Tomas Mach

VADEMECUM OF INTERNATIONAL INVESTMENT LAW

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in memory of
Beverely Alice Hopkins
(1940–2010)

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Table of Abbreviations

AJIL	American Journal of International Law
BIT	Bilateral Investment Treaty
CE	Common Era
CJEU	Court of Justice of the European Union
Draft Articles	Draft Articles on State Responsibility
ECJ	European Court of Justice
EJIL	European Journal of International Law
ESIL	European Society of International Law
FET	Fair and Equitable Treatment
FCN Treaty	Treaty of Friendship, Commerce, and Navigation
FNC Treaty	Treaty of Friendship, Navigation, and Commerce
FPS	Full Protection and Security
GATT '94	General Agreement on Tariffs and Trade
Harvard Int'l L.J.	Harvard International Law Journal
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission of the United Nations
ILM	International Legal Materials
Int'L Trade L.J.	International Trade Law Journal
LCIA	London Court of Arbitration
MFN	Most-favoured-nation clause
MICH. J. INT'L L	Michigan Journal of International Law

MIT	Multi-lateral investment treaty
MST	Minimum standard of treatment
NAFTA	North American Free Trade Agreement
N.Y.U.J INT'L Law & Pol	New York University Journal of International Law and Politics
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
SCC	Stockholm Chamber of Commerce
UK	The United Kingdom of Great Britain and Northern Ireland
USA	United States of America
US Government	Government of the United States of America
UN	The United Nations
UNCITRAL	United Nations Commission on International Trade Law
UN Charter	Charter of the United Nations
VCLT	The Vienna Convention on the Law of Treaties
WTO	World Trade Organisation
WWI	First World War
WWII	Second World Word

Chapter One
Investment Protection under Customary International Law

Public international law used to be the law governing relations between sovereign States. It was only in the 20th Century that private individuals started gaining some relevance and also a partial legal personality under international law. This development occurred in relation to humanitarian law and also to international criminal law. Nevertheless, on the plane of customary international law, apart from the two aforesaid areas, the relevance of individuals has remained rather marginal. Customary international law, being a normative system that has originated in Europe, also recognizes some other subjects of international law of particular nature (such as the Holy See, the Sovereign Order of the Knights of Malta), along with rebels (in scenarios of international armed conflicts), and international (intergovernmental) organizations. The importance of these subjects of this normative system, with the exception of the last category, is rather marginal, however.

This normative system of public international law, being one concerned almost exclusively with States and their mutual right and duties, therefore naturally did not provide for any rights and duties of investors until the second half of the 20th Century, save in particular treaties entered into between sovereign States. Customary international law has had little interest for the position of private individuals, apart from a few substantive exceptions (like the minimum standard of treatment). This does

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not mean, however, that the relevance of protection of assets, lives or interests of subjects (nationals) of States in earlier periods of international law was not present. These rights and duties merely have not been, on the plane of customary international law, treated as rights or duties of such private individuals or corporations, but rather as the rights of their home States. As the PCIJ summarized it into the famous *Mavrommatis Formula*, 'By taking up the case of one of its subjects and by resorting to diplomatic action or international juridical proceedings on his behalf, a State is in reality asserting its own right.'[1] This means, put bluntly, that under customary international law an individual has no rights of his own. Instead, customary international law treats any claims that such an alien may factually have against a sovereign foreign State as being the very own claims of his home State.

In colonial times (times that formed most areas of international law of customary nature and also times during which public international law spread from Europe across the globe and acquired universal acceptance in the international community), there in theory used to exist two sets of tools that States were able to resort to in order to act in protection of their interests in lieu of their subjects/nationals.

The first set of tools was to resort to some kind of armed action or threat thereof, i.e., military intervention or occupation. The spectrum of available tools extended anywhere from threat of use of force, over naval blockade to actual invasion, and subsequent occupation.

The second set of tools were peaceful ones. These included in particular diplomatic action, including *inter alia* diplomatic protection (which the ***Mavrommatis***[2] case was concerned about).

[1] *The Mavrommatis Palestine Concession* (Greece v. UK), Jurisdiction, 1924 PCIJ Series A, No. 2, at p. 12

[2] Ibid.

Armed Action (Military Intervention or Occupation) and the Drago Clause

The 'threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'[3] is currently prohibited by the Charter of the United Nations. This norm is also considered by most scholars[4] to be of *ius cogens* nature and besides being a treaty norm of the UN Charter, it is deemed to have subsequently acquired customary nature as well. The following purposes of the United Nations are listed in Article 1 of the UN Charter: (a) to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; (b) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.[5]

The aforesaid makes military intervention, including occupation to enforce the fulfilment of obligations payable to nationals of a State currently illegal,[6] being contrary to treaty undertakings in the UN Charter and possibly also contrary to peremptory norm of international law (*ius cogens*). Until the creation of the United Nations (at which point the prohibition of the use of force became binding upon its members as signatory parties to

[3] Art. II(4) of the UN Charter

[4] For an opposing view refer to: Green, James A. *Questioning the Peremptory Status of the Prohibition of the Use of Force* (2011) 32 Michigan Journal of International Law, pp. 215–257. Summary available online: https://www.ejiltalk.org/questioning-the-peremptory-status-of-the-prohibition-of-the-use-of-force/

[5] Art. I of the UN Charter

[6] Certainly, amongst UN Member States

the UN Charter – and later become also *ius cogens* and acquired customary nature), however, this used to be a perfectly legal and legitimate customary approach to intervention, obviously based on the strength that could be either demonstrated or exercised – mostly by colonial powers. The right to military intervention used to be limited merely, *inter partes*, by treaty undertakings. A treaty that limited the use of force in this context, *inter partes*, was the below discussed Porter Convention.

The first sophisticated opposition to the legality and legitimacy of the use of force in the context of protection of interests of nationals was formulated by Luis María Drago, an Argentinian advocate and diplomat, who, serving as Argentine's minister of foreign affairs during the 1902–1903 Venezuelan Crisis, which included a naval blockade of Venezuela and shelling of her ports by Germany, Italy, and Great Britain for the purpose of collecting debts owed by Venezuela to subjects of these States, argued that military intervention should not be permitted to recover monetary debts.

This was naturally a novelty based upon the interests of Latin--American States (with rather a history of harming interests of investors) disguised in morals. Moreover, this was in fact merely an idea *de lege ferenda*. A modified version of this innovative doctrine, based on the development of the Venezuelan Crisis as such (where the Venezuelan president Cipriano Castro was forced eventually to agree to submitting some of the claims in question to arbitration) found its way into the Porter Convention, i.e. the 1907 Hague Convention Respecting the Limitation of Employment of Force for the Recovery of Contract Debts.[7] In its opening Article 1 this Convention reads as follows:

> '1. The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

[7] See online: https://avalon.law.yale.edu/20th_century/hague072.asp

2. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromis from being agreed on, or, after the arbitration, fails to submit to the award.'[8]

Besides this Convention, the application of the Drago Doctrine did not find its way into positive international law. The fact that the use of force is under international law no longer permitted to recover debts or to otherwise act in representation of the interests of a State's national comes from the general prohibition of the threat of use of force or the use of force under Art. 2(4) of the UN Charter.

Diplomatic Action and the Calvo Clause; the Calvo Doctrine

The above discussed Drago Doctrine was in fact inspired in the Calvo Doctrine. Carlos Calvo had invented this doctrine in his works *Derecho internacional teórico y práctico de Europa y América*[9] in 1868, arguing that jurisdiction in international investment disputes lies with the country in which the investment is located. The Calvo Doctrine (also called non-responsibility doctrine) sought to rule out diplomatic protection (discussed below) or armed intervention before local resources were exhausted. It also stipulated that States ought not be liable for damages suffered by foreign nationals that occurred during civil wars. Moreover, and in particular, it stipulated that States' international responsibility was not engaged, unless the injured alien had had recourse to the local courts and had there suffered a denial of justice in the strict sense of the term.[10]

[8] Ibid.

[9] Calvo, Carlos. *Derecho Internacional teórico y práctico de Europa y América*. Paris: D'Amyot, 1868

[10] Summers, Morgan Lionel. *The Calvo Clause*. Virginia Law Review. Mar. 1933, vol. 19, No. 5., pp. 459–484, at p. 460

The Calvo Doctrine found its way into the Pan-American Convention of 1902. Articles 2 and 3 of this Convention read:

> '2. The States do not owe to, nor recognize in favor of foreigners, any obligations or responsibilities other than those established by their Constitutions and laws in favor of their citizens. Therefore, the States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of any kind, considering as such the acts of war whether civil or national; except in the case of failure on the part of the constituted authorities to comply with their duties.
> 3. Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country, and such claims shall not be made through diplomatic channels, except in the cases where there shall have been, on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principle of International Law.'[11]

Although Spanish and Portuguese speaking States of the Americas were keen on applying these principles in their municipal legislation and court decisions, these approaches have not met with favourable reception elsewhere. Summers has put it, calling the Calvo Doctrine moribund, as follows:[12]

> 'The constitutions and the laws denying responsibility have not received [...] favorable reception. The United States has nearly always ignored these enactments. If the Latin American nations tried to apply them Washington would at once protest. The attitude of the European governments has not

[11] Cited via: Summers, Morgan Lionel. *The Calvo Clause*. Virginia Law Review. Mar. 1933, vol. 19, No. 5., pp. 459–484, at pp. 461, 463

[12] Ibid. at p. 464

> been far different, and arbitral bodies have taken the same point of view.'

This moribund doctrine gave rise to a derivation based upon expression of will of the alien individual or corporation concerned – the Calvo Clause. The Calvo Clause is a contractual undertaking, often included into a concession contract between a government of a Latin American State and a foreign national (be it an individual or corporation) stipulating that the latter unconditionally agrees to the adjudication of any dispute between the contracting parties before the courts of the State concerned and excluding the option of application of diplomatic protection. The difference seen between the Calvo Doctrine and the Calvo Clause thus rests in the absence or presence of declaration of will of the private party concerned, i.e. in the presence of a legal transaction on party of the investor concerned. Whereas under the Calvo Doctrine the exclusion of diplomatic protection or liability of States for damages that occurred was a unilateral move by the (otherwise potentially liable) State, under the Calvo Clause there must have been a declaration of will on the part of the investor concerned as well, typically via a contract. Summers argues that it be

> 'clear that between the Calvo Doctrine and the Calvo clause there is a great difference. The enforcement of the doctrine was a unilateral act whereas in the case of the clause the individual has consented of his own free will to the abandonment of diplomatic protection.'[13]

A saying has it that the devil's hidden in the details. The current writer is of the view that Summers, when arguing that a case of the clause concerns declaration of free will of the investor to abandon diplomatic protection, is perhaps too optimistic. In particular smaller investors may be placed before the take it or leave it option of an adhesion contract, say a concession

[13] Ibid. at p. 465

contract as a result of public procurement. In such cases, the freedom to choose seems to be rather limited to merely having the option of walking away from an investment, rather than truly negotiating its conditions, or taking it as proposed by the host State.

With this in mind, several approaches have evolved in addressing the validity of Calvo Clauses.

One way of looking at a Calvo Clause has been to treat it as a valid expression of a will of the investor.

Another way of looking at it has been, as exercised by the British Government at the time, to treat nationals as not being legally capable of giving up sovereign rights, but considering that they did so in a given case of their free will (if that was the case) as a circumstance relevant for the discretionary decision of the government of their home State as to whether to exercise diplomatic intervention. A good example of such a view is the reply of the British government to the ***Orinoco Shipping and Trading Company*** case:

> 'Although the general international rights of His Majesty's Government are in no wise modified by the provisions of this document to which they were not a party, the fact that the company, so far as lay in their power, deliberately contracted themselves out of every remedial recourse in case of a dispute, except that which is specified in article 14 of the contract, is undoubtedly an element to take into serious consideration when they subsequently appeal for the intervention of His Majesty's Government.'[14]

A third way of looking at it was simply that a private party, be it an individual or a corporation is simply not capable of giving up

[14] Ralston, Jackson Harvey. *Venezuelan Arbitrations of 1903*. Washington: Government Printing Office, 1904, at p. 90