

**INVESTMENT PROTECTION RIGHTS:
SUBSTANTIVE OR PROCEDURAL?**

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I. INTRODUCTION

Recent investment arbitration cases have issued split decisions on a subtle yet consequential issue: the nature of the rights of investors under investment treaties. And the split extends not only to the outcome of the cases, but within tribunals.¹ I wish to add to the debate by sharing some thoughts on the matter (§III) not before summarizing the split (§II).

II. THE SPLIT

The Mexican fructose saga is important in many ways. Not only is it the most important investment arbitration case Mexico has been a party to, it is also part of a larger, sensitive and politically charged problem between parties to the North American Free Trade Agreement (“*NAFTA*”). Hence, the arbitrations deriving therefrom are bound to produce important case law on international investment law and State responsibility. Moreover, they promise to test the resolve with which *NAFTA* members are committed to the international Rule of Law.

Recently, two ICSID (Additional Facility) tribunals issued awards addressing *inter alia* the nature of investors’ rights under investment treaties. Interestingly, while analyzing the same facts, legal claims and arguments, both tribunals came to opposite conclusions on one topic: the nature of the rights in question. To compound the difference, minority opinions existed on the same point.

Considering the outcome of both cases, three points of view are extant:

1. Investors’ rights under investment treaties are merely procedural;
2. Investors’ rights under investment treaties are substantive as well as procedural;
and

¹ All cases thus far made public displayed minority positions and separate opinions.

3. Irrespective of how investors' rights are characterized, investor rights remain unaffected by countermeasures.

I shall summarize the rationale as posited in the cases to provide the reader a framework for comments to follow.

A. INVESTOR RIGHTS ARE MERELY PROCEDURAL

In *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v The United Mexican States*² (“**ADM v Mexico**”) the Tribunal held that investors' rights are *procedural* only. NAFTA Chapter XI sets forth substantive obligations that remain inter-State, without accruing individual rights for investors.³ In the Tribunals' words:

... the proper interpretation of the NAFTA does not substantiate that investors have individual rights as alleged by the Claimants. Nor is the nature of investors' rights under Chapter Eleven comparable with the protections conferred by human rights treaties ... the fundamental difference between Chapter Eleven of the NAFTA and human rights treaties in this regard is, besides a procedural right of action under Section B, that Chapter Eleven does not provide individual substantive rights for investors, but rather complements the promotion and protection standards of the rules regarding the protection of aliens under customary international law.⁴

...

the obligations under Section A remain inter-State...⁵

Chief in the tribunals' reasoning was that the literal-wording approach advocated by claimants did not provide sufficient evidence to sustain the direct-rights theory.⁶ Also, the intervention right under NAFTA (article 1128) furthers the view that investors do not enjoy individual substantive rights under NAFTA Chapter XI. Rights under Section A

² ICSID Case No. ARB(AF)/04/05, award of 21 November 2007.

³ Id. at para 168.

⁴ Id. at para 171.

⁵ Id. at para 173.

⁶ Id. at para 175.

remain inter-State.⁷ Examples of positions taken by NAFTA parties in prior cases were cited to such effect.

The *ADM* Tribunal considered that investors were “secondary right holders”; beneficiaries of the obligations stemming from the “primary obligations” under Section A of NAFTA Chapter XI. In the Tribunal’s words:

... the rights provided by Section A only exist at the international plane between the NAFTA Parties. Investors are the objects or mere beneficiaries of those rights. Accordingly, under Chapter Eleven, the Member States have an obligation to treat investors of the other NAFTA Parties under the standards addressed in Section A, but this obligation is only owed to the state of the investor’s nationality.⁸ ...

the only individual rights investors enjoy under Chapter Eleven is the procedural right under Section B to invoke responsibility of the host State.⁹

B. INVESTORS’ RIGHTS ARE SUBSTANTIVE AS WELL AS PROCEDURAL

In *Corn Products International, Inc. v the United Mexican States* (“*CPI v Mexico*”)¹⁰ the Arbitral Tribunal found that the NAFTA confers investors *substantive* rights, separate and distinct from those of the State with which it shares nationality.¹¹ The conclusion is premised on the following:

- a) *Backdrop under international law*: the (now current) possibility under international law that individuals and corporations possess rights under international law;¹²
- b) *Textual interpretation*: intention of the NAFTA parties, as evidenced in the language of the treaty;¹³

⁷ Id. at para 176.

⁸ Id. at para 178.

⁹ Id. at para 179.

¹⁰ ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008.

¹¹ *CPI v Mexico*, paras 167, 176.

¹² Id. at para 168.

¹³ Id. at para 169.

- c) *Logical argument*: it is counterintuitive to posit that investors enforce rights which were not theirs but solely the property of the State of their nationality; and
- d) *History of Diplomatic Protection*: the historical fiction that, when exercising diplomatic protection, States assert a right of their own violated by an injury to its national (which amounted to an injury to the State itself) becomes unnecessary where the individual is vested with a right to personally bring claims.

The separate opinion, although taking issue with certain aspects of the award, is in agreement with the majority on the point in question.¹⁴

C. IRRESPECTIVE OF HOW CHARACTERIZED, INVESTOR RIGHTS MAY NOT BE HAMPERED BY COUNTERMEASURES

The concurring opinion in *ADM v Mexico* posits that investor rights are substantive.¹⁵ However, it takes the matter further by arguing that investor rights may not be superseded or eliminated by countermeasures.¹⁶ The position is supported by a cornucopia of legal instruments (including treaties and declarations), case law, doctrine and analysis. Quotes from passages may prove illustrative:¹⁷

...what difference does it make whether an investor's right to redress for a wrong is substantive or procedural, direct or derivative [?]¹⁸ ... there is no compelling logic to the proposition that a NAFTA investor's "procedural" or "derivative" right to legal redress for a breach of Chapter Eleven may be suspended or eliminated by countermeasures ... whereas a "substantive" or "direct" right may not. ...¹⁹

¹⁴ Separate Opinion of Andreas F. Lowenfeld, para 5.

¹⁵ Concurring opinion of Arthur W. Rovine. *Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, paras 5, 49, 82.

¹⁶ Concurring opinion of Arthur F. Rovine. *Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, p. 1.

¹⁷ In fairness, said quotes do not do justice to the opinion. For a thorough view, I refer the reader to the same.

¹⁸ *CPI v Mexico* concurring opinion at 43.

¹⁹ *Id* at 44.

Why is the right to legal redress a substantive rather than a procedural right? ... A right to a remedy is a substantive right. Legal redress for the wrong committed is a substantive right.²⁰ ... legal redress for the wrong committed is a substantive right.²¹

III. IMPLICATIONS AND RAMIFICATIONS

Faced with the canvassed kaleidoscopic variety of stances *viz* the nature of the investors' rights under investment treaties, the reader is forced to wonder: does it matter? Is this yet another interesting discussion that is devoid of practical impact?

Far from it. The answer to the question has with wide-reaching implications and ramifications. To foster a debate, I shall comment on its place under treaty law (§A), and under general international law (§B) and the intellectual history of the discipline (§C).

A. TREATY LAW

It is a well-known truth (a legal axiom, really) that treaties bestow rights and obligations between parties only; they are *res inter alios acta*. Hence, as to third parties, neither rights nor obligations stem therefrom. They are *pacta tertiis nec nocent nec prosunt*. But are nationals of the contracting State parties held to said principle? In other words, are investors to be considered 'third parties' for purposes of the cited principles?

As a point of departure, although the binding force of a treaty and its effects concern contracting states *only*, not their nationals, States can however alter this rule and confer rights to their subjects.²² Hence, the answer to the question whether a treaty provides for rights benefitting private individuals is both casuistic and textual. It begins and ends with the treaty in question.

²⁰ Id at 47.

²¹ Id at 48 *in fine*.

²² See for instance, *Advisory Opinion as to Jurisdiction of the Courts of Danzig* (1928), Series B, No. 15) where the Permanent Court of International Justice held that the intention of the contracting parties may show that the treaty confers rights upon the subjects of one State against another.

NAFTA Article 1116(1)(a) provides that qualified investors may submit to arbitration under section B of Chapter XI a claim that another Party has breached an obligation under section A. Section A contains undertakings involving investments and investors.²³ The text of said commitments have been the subject of much of the analysis on this matter. The typical initial sentence of treatment guarantees reads: “Each Party shall accord to investors of another Party treatment ...”²⁴. The expropriation proviso reads:

“No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment...”

From said language, one can make a myriad of arguments under treaty interpretation law as to what the precise nature of the rights and obligations is and is not. The outcome, I wish to posit, is not to be found in the text,²⁵ but in the backdrop of international law and the consequences of each theory.

In both cases Mexico argued that the investor rights belonged to State parties.²⁶ In support of its proposition it cited arguments made in prior cases, including positions taken by other NAFTA parties. In one of the cases the argument prevailed;²⁷ in another it did not.²⁸

One must wonder, is there a difference? Accepting—as I am sure the reader will—that whatever *A* and *B* agreed to in the investment treaty will benefit or constrain *C*: the beneficiary (the investor), what is the difference from holding that the rights are direct, derivative or intermediate?

²³ For instance, national treatment (NAFTA Article 1102), most favored nation (NAFTA Article 1103), minimum standard of treatment (NAFTA Article 1105) and conditions involving expropriation and nationalization (NAFTA Article 1110).

²⁴ See the first line of NAFTA articles 1102(1), 1103(1) and 1105(1)

²⁵ Not because the text is not relevant, but because it lends itself to so many interpretative arguments, cutting both ways of the debate.

²⁶ *ADM v Mexico*, para 164. *CPI v Mexico*, para 166.

²⁷ *ADM v Mexico*, paras 168, 173, 178.

²⁸ *CPI v Mexico*, para 167.

A moment's pause on the premise is worth making.

One can make the point that for *C* to be able to sue *A*, *C* has to be the title-holder not only of a *procedural*, but also a *substantive*, right (the seed of the 'direct theory').²⁹ In contrast, one could advance the notion that, more than a title-holder, *C* is given the (extraordinary but limited) right to step into the shoes of *B* and sue *A* when *A* fails to comply (the gist of the 'derivative theory').³⁰ Finally, it could be argued that investors are *only* given a *procedural* right to claim responsibility from *A* for failing to observe a duty owed to *B* (the 'intermediate theory').

The discussion reminds this author of the (academically fascinating, but practically indifferent) debate surrounding the institution of *stipulation pour autrui*.³¹ As the reader will recall, said instrument of contractual liberty has provoked (domestic law) theories galore. Irrespective of the preference of the reader, I am sure she will agree that, from the standpoint of the beneficiary, the practical legal result is the same. Whatever promisee agreed *vis-à-vis* promisor will be the alpha and the omega of what the beneficiary may sue for. In a similar fashion, whatever agreement the State parties to an investment treaty came to, is the content and scope of the investor right. Nothing more. Nothing less. And recent cases bear dramatic testimony to the consequences of said principle.³²

With this in mind, one can now ask: which theory better fits the modern international investment regime? In answering this question, the reader is forewarned: *choosing the right theory is pivotal to the consequences*. If the *direct* theory is preferred, arguably the

²⁹ Put differently, investors vindicate their own rights under investment treaties as a result of a quasi-subrogation operated by the investment treaty which allows the investor to seek a remedy that would otherwise accrue in favor of the State.

³⁰ More formally, and following *The Mavrommatis Palestine Concessions* case ((Greece v. Britain), P.C.I.J. Series B, No. 3, (1924)), investors prosecuting a claim further to an investment treaty are merely acting as a proxy for the State with which they share nationality since said State is the true repository of the rights and obligations contained in the investment treaty.

³¹ '*Estipulación a favor de tercero*' in Spanish, which is similar to the *common law*'s 'third-party rights' under contract law (albeit differences exist).

³² For instance, the outcome of the investor definition in *Renta 4 v Russia* (Arbitration V (024/2007) *Renta 4 S.V.S.A., et al, v. The Russian Federation*, Award on Preliminary Objections, 20 March 2009, paras 121-134), which I cite with approval.

right bestowed on investors would be insulated from the political vagaries between the states parties to the investment agreement. And by the same token, if the right benefitting the investor is deemed to be *derivative*, it would be subject to the status of the underlying relation: the treaty between *A* and *B*.

Which is preferable? Or to ask the question more appropriately: which is more consistent with the applicable law?

There is no obvious answer. One could argue for instance that preferring the direct theory furthers the goals of the discipline by insulating the treaty-protections from the dynamics of international politics. Alternatively, one could posit that, as a creature of treaty, believing that the benefits are somehow emancipated from their instrument of origin (the treaty) lacks coherence.

At this juncture, the reader would not be faulted for wondering whether the analysis is not Procrustean.³³ I wish to submit that the better view is that investment treaty rights are part and parcel of the treaty they stem from and hence subject to the legal vicissitudes the treaty may suffer. One said vicissitude may be countermeasures. The foregoing position, when compared to the three theoretical pigeonholes described above (§II, *supra*), appears to fall in the ‘derivative theory’ category thus situating me in the ‘merely procedural’ school of thought. However, I am unsure as to whether what I have in mind is adequately reflected by such characterization. I shall therefore elaborate.

Investor rights flowing from investment treaties are rooted in the treaties they stem from. The claim seems almost tautological. After all, absent the treaty, no such right exists under general international law.³⁴ If one of the States decides to denounce the

³³ In Greek mythology, Procrustes is a giant thief who seizes travelers and ties them to an iron bed. He stretches them or cuts off their legs as needed to make them fit the bed. I use it to illustrate the (intellectually questionable) exercise of adjusting reality to fit the theory one wishes to advance.

³⁴ The careful reader may suggest a caveat. While the assertion is unquestionable for certain rights (such as most-favored-nation treatment), it is arguable for others (such as minimum standard of treatment). I nonetheless leave it unqualified given that the right to a remedy for breach of the treaty enforceable through arbitration is wholly grounded in the treaty.

treaty,³⁵ one could hardly argue that investors' rights therefrom have *indefinitely* inured to the benefit of investors—even after the treaty has ceased to exist.³⁶ Arguing in favor of investors having rights that are *completely insulated* from the instrument they hail from is tantamount to such argument. Investor rights do not float in the international legal firmament; they are anchored in the investment treaties they stem from. Hence, it must be accepted that treaties are subject to a legal regime as to their existence, validity, compliance, and excuse of obligations. That regime is dual: treaty law³⁷ and State responsibility law,³⁸ both of which are nurtured from general international law.

Granted, this does not mean that treaties cannot be tailored to procure rights and duties unaffected by general international law (assuming that is what parties want). International treaty law lends itself to such end. However, such outcome must be agreed to. It cannot be inferred gratuitously.

Admittedly, the conclusion may follow both from an *express* provision or an *implied* one. The question then becomes, is this our case? Can NAFTA Chapter XI be understood to include the desire of NAFTA parties to procure investment rights which are to vest in favor of private investors and be left untouched by any mischance the underlying investment treaty may suffer?

The answer to this question is in NAFTA itself. And, contrary to what some have argued, it does not involve an esoteric dip into the putative intentions of what the NAFTA negotiators may have intended. It stems from express treaty language.

Article 1131 of NAFTA reads:

“Governing Law. 1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement *and applicable rules of international law.*”

³⁵ A reality recently observed in the Latin American international investment realm.

³⁶ Admittedly, the assertion begs the *ratione temporis* question, which I shall not address.

³⁷ Articles 42 *et seq* of the 1969 Vienna Convention on the Law of Treaties.

³⁸ Recently codified in the International Law Commission's Articles on State Responsibility (“ILC Articles on State Responsibility”).

(my emphasis)

As may be observed, NAFTA parties *expressly* agreed that international law applies. In and of itself, the proviso may be insufficient to convince hard core skeptics³⁹—if it wasn't for the backdrop of State responsibility law, which bootstraps the argument.

Article 55 of the ILC Articles on State Responsibility gives eco to the paradigm that international State responsibility law is *lex generalis*; it is subject to the *lex specialis*—in our case, NAFTA. The reason for said principle is easy to understand. States often regulate the legal consequences for breaches of the deals they are striking. Where they have done so, they will be deemed to have contracted *against* default customary international law, which would cease to apply. Admittedly, the proviso need not be express. It may be implied. However, even where a proviso exists, the conclusion cannot *ipso facto* be that State responsibility law is *completely* displaced. It may still apply residually (what is known as the 'weak' version of the *lex specialis* principle). So it is not enough that the subject matter be dealt with in the primary obligation; there must also be either an inconsistency between the contracted primary rule and the general international law rule.

How does the above come into play in our debate? The answer is one of interpretation. How *lex specialis derogat legi generali* impacts the conclusion is a question to be resolved *in casu*. And often the matter is arguable—as in our case. The interpreter seeking guidance could (and should) ask herself: is the treaty regime tailored to be self-contained? If so, the strong version of *lex specialis* would apply: general international law is overridden *in toto*.

In our case, the answer is readily available: not only is NAFTA Chapter XI *not* self-contained,⁴⁰ but it expressly establishes the applicability of international law. Therefore, the school of thought that wishes to emancipate investor rights faces, at least in

³⁹ After all, as an instrument of international law, treaties are *always* governed by such.

⁴⁰ A premise easily observed by the fact that Chapter XI does not provide consequences for breach of the obligations other than simply routes to follow to seek enforcement (NAFTA Article 1136). 'Secondary rule' -type consequences (such as countermeasures) are not addressed in NAFTA Chapter XI.

the case of NAFTA, a textual Achilles Heel: the NAFTA parties expressly agreed to have general international law apply—which includes countermeasures.

The rudimentary instrument of countermeasures is to be found in the toolbox of general international law. Countermeasures are a self-help mechanism extant in the decentralized system of international law. As such, when certain requirements are met, they may be used to inflict an unwelcome cost upon counterparties allegedly delinquent in their respective obligations. The source of said obligations may or may not be a treaty. And there is nothing in investment treaties that *inherently* changes this. If one wishes to find authority against its availability, it must come from the compact itself.

Agnostics point to the fact that NAFTA includes a promise to provide investors “due process before an impartial tribunal”.⁴¹ The *leitmotif* of said instrument —nay, the discipline as a whole— is to remove investment disputes from the political realm by putting disputing parties on a more equal footing, placing them in the realm of commercial arbitration.⁴²

The argument—albeit true—misses the point. Granted, a law-based system is much better to the international no-mans land that would counterfactually prevail. But legal instruments have a legal regime. And within said legal regime one finds all sorts of (valid) legal reasons to —for instance— excuse non-compliance, or exempt liability therefrom. In the private realm, such regime is the province of contract law. In the international sphere, it is the law of treaties and law of State responsibility. Prominent amongst the latter is the regime of countermeasures. Whether we like it or not, absent contrary provision, investment treaties are governed by said regime.

The claim raises the (interesting) issue of the relation between treaties and customary international law. Much can be said on the matter. I wish to recall a relevant clarification made by the ICJ:⁴³

⁴¹ *ADM v Mexico* concurring opinion at para 83.

⁴² *ADM* concurring opinion, paras 78 – 79.

⁴³ *Gabcikovo-Nagymaros Project* (Judgment), para 47.

“...A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.”

The contrary position, in advancing what seems to be a lofty goal, loses sight of the origins of the rights. Hailing from international *lex scripta*, it is hard to deny that they are subject to its legal health. To the treaty’s regime, which is nurtured by general international law, to which I now turn to.

B. GENERAL INTERNATIONAL LAW

In addition to the *lex scripta* angle, a general international law one is worth examining.

A question begged by the debate at hand is whether investment treaties *implicitly* displace the general international law rules involving excuse of obligations. To be sure, it is not the first time the issue surfaces. For instance, the *BG Group plc v Argentina*⁴⁴ Tribunal stated that:⁴⁵

...a defense based on necessity is precluded “where the international obligation in question explicitly or implicitly excludes reliance on necessity”. *It can be argued that the Argentina-UK BIT implies such an exclusion.* ...

(My emphasis)⁴⁶

The citation is apposite in that the defense evoked, albeit different than the one we have been focusing on (countermeasures), also stems from customary international law.

So the question becomes: do investment treaties *per se* imply the intent of displacing customary international law? Thus framed, the question is of the utmost interest, and likely to recur in investment cases.

⁴⁴ UNCITRAL Arbitration Rules, Final Award, 24 December 2007.

⁴⁵ *Id.*, para 409.

⁴⁶ The Tribunal left the issue open. In paragraph 412 it found that, irrespective of the outcome of said question, the answer is the same. In its words: “...whether the Tribunal accepts or rejects the application of Article 25 of the ILC Draft Articles [on State Responsibility], the result is the same: Argentina may not invoke the “state of necessity” doctrine under customary international law to excuse liability for breach of Article 2.2 of the Argentina-UK BIT ...”.

I wish to advance two reasons *against* the proposition: (1) it is contrary to the international law on State responsibility; and (2) it is inconvenient.

1. Proper place in State responsibility law

Obligations under investment treaties are, in the argot of international law of State responsibility, “primary rules”.⁴⁷ Their breach triggers the application of “secondary rules”, which govern the consequences of the breach of the primary obligation. Within said (fascinating) corpus of international law one finds the topic of countermeasures. In a nutshell, absent cessation or reparation, the injured state may take refuge in countermeasures⁴⁸ (provided their regime is complied with⁴⁹).

The relation between treaty law and international law on this topic is precisely that, in presence of an international delict, rules of responsibility apply. And said rules provide excuses in certain cases.

The regime is not only rich but worth having.⁵⁰ Not only does it provide a *juridical* —in contrast to a *political* or forceful— response to an international unlawful act, if properly followed, it always seeks to induce compliance. It is ‘instrumental’: it always seeks to incent compliance and reduce the likelihood of strategic or reproachable behavior.⁵¹

2. The theory is inconvenient

Arguing that rights under investment treaties are insulated from customary international law is not only (legally) inapposite, but suboptimal and inconvenient. *Suboptimal* in that current customary international law includes a robust regime worth having in lieu of doing without. *Inconvenient* because, absent the regime, nefarious conduct would ensue.

⁴⁷ Needless to say, they are not the only primary rules. They are the source of the obligations in question.

⁴⁸ Article 22 of the ILC Articles on State Responsibility.

⁴⁹ As exemplified by articles 49 to 55 of the ILC Articles on State Responsibility.

⁵⁰ It is nurtured by timeless experience and hundreds of cases.

⁵¹ As emphasized by the ICJ in *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, para 87.

Accepting the ‘independent rights’ theory (as I shall henceforth call it) would leave open situations currently adequately addressed by the law of State responsibility. The vacuum will in all likelihood provoke impunity. And impunity will provide protein for reproachable measures.

Bearing the above in mind, one is left to wonder why argue in favor of such scenario? What is gained from giving eco to the independent rights theory? The current literature and opinions giving rise to the theory are oblivious to the question. One surmises that the author of the theory believes that it will inure in favor of more protection of investors and their investments. (Arguably, if countermeasures involving treaty rights are unavailable, investors and their investments would be insulated from the politics inherent in dealings between states.) The argument would be specious. In fact, innocent.

Absent the countermeasure regime, the probable result would not be absence measures against investors and their investments; but a legal-vacuum against which to adjudge measures that will in all likelihood take place. Assuming that States will not take measures when deemed convenient is simply contrary to experience. When faced with a crisis, States will respond. Believing otherwise not only overlooks experience, but is innocent. Thence, it is much better to have a regime in place which counterbalances the exercise of measures taken when another State breaches an international obligation, than having none; particularly because of the inherent tendency to become abusive or excessive.⁵²

With this in mind the reader can see why arguing in favor of excluding investor rights from countermeasures is counterproductive to the goal of protecting investments as much as possible. It amounts to one of those (ironic) instances where the goal sought is hurt by precisely the theory evinced in its favor.

⁵² Hence the warning of the US-France *Air Services* Arbitral Tribunal “*Countermeasures ... [are] a wager on the wisdom, not on the weakness of the other Party*”. (Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, Decision of 9 December 1978, Recueil des Sentences Arbitrales, Vol. XVIII, United Nations, p. 417, para 91.)

C. OTHER ASPECTS

Our debate merits two additional comments from the standpoint of the history of the discipline and current events.

1. Place in the paradigm flux

An argument I have not seen anyone make but may be worth tackling is how this characterization debate should be affected by the (fledgling yet interesting) refinement of international law as to standing of private persons.⁵³ As the reader knows, the traditional positivist thought in international law establishes a dichotomy between *objects* and *subjects* of international law. Under this paradigm, only States and international organizations are *subjects*, whereas individuals are (were) deemed ‘things’ —*objects*— of international law.

A challenge to said view is gradually mushrooming. Some believe a better way to characterize the role of private persons (natural and juridical) is to consider them ‘participants’ in the international legal order.⁵⁴ This conceptual refinement is the product of the empirical development of private persons having international standing under human rights and investment treaties.

This is not the place to expand on the topic. The relevance of the theory in our debate is that advocates of the direct rights theory may quote said development to muster support in favor of the view they wish to advance. And the line of argument would not be hard to imagine: recognizing investors substantive rights would be consonant to the (gradually emerging —and exciting, I might add—) theory that private persons have a place in the international legal order. Hence, characterizing said investor rights as anything less than substantive (eg., ‘merely procedural’ or ‘derivative’) is a step in the wrong direction. It runs counter to the current flux of the paradigm, which many believe to be plausible.

⁵³ *CPI v Mexico* (para 170) touches upon the topic. However, it does not frame it as done in here. It rather uses it as a premise of the conclusion I have summarized in section II.B, *supra*.

⁵⁴ For instance, Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, 1995, p. 50. Also, John Dugard, *First Report on Diplomatic Protection*, ILC 52nd Session, U.N. Doc A/CN.4/506 (2000).

The point deserves careful examination. After all, the development is praiseworthy.

I query whether these are competing lines of thought. Is it really contradictory to argue that (i) investor rights are —absent contrary stipulation in the treaty in question— subject to the general international law regime applicable to the treaty they derive from; and (ii) that private persons deserve a place in the ‘international legal order’? After all, the ‘place’, the ‘room’ Volterra eloquently refers to,⁵⁵ is a product of States *giving* private persons said space.⁵⁶ And they do so through treaties—which are themselves governed by international law. This last strand of the argument deserves emphasis. One may agree with the refinement of the paradigm and, at the same time, in the same breath—without concomitantly blowing hot and cold—believe that the legal status of the said rights is governed by general international law. Why not?

The contradiction, in my opinion, is more apparent than real.

2. Countering a regrettable fiction

A final point merits attention. It has been argued that a reason to construe investor rights as substantive is to be found in the historic problem surrounding diplomatic protection. The *CPI v Mexico* award made the interesting argument that:⁵⁷

It has long been the case that international lawyers have treated as a fiction the notion that in diplomatic protection cases the State was asserting a right of its own — violated because an injury done to its national was in fact an injury to the State itself. It was a necessary fiction, because procedurally only a State could bring an international claim, but the fact that it did not reflect substantive reality showed through not only in the juristic writing but also in various rules of law surrounding diplomatic protection claims.

The award cites two examples in support of its rationale: the local remedies rule and the continuing nationality doctrine.⁵⁸ While the local remedies rule is applicable to

⁵⁵ Robert Volterra, *International Law Commission Articles on State Responsibility and Investor-State Arbitration: Do Investors Have Rights?* ICSID Review, Foreign Investment Law Journal, Vol. 25, No. 1, Spring 2010, p. 223.

⁵⁶ After all, the development grew from treaty law, not customary international law.

⁵⁷ *CPI v Mexico*, para 170.

diplomatic protection claims, it is inapplicable to claims involving obligations owed directly to investors. Hence, if the rights enforced by investors are the State's, it is difficult to understand why the two categories of cases would be treated differently. As to continuing nationality, international law requires that States resorting to diplomatic action espousing as their own a private cause⁵⁹ do so with regards to persons sharing their nationality⁶⁰ at the date of the wrong and continuously.⁶¹ If the rights belong to the State, why is continuous nationality of the private person relevant?

In wish to share some thoughts involving said point in the context of our debate.

True, international law has fabricated a fiction when it comes to injury to aliens: said injury is *also* deemed an injury to the State of nationality *itself* (the reputed *Vattel*ian formula). But does the premise conclusively support the substantive rights conclusion? The *CPI v Mexico* Tribunal thinks so:

“What these two rules [62] actually demonstrate is that when a State claimed for a wrong done to its national it was in reality acting on behalf of that national, rather than asserting a right of its own. ...”⁶³

The point is driven home in para 174:

“...there is no need to continue that fiction in a case in which the individual is vested with a right to bring claims of its own. ...”⁶⁴

Is this true? Although when espousing a claim the State makes its own what originally belonged to the individual, once the claim is brought, in the eyes of international law, the

⁵⁸ *CPI v Mexico*, paras 171 - 172.

⁵⁹ Article 1 of the ILC Draft Articles on Diplomatic and Consular Protection (A/CN.4/567. 7 march 2006).

⁶⁰ See for instance Article 3 of the current ILC Draft Articles on Diplomatic and Consular Protection (International Law Commission, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006)(A/CN.4/567).

⁶¹ I purposefully avoid the controversial issue of the appropriate *dies ad quem* which caused so much revolt after *The Loewen Group Inc v United States of America*. The reason is to avoid distracting from the point I am trying to convey.

⁶² The context refers to the local remedies rule and the continuous nationality doctrine.

⁶³ *CPI v Mexico*, para 173.

⁶⁴ *CPI v Mexico*, para 174.

State is the only claimant. And the right exercised is the (international law) right to protect nationals, not the (private law) property right of the individual. This is made clear by the Permanent Court of International Justice in *The Mavrommatis Palestine Concessions* case:⁶⁵

...It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by restoring to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law. ...

Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

So, if the right exercised is different than the right espoused (the national's right), how does this *conclusively* support the view that investors *have* to own a substantive treaty right to be able to claim?

Perhaps the answer is that the conclusion does not necessarily follow. States have an international law right to espouse claims stemming from injuries to nationals, and States may contractually (through investment treaties) confer rights to nationals to sue, which right —absent contrary proviso— will be subject to the vicissitudes of the treaty it grows from. We are dealing with two substantively different rights. They need not blend. And they need not displace each other.

IV. FINAL COMMENT

The Mexican fructose saga has instilled many lessons in those of us dedicated to investment arbitration. One is that, not only can *reasonable* minds differ, but *brilliant* minds too. The *illuminati* sitting in these tribunals bear testimony to said truth. The awards in comment were drafted by members of the *crème de la crème* of international, investment and arbitration law. The outcome has been as fascinating as it has been controversial.

⁶⁵ *The Mavrommatis Palestine Concessions* (Greece v. Britain), P.C.I.J. Series B, No. 3, (1924), p. 12.

The debate will no doubt continue. And it should. The issue is as profound as it is practical. It deserves careful scrutiny given its ramifications.