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Investment Protection and International Relations

1. Introduction

Economic disputes are frequent sources of international conflicts. Where interests of foreign investors are involved, the traditional method for settlement is the exercise of diplomatic protection. Under this method a State espouses the claim of its national and pursues it in its own name. Diplomatic protection was developed as a consequence of the non-availability of international remedies to individuals and corporations under traditional international law.

Diplomatic protection carries serious limitations for the investor relying on it. The investor must have exhausted the local remedies available in the host State. Even more importantly, the investor has no right to diplomatic protection but depends on the political discretion of his government. The government may refuse to take up the claim. It may discontinue diplomatic protection at any time. It may waive the national's claim or agree to a reduced settlement. As soon as the national State has taken up the claim, it becomes part of the foreign policy process with all the attendant political risks.

Diplomatic protection on behalf of investors also carries important disadvantages to the States concerned. It can seriously disrupt their international relations, at times leading as far as the use of force.¹ Not infrequently, investment disputes have led to protracted litigations between the host State

¹ See the Cerutti case, Moore, *International Arbitrations, History*, Vol. II, 2117 (1898); Venezuelan Preferential case (Germany, UK, Italy v. Venezuela), Award of 22 February 1903, 9 RIAA 99, at 107 (1960); M. Silagi, *Preferential Claims against Venezuela Arbitration*, in EPIL, Vol. III, 1098 (1997).

and the State of the investor's nationality before international arbitral tribunals,² the Permanent Court of International Justice³ and the International Court of Justice.⁴ Not surprisingly, developing countries resent pressure from capital exporting countries whether it is exercised bilaterally or in multilateral fora such as international lending institutions. Diplomatic protection in investment disputes by capital exporting countries against developing countries has been a frequent source of irritation for the latter.

2. Investor-State Arbitration

A number of legal instruments have given direct access to arbitration to investors thus obviating the need for diplomatic protection. This form of investment arbitration serves several purposes. It improves the investor's legal position vis-à-vis the host State. The investor no longer depends on the uncertainties of diplomatic protection and is usually absolved from the need to exhaust local remedies. At the same time access to investor-State arbitration significantly improves the host State's investment climate and will create an additional incentive for foreign direct investment.

A beneficial side effect of investor-State arbitration is the impact on the relations between the States concerned. The host State and the investor's home State are disencumbered from the strains arising from investment disputes. These disputes are transferred from the political bilateral arena to a judicial forum especially charged with the settlement of mixed investor-State disputes. The dispute settlement process is depoliticized and subjected to objective legal criteria.

The ICSID Convention⁵ provides a framework for the settlement of investment disputes between States and nationals of other States. It specifically provides for the exclusion of diplomatic protection in disputes that are subject to investor-State dispute settlement. Article 27 of the Convention provides:

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under

² See e.g. the *Delagoa Bay Railway* case, Moore, *International Arbitrations, History*, Vol. II, 1865 (1898); *El Triunfo* case, Award of 8 May 1902, 15 RIAA 467.

³ See e.g. *Mavrommatis Palestine Concession* (Greece v. UK), 1924 PCIJ (Ser. A) No. 2, 5; *The Factory at Chorzow* (Merits), 1928 PCIJ (Ser. A) No. 17, 3.

⁴ *Nottebohm* case (Liechtenstein v. Guatemala), Second Phase, Judgment of 6 April 1955, 1955 ICJ Rep. 4; *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Second Phase, Judgment of 5 February 1970, 1970 ICJ Rep. 3; *Elettronica Sicula SpA (ELSI)* (US v. Italy), Judgment of 20 July 1989, 1989 ICJ Rep. 15.

⁵ 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, 575 UNTS 159, 4 ILM 532 (1965).

this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

In the course of the Convention's drafting, the exclusion of diplomatic protection was explained *inter alia* in terms of the removal of the dispute from the realm of politics and diplomacy into the realm of law.⁶ In the words of Aron Broches, at the time General Counsel at the World Bank, who chaired the preparatory meetings for the Convention:

The Convention would ... offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.⁷

It follows that the interests of the parties concerned are well balanced. The foreign investor no longer depends on the uncertainties of diplomatic protection but obtains direct access to an international remedy that is depoliticized and subject to objective legal criteria. In turn, the host State by consenting to direct arbitration with the investor obtains the assurance that it will not be exposed to an international claim by the investor's home State, at any rate if it abides by the award. The investor's home State is absolved of the inconvenience of having to represent its national and is able to conduct its foreign policy free from the embarrassment and obstruction caused by investment disputes.

The transfer of investment disputes from the inter-State arena to mixed methods of dispute settlement has not been complete. Even under the contemporary mechanism of investor-State arbitration a limited role remains for the investor's home State and hence for State-State interaction.

3. Remnants of Diplomatic Protection

The drafters of the ICSID Convention retained a residual role for diplomatic protection in case of non-compliance by the host State with an award. The last part of Article 27(1), as quoted above, makes this clear.

Diplomatic protection to ensure compliance is not the only method to secure the enforcement of awards. Article 53 of the ICSID Convention contains an obligation to abide by and comply with the terms of an award and Article 54 provides for an enforcement mechanism that endows an award with the same force as a final domestic judgment in all parties to the

⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formulation of the Convention (History of the Convention), Vol. II, Part I, at 242, 273, 303, 372, 464.

⁷ *Id.*, at 464.

Convention. Therefore, diplomatic protection is an alternative and supplement to the judicial enforcement of awards. This supplement appears particularly important in view of the preservation of State immunity from execution as spelled out in Article 55.

Article 64 of the ICSID Convention gives jurisdiction to the International Court of Justice for any dispute concerning the interpretation or application of the Convention.⁸ In exercising diplomatic protection to secure the compliance with an award a home State may avail itself of this provision.

During the ICSID Convention's drafting there was some concern that diplomatic protection to secure compliance with the award would create a one-sided situation in favour of the investor: there would be no corresponding right for the host State in case the investor failed to abide by the award. The Chairman pointed out that there were sufficient means to enforce an award against the non-State party through the courts while there was no such possibility of enforcement against States.⁹ Therefore, diplomatic protection to secure compliance with the award is also designed to counterbalance any State immunity that is preserved by Article 55 of the Convention.

In actual practice, diplomatic protection to secure the compliance with awards appears to have played little if any practical role. In particular, no case has ever been brought to the ICJ under Article 64. The consequences of non-compliance with an award for a State's reputation with private and public sources of international finance are such that States usually prefer to abide by decisions of tribunals.

4. State-State Dispute Settlement

The treaties providing for investor-State arbitration typically also foresee methods for the settlement of disputes between the contracting parties. These provisions follow the tradition of general dispute settlement clauses commonly found in the final clauses of treaties.

Article 64 of the ICSID Convention has already been referred to. It grants jurisdiction to the ICJ for disputes concerning the interpretation and application of the Convention. During the Convention's drafting there was much concern about the relationship between this State-State procedure and

⁸ Art. 64 ICSID Convention:

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

⁹ History of the Convention, *supra* note 6, at 58, 59, 60, 763, 764, 767.

investor-State arbitration.¹⁰ The idea of preliminary rulings to be sought from the ICJ for pending investor-State arbitrations was canvassed but ultimately abandoned.¹¹

There was also concern that resort to the ICJ in State-State proceedings might be used to frustrate investor-State arbitration proceedings.¹² These fears were allayed through a passage in the Report of the Executive Directors, which forms part of the *travaux préparatoires* to the Convention. The Report specifically states that Article 64 does *not*:

45. ... empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute.¹³

In a similar way, Article 64 of the ICSID Convention does not confer upon the ICJ the power to review a decision of an arbitral tribunal and to act as a court of appeal. The issue was discussed during the Convention's drafting but was never seriously in dispute.¹⁴ The only possibility for the review of ICSID awards is annulment under Article 52, which takes place in investor-State proceedings.

Bilateral investment treaties (BITs) typically provide for two types of dispute settlement. One provision offers arbitration between the host State and an investor. Another provides for arbitration between the contracting parties to the treaty. This raises the question of the relationship of any State-State arbitration to investor-State arbitration. The question of competing remedies in the two types of proceedings was discussed at some length during the ICSID Convention's drafting. The issue remained unregulated but there seemed to be consensus that inter-State arbitration should neither interfere in investor-State cases nor affect the finality of ICSID awards.¹⁵

Parallel proceedings of this kind do not strictly compete with each other since they involve different parties. Nevertheless, conflicting decisions on the same question, possibly involving the same set of facts, are feasible and clearly undesirable. One possibility to deal with the matter is a provision in the BIT barring inter-State arbitration where ICSID arbitration has been instituted or

¹⁰ *Id.*, at 274, 439, 906.

¹¹ *Id.*, at 279-280, 290-292, 354-357, 420, 437, 439, 440-441, 532-533, 577-578, 906.

¹² *Id.*, at 906, 910, 940, 993, 1030.

¹³ 1 ICSID Reports 33.

¹⁴ History of the Convention, *supra* note 6, at 274, 438, 440.

¹⁵ *Id.*, at 65-66, 273, 274, 349, 350, 433, 435, 527-528, 528, 576-577.

is available.¹⁶ Some older German¹⁷ and United States¹⁸ BITs contain clauses to this effect but their use appears to have gone out of fashion.

Even in the absence of such a provision in a BIT, a tribunal in an inter-State arbitration may be expected to decline jurisdiction if the claim is brought in the pursuit of diplomatic protection contrary to Article 27 or Article 26¹⁹ of the ICSID Convention. This would be the case in particular if the inter-State proceedings are designed to avoid, obstruct or influence ICSID arbitration or if they are designed to affect the implementation of an ICSID award or revise its outcome.

This does not mean that the mere existence of a valid consent to ICSID arbitration or even the existence of investor-State proceedings will necessarily rule out any inter-State arbitration in a related matter. As pointed out above, under the terms of Article 27, a claim may be brought by the investor's State of nationality if the host State has failed to abide by the ICSID award.

Another situation in which inter-State proceedings may affect investor-State proceedings arises where the respondent State institutes proceedings against the investor's home State to challenge the jurisdiction of the tribunal seized of the investor-State dispute. The respondent State may argue that a dispute pending before the investor-State tribunal raises general questions of the application and interpretation of the BIT that should be clarified in State-State proceedings. It is not difficult to see that such a strategy may constitute a danger to ICSID arbitration.

In *Lucchetti v. Peru*, the investor had initiated arbitration against the host State under a BIT. Thereupon the respondent State initiated inter-State proceedings under the BIT against Chile, the investor's home State, and sought a suspension of the investor-State proceedings. Peru argued that interpretative priority should be given to the State-State proceedings. The Tribunal in the investor-State proceedings rejected the request for the suspension of

¹⁶ The 1969 ICSID Model Clauses for Use in Bilateral Investment Agreements, 8 ILM 1341 at 1346 (1969), suggest a formula for the avoidance of competing proceedings in investor-State and State-State proceedings.

¹⁷ See e.g., Germany-Honduras BIT (1995) Art. 10(6); Barbados-Germany BIT (1994) Art. 10(6); Costa Rica-Germany BIT (1994) Art. 9(6). See also R. Dolzer & M. Stevens, *Bilateral Investment Treaties* 194 (1995); A. R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID Review-Foreign Investment Law Journal 287, at 335 et seq. (1997).

¹⁸ See e.g., United States-Turkey BIT (1985) Art. VII(7); United States-Cameroon BIT (1986) Art. VIII(9); United States-Senegal BIT (1983) Art. VIII(7). See also P. B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 Stanford Journal of International Law 373, 423, 454 (1985); N. G. Ziadé, *ICSID and Arab Countries*, News from ICSID, Vol. 5/2, 7 (1988).

¹⁹ Art. 26, first sentence, of the ICSID Convention provides: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."

proceedings without giving reasons.²⁰ Peru did not subsequently pursue the inter-State proceedings.

It appears that this decision was entirely correct.²¹ Article 26 of the ICSID Convention provides that ICSID arbitration shall be the exclusive remedy once consent to it has been given.²² Once the investor-State arbitration was under way it was no longer open to either party to resort to another remedy including State-State arbitration. A suspension of the ICSID proceedings to await the outcome of the State-State arbitration would have affected the ICSID Tribunal's exclusive competence.

The question that Peru sought to submit to inter-State arbitration concerned the competence of the ICSID Tribunal. Part of the ICSID Tribunal's competence is its power to determine its own jurisdiction. This power is set out in Article 41(1) of the ICSID Convention.²³

A refusal of the ICSID Tribunal to exercise its power under Article 41 to determine its own jurisdiction could have amounted to an excess of powers *infra petita*. As the *ad hoc* Committee in *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic* (the *Vivendi* case)²⁴ said:

86. It is settled, [and neither party disputes,]²⁵ that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments.²⁶

This result is also supported by fundamental procedural considerations involving the right of a party to judicial proceedings to be heard. A decision by

²⁰ *Lucchetti v. Peru*, Award on Jurisdiction of 7 February 2005, at paras. 7, 9.

²¹ In the interest of disclosure it should be mentioned that the author of this note advised the investor on this point.

²² See Art. 26 ICSID Convention, *supra* note 19.

²³ Art. 41(1) of the ICSID Convention provides: "The Tribunal shall be the judge of its own competence." The power of a judicial body to determine its own competence is an accepted principle of international adjudication and is a common feature in instruments governing international judicial procedure. See also Art. 36(6) of the Statute of the International Court of Justice; Art. 21 of the UNCITRAL Arbitration Rules of 1976; Art. 9 of the International Law Commission's Model Rules on Arbitral Procedure of 1958; Art. 16 of the UNCITRAL Model Law on International Commercial Arbitration of 1985; Art. 6(2) of the International Chamber of Commerce Rules of Arbitration of 1998; Art. 3(b) of the Institute of International Law's Articles on Arbitration between States, State Enterprises or State Entities and Foreign Enterprises of 1989.

²⁴ *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux v. Argentine Republic* (*Vivendi* case), Decision on Annulment of 3 July 2002, 6 ICSID Reports 340, 41 ILM 1135 (2002).

²⁵ The words in brackets were subsequently deleted by the *ad hoc* Committee in proceedings for the Decision's correction.

²⁶ Schreuer, 937-938 [footnote original].

a tribunal in State-State proceedings would have been rendered in proceedings in which the investor was not represented. The acceptance of a decision affecting the investor's right of access to ICSID rendered in proceedings in which he cannot participate and has no opportunity to be heard would amount to a serious departure from a fundamental rule of procedure.

5. Treaty Interpretation by the States Parties

A different way for the States concerned to get involved in investor-State arbitration is through the issue of official interpretations of the relevant treaty or treaties. The NAFTA has a mechanism whereby the Free Trade Commission (FTC), a body composed of representatives of the three States parties,²⁷ can adopt binding interpretations of the treaty. NAFTA Article 1131(2) provides to this effect:

An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

The FTC has made use of this method in July 2001 in interpreting the concepts of "fair and equitable treatment" and "full protection and security" under Article 1105 of the NAFTA.²⁸ NAFTA tribunals have accepted this interpretation as binding.²⁹ For instance, the Tribunal in *Methanex v. United States*³⁰ said:

With respect to Article 1105, the existing interpretation is contained in the FTC's Interpretation of 31st July 2001. Leaving to one side the impact of Article 1131(2) NAFTA, the FTC's interpretation must also be considered in the light of Article 31(3)(a) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA ...³¹

BITs do not normally have institutional mechanisms to obtain authentic interpretations of their meaning. But the United States Model BIT of 2004 provides for a mechanism that is similar to the one in the NAFTA:

²⁷ NAFTA Art. 2001(1): The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees.

²⁸ FTC Note of Interpretation of 31 July 2001.

²⁹ See *Mondev International Ltd. v. United States of America*, Award of 11 October 2002, 6 ICSID Reports 192, at paras. 100 *et seq.*; *United Parcel Service of America, Inc. v. Canada*, Award of 22 November 2002, 7 ICSID Reports 288, at para. 97; *ADF Group, Inc. v. United States of America*, Award of 9 January 2003, 6 ICSID Reports 470, at paras. 175–178; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award of 26 June 2003, 7 ICSID Reports 442, at paras. 124–128; *Waste Management, Inc. v. United Mexican States*, Award of 30 April 2004, at paras. 90–91. See also *United Mexican States v. Metalclad Corp.*, Judgment of 2 May 2001, Supreme Court of British Columbia, 5 ICSID Reports 236, at paras. 61–65.

³⁰ *Methanex v. United States*, Award of 3 August 2005.

³¹ *Id.*, Part II, Chapter H, para. 23.

Article 30(3)

A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

This provision has found entry into the more recent BITs of the United States.³²

Joint interpretations by the States parties to a treaty are possible also without a specific mechanism for interpretations. The two States parties to the BIT may issue a joint statement on a question of interpretation pending before a tribunal. In *CME v. Czech Republic* the BIT between the Czech Republic and the Netherlands provided for “consultations” with a view to resolving any issue of interpretation and application of the Treaty. After the Tribunal had issued a Partial Award,³³ the Netherlands, the investor’s home State, and the Czech Republic issued “Agreed Minutes” containing a “common position” on the BIT’s interpretation. In its Final Award³⁴ the Tribunal took this joint statement into account.³⁵

Joint declarations of the States parties on the proper interpretation of an investment treaty may appear efficient. But if the question is relevant to pending proceedings such an interpretation gives rise to serious concerns about the fairness of the procedure before the investor-State tribunal. If the interpretation is binding, this method infringes the independence of the international tribunal. Once a case is under way, the State that is the respondent in the investor-State proceedings is obviously motivated primarily by defensive concerns related to the pending dispute. The home State of the disputing investor is typically less interested in an interpretation favourable to its national in the pending dispute than in an interpretation that favours State respondents generally.

The July 2001 interpretation of the FTC under NAFTA is a vivid example of this phenomenon. It bears all the hallmarks of a restrictive interpretation that is designed to curtail the usefulness of the provisions in question for investors. It is obvious that a mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing an official interpretation to the detriment of the other party, is questionable.

A non-disputing State party to a treaty, usually the investor’s home State, may give a unilateral statement of its view of the treaty’s interpretation. Such a statement may or may not confirm the position of the disputing State party to the treaty. In *Aguas del Tunari v. Bolivia*,³⁶ the Dutch Claimant had submitted statements made by Ministries of the Government of the Netherlands to the

³² See e.g. Art. 30 (3) of the US-Uruguay BIT of November 2005.

³³ *CME v. The Czech Republic*, Partial Award of 13 September 2001, 9 ICSID Reports 121.

³⁴ *CME v. The Czech Republic*, Final Award of 14 March 2003, 9 ICSID Reports 264.

³⁵ *Id.*, at paras. 437, 504.

³⁶ *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction of 21 October 2005, available at http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf.

Parliament of the Netherlands.³⁷ The Tribunal took the unusual initiative of writing to the Legal Adviser at the Foreign Ministry of the Netherlands enquiring about certain aspects of the BIT's interpretation.³⁸ In the end, the Tribunal found the information thus obtained not helpful.³⁹ It said:

... the Tribunal can find no "subsequent practice ... which establishes an agreement of the parties" regarding the interpretation of the BIT. In addition, the response from the Netherlands provides no additional information of the type suggested by Article 31 of the Vienna Convention on the Law of Treaties as being possibly relevant and upon which a general interpretative position might be based.⁴⁰

In one case the government of the Claimant's nationality actually complained, after the award had been rendered, about the fact that it had not been consulted on the treaty's interpretation by the ICSID tribunal. In *SGS v. Pakistan*⁴¹ the Swiss Government in a letter to ICSID's Deputy Secretary-General stated with respect to the Pakistan-Switzerland BIT:

... the Swiss authorities are wondering why the Tribunal has not found it necessary to enquire about their view on the meaning of Article 11 [the umbrella clause] in spite of the fact that the Tribunal attributed considerable importance to the intent of the Contracting Parties in drafting this Article and indeed put this question to one of the Contracting Parties (Pakistan).⁴²

The Swiss authorities added that they were alarmed by the interpretation given by the Tribunal to the provision. The letter added that the interpretation ran counter to the intention of Switzerland when concluding the Treaty and was neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments.⁴³

6. The Nature of Investor-State Arbitration

This overview of the transfer of investment disputes from the inter-State arena to a mixed mechanism of investor-State arbitration shows that the involvement of the non-disputing State, and hence the potential for inter-State conflict, has been drastically reduced. But it has not been eliminated entirely. There is still

³⁷ *Id.*, at paras. 249-257.

³⁸ *Id.*, at paras. 47, 258-259.

³⁹ *Id.*, at paras. 260-263.

⁴⁰ *Id.*, at para. 262.

⁴¹ *SGS v. Pakistan*, Decision on Jurisdiction of 6 August 2003, 8 ICSID Reports 406.

⁴² E. Gaillard, *Investment Treaty Arbitration and Jurisdiction Over Contract Claims - the SGS Cases*, in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 325, at 341-342 (2005).

⁴³ See also S. A. Alexandrov, *Breaches of Contract and Breaches of Treaty*, 5 *The Journal of World Investment & Trade* 555, at 570-571 (2004).

some room, if only to a limited extent, for action by the investor's home State in the dispute's solution: diplomatic protection may be revived if the host State fails to abide by an award; State-State dispute settlement procedures may interfere in investor-State proceedings and interpretative statements by the parties to a relevant treaty may exercise a decisive influence on the investor-State arbitration.

All of this leads to the question whether the investor has been truly emancipated and is empowered to pursue its own rights in the international arena or merely acts as a proxy to its home State to whom the rights granted by investment treaties are ultimately owed.⁴⁴

The Tribunal in *Loewen v. United States*⁴⁵ seemed to adhere to the second theory when it said:

There is no warrant for transferring rules derived from private law into a field of international law where the claimants are permitted for convenience to enforce what are in origin the rights of Party States.⁴⁶

This question, theoretical as it may sound, has significant practical implications. This may be demonstrated with the help of two examples.

In *Occidental v. Ecuador*, the investor had obtained an award of damages under the US-Ecuador BIT in proceedings under the UNCITRAL Arbitration Rules.⁴⁷ Ecuador sought to have the Award set aside by the English courts under the terms of the United Kingdom Arbitration Act.⁴⁸ Occidental opposed this motion arguing that the matter was non-justiciable under the doctrine of judicial restraint or abstention which demanded that an English court should not adjudicate upon the transactions of foreign sovereign States. Under this theory the rights and duties in issue were State rights since Occidental was merely claiming to enforce the rights, which the United States had in international law against Ecuador in respect of a breach of the treaty.⁴⁹

The Court of Appeal dismissed this approach in a carefully reasoned judgement. It said:

The case is not concerned with an attempt to invoke at a national legal level a Treaty which operates only at the international level. It concerns a Treaty intended by its signatories to give rise to rights in favour of private investors

⁴⁴ For an extensive discussion of this question see Z. Douglas, *The Hybrid Foundation of Investment Treaty Arbitration*, 74 BYIL 152 (2003).

⁴⁵ Loewen case, *supra* note 29.

⁴⁶ *Id.*, at para. 233.

⁴⁷ Occidental Exploration and Production Company v. The Republic of Ecuador, Final Award of 1 July 2004, available at http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf.

⁴⁸ Unlike ICSID awards, UNCITRAL awards are not immunized from a review by domestic courts at the tribunal's seat.

⁴⁹ See Occidental Exploration & Production Company v. The Republic of Ecuador, Court of Appeal, Judgment of 9 September 2005, [2005] EWCA Civ 1116, at para. 11, available at <http://ita.law.uvic.ca/documents/Ecuador-FinalCAJudgment.doc>.

capable of enforcement, to an extent specified by the Treaty wording, in consensual arbitration against one or other of its signatory States.⁵⁰

...

We see no good reason why any arbitration held pursuant to such an agreement, or any supervisory role which the court of the place of arbitration may have in relation to any such arbitration, should be categorised as being concerned with “transactions between States” so as to invoke the principle of non-justiciability in *Buttes Gas*.⁵¹

Another example for the relevance of the question whether the rights pursued in mixed arbitration are original rights of the investors or derivative rights of the home State, is the question of the investor’s ability to waive access to international arbitration. Contracts between foreign investors and host States or their agencies often contain domestic forum selection clauses. These clauses submit disputes arising from the investment contract to the jurisdiction of the host State’s courts or to local arbitration. Host States have argued that these contractual clauses constitute a waiver of the right to access international arbitration as provided for in treaties. Tribunals have responded to this argument by introducing a distinction between treaty claims and contract claims: the contractual domestic forum selection clause only applied to disputes arising from the contract and did not deprive them of their jurisdiction to decide whether rights under the treaty had been violated.⁵²

This leaves the question whether an explicit waiver of access to international arbitration offered to investors under a treaty is possible. If the right to take the host State to arbitration is a genuine right of the investor and of the investor alone, it would seem that nothing stands in the way of such a waiver. The limited success of Calvo clauses, by which investors purported to give up a right to diplomatic protection, is no argument to the contrary: it is uncontested that diplomatic protection is the right of the home State and not of the protected

⁵⁰ *Id.*, at para. 37.

⁵¹ *Id.*, at para. 41.

⁵² See e.g. *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux v. Argentine Republic*, Award of 21 November 2000, 16 ICSID Review – FILJ 643 (2001), 5 ICSID Reports 296, 40 ILM 426 (2001); *Vivendi case*, *supra* note 24; *Salini Costruttori SpA et Italstrade SpA c. le Royaume du Maroc*, Decision on Jurisdiction of 23 July 2001, *Journal de Droit International* 196 (2002), 6 ICSID Reports 400, 42 ILM 609 (2003); *CMS v. Argentina*, Decision on Jurisdiction of 17 July 2003, 42 ILM 788 (2003); *SGS v. Pakistan*, Decision on Jurisdiction of 6 August 2003, 42 ILM 1289 (2003); *Azurix v. Argentina*, Decision on Jurisdiction of 8 December 2003, available at <http://ita.law.uvic.ca/documents/Azurix-Jurisdiction.pdf>; *Enron v. Argentina*, Decision on Jurisdiction of 14 January 2004, available at <http://ita.law.uvic.ca/documents/Azurix-Jurisdiction.pdf>; *SGS v. Philippines*, Decision on Jurisdiction of 29 January 2004, 8 ICSID Reports 518; *Siemens v. Argentina*, Decision on Jurisdiction of 3 August 2004, available at <http://ita.law.uvic.ca/documents/Azurix-Jurisdiction.pdf>. For a broader discussion see C. Schreuer, *Investment Treaty Arbitration and Jurisdiction over Contract Claims - the Vivendi I Case*, in Weiler, (ed.), *supra* note 42, at 281-323 (2005).

national. Therefore, any waiver by the national of a right that was not his own would have been without effect.

Even if it is accepted that investors pursuing rights in arbitration against host States genuinely act in their own name, does it follow that they have the capacity to waive in advance rights granted to them under a treaty? The parallel of human rights, which are inalienable and not susceptible to waiver, comes to mind. Human rights have a special status and the possibility to rely on them by analogy may be limited.⁵³ But the idea of a public order function of treaties that provide an agreed minimum standard and which should not be susceptible to abrogation is also applicable to the investment field.

In *SGS v. Philippines*,⁵⁴ the Tribunal said:

It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract.⁵⁵

It is clear that an investor is free to settle a dispute once it has arisen. It may discontinue arbitration proceedings. It may refrain from taking up the offer to arbitrate contained in an investment treaty. Such decisions may be prompted by tactical considerations such as costs, reputation or future cooperation with the host State.

But it is a different matter for the investor to waive, upon the insistence of the host State, access to a remedy granted by treaty in relation to future uncertain events. Investor-State arbitration serves not only the investor's interests but has an important function in the public interest for the relations between the States concerned. In situations of egregious violations of investors' rights, their home States would most probably resume diplomatic protection despite any prior waiver of investment arbitration secured by the host State.

Circumventing an effective system for the settlement of disputes by individual contracts with investors would be in nobody's longer term interest. Mixed arbitration serves not only the investor's personal interests but also the public interests of the States concerned and the broader interest of the international community in the avoidance of international conflicts. It follows

⁵³ See Z. Douglas, *Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, 22 *Arbitration International* 27, at 37 (2006).

⁵⁴ *SGS v. Philippines* case, *supra* note 52.

⁵⁵ *Id.*, at para. 154. The Tribunal proceeded to hold that as a matter of admissibility a party should not be allowed to rely on the contract when the contract itself referred that claim exclusively to another forum.

that, under a system of mixed arbitration, even if it is accepted that investors pursue their own rights, the system itself is not at the disposal of the parties to potential disputes.