The juridical foundations of investment treaty arbitration

Rule 1: Where the contracting states to an investment treaty have agreed to a procedure for the judicial settlement of disputes between an investor and the host state, a claim advanced by the investor in accordance with such procedure is its own claim and the national contracting state of the investor has no legal interest in respect thereof.

Rule 2: The rules of admissibility of diplomatic protection in general international law are not generally applicable to the regime for the settlement of disputes between an investor and the host state created by an investment treaty.

A. INVESTMENT TREATIES AND INVESTMENT TREATY ARBITRATION

1. There is a highly competitive global market for foreign direct investment. The standing of each nation state in that market depends upon a myriad of factors, among which the stability and predictability of the existing regulatory regime for investments is always important and often decisive. Stability and predictability are attributes that are rarely ascribed to a regulatory environment created by nascent public institutions and hence many developing countries might be expected to suffer from a serious competitive disadvantage. Many of those developing countries have sought to redress that disadvantage by concluding investment treaties. These operate to reduce the level of sovereign risk inherent in every foreign direct investment project by establishing a regime of international minimum standards for the exercise of public power by the host contracting state in relation to investments made in its territory by the nationals of another contracting state. In this way, a state that is unable to trade on an inherent confidence in its regulatory regime (predicated upon decades of proven commitment to the rule of law) can nevertheless compete for foreign direct investment by subjecting the conduct of its public institutions to exogenous minimum standards. Those minimum standards take the form of investment treaty obligations such as the prohibition of uncompensated expropriation, fair and equitable treatment, national treatment, full protection and security
and most-favoured-nation treatment. These investment treaty obligations are generally enforceable against the host state of the investment at the suit of the investor by recourse to international arbitration. Hence the protection afforded by investment treaties is tangible enough to feature in the investor’s calculus of investment risks. An investment treaty can thus serve to bridge part of the gap between the perception of sovereign risk in a developing country, on the one hand, and in a highly developed country with public institutions that have acquired a firm reputation for fairness and transparency, on the other. An investment treaty cannot, of course, be expected to bridge that gap entirely. That is not its function. Investment treaties do not create a uniform law on the establishment, acquisition, expansion, management, conduct, operation or alienation of foreign investments; their object and purpose is not to create a single regulatory regime for foreign investment. Sovereign risk will vary considerably from country to country regardless of the existence of investment treaties. For a developing country to compete successfully for foreign direct investment, however, it is sufficient if the level of sovereign risk is counter-balanced by its comparative advantages as a destination for foreign capital (cheaper labour or material costs, expanding consumer markets, higher profit margins, etc.). An investment treaty can assist a developing country to tip these scales in its favour.¹

2. Bilateral investment treaties (‘BITs’) for the reciprocal encouragement of investment, predominantly between capital importing and exporting states, numbered 2,573 at the end of 2006.² Multilateral investment treaties such as the North Atlantic Free Trade Agreement (‘NAFTA’)³ and the Energy Charter Treaty⁴ create reciprocal investment protection obligations across the same divide but are also notable for extending the regime to investment relations between states with highly developed economies as well.⁵ Investment treaties usually create two distinct dispute resolution mechanisms: one for disputes

between a qualifying investor and the host state in relation to its investment ('investor/state disputes') and another for disputes between the contracting state parties to the treaty ('state/state disputes'). Investment treaties generally provide that the state/state mechanism covers disputes 'concerning the interpretation or application' of the treaty, whereas disputes relating to a specific investment of a particular investor (which may of course give rise to interpretative questions) are encompassed by the investor/state dispute resolution procedure. This study focuses almost exclusively on the resolution of investor/state disputes through recourse to international arbitration, which is by far the most utilised dispute resolution mechanism that is available under investment treaties. Nevertheless, it is useful to set the stage with a brief appraisal of each type of mechanism.

3. The judicial forums specified for the resolution of investor/state disputes generally include one or more of the following at the option of the claimant investor:

6 Asian–African Legal Consultative Committee Model BIT, Art. 11(i), UNCTAD Compendium (Vol. III, 1996) 122; Chile Model BIT, Art. 9(1), ibid. 148; China Model BIT, Art. 8(1), ibid. 154; Switzerland Model BIT, Art. 9(1), ibid. 181; UK Model BIT, Art. 9(1), ibid. 190; Egypt Model BIT, Art. 9(1), ibid. (Vol. V, 2000) 297; France Model BIT, Art. 11(1), ibid. 306; Jamaica Model BIT, Art. 9(1), ibid. 321; Malaysia Model BIT, Art. 8(1), ibid. 329; Netherlands Model BIT, Art. 12(1), ibid. 337; Sri Lanka Model BIT, Art. 9(1), ibid. 344; Cambodia Model BIT, Art. 9(1), ibid. (Vol. VI, 2002) 467; Croatia Model BIT, Art. 11(1), ibid. 477; Iran Model BIT, Art. 13(1), ibid. 483; Peru Model BIT, Art. 9(1), ibid. 498; USA Model BIT, Art. 10(1), ibid. 508; Austria Model BIT, Art. 18, ibid. (Vol. VII) 267; Belgium–Luxembourg Economic Union Model BIT, Art. 11(1), ibid. 276; Denmark Model BIT, Art. 10(1), ibid. 284; Finland Model BIT, Art. 10(1), ibid. 293; Germany Model BIT, Art. 10(1), ibid. 300; South Africa Model BIT, Art. 8(1), ibid. (Vol. VIII) 277; Turkey Model BIT, Art. 8(1), ibid. 284; Benin Model BIT, Art. 8(1), ibid. (Vol. IX) 282; Burundi Model BIT, Art. 9(1), ibid. 292; Mauritius Model BIT, Art. 9(1), ibid. 300; Mongolia Model BIT, Art. 9(1), ibid. 306; Sweden Model BIT, Art. 9(1), ibid. 314; Indonesia Model BIT, Art. 9 ('Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible be settled through diplomatic channels' but fails to provide for any compulsory dispute resolution in the event that diplomacy is not successful), ibid. (Vol. X) 313; OPEC Fund Model BIT, Art. 9.01, ibid. (Vol. VI) 489; Bolivia Model BIT, Art. 10, ibid. (Vol. X) 283; Burkina Faso Model BIT, Art. 10(1), ibid. 292; Guatemala Model BIT, Art. 9(1), ibid. (Vol. XII) 292; Italy Model BIT, Art. 9(1), ibid. 300; Kenya Model BIT, Art. 11(a), ibid. 310; Uganda Model BIT, Art. 11(1), ibid. 319; Ghana Model BIT, Art. 11(1), ibid. (Vol. XIII) 284; Romania Model BIT, Art. 10(1), ibid. 291; Canada Model BIT, Art. 48(1), ibid. (Vol. XIV) 252–3; Energy Charter Treaty, Art. 27(1), Appendix 4; USA Model BIT (2004), Art. 37(1); Germany Model BIT (2005), Art. 10(1), Appendix 7; France Model BIT (2006), Art. 11(1), Appendix 6; China Model BIT (1997), Art. 8(1), Appendix 5; UK Model BIT (2005), Art. 9(1), Appendix 10.

7 See the discussion accompanying Rule 25 in relation to the jurisdiction ratione materiae of an investment treaty tribunal.

8 The only example of a state/state arbitration to date has arisen under the Peru/Chile BIT, where Peru invoked the state/state dispute mechanism against Chile after being served with a notice of arbitration by a Chilean investor under the same BIT. Peru apparently sought a favourable interpretation of the BIT in the state/state arbitration to assist its case in the investor/state arbitration. In the end, the claim of the Chilean investor failed. See: Lucchetti v Peru (Preliminary Objections) 12 ICSID Rep 219, 221/7.
4 THE INTERNATIONAL LAW OF INVESTMENT CLAIMS

– municipal courts of the host state;\(^9\)
– arbitration pursuant to the ICSID Arbitration Rules or the ICSID Additional Facility Rules;\(^10\)
– ad hoc arbitration pursuant to the UNCITRAL Arbitration Rules.\(^11\)

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\(^9\) Chile Model BIT, Art. 8(2)(a), UNCTAD Compendium (Vol. III, 1996) 147; China Model BIT, Art. 9(2), ibid. 155; Egypt Model BIT, Art. 8(2)(a), ibid. (Vol. V, 2000) 297; Jamaica Model BIT, Art. 8(2)(a), ibid. 322; Sri Lanka Model BIT, Art. 8(2)(a), ibid. 343; Croatia Model BIT, Art. 10 (2)(a), ibid. (Vol. VI, 2002) 476; Iran Model BIT, Art. 12(2), ibid. 483; Peru Model BIT, Art. 8(2)(a), ibid. 497; USA Model BIT, Art. 9(2)(a), ibid. 507; Austria Model BIT, Art. 12(1)(a), ibid. (Vol. VII) 264; Finland Model BIT, Art. 9(2)(a), ibid. 292; Benin Model BIT, Art. 9(2)(a), ibid. (Vol. IX) 283; Indonesia Model BIT, Art. 8(2), ibid. (Vol. V) 313; Bolivia Model BIT, Art. 10, ibid. (Vol X) 283; Burkina Faso Model BIT, Art. 9(2)(a), ibid. 292; Guatemala Model BIT, Art. 8(a), ibid. (Vol. XII) 292; Italy Model BIT, Art. 10(3)(a), ibid. 301; Kenya Model BIT, Art. 10(b)(1), ibid. 309; Uganda Model BIT, Art. 7(2), ibid. 317; Ghana Model BIT, Art. 10(1), ibid. (Vol XIII) 283; Romania Model BIT, Art. 9(2)(a), ibid. 291; China Model BIT (2003), Art. 9(2)(a), Appendix 5; Energy Charter Treaty, Art. 26(2)(a), Appendix 4.

\(^10\) Asian–African Legal Consultative Committee Model ‘A’ BIT, Art. 10(v), UNCTAD Compendium (Vol. III, 1996) 122; Asian–African Legal Consultative Committee Model ‘B’ BIT, Art. 10(v), ibid. 133; Chile Model BIT, Art. 8(2)(b), ibid. 147; Switzerland Model BIT, Art. 8(2), ibid. 181; UK Model BIT, Art. 8, ibid. 189; Egypt Model BIT, Art. 8(2)(b), ibid. (Vol. V, 2000) 297; France Model BIT, Art. 8, ibid. 305; Indonesia Model BIT, Art. 8(3)(a), ibid. 313; Jamaica Model BIT, Art. 10, ibid. 322; Malaysia Model BIT, Art. 7(3), ibid. 329; Netherlands Model BIT, Art. 9, ibid. 336; Sri Lanka Model BIT, Art. 8(2)(b), ibid. 343; Cambodia Model BIT, Art. 8(3)(a), ibid. (Vol. VI, 2002) 467; Croatia Model BIT, Art. 10(2)(b), ibid. 476; Peru Model BIT, Art. 8(2)(b), ibid. 497; USA Model BIT, Art. 9(3)(a), ibid. 507; Austria Model BIT, Art. 12 (1)(c), ibid. (Vol. VII) 264; Belgo-Luxembourg Economic Union Model BIT, Art. 10(3), ibid. 275; Denmark Model BIT, Art. 9(2)(a), ibid. 283; Finland Model BIT, Art. 9(2)(b), ibid. 292; Germany Model BIT, Art. 11, ibid. 301; South Africa Model BIT, Art. 7(2), ibid. (Vol. VIII) 276; Turkey Model BIT, Art. 7(2)(a), ibid. 284; Benin Model BIT, Art. 9(3), ibid. (Vol. IX) 283; Burundi Model BIT, Art. 8(3), ibid. 292; Mongolia Model BIT, Art. 8(2)(a), ibid. 306; Sweden Model BIT, Art. 8(2), ibid. 313; Indonesia Model BIT, Art. 3(a), ibid. (Vol. V) 313; Bolivia Model BIT, Art. 10, ibid. (Vol. X) 283; Burkina Faso Model BIT, Art. 9(2)(c), ibid. 292; Guatemala Model BIT, Art. 8(b), ibid. (Vol. XII) 292; Italy Model BIT, Art. 10(3)(c), ibid. 301; Kenya Model BIT, Art. 10(b)(i), 10(c), ibid. 310; Uganda Model BIT, Art. 7(3), ibid. 317; Ghana Model BIT, Art. 9(2)(b), ibid. (Vol. XIII) 284; Romania Model BIT, Art. 10(1), ibid. 291; Canada Model BIT, Art. 27(1)(a)(b), ibid. (Vol. XIV) 240; Germany Model BIT, Art. 10(5), ibid. 11, Appendix 7; France Model BIT (2006), Art. 8, Appendix 6; China Model BIT (1997), Art. 9(2)(b) (‘provided that the Contracting Party involved in the dispute may require the investor to go through the domestic procedures specified by the laws and regulations of the Contracting Party before the submission to the ICSID’); UK Model BIT (2005), Art. 8(2)(a) (if ‘the national or company and the Contracting Party concerned in the dispute may agree …’), Appendix 5; Energy Charter Treaty, Art. 26(4); NAFTA, Art. 1120(1), Appendix 3.

\(^11\) Asian–African Legal Consultative Committee Model ‘A’ BIT, Art. 10(v), UNCTAD Compendium (Vol. III, 1996) 122; Asian–African Legal Consultative Committee Model ‘B’ BIT, Art. 10(v), ibid. 133; UK ‘Alternative’ Model BIT, Art. 8, ibid. 189; Egypt Model BIT, Art. 8(2)(c), ibid. (Vol. V, 2000) 297; Indonesia Model BIT, Art. 8(3)(b), ibid. 313; Sri Lanka Model BIT, Art. 8(2)(f), ibid. 343; Cambodia Model BIT, Art. 8(3)(b), ibid. (Vol. VI, 2002) 467; Iran Model BIT, Art. 12(6), ibid. 483; USA Model BIT, Art. 9(3)(a)(iii), ibid. 507; Austria Model BIT, Art. 12(1)(c), ibid. (Vol. VII) 265; Belgo-Luxembourg Economic Union Model BIT, Art. 10(3), ibid. 275; Denmark Model BIT, Art. 9(2)(c), ibid. 283; Finland Model BIT, Art. 9(2)(d), ibid. 292; Turkey Model BIT, Art. 7(2)(a), ibid. 284; Benin Model BIT, Art. 9(3)(b), ibid. (Vol. IX) 284; Mongolia Model BIT, Art. 8(2)(b), ibid. 306; Sweden Model BIT, Art. 8(2), ibid. 313; Indonesia Model BIT, Art. 3(b), ibid. (Vol. V) 313; Bolivia Model BIT, Art. 10, ibid. (Vol X) 283;
– arbitration pursuant to the Rules of Arbitration of the International Chamber of Commerce;\textsuperscript{12}

– arbitration pursuant to the Rules of Arbitration of the Stockholm Chamber of Commerce,\textsuperscript{13}

– arbitration pursuant to the Rules of the Cour Commune de Justice et d’Arbitrage (CCJA);\textsuperscript{14}

– a settlement procedure previously agreed to between the investor and host state.\textsuperscript{15}

4. In relation to state/state disputes, investment treaties almost without exception refer such disputes to ad hoc arbitration with the President of the International Court of Justice nominated as the appointing authority.\textsuperscript{16} Also,
in the vast majority of cases, investment treaties prescribe that the arbitral tribunal shall determine its own rules of procedure. In the rare instances that a model set of rules is specified, those rules designed for public international law arbitrations between states are generally preferred.\footnote{The Austria Model BIT selects the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes, Art. 21(2), UNCTAD Compendium (Vol. VII, 2002) 267. The NAFTA Parties have enacted a very detailed set of ‘Model Rules of Procedure for Chapter 20 of the NAFTA’ (relating to state/state disputes) in accordance with Article 2012 of the NAFTA. Conversely, the Energy Charter Treaty makes no distinction between the procedural rules for investor/state and state/state arbitrations by selecting the UNCITRAL Arbitration Rules for state/state disputes in Article 27(3)(f), see Appendices 3 and 4.}

5. The rights and obligations as between the state parties to investment treaties arise in the context of a classic bilateral relationship on the international plane and are opposable by one state party against another on that basis. Furthermore, disputes between the contracting states fit into the familiar paradigm of arbitrations governed by public international law. In contradistinction, it will be demonstrated in this chapter that the public international law paradigm for international claims for harm to individuals or legal entities – the customary law of diplomatic protection – is inappropriate as a foundation for the rationalisation of the legal relationship between the private investor and the host state of the investment. It is a relationship that can only be described as \textit{sui generis}; one of the principal objectives of this study is to give precise content to that characterisation.

\section*{B. THE LEGAL CHARACTER OF THE INVESTMENT TREATY REGIME}

6. The analytical challenge presented by the investment treaty regime for the arbitration of investment disputes is that it cannot be adequately rationalised either as a form of public international or private transnational dispute resolution.\footnote{The France Model BIT nominates the Secretary General of the UN, Art. 11: \textit{ibid}. (Vol. V) 307. The Energy Charter Treaty nominates the Secretary General of the Permanent Court of Arbitration: Art. 27, see Appendix 4.} Investment treaties are international instruments between states governed by the public international law of treaties. The principal beneficiary of the investment treaty regime is most often a corporate entity established under a municipal law,\footnote{See, e.g.: J. Paulsson, ‘Arbitration Without Privity’ (1995) 10 ICSID Rev – Foreign Investment LJ 232, 256 (‘[T]his is not a sub-genre of an existing discipline. It is dramatically different from anything previously known in the international sphere’).} while the legal interests protected by the regime are a bundle of
rights in an investment arising under a different municipal law.\textsuperscript{20} The standards of protection are prescribed by the international treaty,\textsuperscript{21} but liability for their breach is said to give rise to a ‘civil or commercial’ award for enforcement purposes.\textsuperscript{22}

7. There is nothing revolutionary in abandoning the simple dichotomy between public and private international law conceptions of dispute resolution. Modern international society and commerce are characterised by a complex and sometimes disordered web of relationships between states, individuals, international organisations and multinational corporations. As this web grows in density and coverage, traversing territorial and jurisdictional frontiers, the challenges for the international or transnational legal order become ever more acute. The response to these challenges has often been in the form of innovative international treaties that introduce an array of substantive norms and a distinct dispute resolution mechanism. In the sphere of legal relationships between private entities and sovereign states, there are parallels between the legal regime created by investment treaties on the one hand, and those regimes established by the European Convention on Human Rights,\textsuperscript{23} and the Algiers Accords (creating the Iran/US Claims Tribunal), on the other.\textsuperscript{24} Anyone within the ‘juridical space’ of the European Convention on Human Rights has the right to pursue remedies directly against a contracting state party for violations of international minimum standards of treatment, formulated as universal and inalienable human rights, before an international tribunal.\textsuperscript{25} Nationals of Iran and the United States have the right to pursue remedies directly against the other state for certain violations of international minimum standards of treatment, such as the prohibition against

\textsuperscript{20} See the commentary to Rule 4 below.
\textsuperscript{21} See the commentary to Rule 10 below.
\textsuperscript{22} See the commentary to Rule 12 below.
\textsuperscript{23} This link was made by G. Burdeau, ‘Nouvelles perspectives pour l’arbitrage dans le contentieux économique intéressant l’État’ (1995) Revue de l’arbitrage 3, 16 (‘[L]a “philosophie” des deux mécanismes paraît la même: il s’agit dans l’un et l’autre cas d’ouvrir à des particuliers non identifiés à l’avance un droit de recours direct contre un État en vue de sanctionner le respect de l’engagement pris par ce dernier dans un traité international d’accorder un certain traitement à des personnes privées.’).
\textsuperscript{24} Investment treaty tribunals, and counsel pleading before them, cite precedents of the Iran/US Claims Tribunal with great frequency. However, the tribunal in Pope & Talbot v Canada (First Merits) 7 ICSID Rep 69, 84–94 and 84–104, appeared to reject the significance of the precedents of the Iran/US Claims Tribunal in relation to the prohibition against expropriation in Article 1110 of NAFTA. For a critique of this approach: M. Brunetti, ‘The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation’ (2001) 2 Chicago J of Int L 203.
uncompensated expropriation, before an international tribunal.26 The right of recourse to the European Court of Human Rights, the Iran/US Claims Tribunal and the international tribunals established pursuant to investment treaties has catapulted individuals and corporate entities into an international system of adjudication alongside states. In this respect also the traditional view of the international legal order that relegated individuals and corporate entities to the status of mere ‘objects’ of international law is no longer sustainable.27

8. An analysis of these different treaty regimes would be distorted if one were to adhere to a strict distinction between public and private international law conceptions of dispute resolution. Many of the awards of investment treaty tribunals – and the pleadings of parties to these disputes – disclose a dogmatic distinction between ‘international’ or ‘treaty’ versus ‘municipal’ or ‘contractual’ spheres, as if each concept can be forced into a separate hermetically sealed box. By characterising the status of an investment treaty tribunal as ‘international’, arbitrators have professed to occupy a position of supremacy in a ‘hierarchy’ of legal orders to justify the relegation of any competing law or jurisdiction. The principle of international law that is used to buttress this approach, whether expressly or implicitly, is the rule of state responsibility that a state cannot invoke provisions of its own law to justify a derogation from an international obligation. Article 3 of the ILC’s Articles on the Responsibility of States for International Wrongs, titled ‘Characterization of the act of a State as internationally wrongful’, is a codification of this rule, which reads:

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.28

9. When an investment treaty tribunal rules upon the international legality of a state’s conduct then an appeal to this conflict-regulating norm is entirely justified. But investment disputes give rise to a host of other issues that do not generate a clash between the international and municipal legal orders – questions pertaining to the existence, nature and scope of the private rights


27 The ‘father’ of the positivist conception of the subjects of international law was arguably Bentham, who in 1789 defined international law as ‘the mutual transactions between sovereigns’: J. Bentham, Introduction to the Principles of Morals and Legislation (1789) 296. Janis has pointed out the irony that in the same year as Bentham propounded this thesis, the First United States Congress authorised suits by individuals to address grievances under the law of nations before the Federal District Courts pursuant to the Judiciary Act: M. Janis, ‘Subjects of International Law’ (1984) 17 Cornell Int L J 61.

28 The ILC’s Articles and official commentary thereto are reproduced in: Crawford, ILC’s Articles, 61.
comprising the investment being the prime example. These matters are outside the purview of international law and the rule of state responsibility just recalled. To treat international law as a self-sufficient legal order in the sphere of foreign investment is untenable. At the intersection of private investment rights and international investment regulation, problems relating to overlapping adjudicative competence and the application of municipal law cannot be resolved by playing the simple ‘international trump card’ of Article 3 of the ILC’s Articles.

10. There is, moreover, precious little utility in adopting a binary classification scheme that distinguishes between ‘international’ and ‘municipal’ in respect of procedural matters. Witness the example of the Iran/US Claims Tribunal, whose precise legal status remains a subject of controversy even as its mandate expires after nearly thirty years of activity. The literature on the subject testifies to a complete lack of consensus. Judge Brower of the Tribunal asserts that ‘there can be little doubt that the Tribunal is an international institution established by two sovereign States and subject to public international law’.29 Similarly, Fox regards the Tribunal as an example of ‘private claims taken up by the State and presented through an inter-State arbitration’.30 The Iranian writer, Seifi, emphasises the Tribunal’s ‘exclusively international character’,31 while the American writer, Caron, takes the view that, at least in relation to claims involving nationals, ‘the Accords established a clear presumption that the legal system of the Netherlands would govern the Tribunal’s arbitral process’.32 Two Dutch lawyers, Hardenberg and van den Berg, reach contrary conclusions on the applicability of Dutch law as the lex loci arbitri.33 Other commentators have perhaps sought the middle ground in describing the procedural regime for the Iran/US Claims Tribunal as ‘denationalised’:

[I]t appears truer to the Accords to recognize the Tribunal as a denationalized body subject to its organic treaty and its rules, but not to national arbitral law.34

29 Brower and Brueschke, The Iran–United States Claims Tribunal, 16.
30 H. Fox, ‘States and the Undertaking to Arbitrate’ (1988) 37 ICLQ 1, 3.
11. An Iranian writer, Avanessian, agrees with this analysis, but adds:

[The Tribunal] somehow exists and operates on the borderline of public and private international law, sometimes falling in the domain of one and sometimes in that of the other.35

12. A complete spectrum of views can thus be distilled from the literature on the juridical status of the Iran/US Claims Tribunal. The fact that the writers just mentioned reach divergent conclusions on this subject should at least put those dealing with investment treaty arbitration on notice of the complexity of the issues at hand. Any single-sentence proclamations about the true nature of the legal regime for the settlement of investor/state disputes must be viewed with scepticism.

**Rule 1.** Where the contracting states to an investment treaty have agreed to a procedure for the judicial settlement of disputes between an investor and the host state, a claim advanced by the investor in accordance with such procedure is its own claim and the national contracting state of the investor has no legal interest in respect thereof.

**Rule 2.** The rules of admissibility of diplomatic protection in general international law are not generally applicable to the regime for the settlement of disputes between an investor and the host state created by an investment treaty.

### A. THE BENEFICIARY OF INVESTMENT TREATY RIGHTS

13. In this chapter we are concerned with a question of singular importance: whether a claimant investor, by prosecuting an investment treaty claim, is vindicating its own rights conferred by the treaty or is acting as a proxy for its national state as the true repository of the rights and obligations set out in the treaty. From the perspective of public international law the same question can be formulated differently: does the investor/state arbitral mechanism in the modern investment treaty create a device for triggering the rights and obligations of diplomatic protection? If it does, then the investor would essentially be stepping into the shoes of its national state and bringing a claim on behalf of its national