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Pertinent Issues of International Investment Law
Arising in the FIAMC 2019 Case

Individual Rights Under Interstate Treaties

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What Is International Law?

“International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law.”

J.R. Bolton, *Is There Really “Law” in International Affairs*, 10, *Transnat’l L. & Contemp. Probs.* 1, p. 48 (2000).

What Is International Law?

“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.”

The ‘Lotus’ [France v Turkey] [1927] PCIJ Series A No 10, para. 44.

What Is International Law?

“International law is the legal order which is meant to structure the interaction between entities participating in and shaping international relations.”

S. Besson, *Theorizing the Sources of International Law* in S. Besson & J. Tasioulas (eds) *The Philosophy of International Law*, p. 163.

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The Rise of the Individual in International Law

- Judgment of the Nuremberg International Military Tribunal 1946 [1947]: “[...] international law imposes duties and liabilities upon individuals as upon States.”
- International Human Rights Covenants (1966)
- 11th Protocol to the ECHR (1998) allowing the individual victim to seize the ECtHR directly.

The Rise of the Individual in International Law

“There is no general rule that the individual cannot be a ‘subject of international law’, and in particular contexts he appears as a legal person on the international plane.”

Brownlie’s *Principles of International Law* (1966) at p. 65.

The Rise of the Individual in International Law

“[...] modern practice does demonstrate that individuals have become increasingly recognised as participants and subjects of international law.”

Shaw's *International Law* (6th edn, 2008), at p. 258.

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- 1.2 The rise of the individual in international law
- 1.3 The evolution of individual rights in international law

The Evolution of Individual Rights in International Law

“Both the substantive and the procedural rights of the individual in international law have undergone considerable development.”

Mondev International Ltd. v. United States, Award of 11 October 2002, para. 116.

The Evolution of Individual Rights in International Law

“It may be readily admitted that, according to a well-established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and enforceable by the national courts.”

Jurisdiction of the Courts of Danzig, Advisory Opinion, PCIJ Series B No. 15 (1928), 18-21.

The Evolution of Individual Rights in International Law

- Starting in 1959, investment treaties granted investors procedural and substantive rights.
- *LaGrand* case: the ICJ referred to the Vienna Convention on Consular Relations of 24 April 1963 and concluded that “article 36, paragraph 1, creates individual rights” (I.C.J. Reports 2001, para. 77).

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Relevance of the Debate in ISDS

- Can the Home State settle or waive an investor's claim without the investor's consent?
- Is an investor's claim affected by countermeasures taken by the Home State?
- Can an investor waive its rights under a BIT?
- Can the Home State pre-empt existing or future investor-state claims by filing its own state-to-state claim covering the same underlying conduct?
- Is an ISDS tribunal bound by interpretative statements of the treaty parties affecting the scope of the investor's rights?

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Third Party Rights vs Third Party Benefits

“A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.”

Article 36(1) of the Vienna Convention on the Law of Treaties.

Third Party Rights vs Third Party Benefits

“When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.”

Article 37(2) of the Vienna Convention on the Law of Treaties.

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4.1 The direct rights theory

4.2 The derivative rights theory

4.3 The contingent rights theory

The Direct Rights Theory

“The Claimants' position is that qualified investors under Chapter Eleven are vested with direct independent rights and that they are immune from the legal relationship between the Member States. The investor's cause of action is grounded upon substantive investment obligations which are owed to it directly.”

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), p. 54.

The Direct Rights Theory

“While this Tribunal is clearly an international tribunal established by treaty and while some of its cases involve the interpretation and application of public international law, most disputes (including all of those brought by dual nationals) involve a private party on one side and a Government or Government–controlled entity on the other, and many involve primarily issues of municipal law and general principles of law. In such cases it is rights of the claimant, not of his nation, that are to be determined by the Tribunal.”

Islamic Republic of Iran and United States (Case A/18) (Dual Nationality) (6 April 1984), 5 Iran-US CTR, 251 (261)

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4.1 The direct rights theory

4.2 The derivative rights theory

4.3 The contingent rights theory

The Derivative Rights Theory

“[...] the obligations listed in Section A of NAFTA Chapter Eleven are not owed directly to individual investors. Rather, the disputing investor must prove that the NAFTA Party claimed against has breached an obligation owed to another NAFTA Party under Section A ...”

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), p. 56 (citing Canada's pleadings before the Courts of Ottawa challenging the NAFTA Award in *S.D. Myers Inc. v. Government of Canada*).

The Derivative Rights Theory

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

Loewen Group, Inc. & Raymond v. United States of America, ICSID Case No. ARB(AF)/98/3 (June 26, 2003), para. 233.

The Derivative Rights Theory

“The derivative theory [...] supports the proposition that investment treaties provide a set of obligations which require the State to treat investments of qualified investors in accordance with the standards of the treaty; but these obligations are only owed to the State of the investor's nationality. If a breach of any of these standards occurs, the investor may bring the host State to an international arbitration in order to request compensation, but the investor will be in reality stepping into the shoes and asserting the rights of the home State.”

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), p. 57.

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The Contingent Rights Theory

“This approach is supported by a traditional derivative theory – pursuant to which when investors trigger arbitration proceedings against a State they are in reality stepping into the shoes and asserting the rights of their home State – and an intermediate theory – whereby investors are vested only with an exceptional procedural right to claim state responsibility under Section B before an international arbitral tribunal, deciding the dispute in accordance with the rights and obligations defined under Section A, which remain inter-state.”

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), p. 54.

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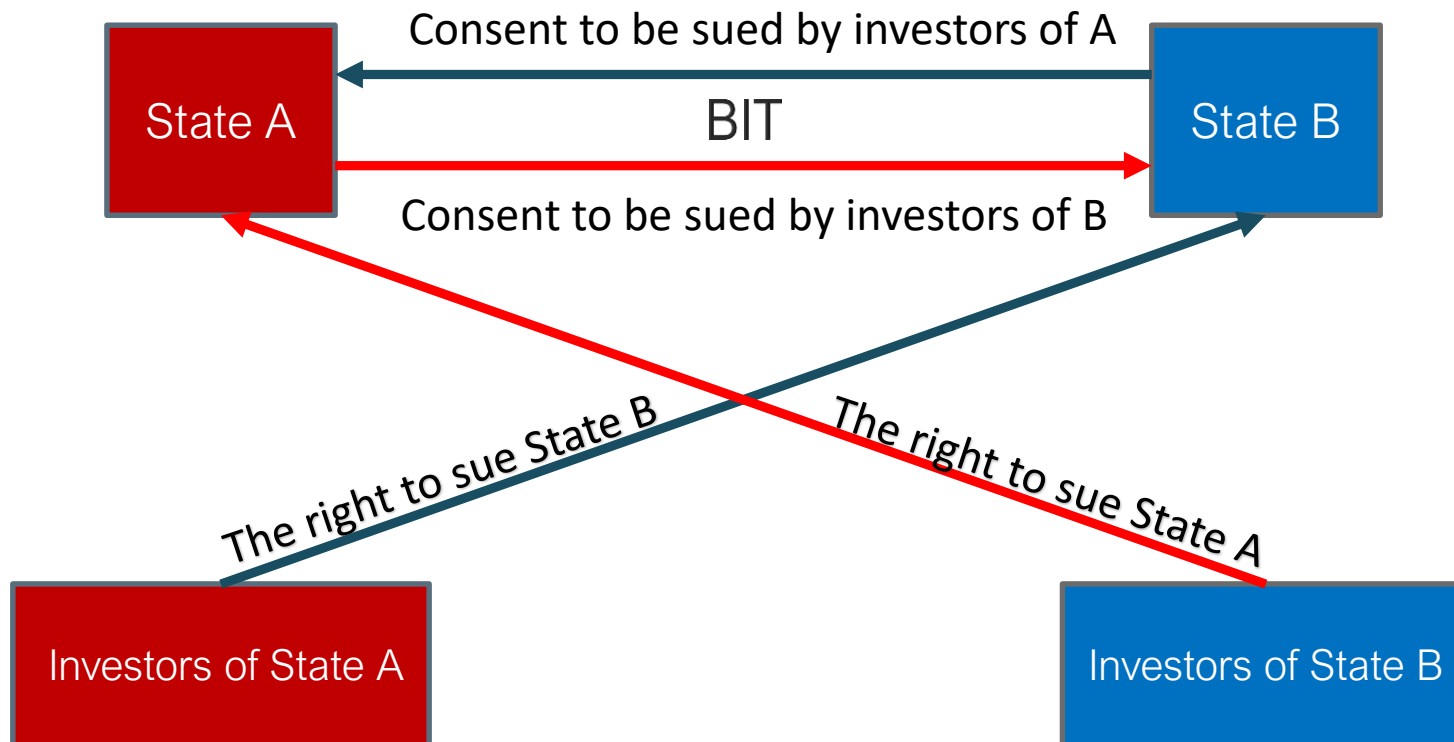
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Powers Retained by the Home State



Powers Retained by the Home State

“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.”

SGS Société Générale de Surveillance SA v. Philippines, ICSID Case Nos ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, 29 Jan. 2004, para. 154.

Powers Retained by the Home State

- Did States intend to prevent the Home State from exercising diplomatic protection or interfering in investor-state dispute ?
 - Article 27(1) of the ICSID Convention limiting the right to exercise diplomatic protection and to bring an international claim
 - Right of treaty parties to issue binding interpretative statements (e.g. NAFTA, Art 1131(2); China-Canada BIT, Articles 18 & 20).

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- A distinction must be drawn between the recognition and the granting of a right by treaty;
- The limits of individual rights under treaties are as important than their nature;
- These limits are defined by the agreement of the Parties.
- Whether States fully retain the ability to withdraw rights depends on the applicability of Article 37 VCLT to non-state actors
- In any event, the powers retained by the State also have their limits. States cannot reserve the power to change the past.