In Someone Else's Shoes: Are the Investor's Rights His Own or Those of the Home State?

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and Oleg Temnikov

> There is a Taoist fable of the three stupid men who were traveling together from one village to the next. They rested for the night under a banyan tree. In the morning, it turned out that the travelers have forgotten whose shoes are whose. Because none of the three men was able to walk in another man's shoes or to recognize his own their journey ended under the banyan tree.

Foreword

On February 8, 2013 the tribunal in *Tidewater and ors v. Venezuela* (ICSID Case No. ARB/10/5) issued its Decision on jurisdiction. To the present authors it was of particular interest for the following passage:

> "[Investment treaties] … may provide for investor-state arbitration, but only for a class of claims that is more limited ratione materiae than the total **corpus of substantive rights** vouchsafed under the treaty." (para. 128)

Using this decision as an occasion, we here join in the debate as to whether the investor has substantive rights under a BIT or he is rather only permitted to step "into the shoes and asserting the rights of the home State". (*Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, November 21, 2007, para. 169)

The roots of the debate: Investor's substantive rights and countermeasures

The debate as to whether investors possess individual rights under BITs was brought to the forefront by the three "sweetener" cases which dealt with the question whether Mexico can rely on a defence of countermeasures against the United States to justify its breach of the NAFTA. To understand the matter, consider Comm. 5 to Art. 49 of the ILC's Articles on State responsibility:

> "[C]ountermeasures may […] incidentally affect the position of third States or indeed *other third parties […] If they have no individual rights in the matter they cannot complain*."

It follows that if investors have individual rights under BITs, the host State cannot rely on a defence of countermeasures.

The first tribunal in *Archer Daniels* denied that investors have individual rights under the NAFTA and found that investors are permitted to enforce what are in essence inter-State rights: "Chapter Eleven sets forth substantive obligations which remain inter-State, **without accruing individual rights for the Claimants**." (para. 168; See also paras. 169-180) As a result, the tribunal held that the Respondent State can rely on countermeasures. (para. 180)

The second tribunal in *Corn Products International, Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/01, Decision on responsibility, January 15, 2008) took exactly the opposite view: "In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the Parties **was to confer substantive rights directly upon investors**." (para. 169)

Therefore, it rejected the defence of countermeasures:

> "A central purpose of Chapter XI… was to remove such claims from the inter-State plane and to ensure that investors could assert rights directly against a host State. The Tribunal considers that, in the context of such a claim, **there is no room for a defence based upon the alleged wrongdoing not of the claimant but of its State of nationality, which is not a party to the proceedings**." (para. 161; See also paras. 176, 192)

Finally, the third tribunal in *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009) also supported the position that countermeasures may not preclude the wrongfulness of an act in breach of obligations owed to nationals of the 'offending State'. (para. 422, See also para. 429)

None of the three tribunals discussed the possible implications of the Monetary Gold principle. According to said principle, whether legal interests of a third State (in the above cases the United States) not participating to the proceedings "would not only be affected by a decision, but would form the very subject-matter of the decision"[fn]Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954, pp.32-33.[/fn] the judicial or arbitral body before which the claim is presented shall decline to exercise jurisdiction since the consent of the third State is a necessary precondition. This is another ground on which the defence of countermeasures must fail.[fn]Although the question whether the Monetary Gold principle applies in investment disputes is still unsettled its applicability has not been denied by a tribunal which recently faced this problem. (Chevron Corporation & Texaco Petroleum Company v. Ecuador, PCA Case No. 2009-23, Third Interim Award on jurisdiction and admissibility, February 27, 2012, paras. 4.60, 4.64)[/fn]

Further support for the view that investors have substantive rights under BITs

Other arbitral awards[fn]SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004, para. 154; Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Decision on jurisdiction, February 8, 2005, para. 141; Camuzzi International S.A. v. Argentina, ICSID Case No. ARB/03/7, Decision on Jurisdiction, June 10, 2005, para. 44; Gas Natural SDG, S.A. v. Argentina, ICSID Case No. ARB/03/10, Decision on Jurisdiction, June 17,

2005, para. 34; BG Group Plc. v. Argentina (UNCITRAL Arbitration Rules) Final Award, December 24, 2007, para. 145.[/fn] as well as national court decisions[fn]Occidental Exploration & Production Company v. Ecuador, UK Court of Appeal, Judgment September 9, 2005, (2005) EWCA Civ 1116, para. 20; British Caribbean Bank Limited v. The Attorney General of Belize (Civil Appeal No. 6 of 2011) Court of appeal of Belize, Decision, August 3, 2012, para. 153.[/fn] recognize that investors have substantive rights. The International Law Commission has also supported this view in its study on the MFN clause:

> "While the obligation to accord most-favoured nation treatment is undertaken by one State vis-à-vis another, the treatment promised thereby is one actually **given in most cases to persons**…" (Comm. 2 to Article 5 1978 Draft Articles on most-favoured-nation clauses with commentaries)

It is therefore submitted that the rights of investors are substantive and that they cannot be stripped of those rights by the host State's exercise of countermeasures.[fn]See Douglas, Z., The Hybrid Foundations of Investment Treaty Arbitration in 74 BYIL 151(2003) p. 182.[/fn]

This proposition is further supported by the fact that home States have no control over the investor's claims. Likewise, the tribunal in *Corn Products* mentioned that:

> "The individual may even advance a claim of which the State disapproves… That occurred in *GAMI*, in which the United States filed a submission that the Tribunal lacked jurisdiction…" (para. 173)

Other implications of the direct/procedural rights debate

The other implications of the debate turn on issues such as the continuous nationality rule[fn]See Schreuer, C. et al., The ICSID Convention: A Commentary (Cambridge: 2009) p. 276. Cf. The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, para. 220.[/fn] and waiver of rights.

As to the continuous nationality rule it suffice to mention that since the rights under BITs accrue to investors and are not constrained in the inter-State diplomatic protection model[fn]See Arts. 5 and 10 ILC's draft Article on diplomatic protection with commentaries and references there.[/fn] there is no requirement that the claimant shall have the nationality of the home State continuously from the date of the injury to the date of the award, but need only establish that it had the nationality of the home State on the two dates specified in Article 25(2)(a) of the ICSID Convention, namely "on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered." (*Corn Products*, para. 172)

As to waiver, it shall be stated that investors may make valid waiver of their rights, if it is explicit and unambiguous[fn]Aguas del Tunari, S.A. v. Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction, October 21, 2005, para. 118.[/fn] contrary to the view once expressed by the tribunal in *SGS Société Générale de Surveillance S.A. v. Philippines* (ICSID Case No. ARB/02/6, Decision on jurisdiction, January 29, 2004, para. 154).

We do not go so far as to suggest that due to the direct nature of the investor's rights a defence based on necessity would be unsuccessful.[fn]See Reinisch, A., Necessity in Investment Arbitration, 41 Netherlands YBIL 137 (2011), pp. 151 ff.[/fn] Notably, in 2007 the German Constitutional Court

held that:

> "currently no rule of general international law can be ascertained entitling a State, *vis-à-vis* private individuals, to suspend the performance of due obligations for payment arising under private law by invoking necessity based on an inability to pay".[fn]Schill, S., German Constitutional Court Rules on Necessity in Argentine Bondholder Case, 11:20 ASIL Insight (2007).[/fn]

However, this topic deserves further research.

Are individuals subjects of international law?

Finally, one last and more general implication of the debate concerns the status of individuals as subjects of international law. The most authoritative definition of subjects of international law given so far is that provided by the ICJ in the *Reparation for injuries* Advisory Opinion:

> "a subject of international law [is] capable of possessing international rights and duties, and… it has capacity to maintain its rights by bringing international claims."[fn]Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 179.[/fn]

The theory of international legal personality has some inherent ambiguities. Firstly, it is not clear whether subjectivity is acquired *a posteriori*; that is, it follows the conferment of rights and duties, or, on the contrary, the latter flows from the recognition of international personality. Secondly, under the theory that individuals are subjects of international law since they are capable of possessing rights and duties under international law, it turns out that only certain individuals – and not the whole class of individuals or their formations – would qualify as subjects. For example, only protected investors have rights under BITs, as suggested above, or, in the field of human rights, only those nationals of States parties to the First Optional Protocol to the ICCPR are capable of bringing individual communications.

Be that as it may, it appears generally agreed that individuals qualify as subjects of international law. This view is supported by the two latest treatises on the subject.[fn]Portmann, R., Legal Personality in International Law 276 (Cambridge: 2010); Parlett, K., The Individual in the International Legal System. Continuity and Change in International Law 371 (Cambridge: 2011).[/fn] Similarly, the tribunal in *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24, Decision on jurisdiction, February 8, 2005) prominently held that:

> "By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, **marking another step in their transition from objects to subjects of international law**." (para. 141)

Conclusion

The majority of arbitral tribunals have opined that investors possess substantive rights under BITs and this has important implications as above described. To return to the *leitmotif* contained in the beginning of this post, the investor is now able to walk in the field of international investment law

comfortably on his own legs and in his own shoes.