of international customs by arbitral tribunals. Unfortunately, these discussions have not yet been properly reflected in the Russian literature, with the exception of a number of publications (see, for example: [7]).

As the arbitrators of the Iran-US Claims Tribunal noted in the *Amoco* case, «the rules of customary law may be useful in order to fill in possible lacunae of the Treaty to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions»[2]. In addition, the rules of customary international law can be applied when there is a reference to such rules in the applicable international treaty, and, theoretically, if such a rule came into existence after the conclusion of the international treaty, and replaced the corresponding treaty norm (so far, no arbitration tribunal has declared such a case) [8, p. 309].

The conducted research shows that when considering investment disputes, arbitral tribunals quite often use the rules of customary international law (usually, at the initiative of the parties to the dispute), applying them as a separate legal basis for their conclusions. The rules of customary international law are applied by the tribunals when considering a wide range of issues (jurisdiction, organization of arbitration proceedings, applicable substantive law and liability issues) [8, p. 310].

This article will address the main issues concerning application of the rules of customary international law by arbitral tribunals in resolving investment disputes.

2.Filling the gaps

A clear example of the use of the rules of customary international law to fill the gaps in applicable international treaties is the frequent references made by arbitral tribunals to Draft Articles on Responsibility of States for Internationally

[1] According to the latest statistics, as of July 1st, 2024, a total of 2,835 bilateral investment agreements have been signed, of which 2,222 have come into effect. Additionally, 462 regional treaties with investment provisions have been concluded, with 388 of these also having come into force. This brings the total number of international investment agreements to nearly 3,300. See: International Investment Agreements Navigator. URL: https://investmentpolicy.unctad.org/international-investment-agreements.

[2] Iran–United States Claims Tribunal (IUSCT). Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited. Partial Award No. 310 of 14 July 1987. P. 48. §112.

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Wrongful Acts of 2001 (hereinafter referred to as the ARSIWA) developed by the International Law Commission (hereinafter referred to as the Commission). The arbitrators needed to explain the reason behind the use of this particular document, taking into account, that the ARSIWA are not an international treaty that has entered into force and is thus became binding, and according to the Commission's plan was intended for use in relations between States, and not in disputes between States and private persons [9, p. 287].

As for the first aspect, arbitrators were usually limited to pointing out that the ARSIWA 'reflect', 'codify', 'state', 'restate', 'formulate', 'articulate', 'represent' or 'are declaratory of' the rules of customary international law [10, p. 101]. Thus, in the case of *Noble Ventures Inc. v.. Romania*, the arbitral tribunal noted, that although the ARSIWA are not binding, they are widely regarded as a codification of existing rules of customary international law on State responsibility[3].

The arbitrators had no trouble justifying the application of the ARSIWA in disputes between the States and private persons. Thus, in the case of *Salini v. Argentina*, the arbitral tribunal concluded, that although the ARSIWA refer only to interstate claims, «similar principles apply to individual claims under international law»[4]. Similarly, the tribunal in *Vestey Group v. Venezuela* pointed out that, that while the ARSIWA «govern a State responsibility vis-à-vis another State and not a private person», it is generally accepted that their key provisions «can be transposed in the context of the investor-State disputes»[5].

As a result of such «normatively unexpected but remarkably uncontroversial practice» [11, p. 620] arbitral tribunals regularly refer to the ARSIWA as a set of international law norms, applicable to disputes between a foreign investor and a State based on international investment agreements [12, p. 381].

Regular reports of the Secretary-General of the United Nations on the use of ARSIWA by international courts and tribunals once again demonstrate that nowadays it is the investment tribunals that are mostly active in this regard compared to other international courts and tribunals. According to researchers' estimates, the share of investment arbitration awards reaches 70% of the total number of decisions cited in the report [10, p. 94]. Only in exceptional cases do arbitral tribunals refuse to apply the ARSIWA, believing that they relate only to relations between the States[6].

However, such widespread use of the ARSIWA by arbitral tribunals has its own peculiarities. Firstly, the arbitrators view the ARSIWA as a document containing wording that is materially identical to the existing rules of customary international law, and not as recommendations of the Commission [10, p. 107–108]. In other words, the arbitrators' reasoning proceeds from the fact that the Commission has already done the relevant work for them, and their task is just to apply the provisions of the ARSIWA as a binding document that does not require additional analysis of the relevant State practice and their *opinio juris*. In addition, the arbitrators treat ARSIWA as the text of the international treaty and apply the relevant rules of interpretation to it, focusing on the object and purpose of the international treaty, the gaps of which need to be eliminated [10, p. 110]. This approach allows arbitrators to interpret the provisions of the ARSIWA with a meaning that may differ significantly from the Commission's original intentions.

For example, since international agreements on the protection of foreign investment usually do not contain provisions on the responsibility of States for violations of their obligations arising from such treaties, arbitral tribunals apply the relevant provisions of the ARSIWA. Thus, modern investment agreements regulate in detail the issues of calculating and paying compensation for expropriation, which is considered a legitimate action of States. However, today a significant part of

[3] Noble Ventures, Inc. v. Romania. ICSID Case No. ARB/01/11. Award of 12 October 2005. §69.

[4] Webuild (formerly Salini Impregilo) v. Argentina. ICSID Case No. ARB/15/39. Decision on Jurisdiction and Admissibility dated 23 February 2018. §87.

[5] Vestey Group Ltd v Bolivarian Republic of Venezuela. ICSID Case No ARB/06/4. Award of 15 April 2016. §326.

[6] Wintershall Aktiengesellschaft v. Argentine Republic. ICSID Case No. ARB/04/14. Award of 8 December 2008. §113.

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investment disputes is not related to the legitimate expropriation of foreign property and the payment of appropriate compensation. On the contrary, investors mostly challenge the actions of the States that violate other obligations arising from international agreements on the protection of foreign investment. At the same time, as a rule, the procedure for calculating and paying compensation by the host State of investments for such illegal actions (see, for example: [13, p. 725–726]) is not provided for in these agreements. In order to close this gap the tribunals needed to find relevant international customs, considering them as a valuable source of applicable legal norms [14, p. 71]. As the tribunal noted in the case *of British Caribbean Bank Limited v. Belize*, in the absence of provisions in the text of the treaty itself [the dispute was about the violation by the respondent State of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 1982] which would set compensation standards as *lex specialis*, the applicable standard of compensation shall be the relevant rules of customary international law[7]. Such standards were found by the tribunal in the judgment of the Permanent Court of International Justice in the Case Concerning the Factory at Chorzów and in Articles 31, 34, 35 of the ARSIWA[8].

Arbitral tribunals use the ARSIWA to decide, in particular, such issues as the attribution of conduct to the respondent State, the circumstances precluding wrongfulness, and the contributory fault of the investor. However, the application by the tribunals of a number of key provisions of the ARSIWA is controversial and far from uniform, especially in such sensitive issues for the States as the methodology for calculating compensation awarded to an investor [15, p. 224] (for an alternative point of view, see, for example: [16, p. 252]) and the need to take into account the contributory fault of the investor when calculating the amount of compensation [17, p. 905].

For example, the Commission ignored the issue of the principles a court or tribunal should follow in the cases where the contributory fault of the investor is established. In fact, the resolution of this matter was left to the international courts and tribunals. The Commission in Article 39 of the ARSIWA limited itself only to the general wording that «in the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State». The practical results of the application by investment tribunals of this broad provision of the ARSIWA were completely unpredictable and contradictory. Thus, in *MTD v. Chile* the arbitral tribunal reduced the amount of compensation by half, since the investor has paid full price up-front for the land, which was considered by the arbitrators as a lack of due diligence[9]. Another example is the scandalous case of YUKOS shareholders, in which the amount of initial compensation set by the arbitrators in the amount of $66.6 billion was reduced by 25% to $50 billion (this amount appeared in subsequent lawsuits and went down in the history of international justice as the largest compensation ever awarded)[10]. The reason for the reduction in the amount of compensation was that the contributory fault of the investor was established by the tribunal[11].

Such inconsistent practice of investment tribunals regarding the contributory fault of the investor caused criticism from the scholars, who as a solution to this problem suggested that these issues should be disclosed in as much detail as possible when concluding new agreements on the protection of foreign investments or making changes to the existing ones [17, p. 901]. When such well-developed treaty norms appear, the tribunals will be forced to apply them as *lex specialis*, and not the rules of customary international law, represented by vague wording of the ARSIWA [12, p. 390].

[7] British Caribbean Bank Limited v. Govern ment of Belize (I). PCA Case No. 2010-18. Award of 19 December 2014. §288.
[8] Ibid. §288–291.
[9] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile. ICSID Case No. ARB/01/7. Award of 25 May 2004. §242, 243.
[10] Yukos Universal Limited (Isle of Man) v. The Russian Federation. PCA Case No. 2005-04/AA227. Award of 18 July 2014. §1827.
[11] Ibid. §1809.

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3.Establishing the content of applicable customary rules of international law

In the view of the ICJ, a party that bases its claims on a rule of customary international law must first prove the existence of this rule[12]. At the same time, the presence of both elements of an international custom (general practice and *opinio juris*) [18, p. 33] can be established in the course of judicial proceedings. However, until a court renders its judgments these elements are nothing more than facts, the existence of which must be proved by the party most interested in it [19, p. 33]. As one of the judges of the ICJ noted in his dissenting opinion, «to decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances»[13].

The main difficulty in application of the rules of customary international law during the resolution of the dispute lies in establishing the exact content of the rule. Researchers have reached the consensus that the process of creation and evolution of customary rules of international investment law does not differ from other branches of international law [20, p. 691]. At the same time, the latest practice of arbitral tribunals shows that in the majority of cases arbitrators are not inclined to analyze the issues of the presence or absence of consistent State practice as the first constituent element of the rule of customary international law [3, p. 20]. Instead, they, rather, rely on conclusions about the existence of a rule of customary international law made earlier by other international courts and tribunals, or researchers [3, p. 20]. Arbitrators usually base their arguments about the existence of a particular rule of customary international law, as well as its content, on the decisions of the ICJ, the PCIJ, or other arbitral tribunals, and also provide references to international treaties, documents of the International Law Commission and the positions of scholars [8, p. 311]. In some cases arbitrators do not provide any evidence of the existence of the relevant practice when declaring the existence of a rule of customary international law[14], although it is the practice that remains a necessary condition for establishing the existence of a rule of customary international law and determining its content [21, p. 46].

One could refer, for example, to the above-mentioned judgment of the PCIJ in the Case Concerning the Factory at Chorzów, in which the principle of full reparation was outlined[15]. This judgment remains relevant in the doctrine (see, for example, [22]) and is perceived by many investment tribunals as a kind of textualization of the relevant rule of customary international law and is, perhaps, the most cited judgment of all the decisions of the PCIJ and the ICJ. Back in 1987, the Iran-US Claims Tribunal noted that despite the fact that 60 years have passed since this judgment has been rendered, it is regarded by the States as the most authoritative formulation of the principle of full reparation for committing internationally wrongful acts. However, according to researchers' estimates, arbitral tribunals often choose the shortest route and immediately proceed to calculating compensation, indicating that the calculation process is carried out in accordance with the principles established in the judgment of the PCIJ in the Case Concerning the Factory at Chorzów [9, p. 288].

4.Unresolved doctrinal issues

4.1. Issues of the priority and interaction of treaty norms and customary rules of international investment law

Regarding the interaction between the provisions of an applicable international treaty and a rule of customary international law the arbitral

[12] ICJ. Asylum (Colombia/Peru). Judgment of 20 November 1950 // I.C.J. Reports 1950. P. 276.

[13] ICJ. North Sea Continental Shelf (Federal Republic of Germany/Netherlands). Judgment of 20 February 1969. Dissenting Opinion of Judge Tanaka // I.C.J. Reports 1969. P. 175.

[14] Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe. ICSID Case No. ARB/05/6. Award of 22 April 2009. §115.

[15] PCIJ. Case Concerning the Factory at Chorzów (Germany v. Poland). Judgment of 13 September 1928 // PCIJ Series A. No. 17. P. 27.

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tribunal in the *Enron* case in its assessment of the term «necessity» noted that:

«a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. Had this been the case here the Tribunal would have started out its considerations on the basis of the Treaty provision and would have resorted to the Articles on State Responsibility only as a supplementary means. But the problem is that the Treaty itself did not deal with these elements. The Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned[16]».

In other words, provisions of an international investment treaty are always considered *lex specialis* and should take precedence over more general rules of customary international law.

At the beginning of the XXI century a theory was put forward that substantive provisions of numerous bilateral and multilateral agreements on the protection of foreign investment, to which almost all States have become parties, represent the rules of customary international law binding even for the States not participating in these treaties [23, p. 77]. This concept has been criticized in the doctrine (see, for example, [24, p. 701]) and was finally removed from the agenda by the ICJ judgment in the *Diallo* case. As the ICJ noted in this judgment, «the fact… that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection… is not sufficient to show that there has been a change in the customary rules of diplomatic protection[17]».

4.2. Possibility for the investors to file claims based solely on the rules of customary international law

Previously, the possibility for the investors to file claims based solely on the rules of customary international law seemed purely doctrinal. However, theoretically, there are some instances in which filing of such claims is possible. For example, in the situation when an applicable investment treaty provides less rights and guarantees to the investor than the rules of customary international law, or if such rights and guarantees are completely absent in the treaty [25, p. 435]. In addition, if the protection provided by an investment treaty begins to produce its effect from the moment that treaty enters into force, an investor may attempt to resolve a dispute with a host State on the basis of customary international law, if such dispute arose before that treaty entered into force. Finally, the rules of customary international law can be used by an investor in the absence of the treaty norms applicable to a dispute [25, p. 436].

Thus, in several disputes resolved by the ICSID arbitral tribunals investors filed the claims based on the rules of customary international law, in addition to the claims based on international treaties or investment contracts[18]. Unfortunately, in all three disputes the case was dismissed at the jurisdictional stage, and the arbitrators did not reach the stage of analysis and application of the rules of customary international law to the merits of the disputes. However, as noted in the literature, such an approach of investors to the formulation of claims gives grounds to assume that soon there will be claims based only on the rules of customary international law, including the customs that go far beyond the limits of international investment law [25, p. 456].

5.Conclusion

Despite the fact that the norms of international investment agreements are the main applicable law in resolving most investment disputes, at the beginning of the XXI century growing interest of the parties and arbitral tribunals in the rules of

[16] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic. ICSID Case No. ARB/01/3. Award of 22 May 2007. §334.

[17] ICJ. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo). Judgment of 24 May 2007 // I.C.J. Reports 2007. P. 615. §90.

[18] Cambodia Power Company v. Kingdom of Cambodia. ICSID Case No. ARB/09/18. Decision on Jurisdiction of 22 March 2011; Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary. ICSID Case No. ARB/12/3. Decision on Respondent's Objection under Arbitration Rule 41(5) of 16 January 2013; Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary. ICSID Case No. ARB/12/2. Award of 16 April 2014.

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customary international law became apparent. This has raised doctrinal and practical questions about the relationship between the treaty norms and the rules of customary international law in the field of foreign investment protection. The most discussed issues were filling the gaps in international treaties through the application of the rules of customary international law and establishing the content of the rules applied by arbitral tribunals.

The practice of resolution of investment disputes shows that arbitral tribunals constantly use the rules of customary international law. Moreover, arbitrators often apply the rules of customary international law as a separate legal basis for their conclusions.

As current practice shows, in most cases arbitrators are not inclined to consider the existence or absence of State practice or *opinio juris*, instead relying on the conclusions about the existence of the rule of customary international law made earlier by the ICJ, the PCIJ and other arbitral tribunals, as well as on international treaties, documents of the International Law Commission and the doctrine.

An example of the use of customary international law in investment disputes for filling the gaps in applicable international treaties is the reference by the arbitral tribunals to the ARSIWA as a document that codifies the existing rules of customary international law on State responsibility. However, arbitrators consider the ARSIWA to be a document that contains wording identical in content to the existing rules of customary international law. This leads to the automatic application by arbitral tribunals of the provisions of the ARSIWA to the facts of the case before them, without analyzing State practice. Still, the application by arbitral tribunals of the provisions of the ARSIWA appears inconsistent, especially in matters that are sensitive to the States, such as calculation of compensation awarded to an investor and consideration of the contributory fault of the investor.

In addition, creativity of the investors suggests the possibility of new claims based solely on the rules of customary international law, rather than on the provisions of international agreements on the protection of foreign investment.

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