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Custom and Its Interpretation in International Investment Law

Final Musings

PANOS MERKOURIS, ANDREAS KULICK,
JOSÉ MANUEL ÁLVAREZ-ZARATE AND
MACIEJ ŻENKIEWICZ*

1 The Continued Relevance of Custom in International Investment Law

At first glance, one may think of international investment law (IIL) as a response to custom (or lack thereof), instead of a field of its application. Indeed, modern IIL and arbitration arguably have developed in order to fill the void provoked by the challenges to the Hull formula and other custom regarding the treatment of aliens, especially post-1945 and, most notably, through the New International Economic Order (NIEO). Hence, one may be inclined to wonder whether an inquiry into the relationship of custom and IIL, as this edited volume intends, represents a rather skewed or anachronistic choice of topic.

However, in fact, the opposite is the case. Looking at the practice of international investment tribunals as well as the central discussions in international legal scholarship, general international law and most of all customary international law (CIL) is pervasive, if not to say ubiquitous. The interpretation and application of customary rules and principles is the bread and butter of IIL and arbitration. Interpretation, termination or provisional application of treaties, attribution of conduct, circumstances precluding wrongfulness or reparation and other remedies are but a few examples of how CIL permeates the IIL and arbitration. Custom is of pivotal importance in nearly every single investment dispute. Even beyond

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customary treaty law and the rules of State responsibility, the recourse to and discussion of standards and principles such as the international minimum standard of treatment (MST), *inter alia*, is a frequent sight in investment arbitration practice. In the following few pages, we offer some final musings on key themes that permeate and connect not only the contributions in this volume but the general engagement both in academia and in practice with international investment law and CIL.

2 Musings on Custom and International Investment Law

Despite the preponderance of academic and jurisprudential focus on the identification of CIL through the classical two-element approach, *ie* State practice and *opinio juris*, with all the associated problems that this approach and its misapplication entails,¹ there is also the oft-neglected aspect of the *interpretation* of customary rules. Even the International Law Commission (ILC) itself, in its 2018 Draft Conclusions on Identification of Customary International Law, accepted the reality of the distinction between the existence of a customary rule and its content determination,² although it decided to leave this and the concept of change and evolution of customary rules from the scope of its work.³ In other topics being considered by the ILC at the same time, as, for instance, on *jus cogens* and on immunities of State officials from foreign criminal jurisdiction, the inevitability and utility of CIL interpretation has also found its way more explicitly in the reports of Special Rapporteurs, the Draft Conclusions and the corresponding commentaries.⁴

It is not just in the expert works of the ILC that interpretation of customary rules can be spotted. Quite the contrary. International and

¹ See contributions by Dumberry (Chapter 1), El Boudouhi (Chapter 2), Mejia-Lemos (Chapter 3) and Álvarez-Zarate (Chapter 4) in this volume.

² ILC, 'Report of the International Law Commission on the Work of its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 124 [4]. The Netherlands made this distinction more forcefully in its comments to the Draft Conclusions; The Netherlands, 'ILC Draft Conclusions on Identification of Customary International Law – Comments and Observations by the Kingdom of the Netherlands' (2018) 1, [5] <https://legal.un.org/ilc/sessions/70/pdfs/english/icil_netherlands.pdf> accessed 1 August 2022.

³ ILC (n 2) 122–4.

⁴ ILC, 'Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur' (14 June 2016) UN Doc A/CN.4/701 [136 & 150]; ILC, 'Peremptory Norms of General International Law (*jus cogens*): Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading' (29 May 2019) UN Doc A/CN.4/L.936, Draft Conclusion 20 [10(3) & 17(2)].

domestic jurisprudence is replete with such examples.⁵ CIL interpretation by international courts and tribunals is ubiquitous across all regimes of international law. Such interpretation contributes not only to the refinement, clarification of the content of the customary rule (the ‘collapsing function’ of CIL interpretation), but also, on occasion and depending on the circumstances, to its evolution (the ‘evolutive function’ of CIL interpretation).⁶

IIL could not possibly be an exception to this pattern. As the various contributions of this edited volume⁷ aptly and amply demonstrate several sub-sets of rules on State responsibility and the law of treaties raise intriguing points as to the manner in which, and the variety of methods employed by investment arbitration tribunals when they interpret and apply these customary rules. Irrespective of whether this variation can be unequivocally distilled in certain patterns, or is sometimes the unfortunate result of incorrect and uninformed interpretations and applications of CIL, what is indisputable is that the identification scheme of focusing solely on State practice and *opinio juris* is woefully incapable of making sense of the multifariousness of tools and methods employed by these courts and tribunals. Contrarily, if one views these through the prism of interpretation, one can clearly see familiar patterns.

The same holds true for the ‘evolutive function’ of the interpretation of CIL as evinced by the contributions in Part III of this volume.⁸ Evolutive interpretation allows rules to breathe and grow like a ‘living tree’ that reacts to changes in fact and in law, and adapts to new challenges and new factual situations. The same flexibility, which ensures the continued relevance of the rule, can also be seen in the case of CIL. To add to this, this ‘evolutive function’ combined with the ‘collapsing function’ of interpretation may allow the use of interpretation as a tool that can help if not course-correct, or at least address and partially mitigate some of the

⁵ For detailed examples and the particular methods of interpretation used, see P Merkouris, *Interpretation of Customary International Law: of Methods and Limits* (Brill 2023).

⁶ That is, of course, not to say that these two functions of CIL interpretation are completely separate and distinct from each other, but as in treaty interpretation they overlap. In more detail, see: P Merkouris & N Mileva, ‘ESIL Reflection – Introduction to the Series “Customary Law Interpretation as a Tool”’ (2022) 11(1) ESIL Reflections 1 <<https://esil-sedi.eu/wp-content/uploads/2022/08/ESIL-Reflection-Merkouris-Mileva.pdf>> last accessed 24 June 2023.

⁷ See, in particular, Lekkas (Chapter 5), Ventouratou (Chapter 6), Paddeu (Chapter 7), Giakoumakis (Chapter 8) and Kulaga (Chapter 9) in this volume.

⁸ Hailes (Chapter 10), Mallya (Chapter 11) and Balcerzak (Chapter 12) in this volume.

warranted criticisms that have been levelled, among others by the Third World Approaches to International Law (TWAAIL) movement, against the formation of CIL.⁹

That is not to say, of course, that interpretation is a panacea or a *deus ex machina* that can solve everything that has been and is wrong with IIL, and international law in general. If anything, it is less of a *deus* and more of a ghost in the machine or in the shell,¹⁰ which can contribute to the rule being more attune to the current pulse of the society.

In this context and as already mentioned, any discourse on IIL cannot but engage with critical theories on international law, and most notably, the perspective and insight offered by the intellectual movement of TWAAIL. This is a point that deserves further attention. Colonialism and imperialism have been central in the discussion among scholars and States for their opposing interests in political, cultural and legal matters¹¹ with former colonies and their former rulers. Legal and subaltern studies from the UK, India, the United States and Latin America,¹² have coincided in questioning Western universalism versus particularism. This refers to whether colonialism and its civilising mission still has effects on an inclusion-exclusion discourse.¹³ Yet, in the construction of a modern global society, where the world system rests, it has been claimed that ‘Third World’ voices have not been heard, or have been ignored or relegated.¹⁴ In the case of CIL in Investment Law, it is crucial to clarify, bolster

⁹ Mileva (Chapter 13) in this volume.

¹⁰ For ‘ghost in the machine’, see A Koestler, *Ghost in the Machine* (Macmillan 1967), and even earlier, G Ryle, *The Concept of Mind* (Hutcheson 1949); for ‘ghost in the shell’, see M Oshii, ‘Ghost in the Shell’ (Shochiku 1995).

¹¹ M Koskenniemi, *The Gentle Civilizer: The Rise and Fall of International Law 1870–1960* (CUP 2001); A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004)

¹² See, eg E Said, *Orientalism* (Random House Inc 1978); R Guha & G Spivak, *Selected Subaltern Studies* (OUP 1988). See also authors such as: H Bhabha (from the US) and W Mignolo, E Dussel and E Quijano (from Latin America).

¹³ Koskenniemi (n 11) 130 (‘exclusion in terms of a cultural argument about the otherness of the non-European that made it impossible to extend European rights to the native’); Anghie (n 11) 3–4 (‘“Third World” sovereignty appeared quite distinctive as compared with the defining Western sovereignty ... [where] the civilizing mission, the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, underdeveloped people of the non-European world by incorporating them into the universal civilization of Europe’).

¹⁴ E Said, *Orientalism* (25th anniversary edn, Penguin 2003) Preface; (‘In the process the uncountable sediments of history, a dizzying variety of peoples, languages, experiences, and cultures, are swept aside or ignored, relegated to the sandheap along with the treasures ground into meaningless fragments that were taken out of Baghdad’).

and/or create means to compel the system to listen to the said voices and not to repeat the mistakes of the past. This would result in more legitimate outcomes in the identification and interpretation of the CIL rule.

TWAIL might be placed and understood as part of a wider set of scholarly writings that has adopted some of its concepts from the discussions on post-colonial critical theory. It is characterised by a pattern of continuity in the use of power in the construction of international law and investment law. However, over time, one might see different reactions to imperialism from former colonies and regions. On the one hand, since the revolutionary wars of independence, former Latin-American colonies endorsed the posture on international law. For instance, in 1832, Andrés Bello claimed that local law applied to foreigners who should be protected or judged in local courts and given national treatment in such courts.¹⁵ This was resurrected by Carlos Calvo, in 1863, who laid it on the international discussion table with the US and European States. Later, in 1902, Luis M Drago opposed the use of force by western powers to claim foreign debts.¹⁶ On the other hand, in the mid-twentieth century, newly decolonised States from Africa and Asia made other claims to the international community, including that of a NIEO, and confirming/establishing permanent sovereignty over their natural resources to promote development.¹⁷ Mohammed Bedjaoui stands out as one of its prominent pioneers.¹⁸ Together with Latin American countries, which supported these positions as ‘Third World’, their interests in reversing colonialism were placed on the international agenda and even were recognised in international instruments.¹⁹ This despite opposition by the Global North that promoted a swift treatification of investment protection.

Thus, the confrontation between the Global North and the Third World has not been successful in including the aforementioned interests in formal treaties. If TWAIL’s claims are to be integrated into the formal system of international law, a constructive discussion of the interpretation of customary international investment law is required. Accordingly, Mileva’s²⁰

¹⁵ A Bello, *Principios de Derecho de Gentes* (2nd edn, Printing Press Bruneau 1840) 63, 67, 70–1, 76 & 89.

¹⁶ See Mileva (Chapter 13) in this volume.

¹⁷ Angie (n 11) 211.

¹⁸ M Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979).

¹⁹ The NIEO was addressed in the UN through the Declaration on the Establishment of a New International Economic Order (UNGA Res 3201/1974) and with the Charter of Economic Rights and Duties of States (UNGA Res 3281/1974).

²⁰ Mileva (Chapter 13) in this volume.

proposal of including TWAIL's legal arguments in such discussions, within the existing system might be one option. This may help in avoiding throwing the baby out with the bathwater, ie achieving legitimate change without dismissing the formal structures of international law. In other words, based on the constructive/'collapsing' and evolutive functions of interpretation of CIL²¹ new developments of both fact and law would be taken into account in the interpretation of existing customary norms, and thus, 'Third World' States' interests would be more fairly represented in the content determination of these norms.²²

An additional point of entry of TWAIL considerations in IIL could be through the inclusion of clauses in investment treaties that would provide clarity on the policy space recognised by States regarding, for example, the protection of the environment. This should set a different context for arbitrators to decide differently from the norm on the content of the MST if the said policy space clause was not included in the treaty. The MST clause has been considered a CIL rule that was included in bilateral investment treaties, in the midst of the twentieth century.²³ At the time, environmental or development provisions did not manifest in such treaties. Environmental clauses have been included in second generation treaties and BIT models.²⁴ Tribunals' decisions based on such second-generation treaties should take into account the new legal developments when interpreting the customary MST provision. After all, they have the responsibility to maintain 'a "methodological honesty" in their development of arguments concerning the content and purpose of²⁵ these rules.

However, one can still find examples in investment arbitration that surprisingly both from a methodological and an outcome perspective, seem to lean in a different direction, as in the case of *Eco Oro Minerals Corp v Colombia*²⁶ where the interpretation of the MST did not consider the

²¹ Merkouris & Mileva (n 6).

²² An example of this would be, for instance, taking into account the Third World States' interests on sustainable development.

²³ See on that subject: M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013); P Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013) 13–46; JM Álvarez-Zarate & DM Beltran Vargas, 'El derecho consuetudinario en el derecho internacional de inversiones' in JM Álvarez-Zarate & M Żenkiewicz (eds) *El derecho internacional de las inversiones* (Universidad Externado de Colombia 2021) 63–4.

²⁴ Eg Canada-Colombia Free Trade Agreement (Canada & Colombia) (adopted 21 November 2008, entered into force 15 August 2011).

²⁵ Mileva (Chapter 13) in this volume.

²⁶ *Eco Oro Minerals Corp v Colombia* (Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021) ICSID Case No ARB/16/41.

environmental exception of Article 2201(3).²⁷ This led to the State being found responsible for breaching the treaty. The investor claimed that Colombia had breached Article 805 'relating to the customary international law minimum standard of treatment of aliens, including fair and equitable treatment'.²⁸ The Tribunal said that under CIL the MST had evolved 'as indeed international customary law itself evolves'.²⁹ However, it disregarded that environmental protection would take precedence, as investment protection and environmental protection 'must co-exist in a mutually beneficial manner'.³⁰

Eco Oro Minerals Corp v Colombia demonstrates that arbitral tribunals may, on occasion, resist an evolutive interpretation when this would favour the State. This, in the case of investment law, may be further accentuated by the fact that arbitral tribunals more frequently base their decisions on previous cases where the BIT did not have environmental or human rights provisions.³¹ That is not to say that an evolutive interpretation should always be opted for. Far from it. However, arbitral tribunals such as in the case of *Eco Oro Minerals Corp v Colombia* should be cognisant and vigilant of the relevant standards and the way the normative context in which the rule operates may have changed, and adapt accordingly. Disregarding such changes might need the development of an education strategy to avoid costly outcomes that are also at dissonance with the contemporary international legal system and society in general.

A need for an improvement in the methodology and reasoning employed by investment tribunals can also be felt in the context of 'secondary rules'. While the terminology is not fully consistently applied in

²⁷ Article 2201(3) of the Treaty provides as follows: '(3) For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;
- (b) To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
- (c) For the conservation of living or non-living exhaustible natural resources.'

²⁸ *Eco Oro Minerals Corp v Colombia* [383].

²⁹ *ibid* [744].

³⁰ *ibid* [744, 748 & 828].

³¹ W Alschner, *Investment Arbitration and State-Driven Reform, New Treaties, Old Outcomes* (OUP 2022) 6–8.

international legal scholarship, ‘secondary rules’ usually are considered to constitute those rules that are ‘rules about rules’:³² the ‘common grammar’³³ of international law that determines how primary rules, ie international rights and obligations, are to be established, interpreted, applied or what are the conditions and consequences of breaches of international obligations.³⁴ The law on the international responsibility of States constitutes an integral part of those secondary rules of international law. It is of a customary nature only, not enshrined in an international treaty, and features prominently in IIL and arbitration, as the contributions in Part II of this volume attest.

In a recent study, undertaken at the event of the Articles on the Responsibility of States for Internationally Wrongful Acts’ (ARSIWA) 20th anniversary and published as part of a symposium in a special double issue in Vol 37 of the ICSID Review, Esmé Shirlow and Kabir Duggal count no less than 136 arbitral awards and decisions that refer to the ARSIWA for the period of 2011–2020 alone, with 219 overall in the 20-year span from 2001–2020.³⁵ As the late James Crawford noted in his 10th anniversary review in the same journal in 2011, the ARSIWA are ‘considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility’.³⁶ In a similar vein, according to Hobér, ‘there is general consensus that the ILC Articles accurately reflect customary international law on state responsibility’.³⁷ Investment arbitration tribunals also routinely stress that the ARSIWA are ‘widely regarded as a codification of customary international law’³⁸ and that they have been applied as ‘declaratory of customary international law’.³⁹ However, not all of the ARSIWA have accrued to

³² cf HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 94.

³³ PM Dupuy, ‘A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law’ (2007) 1 EJLS 1, 4.

³⁴ cf J Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law* (CUP 2003) 159 (they ‘regulate other norms, that is they may address the creation, application, interplay, suspension, termination, breach of enforcement of other norms of international law’).

³⁵ E Shirlow & K Duggal, ‘Special Issue on 20th Anniversary of ARSIWA: The ILC Articles on State Responsibility in Investment Treaty Arbitration’ (2022) 37 ICSID Rev 378, 380, Figure 1.

³⁶ J Crawford, *State Responsibility: The General Part* (1st edn, CUP 2013) 43.

³⁷ K Hobér, ‘State Responsibility and Attribution’ in P Muchlinski, F Ortino & C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 549, 553.

³⁸ *Noble Ventures Inc v Romania* (Award of 12 October 2005) ICSID Case No ARB/01/11 [69].

³⁹ *EDF (Services) Ltd v Romania* (Award of 8 October 2009) ICSID Case No ARB/05/13 [187].

custom. Their customary nature needs to be established individually and carefully in each instance – a task in which investment tribunals have only partly succeeded.⁴⁰

Among the plethora of issues arising from the interaction of the customary rules on State responsibility with IIL in general and addressed in or inspired by the contributions in this volume in particular, two stand out in particular. First, as the contributions in this volume acknowledge,⁴¹ identification of custom is one thing, the interpretation of a customary norm quite another.⁴² In the case of State responsibility, the peculiarity exists that most other customary rules, whether of a primary or secondary nature, do not feature in a written document. Custom is an unwritten source of international law. Sometimes, it might find expression in a written text, which at the same time usually constitutes a primary source of international law in its own right, ie a treaty – with most of the Vienna Convention on the Law of Treaties (VCLT) arguably the most prominent case in point. Alas, the ARSIWA are a written text, but not a treaty. However, the draft articles the ILC submitted to the UN General Assembly, which unanimously accepted them, very much have the looks of a treaty text. This may be one of the reasons why, as several of the contributions confirm,⁴³ many investment tribunals appear to treat the ARSIWA very similarly to a treaty, seemingly also applying interpretation rules similar to Articles 31 and 32 VCLT to the ARSIWA. A bit like Andri, the protagonist in Max Frisch's play *Andorra*,⁴⁴ the ILC Articles, by repeatedly being attributed a different identity, somewhat assume such new identity. Arguably, such attribution to one thing of something else until it becomes this other thing is the very essence of custom: this is at least how a new rule of custom emerges – if the breach of a rule is repeated long enough and 'accepted as law', such breach becomes the new customary rule. However, a lacklustre treatment as quasi-treaty is hardly conducive to apt application of interpretive rules to something that is manifestly not a treaty.

⁴⁰ Positive example: *Cargill, Inc v Mexico* (Award of 18 September 2009) ICSID Case No ARB(AF)/05/2 (NAFTA) [381]; negative example: *MCI Power Group LC & New Turbine, Inc v Republic of Ecuador* (Award of 31 July 2007) ICSID Case No ARB/03/6 [42].

⁴¹ Eg Lekkas (Chapter 5) in this volume.

⁴² On the specifics of the distinction and its implications and consequences, see P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 126.

⁴³ cf, eg Lekkas (Chapter 5), Paddeu (Chapter 7) and Giakoumakis (Chapter 8) in this volume.

⁴⁴ M Frisch, *Andorra* (P Hutchison tr, Routledge 1994).

Second, as evinced by several of the pieces in this volume,⁴⁵ the reasoning of arbitration tribunals on both identification and interpretation of the customary rules of State responsibility has room for improvement. As, for example, Federica I Paddeu illustrates in her contribution on compensation in cases of necessity, tribunals have often merely asserted the existence of a customary rule, without undertaking much effort to support such assertion with reasoning and evidence, while others tend to make doubtful deductions.⁴⁶ As mentioned before, these defects are not an outlier. No doubt, investment tribunals are not alone in their oftentimes rather questionable approach to custom identification or interpretation, as Talmon so aptly demonstrated vis-à-vis the determination of customary rules by the International Court of Justice (ICJ).⁴⁷ However, even given their, sometimes, limited interest in coherence and consistency of method, possibly due to their nature as *ad hoc* tribunals and the limited grounds of annulment under Article 52 of the ICSID Convention, investment tribunals' practice also could do better in this regard.

3 Concluding Thoughts

Despite the undeniable 'treatification' of IIL,⁴⁸ that should not lead one to the erroneous assumption that, as a direct consequence of this, other sources of law and custom, in particular, become gradually and increasingly more irrelevant in this particular field of international law. Contrarily, customary rules remain of fundamental importance in what has been called 'the age of treatification of international investment law'.⁴⁹ This holds true on more than one levels: (i) with respect to both the customary primary rules specific to IIL and the customary secondary rules; and (ii) with respect to the stage of its identification as it does also to the stage of its interpretation. Furthermore, custom, both in its primary rule and secondary rule incarnation, potentially will even grow further in its importance to IIL and arbitration, considering the seemingly increasing

⁴⁵ cf Lekkas (Chapter 5), Ventouratou (Chapter 6), Paddeu (Chapter 7) and Giakoumakis (Chapter 8) in this volume.

⁴⁶ cf Paddeu (Chapter 7) in this volume.

⁴⁷ cf S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 434 et seq.

⁴⁸ JW Salacuse, 'The Treatification of International Investment Law' (2007) 13(1) Law & Bus Rev Am 155.

⁴⁹ P Dumberry, 'A Few Observations on the Remaining Fundamental Importance of Customary Rules in the Age of Treatification of International Investment Law' (2016) 34(1) ASA Bulletin 41.

trend of what may be dubbed if not a 'de-treatification' then at least a decrease in the number of treaties (or treaty ratifications) relating to IIL.⁵⁰

Even with the justified criticisms about false narratives and the creation of custom being a reflection of prior and current power structures, the study of custom and its function across all stages of its life-cycle has a lot to yield. Both these criticisms and the general academic inquiries into the lacunae of custom (at the identification as well as the interpretation/content-determination stages) contribute to the gradual refinement of our understanding of how custom works, how it is used, what gaps it has and how it can adapt to modern challenges and new circumstances.

The contributions to the present edited volume have hopefully given the reader a peek into the inner workings and continued relevance of custom and its interpretation in IIL, highlighted that the study of custom has still a lot of mysteries to yield and demonstrated that custom and international investment law go hand in hand, entangled in a never-ending dance. And since these are 'final musings', as the etymology of the name of the Muse of dancing, Terpsichore, reveals there is 'delight [to be found] in [such] dancing'!

⁵⁰ Eg the termination of bilateral investment treaties, in intra-EU constellations and beyond, of the ICSID Convention.