Analysis on customary international law

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Abstract

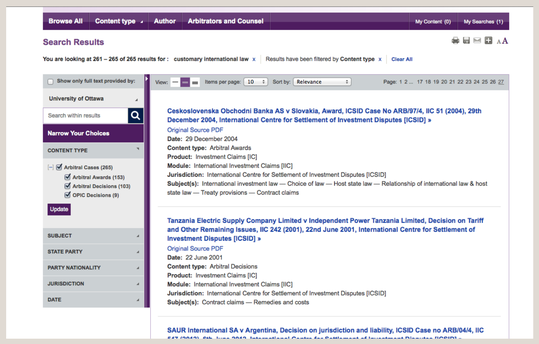
- This research aims to determine if the "fair and equitable treatment" is established as a customary internal law, and therefore a legally binding obligation for the host States to provide to foreign investors' investments.
- **The conditions required to prove and establish the existence of an international custom law obligation are the presence of a constant and uniform practice of States and the perception on the part of States that this behaviour is binding in international law (*opinio juris*).**
- My purpose in this research is to analyze the awards (cases) given by arbitral tribunals in order to analyse whether the tribunals actually recognized and applied the definition of customary international law while giving out their decisions and thus, see if there is a precedent.

Introduction

- The relevance of this research question holds great political and legal implications. Indeed, if the "fair and equitable treatment" is established as a customary international law, this will entail a legally binding obligation for the host State to provide a set of protection to foreign investors' investments.
- Foreign investment constitutes a significant factor in a State's prosperity and development, more particularly so, for developing countries. Without some sorts of protection for the investments, investors are reluctant to take the risk to invest in a legally and politically turbulent foreign State.
- Indeed, an investor's decision to make an investment abroad depends on a secure and stable environment in the host country. However, in general, international arbitral tribunals have not conducted an in-depth analysis to see if the obligation of fair and equitable treatment constitutes a customary intentional law.
- In consideration of the important repercussions it will have on investment practice, the present projects aims to review arbitral awards to see if "fair and equitable treatment" constitutes a customary international law.

Methodology

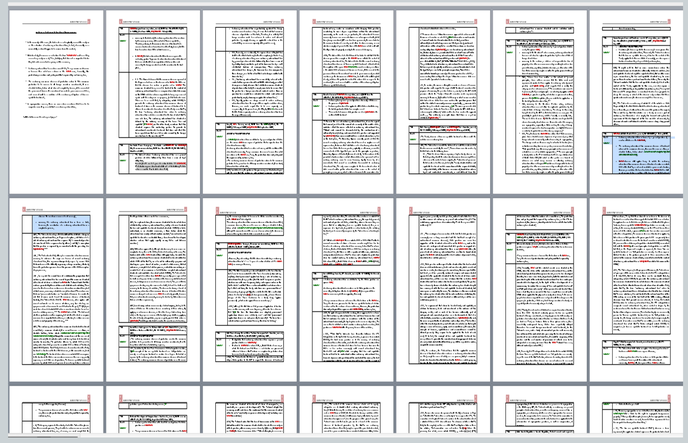
- I went to the specialised database called "Investment Claims". Then, I refined my search in the data box, for only awards that have the term "*customary international law*" and "*opinion juris*" on them.



- Afterwards, I went thru all the awards individually to see in what context they applied these notions and analyse their interpretation. More precisely, for each case, I did a summary in a table.
- No other materials were used besides that.

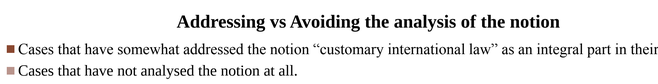
Results

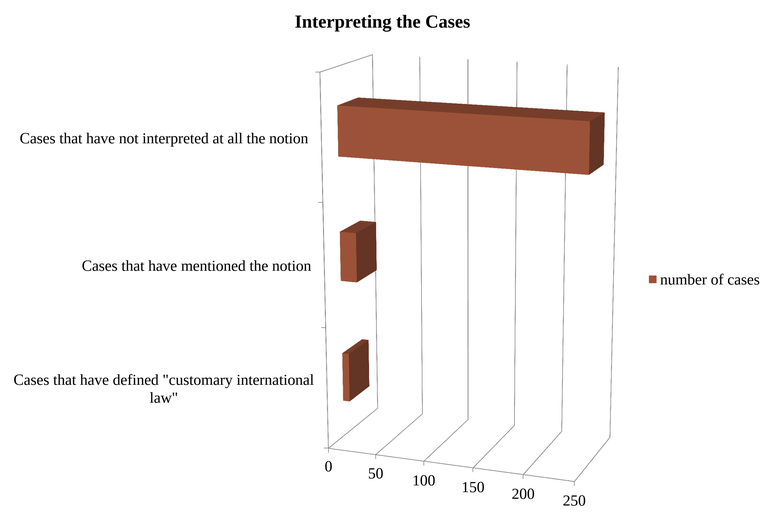
- In the majority of the cases, the tribunals do not explicitly conduct the analysis on the definition of customary international law. In fact, it is mostly done incidentally or it just happen to be derived from the context.
- Unfortunately, the awards do not define the term "*opinio juris*" neither do they conduct any analysis on it. Thus, testifying that it is not an important factor they take into account when giving out the decisions.
- Customary internal law has evolved since 1920s. Today's minimum standard is broader than what was defined in the *Neer's* case. Currently, the protection given does not go beyond that required by customary law.
- **The customary minimum standard of protection refers to "the minimum protection to be assured to all foreign investors' investments. It is an absolute bottom, below which it is not acceptable. Indeed, if the conduct of the government toward the investment amounts to gross misconduct then, such conduct will be a violation of the customary obligation of fair and equitable treatment."**
- In **265** cases, **only 17** cases somewhat addressed the notion "customary international law" as an integral part in their judgment.
- **Only 7** cases from these **265** decisions, explicitly defined the term "customary international law".

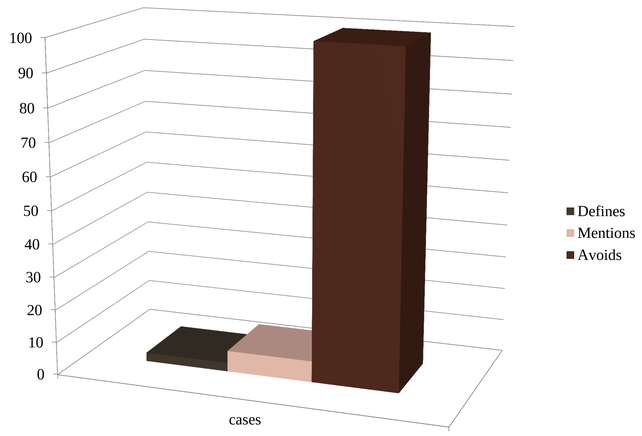


Conclusion

- The results support my hypothesis. Indeed "fair and equitable treatment" does not constitute a customary international law.
- The results are extremely insightful because it demonstrated the lack of analysis conducted by the tribunals on the definition of "customary international law" and "*opinion juris*"







*Visual representations of the importance of "customary international law" given in the cases**

References, Acknowledgements & Contact info

Citing my source: http://oxia.ouplaw.com/home/ic [Investment Claims database]

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Thanks for attending this year's symposium