Chapter Fifteen

Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?

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I. Laying the Ground: Diplomatic Protection and Investment Arbitration

It is commonplace to state that in the field of the treatment of aliens, investment arbitration has replaced the traditional mechanism of diplomatic protection. The establishment of a dispute settlement method allowing for

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1 See generally Ben Juratowitch, “The Relationship between Diplomatic Protection and Investment Treaties”, 23(1) ICSID Review – Foreign Investment Law Journal 10 (2008); Christoph Schreuer, “Investment Protection and International Relations”, in August Reinisch and Ursula Kriebaum eds., The Law of International Relations – Liber Amicorum Hanspeter Neuhold (Eleven International Publishing: The Hague, 2007), 345–358. In its Decision on Preliminary Objections in the Diallo case, the International Court of Justice (ICJ) noted that “in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as treaties for the promotion and protection of foreign investments [...] and also by contracts between States and foreign investors. In that context, the role of diplomatic protection has somewhat faded, as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative”. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J., 24 May 2007, General List No. 103, at § 88. For a recent definition of diplomatic protection, see Art. 1 of the International Law Commission (ILC) Draft Articles on Diplomatic Protection of 2006, which reads: “[...] diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.” See also Art. 17 of the Draft Articles on Diplomatic Protection (2006), which stipulates that “[t]he present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments”.

the investor’s direct recourse to an independent international forum, without the need for the home State to espouse the claim of its national against the host State, is usually commended for depoliticising the dispute and bringing it within the realm of law rather than of politics and diplomacy.2

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’) contains the following provision addressing the issue of diplomatic protection:

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 this Convention [...].3

Hence, within the ICSID framework, the rule is that there can be no duplication of an international claim brought through investor-State arbitration by the espousal of the same claim by the home State through diplomatic protection.4 The relationship between investor-State arbitration and diplomatic protection is also addressed in a number of bilateral investment treaties

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2 The travaux préparatoires of the ICSID Convention, for example, explain the exclusion of diplomatic protection in terms of the removal of the dispute from the realm of politics and diplomacy into the realm of law. See in this regard Christoph Schreuer, “Investment Protection and International Relations”, in August Reinisch and Ursula Kriebbaum eds., The Law of International Relations – Liber Amicorum Hanspeter Neuhold, (The Hague: Eleven International Publishing, 2007), at 345–358, at 347, with references to the drafting history of the Convention. The ILC, in its commentary to Art. 17 of its Draft Articles on Diplomatic Protection remarked that “[t]he dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection.”


4 An exception is provided for the event that the host State has failed to abide by and comply with the award rendered in an investor-State dispute. See the final sentence of Art. 27 ICSID Convention. In this regard, see Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic, Annulment Proceedings, (ICSID Case No. ARB/01/3), Decision on the Argentine