Beyond Protection: The Role of the Home State in Modern Foreign Investment Law

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Contents

Abstract The chapter examines the evolution of the role of the home state in foreign investment law. Traditionally, such a role was essentially limited to norm-setting and protecting nationals and national companies abroad. Protection was typically offered through diplomatic protection, which was based on the legal fiction that the state was vindicating its own right. The conclusion of modern investment treaties, the progressive emancipation of foreign investors and the development of investor-state arbitration meant a marginalisation of the home state. Some recent treaties, however, have paved the way for a new role for the home state that goes well beyond protection of its nationals and national companies. Innovative provisions have introduced obligations and responsibilities for the home state, especially with regard to the fight against corruption and the liability of its own investors. It remains to be seen to which extent these provisions will spread across the international community of states.

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C. Titi (ed.), *Public Actors in International Investment Law*, European Yearbook of International Economic Law, https://doi.org/10.1007/978-3-030-58916-5_2

1 Introduction

The aim of the chapter is to reflect on the role the home state plays in foreign investment law in the light of some recent developments and in particular some innovative provisions contained in investment treaties or model treaties. The chapter is divided in three parts that follow a chronological order: the role traditionally played by the home state; the role played by the home state in modern foreign investment law; and the role the home state may play in the future.[1]

2 Role of the Home State Before the Development of Foreign Investment Law

Before the full development of international investment law as we know it today, the role of the home state was essentially limited to protecting its subjects at the international level. As pointed out by the Permanent Court of International Justice (PCIJ) in 1924, it was—and still 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".[2]

In protecting its subjects, the home state performed three main functions. First, it contributed to the setting of normative standards for what was essentially the protection of aliens and their properties abroad. This occurred at the level of customary international law through legal claims and counterclaims put forward—and often fiercely resisted—in official documents, such as diplomatic correspondence in the context of international disputes.[3]

At the same time, states concluded increasingly sophisticated agreements, inter alia, for the promotion and protection of foreign investment. These agreements took typically the form of friendship, commerce and navigation (FCN) treaties and similar instruments. Initially dealing with a rather heterogeneous range of issues, these treaties progressively focused on economic matters. The most sophisticated of

[1] Unless otherwise indicated, treaties and investment decisions referred to in this paper are available, respectively, at https://investmentpolicy.unctad.org/international-investment-agreements, and https://www.italaw.com.

[2] *Mavrommatis Palestine Concessions (Greece v. UK)*, 1924 PCIJ (ser. B) No. 3, 30 August 1924, p. 12. In literature, see in particular Salacuse (2015), esp. Ch. 4; Miles (2013); Polanco (2018). See also Dumberry (2016), esp. Ch 2.

[3] For the famous diplomatic correspondence between Mexico and the United States in the 1930s in relation to the rules governing expropriation in the context of the Mexican economic reforms, see e.g. the documents reproduced in Hackworth (1942) vol. III, 228. Less known, but equally interesting is the contemporaneous correspondence between the British and the Mexican governments, see *Correspondence with the Mexican Government regarding the Expropriation of Oil Properties in Mexico*, 8 to 20 May 1938, *Cmd*. 5758.

these treaties can be considered as the precursors of modern bilateral investment treaties (BITs).[4]

Secondly, the home state played an important role in the adjudication of disputes concerning alleged violations of the international rules on the treatment of aliens and their properties. The typical mechanisms were claims commissions, mixed arbitral tribunals, and occasionally resort to the Permanent Court of Permanent Justice and later the International Court of Justice (ICJ).[5] These disputes were clearly interstate disputes in which the home state asserted its own rights or, more precisely, "its right to ensure, in the person of its subjects, respect for the rules of international law".[6]

This is evidenced by the fact that the home state was the claimant,[7] and therefore was in control of the presentation of the claim and the submission of evidence, although the affected nationals could marginally be involved in the proceedings. That the claim belonged to the home state was further confirmed by the calculation of compensation. As pointed out by the PCIJ, "the damage suffered by an individual is never [. . .] identical in kind with that which will be suffered by a state; it can only afford a convenient scale for the calculation of the reparation due to the State".[8]

Thirdly, with regard to the enforcement of the rules on the protection of nationals and their properties, the home state characteristically acted in diplomatic protection, which was based on the legal fiction that "an injury to the national was an injury to the State".[9] The home state did not hesitate to intervene militarily in a period in which, "from the nature of things and the absence of any common superior tribunal, nations [were] compelled to have recourse [to go to war], in order to assert and vindicate their rights".[10] The action of the home state typically took the form of what was elegantly—but by no means less brutally—called gunboat diplomacy.[11] Significantly, the first treaty limitation on the use of military force related precisely to the

[4]For two interesting examples, compare the Treaty of Peace, Friendship, Commerce, and Navigation between the United States and Bolivia (1858) at https://avalon.law.yale.edu/19th_century/bolivia01.asp, and the much more sophisticated Treaty of Amity and Economic Relations between the United States and Ethiopia (1951), 206 *UNTS* 41. In the second agreement the parties committed themselves to accord "at all times fair and equitable treatment" to the respective nationals and companies, and to expropriate their properties only for public purposes and against "prompt payment of just and effective compensation" (Article VIII).

[5]See Parlett (2011), esp. Ch. 2.

[6]*Mavrommatis Palestine Concessions*, *Mavrommatis Palestine Concessions (Greece v. UK)*, 1924 PCIJ (ser. B) No. 3, 30 August 1924, p. 12.

[7]As expressly held by the Germany-United States Mixed Claims Commission in *Administrative Decision II*, 1 November 1923, VII UNRIIA 23, p. 26.

[8]*Case Concerning the Factory at Chorzów*, PCIJ, Series A, No. 17 (1928), p. 28.

[9]International Law Commission, Draft Articles on Diplomatic Protection (2006), Commentary to Article 1, para 4.

[10]Phillimore (1885), vol. III, p. 77.

[11]Borchard (1929), p. 121; Tomz (2007).

recovery of contract debt claims claimed by one government from another government as due to the former's nationals.[12]

The exercise of diplomatic protection was opposed by several Latin American states, which developed the so-called Calvo doctrine.[13] According to the doctrine, foreigners were entitled to the same protection as nationals and could not lay claim to more extensive protection.[14] An important corollary of the doctrine was that states could not intervene in diplomatic protection. Latin American states sought to exclude diplomatic protection through the inclusion in contracts with foreigners of the so-called Calvo clause.[15]

3 Role of the Home State in Foreign Investment Law

3.1 Normative Function

The first function sketched in the previous section, namely norm-setting, is still firmly in the hands of states. The legal protection of foreign investment has changed radically with the conclusion since 1959 of more than 3000 bilateral investment agreements or economic integration agreements containing provisions on investment.[16] The conclusion of these agreements recorded a spectacular increase in the 1990s and 2000s.

States remain the masters of these agreements. They negotiate, amend, interpret and terminate them (unilaterally or by mutual consent) in accordance with the terms of the agreements themselves and the law of treaties. Contrary to FCN treaties, modern BITs focus exclusively on the promotion and protection of foreign investment. They contain increasingly sophisticated definitions and substantive and procedural rules.[17]

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[12]Convention Respecting the Limitation of Employment of Force for Recovery of Contract Debts (The Hague Convention II), concluded on 18 October 1907, at https://avalon.law.yale.edu/20th_century/hague072.asp.

[13]The doctrine was originally elaborated by Andrés Bello, see Montt (2009), pp. 41–44. It was proclaimed in Article 9 of the 1933 Convention on the Duties and Rights of States, 26 December 1933, 165 LNTS 19.

[14]Calvo (1896), p. 231. See also Hershey (1907), p. 1; Shea (1955); Orrego Vicuña (2003), p. 19; Schreuer (2005).

[15]See Summers (1933), p. 459; Lipstein (1945), p. 130.

[16]According to UNCTAD's website, 3291 investment agreements have been concluded and 2649 of them have entered into force, https://investmentpolicy.unctad.org/international-investment-agreements.

[17]To appreciate the evolution of BITs, it is sufficient to compare a BIT concluded by the United States in the 1990s with the BIT concluded with Uruguay on 4 November 2004. In literature, see in particular Dolzer and Stevens (1995); Sacerdoti (1997), p. 251; Vandevelde (2010); Van Harten (2010); Salacuse (2015); Brown (2013).

3.2 Adjudication

The real breakthrough, however, has occurred with regard to the second function, namely adjudication of disputes. Modern investment agreements systematically provide for two categories of disputes: interstate disputes and disputes between investors and the host state. While interstate disputes remain rather exceptional, according to UNCTAD, the number of known investor-state disputes is approaching 1000.[18] Virtually all investment treaties[19] give the concerned foreign investors access to international arbitration tribunals, normally without any obligation to exhaust domestic remedies beforehand.[20] The rationale behind these provisions is precisely to remove the dispute from the domestic arena and insulate it from any kind of pressure, including political pressure.[21]

These provisions propel foreign investors into the realm of international dispute settlement, a development that can be explained in two ways.[22] According to the first explanation, the agreement creates a legal relationship between the host state and the investor, the latter being the holder of substantive rights. Violations of these rights can be vindicated directly by the investor. As held by a tribunal, investment arbitration is "a remedy exercisable by an investor by itself and in its own right against the host state".[23] It is worth noting that some investment treaties, such as the BIT between Peru and the Belgium-Luxembourg Economic Union (BLEU), expressly recognise "that investors of one of the Contracting Parties are entitled to prevail directly their rights against the other Contracting Party through the arbitration."[24]

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[18] At https://investmentpolicy.unctad.org/investment-dispute-settlement. On the current discussion on the reform of investment arbitration within UNCITRAL, see https://uncitral.un.org/en/working_groups/3/investor-state. On asymmetries of investment arbitration, see in particular Toral and Schultz (2010). See also Laborde (2010) and Van Harten (2012).

[19] For two exeptions, see the BIT between Bulgaria and Cyprus, concluded on 17 November 1987 and entered into force on 18 May 1988, and the free trade agreement (FTA) between the United States and Australia, concluded on 18 May 2004 and entered into force on 1 January 2005.

[20] See Paulsson (1995), Sornarajah (2000), McLachlan et al. (2007) and De Brabandere (2015).

[21] See, for instance, *Gas Natural SDG* v *Argentina*, ICSID ARB/03/10, Decision on Jurisdiction, 17 June 2005, paras 29 ff.

[22] Douglas (2003), especially pp. 181–184; De Brabandere (2015), Ch. 2.

[23] *Plama v. Bulgaria*, ICSID ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 150. In *Gas Natural SDG* v *Argentina*, ICSID ARB/03/10, Decision on Jurisdiction, 17 June 2005, para. 34, the tribunal held that "the foreign investor acquires rights" under the treaty. In *Corn Products International, Inc.* v. Mexico, ICSID ARB (AF)/04/1, Decision on Responsibility, 15 January 2008, para. 168, the tribunal held that NAFTA contracting parties intended "to confer substantive rights directly upon investors". In *Case No. A/18*, 5 Iran-U.S.C.T.R. (1984-I) 251, p. 261, the Iran-United States Claims Tribunal emphasised that "it is the rights of the claimant, not of his nation, that are to be determined by the Tribunal". See also, UK Court of Appeal (Civil Division), *Occidental Exploration & Production Company and Ecuador*, 9 September 2005, [2005] EWCA Civ 1116, para. 18.

[24] Article 11.2, second sentence, of the BLEU-Peru BIT, concluded on 12 October 2005 and entered into force on 12 September 2008.

Alternatively, a second and more conservative explanation splits substantive and procedural provisions. From this perspective, substantive rules continue to be binding exclusively upon states, while investors are permitted to file requests for arbitration in case of violation.[25] From this perspective, the right of investors is derivative as states have transferred the right to seek the enforcement of the obligations contained in the treaty to their respective foreign investors. According to a North America Free Trade Agreement (NAFTA) tribunal, foreign investors "are permitted for convenience to enforce what are in origin the rights of Party states".[26]

In spite of the different theoretical foundations, however, the ultimate result is in good substance the same. In sharp contrast with disputes described in the previous section, in investment arbitration the claim is put forward and managed by the investor itself. The investor first attempts to reach a friendly settlement, makes a selection between the possible fora (if more than one are available), is involved in the appointment of the members of the tribunal, is in charge of all litigation strategies, submits all written documents, participates in the hearings, and ultimately is the recipient of compensation, if any is due.[27] As pointed out by a tribunal, "[t]he State of nationality of the Claimant does not control the conduct of the case. No compensation which is recovered will be paid to the State".[28] Quite the contrary, the idea of investment arbitration is precisely to keep the state as much as possible away from the proceedings.

The emancipation of investors as fully independent actors allowing them to bring and manage their own claims before arbitral tribunals means that claims brought against the host state by a foreign investor and by the home state are independent, even if they refer to the same measures or conduct. In *Plama v. Bulgaria*, the tribunal convincingly held that even if the investor cannot invoke the relevant provision on the settlement of investor-state disputes (Article 26 of the Energy Charter Treaty (ECT)),[29] the right of the home state to invoke the state-state dispute settlement provision (Article 27 of the ECT) remains intact.[30]

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[25]This seems to be the preferred position of Canada, *Methanex* v. *United States*, Second Submission of Canada Pursuant to NAFTA Article 1128, 30 April 2001, para. 9, at https://www.investorstatelawguide.com/documents/documents/UN-0015-29%20-%20Methanex%20v.%20US%20-%20Canada%201128%20Subm%202.pdf.

[26]*Loewen Group, Inc* v. *United States*, ICSID ARB (AF)/98/3 (NAFTA), Award, 26 June 2003, para. 233. NAFTA was concluded on 17 December 1992 and entered into force on 1 January 1994.

[27]This is without prejudice to the possibility of negotiations between the host and the home state, or the institution of proceedings by the latter against the former.

[28]As pointed out in *Corn Products International, Inc.* v. Mexico, ICSID ARB (AF)/04/1, Decision on Responsibility, 15 January 2008, para. 173 and footnote 70, only exceptionally is the investor not fully in control of the claim. This is the case of Article 2103(6) of NAFTA, according to which the home state and the host state can effectively preclude a putative claim of expropriation based upon a taxation measure by determining that the measure in question was not an expropriation.

[29]Concluded on 17 December 1994 and entered into force on 16 April 1998.

[30]*Plama* v. *Bulgaria*, ICSID ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 150.

Furthermore, the home state cannot prevent its own investors from filing a request for arbitration, not even if it has started state-state proceedings. In *Empresas Lucchetti v. Peru*, the host state asked for the suspension of the investor-state proceedings since the claimant's allegations at the heart of the dispute were the object of a *concurrent* state-state arbitration. The tribunal held that the conditions for a suspension of the proceedings were not met and rejected the request without further discussion.[31]

The independence of each claim is further demonstrated by the fact that some treaties expressly preclude the possibility of international claims brought by the home state if the investor has started arbitration proceedings, unless the host state has failed to abide by and comply with the award rendered in the dispute. Article 27(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) offers an excellent example. It provides that "[n]o 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 this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute".[32] Finally, in investor-state disputes, the home state can make—and has indeed made—non-disputing party submissions expressing disagreement with the position of its own investors, an issue that will be discussed below.[33]

Yet, in spite of the developments concerning the settlement of disputes through arbitration, diplomatic protection retains its importance, especially before resort to arbitration. Diplomatic action continues to be used for the purpose of facilitating the settlement of the dispute,[34] and even of pushing the host state to consent to arbitration.[35] From this perspective, diplomatic protection has not been disposed of by arbitration, but rather plays a complementary role.[36]

Furthermore, it is worth noting that diplomatic protection has undergone a profound evolution. The International Law Commission has considered the legal

[31] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.* v. *Peru*, ICSID ARB/03/4, Award, 7 February 2005, paras 7 and 9.

[32] For other examples, Article 34.3 of the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement; Article 14.13(i) of the Indian Model BIT; Article 30.1 of the Belarus-India BIT, signed on 24 September 2018 (not in force yet). See also Appendix III, Article 4 of the Arbitration Rules of the Stockholm Chamber Commerce.

[33] See, for instance, United States Submission in *GAMI Investment Inc.* v. *Mexico*, 30 January 2003, at https://jusmundi.com/en/document/pdf/Other/IDS-87-4041955868-2425331503/en/en-gami-investments-inc-v-united-mexican-states-submission-of-the-united-states-of-america-monday-30th-june-2003.

[34] This is fully consistent with Article 27 of the ICSID Convention. See the action of the German Government in relation to the claim brought by Fraport against the Philippines in Polanco (2018), p. 226.

[35] See *Compañia del Desarrollo de Santa Elena S.A.* v. *Costa Rica*, ICSID ARB/96/1, Final Award, 17 February 2000, paras 24–26.

[36] See Polanco (2018), p. 230.

fiction behind the traditional exercise of diplomatic protection as unnecessary in contemporary international law and recognised that states may exercise it in their own right, that of their nationals, or both.[37] From this perspective, in *CSM v. Argentina*, the tribunal did not hesitate to hold that "the State of nationality is no longer considered to be protecting its own interest in the claim but that of the individual affected".[38]

3.3 Enforcement

With regard to the third function, namely enforcement, the introduction of investment arbitration has also meant a significant retreat of the home state once the investor has instituted arbitral proceedings and possibly the relegation of diplomatic protection to the hypothesis of failure by the host state to comply with the award rendered by the arbitral tribunal. A minority of investment treaties (around 12%) expressly preclude resort to diplomatic protection during arbitral proceedings, apart from informal diplomatic exchanges genuinely meant to facilitate the settlement of the dispute.[39]

It remains to be seen whether diplomatic protection is still available during arbitral proceedings when the relevant treaties are silent on the issue. In *Italy v. Cuba*, the ad hoc arbitral tribunal held by majority that "*tant que l'investisseur ne s'est pas soumis à l'arbitrage international contre l'Etat d'accueil, son droit à la protection diplomatique subsiste*".[40] The statement hints *a contrario* to the fact that diplomatic protection is not available once arbitral proceedings have been instituted. This position seems to be shared by some scholars. According to one view, investment arbitration is based on a trade-off since "the potential respondent State accepts to arbitrate with a private entity and [. . .] is relieved from the risk of being exposed to diplomatic protection by the investor's Home State".[41]

Yet, other authors are sceptical about the exclusion of diplomatic protection during arbitration proceedings in the absence of a specific treaty provision in this

[37] Draft Articles on Diplomatic Protection with Commentaries (2006), Article 1, Commentary, para. 5, *Yearbook of the International Law Commission* (2006) Vol. II, Part II, 27.

[38] *CMS Gas Transmission Company* v. *Argentina*, ICSID ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 45 (relying on Bederman (2002), pp. 253–256). Quoted with approval in *Italy v. Cuba*, Interim Award, 15 March 2005, para. 65. In the Final Award, 1 January 2008, para. 141, the Tribunal seems more hesitant when holding that the home state acting in diplomatic protection still makes the claims its own ("*s'approprie*").

[39] Paparinskis (2008), pp. 281–297.

[40] *Italy v. Cuba*, Interim Award, 15 March 2005,para 65; Final Award, 1 January 2008, para. 141.

[41] Kaufmann-Kohler (2013), pp. 324–325. See also Kokott (2002), esp. p. 31; Juratowitch (2008), pp. 21–22.

sense.[42] They have insisted on the absence of sufficient evidence on the emergence of customary rules preventing states from exercising diplomatic protection once arbitral proceedings have been instituted. According to this view, the very fact that some treaty provisions—such as Article 27 of the ICSID Convention—preclude diplomatic protection during arbitral proceeding proves that the two remedies are autonomous and may well coexist as long as the concerned states have not agreed otherwise.

The delicate relationship between diplomatic protection and investment arbitration has resurfaced in the context of the 2014 Rules on Transparency of the United Nations Commission on International Trade Law (UNCITRAL), whose Article 5 (2) *in fine* directs the tribunal to take into account, when allowing non-disputing party submissions, "the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection".[43]

It is well known that several investment treaties, such as NAFTA,[44] the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada,[45] or the BIT between Peru and Japan,[46] offer the non-disputing state parties the possibility of presenting formal written submissions on the interpretation of the relevant treaty provisions with a view to assisting the tribunal in its search of the common intention of the parties as recorded in the treaty.[47] Obviously, the interpretation put forward in the non-disputing party submission may influence the decision of the tribunal since interpretation "[i]nvolves understanding the intention" of the parties to the treaty.[48] Indeed, this is precisely the purpose of the submissions, namely to safeguard the "legitimate"[49] or "systemic"[50] interest of the treaty parties to the treaty in the correct interpretation of the treaty.

Non-disputing party submissions relate to the interpretation of certain treaty provisions and as such must be abstract and detached from the merits of the dispute.

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[42]Polanco (2018), p. 222, notes that "in the absence of a specific provision in an investment treaty or the applicable arbitral rules, there should be no limitation on having both [Investor-State Arbitration] and diplomatic protection claims in parallel". See also Paparinskis (2008), pp. 281–300.

[43]See https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

[44]Article 1128 of NAFTA.

[45]Article 8.38(2) of CETA, concluded on 30 October 2016 and entered into provisional application on 21 September 2017, with the exclusion of the chapter on investment.

[46]Article 18(17) of the Japan-Peru BIT, concluded on 21 November 2008 and entered into force on 10 December 2009.

[47]In 2015, the estimation was that well under 1% of investment treaties provide explicitly for submissions by non-disputing parties, see Gordon and Pohl (2015), p. 26.

[48]*Mobil Investments Inc. & Murphy Oil Corporation* v. Canada, ICSID ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 254, quoted with approval in *Mesa Power Group LLC* v. *Canada*, PCA Case No. 2012-17 (NAFTA and UNCITRAL), Award, 24 March 2016, para. 405.

[49]Kinnear (2006).

[50]Paparinskis and Howley (2015), p. 196.

If they are not, the tribunal should simply discard them. Whether a submission is in favour of the investor should be incidental. The reference to "tantamount to diplomatic protection" in Article 5(2) of the 2014 UNCITRAL Rules on Transparency[51] can indeed be read as excluding submissions intended to advance the cause of the investor by taking position on the specific circumstances of the pending dispute instead of clarifying the non-disputing party's position on certain points of treaty interpretation. Otherwise the state would unduly interfere with the proceedings and affect their independence and fairness.

The risk is however more apparent than real. According to an arbitrator, the respondent state and the non-disputing state(s) inevitably "club together" to share the same interpretation at the expense of the investor.[52] Whatever the merits of this view and the negative connotation attached to it, the statement demonstrates that the home state does not necessarily share the position of its own nationals and has moved away from its role as protector. Indeed, the attitude of the home state must be seen through the lens of mutual interest and reciprocity, the engines of the development of international law. From this perspective, the home state is more interested in the proper interpretation of the treaty rather than in the outcome of the specific dispute before the tribunal. In other words, what really matters to the home state is ensuring that all investors falling within the scope of the treaty enjoy exactly the protection the contracting parties had agreed to grant them, nothing less and nothing more.

Ultimately, in addition to diplomatic protection, the home state may adopt the measures permitted under general international law to induce compliance by the host state with its investment obligations or final and binding investment awards.[53] Such measures may typically take the form of acts of retorsion, which consist in unfriendly measures always available to states—since they are not inconsistent with any relevant international obligations—possibly including withdrawal from the World Trade Organization's (WTO) Generalized Systems of Preferences.[54] Alternatively, the home state may resort to countermeasures. This presupposes a prior breach of international law—in this case non-compliance with investment obligations or investment awards—, it implies a conduct otherwise contrary to international law and must respect all conditions required under the rules on state responsibility.[55]

It remains however doubtful whether, in the case of a plurilateral investment treaty, the right to adopt countermeasures may be extended also to what the International Law Commission has qualified under Article 54 of the Articles on

[51]See https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

[52]C. N. Brower, Concurring and Dissenting Opinion in *Mesa Power Group LLC* v. *Canada*, PCA Case No. 2012-17 (NAFTA and UNCITRAL), Award, 24 March 2016, para. 30.

[53]See Schreuer et al. (2009), p. 1109; Echandi (2012).

[54]See Alford (2014); Titi (2014); Polanco (2018), pp. 205–209.

[55]See International Law Commission, Articles on State Responsibility (2001), especially Articles 49 to 53, *Yearbook of the International Law Commission* (2001) Vol. II, Part II, 20. Countermeasures have normally been discussed as circumstances precluding wrongfulness see, in particular, Paparinskis (2008).

the Responsibility of States as "States other than the injured State"—or, for the purpose of this chapter "states other than the home state". Since the obligations imposed by the treaty are clearly based on reciprocity and not "established for the protection of a collective interest of the group",[56] the right to adopt countermeasures clearly only concerns the home state. Indeed, these obligations are divisible, in the sense that a state may breach them with regard to one but not necessarily all other states parties to the treaty.[57]

4 Towards a New Role for the Home State

The role the home state is going to play in the future, and indeed the role it has already started to play, must be appreciated in the context of the reform that the entire investment treaty regime is currently undergoing.[58] After the golden period between 1990 and the 2000s, the popularity of investment treaties has significantly dropped. States are now rather reluctant to conclude investment agreements, although regionalism is still on the rise.[59] A significant number of BITs have been terminated and their global number has started to decline. States have responded differently to the three main concerns raised with regard to investment treaties: their manifestly unbalanced content;[60] the safeguard of regulatory powers, which many states perceive as inadequate;[61] and the lack of legitimacy and other shortcomings of investment arbitration.[62]

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[56]Article 48(1)(a) of the Articles on State Responsibility, *Yearbook of the International Law Commission* (2001) Vol. II, Part II, p. 20.

[57]*Contra* Echandi (2012), p. 122.

[58]See UNCTAD, *Reforming Investment Dispute Settlement: A Stocktaking*, IIA Issues Note No 3 (May 2019) https://investmentpolicy.unctad.org/news/hub/1608/20190329-reforming-investment-dispute-settlement-a-stocktaking. See also UNCTAD, *Reform Package for the International Investment Regime* (2018 edition) https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf.

[59]See UNCTAD, *The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?*, IIA Issues Note No 3 (June 2013) http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=532. On investment agreements concluded by the European Union or under negotiation, see the Commission's website https://ec.europa.eu/trade/policy/accessing-markets/investment/index_en.htm. On African regional agreements, see Special Issue, 18 *Journal of World Investment & Trade* (2017).

[60]In *Spyridon v. Romania*, ICSID ARB/06/1, Award, 7 December 2011, para. 871, the tribunal conceded that the relevant BIT "imposes no obligation on investors, only on contracting States".

[61]As pointed out by the Commonwealth Investment Experts Group Meeting for the African Region, "[o]ne common issue is the need to clarify the interaction between international investment instruments and domestic investment policy as well as policy in other areas – for e.g., sustainable development and environmental regulation. Governments must always be concerned about ensuring that there is sufficient policy space for them to engage in reconciling competing interests", Kampala, Uganda, 20-21 October 2011, on file with author.

[62]See, in particular, Waibel et al. (2010); Kalicki and Joubin-Bret (2015).

Some states have modernized their BITs with a view to bringing them in line with the development of international law, rebalancing and better defining their substantive provisions, and recalibrating the host state's exposure to arbitration.[63] States have also adopted new and more sophisticated model BITs, as the Model Text for the Indian Bilateral Investment Treaty adopted in 2015 (hereinafter Indian Model BIT), which will be used in the negotiations of BITs between India and other states and can also be expected to inspire other governments.[64] Other states have reconsidered their investment treaty policy and eventually decided to switch to domestic legislation. The adoption of the South African Protection of Investment Act (2015), which is largely pegged to the South African Constitution, is a good example.[65]

The concerns under discussion are real and have been addressed primarily by striking a better balance between, on the one hand, the rights and obligations of the host state and, on the other hand, those of investors. Moreover, a few legal instruments have introduced provisions imposing obligations upon the home state and enhancing the collaboration between the host and home states, most prominently in the promotion of sustainable development, the fight against corruption and the liability of foreign investors.

From this perspective, the Economic Community of West African States' (ECOWAS) Supplementary Act of 2008 can be considered as having pioneered a new approach.[66] Several of its innovative provisions have subsequently made their way into other African treaties as well as treaties outside that continent. The ECOWAS Supplementary Act includes an entire section on the rights and obligations of the home state, dealing with four issues, namely facilitation of foreign investment, disclosure of information, liability of investors, and the fight against corruption.[67]

In accordance with the ECOWAS Supplementary Act, first, the home state *may* facilitate cross border investment and is obliged to inform the host state of the measures adopted in this regard.[68] Second, and more incisively, the home states shall, on request and subject to a confidentiality caveat, promptly provide a potential host state with the information expected to enable the latter to comply with its

[63]See, for instance, the Morocco-Nigeria BIT, concluded on 3 December 2016 (not entered into force yet).

[64]See https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf. For the agreements concluded since the adoption of the Model BIT or under negotiation see https://www.dea.gov.in/bipa?page=10.

[65]See https://www.thedti.gov.za/gazzettes/39514.pdf. For a much more pro-investor piece of legislation, see the Law Relating to Investment Promotion and Facilitation adopted by Rwanda in 2015 (N° 06/2015) https://investmentpolicy.unctad.org/investment-laws/laws/82/rwanda-investment-law.

[66]Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (hereinafter ECOWAS Supplementary Act), concluded on 28 December 2008 and entered into force on 19 January 2009.

[67]Section VI of the ECOWAS Supplementary Act.

[68]Article 27 of the ECOWAS Supplementary Act.

obligations under the treaty and domestic legislation. The home states shall also, on request, promptly provide information on standards that may apply to investors, and most prominently, those related to social and environmental impact assessments.[69] On the latter point, it is worth stressing that the home state may contribute to standard-setting and to the review of standards applicable to the authorisation and management of investments made by its own investors in the host state. The main aim of these provisions is to optimise the impact of investment projects as well as to enhance compliance by the host state with its international commitments.

With regard to the liability of its own investors, the ECOWAS Supplementary Act imposes upon the home state the obligation to ensure that its legal system allows for, or does not prevent or unduly restrict, civil action before its courts in relation to liability for damages resulting from alleged acts or decisions made by investors in the territory of the host state. The host state laws on liability shall apply to such civil proceedings.[70]

The above provision on liability has been reproduced in the Southern African Development Community (SADC) Model BIT Template (2012),[71] in the BIT between Morocco and Nigeria,[72] and more importantly the 2015 Indian Model BIT.[73] However, and quite significantly, the provision has not been included neither in the BIT concluded between India and Belarus on 24 September 2018,[74] nor in the Investment Cooperation and Facilitation Treaty concluded between India and Brazil on 25 January 2020.[75] This is a clear reminder that states may be reluctant to accept international obligations in this respect.

As pointed out by the Indian Law Commission in its analysis of the 2015 Indian Model BIT, the provision aims at removing or minimising jurisdictional constraints that could prevent civil action before the tribunals of the home state, most prominently under the *forum non conveniens* doctrine on grounds that there is a more appropriate forum to hear the case.[76] This would be typically the case of a dispute

[69]Article 28 of the ECOWAS Supplementary Act. Article 5 of the Morocco-Nigeria BIT provides that "[t]he Parties shall exchange information concerning investment, particularly through the Joint Committee. Whenever possible, the information shall, reveal, in advance, useful data on procedures and special requirements for investment, business opportunities and expectations for major parties projects".

[70]Article 29 of the ECOWAS Supplementary Act.

[71]See https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf, Article 17.

[72]Article 20 reads: "Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state".

[73]Article 13, entitled *Home State Obligations*.

[74]Not entered into force yet.

[75]Not entered into force yet.

[76]Law Commission of India, Report 260 http://lawcommissionofindia.nic.in/reports/Report260.pdf, p. 37. On the doctrine, see amongst many, Brand and Jablonski (2007) and Gardner (2017). On the resilience of the doctrine, see Holly (2019).

such as the one related to the infamous Bophal incident,[77] which was expressly mentioned by the Indian Law Commission.[78]

Enhancing the liability of the home state has found the support of Nobel Prize economist Joseph Stiglitz, who emphasised, with regard to the liability of multinational companies under the United States Alien Tort Act,[79] that civil claims "will not harm economic development of least developed countries, United States businesses operating abroad, or investment in the United States".[80]

Coming back to the ECOWAS Supplementary Investment Act, investors must refrain from engaging in practices of corruption.[81] Connivance in corruption certified by a court of the host state would deprive the investor of the right under the treaty to bring a claim against the host state.[82] Interestingly, not only the host but also the home state may object, on grounds of violations of the above provision, to the jurisdiction of any tribunal before which the investor has brought a case under the treaty.[83]

Moreover, the host state must make corrupt practices criminal offences and investigate, prosecute and punish them with appropriate sanctions.[84] The home state, in turn, must ensure that any money or other benefits obtained through these practices is not recoverable or deductible through any fiscal or tax policies. The home state must also provide all available information that might assist a tribunal dealing with a claim brought under the treaty in determining whether there has been a breach of an anti-corruption obligation.[85]

Furthermore, both the host and the home state may initiate proceedings against the investor in case of breaches of the prohibition to become involved in corruption, or in case of persistent failure to comply with domestic obligations related to hygiene, security, health and social welfare, human rights and fundamental labour standards, as well as corporate governance and practices.[86] The dispute will fall within the jurisdiction of a tribunal established in accordance with the

[77]For a recent discussion of the complex litigation in the United States that followed the Bophal incident, see Krishna (2020). See also, Muchlinski (1987), p. 545; Baxi (1986).

[78]Law Commission of India, Report 260 http://lawcommissionofindia.nic.in/reports/Report260.pdf, pp. 36–37.

[79]28 USC § 1350. See in particular *Kiobel* v. *Royal Dutch Petroleum Co*., 569 US 10, 17 April 2013. In *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018), 24 April 2018, the United States Supreme Court held by a five-four Justice majority that foreign corporations cannot be sued under the Act https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf.

[80]Brief of Joseph E. Stiglitz as *amicus curiae*, *Kiobel* v. *Royal Dutch Petroleum CO* et al, 11 December 2011 https://harvardhumanrights.files.wordpress.com/2012/01/brief-of-joseph-e-stiglitz.pdf.

[81]Article 13 of the ECOWAS Supplementary Act. See also Article 17 of the Morocco-Nigeria BIT.

[82]Article 18.1 of the ECOWAS Supplementary Act.

[83]Article 18.1 of the ECOWAS Supplementary Act.

[84]Article 30.1 of the ECOWAS Supplementary Act.

[85]Article 30.3 of the ECOWAS Supplementary Act.

[86]Article 18. 3 of the ECOWAS Supplementary Act.

Supplementary Act. This part of the provision remains obscure as the Supplementary Act expressly provides only for the judicial settlement of a dispute between the host state and investors.[87] This serious shortcoming notwithstanding, the provision shows that states can go as far as envisaging a role for the home state in the judicial enforcement of the obligations of its own nationals under the treaty.

The above provisions design a role for the home state that is much more complex than the traditional norm-setting and protection of national investors and investments. They have introduced new responsibilities for the home state that, at least potentially, enhance the collaboration with the host state, increase the standard of liability for foreign investors, and ultimately may improve the legitimacy of foreign investment law.

5 Conclusions

Traditionally, the home state acted as the protector of national investors and could make investors' claims its own for the purpose of diplomatic protection. The establishment and development of increasingly sophisticated and efficient international mechanisms for the settlement of disputes between investors and the host state have profoundly modified the situation. On the one hand, foreign investors have been fully emancipated and can normally bring their own claims before international arbitral tribunals. They are in control of the entire process of adjudication, although they may need the support of their own state in case of non-compliance with the arbitral award. On the other hand, the home state has been relegated to a rather marginal role as demonstrated, inter alia, by the scarcity of state-state investment disputes. During the proceedings, the presence of the home state has become much more discrete and it is not necessarily supportive of the national investors' claims, as in the case of non-disputing party submissions.

Recently, however, a few investment treaties provide for a more active role of the home state. Although such treaties still remain rather isolated, it is possible to detect a relatively clear trend. Home states are progressively called to play a role that goes well beyond the traditional protection and may contribute to the reform of the investment treaty regime. Such a role is emerging in areas where the public interest is of paramount importance, such as the protection of the environment, the fight against corruption, and the liability of multinational companies. Yet, borrowing from the nomenclature of Hollywood's Oscar awards, the home state will probably never be nominated for a leading role. This will remain the domain of the host state and foreign investors. But in due time the home state may receive a nomination for a supporting role.

[87] Article 33.6 of the ECOWAS Supplementary Act.

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