Investor-State Mediation: Is There a Future?

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HOME-STATE ASSISTED NEGOTIATIONS—AN ALTERNATIVE TO MEDIATION?

Seen from a historical standpoint, the emergence of bilateral investment treaties (BITs) and investor-State arbitration can essentially be understood and described as a reaction to the procedural uncertainties of diplomatic protection in customary international law and the uncertainties of its material standards.¹ As international law has traditionally been interpreted, individuals are considered to possess importance under international law—and are thus legally relevant from the point of view of States—only in cases when their home States have interceded on their behalf in disputes with other countries. A classical example of this mediation of the individual in the context of diplomatic protection can be found in cases where a home State can enforce a violation of a minimum standard of the law relating to aliens on the part of a host State as its own right:² “By taking up the case of one of its subjects and


² 3 Emer de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns 136 (1758, English translation 1916) (“Whoever offends the State, injures its rights, disturbs its tranquility, or does it a prejudice in any manner whatsoever, declares himself its enemy, and exposes himself to be justly punished for it. Whoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety”); see also Edwin Montefiore Borchard, The Diplomatic Protection of Citizens Abroad or the Law for International Claims 354 (1915) (“Diplomatic Protection is in its nature an international proceeding, consti-
by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.\textsuperscript{3}

A logical consequence of this, to date, overwhelmingly dominant understanding that it is the rights of the home State that are violated in such cases rather than those of the investor, is that the granting of possible diplomatic protection remains at the discretion of the home State: “The State must be viewed the sole judge to decide whether its protection will be granted, to what extent it will be granted and when it will cease…. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the case.”\textsuperscript{4}

Thus, the investor is not inherently entitled to call on its home State to enforce the possible violation of its rights vis-à-vis the host State in which the investment was made:\textsuperscript{5} “All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress.”\textsuperscript{6} Where human rights are concerned, the discretion of a State may, in certain constellations, exceptionally face a normative “expectation of protection” of its citizens, which may intensify to become a duty to exercise diplomatic protection.\textsuperscript{7} Under German law, the only protection that exists is constituting an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties.”\textsuperscript{3}).


\textsuperscript{6} Barcelona Traction, \textit{supra} note 4.