Before the Investment

A Preliminary Inquiry into the Unstated Commitments of International Investment Law

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I. A Concession in Caracas

The law of foreign investment has an excellent memory; and it is a memory arranged by persons. What the host State did it remembers at every stage: the treaty it signed, the assurances it gave, the measures it took, the loss it caused. What the investor did it can be brought to remember when it must: the bribe, the fraud, the contrivance. What the investor's own State did — the exercise of public power by which the opportunity for the investment was created — belongs to neither account: it is history; and history a tribunal may read with interest, and find no category in which to weigh it.

On 3 January 2026 the forces of the United States seized the President of Venezuela in Caracas and removed him from the country.[1] Two days later the Vice-President was sworn in to act in his place; and before the month was out the hydrocarbons law had been amended, so that private companies might themselves explore for and produce the oil which had been reserved to the State oil company and the ventures it controlled.[2] Assume, for present purposes and for those alone, that the intervention was unlawful: upon that question no view is taken.

Suppose that an American oil major, long established in the country, where it had kept what it held and been offered nothing more, concludes under that law a new and long-term concession;[3] and let the investor have every advantage which the facts can give it. It did not procure the intervention,

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[1] M Kinnard and M L Price, 'How the US captured Venezuelan leader Nicolás Maduro', Associated Press, 3 January 2026.

[2] 'Delcy Rodriguez sworn in as Venezuela's interim president', Agence France-Presse (Gulf News), 6 January 2026; C Leathley, D Paez and J L Repetto, 'Venezuela approves landmark reform opening its hydrocarbons sector to foreign companies', Herbert Smith Freehills Kramer, 2 February 2026 (reform of the Organic Hydrocarbons Law approved by the National Assembly on 29 January 2026 and signed the same day).

[3] The facts are a good deal more complicated than the case supposed; and in one respect the involvement of the intervening State is more direct, and more unusual. The United States is reported to be taking for itself, through its Department of Defense, a 35 per cent equity stake in the parent of a company granted rights over seventeen Venezuelan oil fields, together with rights over its production; and the legality of the arrangement under the Constitution and the hydrocarbons law of Venezuela has been openly questioned: J I Hernández, 'Understanding the Implications of the U.S.-Venezuela Oil Deal', Center for Strategic and International Studies, 4 September 2026. All of this is deliberately left out of account, and no view is taken upon it: the case is kept clean in order that the question of method may be put.

or encourage it, or pay for it, or take any part in it whatever; the concession was obtained without fraud, without corruption and without pressure of any kind upon the minister who signed it, who was at liberty to refuse and may very well have signed gladly; it is valid under its proper law and ordinary in its terms; and consent to arbitration is given in the agreement itself. Two facts alone complicate the account: the new concession would not have been offered but for the intervention; and the investor knows it. Four years pass; a new government terminates the concession; and the investor goes to arbitration.[4]

The tribunal will ask what the State has done to the investment; and for that inquiry the discipline is admirably furnished: it has a vocabulary, a body of authority and a machinery of decision; and it knows, with the assurance of long practice, what is to count as a taking, what as unfairness, and what as loss. The origin of the investment lies outside the inquiry; and if the intervention is mentioned at all, the familiar categories return an answer which has every appearance of completeness: the investor did not intervene. The answer is true. It establishes that the investor is not answerable for the intervention; and there, in strictness, its work is done. Has it been taken, without argument, to settle as well what the investor is entitled to? Has a true answer to the question of responsibility been quietly promoted into a complete theory of the investor's entitlement?

The suspicion examined here is that it has; and that the promotion is effected by a substitution of questions. There are three. Who is responsible for the intervention? Who is bound by the concession? And may force directed at the political order bear upon the protection or enforcement of a right otherwise valid, although the investor bears no responsibility for that

[4] The sequence is not new; and the published archives of the United States disclose an earlier instance of it. A memorandum of the Central Intelligence Agency, headed "Campaign to Install Pro-Western Government in Iran", records an operation approved by the President, the Secretary of State and the Director of Central Intelligence, whose object was the fall of the Mossadegh government and its replacement by one under the Shah: Memorandum prepared in the Directorate of Plans (revised and signed 8 March 1954), in *Foreign Relations of the United States, 1952–1954, Iran, 1951–1954* (Washington: Government Publishing Office, 2017), doc 363, at 911–912. The oil settlement followed as an object of policy: the National Security Council determined that the security interests of the United States required American oil companies to be invited into an international consortium; and the companies, which already had "a substantial surplus of production", desired to participate "only to facilitate the objectives of national security": *Foreign Relations of the United States, 1952–1954*, vol X, *Iran, 1951–1954* (Washington: Government Printing Office, 1989), doc 411, at 902, and doc 413, at 907. The record thus identifies organs of State as the authors of the intervention, and presents the companies as participants whose commercial appetite was expressly subordinated to the stated objectives of national security. The consortium agreement of 1954 was replaced by agreement in 1973; and the ending of the replacing agreement, after the revolution of 1979, came before the Iran–United States Claims Tribunal: *Mobil Oil Iran Inc v Islamic Republic of Iran*, Partial Award No 311-74/76/81/150-3, 14 July 1987, 16 Iran–US CTR 3, para 126.

force? To the first, international investment law answers by separating the investor from the intervention; to the second, by identifying the host State continuously with the concession; and the two answers, each sufficient for its own question, are then taken together to dispose of the third: the investor's absence of responsibility for the intervention becomes the irrelevance of the intervention to the protection of an entitlement knowingly acquired through it. No articulated rule produces that result: it proceeds from a prior commitment as to where the legally relevant account begins. That is the charge: a question excluded before it is asked.

II. The Division of Persons

Had the investor procured the intervention, the case would be easy: legal systems readily recognise complicity, and the maxim that no one shall profit by his own wrong. The difficulty lies in a division of persons. The power which intervenes takes no entitlement under the concession; the corporation which takes the entitlement did not intervene. The host State, for its part, seeks no judgment against the intervening power: it invokes the intervention only as bearing upon the entitlement asserted against itself. Yet its contention is received as a claim of responsibility, and as such it is twice defeated: against the intervening power it cannot be adjudicated, for that power is absent; against the investor it is misdirected, for the investor did not intervene. Each proposition, taken singly, is orthodox: that a corporation is a person distinct from its State; that no State is judged without its consent; that each answers for its own acts and for no other's. Taken together they yield a result which none of them announces: the act is lodged in one person, the entitlement in another, and the two are never present in the same room.

Yet two persons who are never in the same room are not, for that reason, strangers. The power opens what the corporation could not have opened for itself; the corporation gathers what the power does not gather in its own name; and of what is gathered a part may go home — in taxes, in dividends, in the depth of the capital markets upon which the power draws — to pay, among other things, for the forces by which the opening was made. Thomas Friedman, the *New York Times* columnist, put it in a sentence: "The hidden hand of the market will never work without a hidden fist — McDonald's cannot flourish without McDonnell Douglas, the builder of the F-15."[5] Call that circuit the imperial treasury: symbiotic without identity; reciprocal without concert; cyclical without attribution. It asks of neither party a conspiracy, an instruction or so much as a common intention: each has only to mind its own business, the one of State and the

[5] T L Friedman, 'A Manifesto for the Fast World', *New York Times Magazine*, 28 March 1999.

other of profit, and each will be found to have served the other. The law's separation of the two is therefore at once accurate and incomplete: accurate, because the corporation does not on that account become responsible for anything the power has done; incomplete, because a separation which suffices for responsibility is no description of the transaction. The fiction of separate persons conceals a fact of mutual dependence; and the juridical account, which runs in a straight line from grant to breach, describes a movement which may be circular.

Upon that separation the law works a juridical bait and switch: a substitution of premises, in which no one deceives and no one need intend the result. When responsibility is in question, the law insists upon the separation of persons: the investor is a stranger to the acts of its State. When protection is in question, the law insists upon the continuity of the State: the concession is the act of the very person who is afterwards called upon to honour it. Separateness serves the beneficiary; continuity binds the obligor. The one doctrine settles who is responsible, the other who is bound; neither so much as asks whether the protection of an entitlement is touched by the manner of its coming into being. Yet between them they secure it; and the host State, referred to the intervening power when it complains and to its own signature when it resists, meets first the one and then the other.

The substitution may be reduced to its logical form. The investor neither procured the intervention nor took part in it; it follows that the investor is not responsible for it; it does not, without more, follow that the intervention is irrelevant to the protection or enforcement of an entitlement knowingly acquired through it. The first proposition is a stipulated fact; the second follows from it; the third does not, and must find a premise of its own. Nothing here impugns the doctrines: what is challenged is an inference drawn from them.

Persons are divided; knowledge is not. The investor had no part in the intervention; it is ignorant of nothing. It knows why the sector is open, and why it was not opened before; it knows what manner of government sits across the table, and what brought it there; and it knows that, but for the intervention, the concession would never have been granted. Assume also that it contracts in the confidence that none of this will be laid at its door. Knowledge does not make it responsible; nor does knowledge, of itself, determine validity, enforceability or relief. Its office in the argument is narrower, and for that reason more exact: it forbids the entitlement to be presented as an autonomous commercial fact, acquired in ignorance of its provenance. What the discipline is asked to protect in such a case is an entitlement knowingly taken; and the question of method is whether it may

be protected without any examination of the conditions which made it available.

III. The Prior Commitment

Every dispute must begin somewhere; and its beginning is not chosen afresh by those who argue it: much of the choice has already been made by the categories in which the dispute must be expressed. In the case supposed the law of investment arrives after public power has produced the opportunity, and before the host State interferes with the entitlement which followed: it begins with the investment. It takes the middle segment of the circuit, the agreement between host State and investor, and makes of it a self-sufficient relation between two parties: an asset with an owner, a date and a value; and it asks what the host State afterwards did to that asset. Power has become property: the phrase describes a conversion, and implies nothing as to the validity of the right which results. No one doubts that rights may vest, or that an earlier right may bind a later government. The objection is narrower: the concession is received as the point from which everything else is measured, while the political conditions which produced it are left out of the account. The entitlement is given juridical memory; the memory of the conditions which produced it is, in law, expunged.

The selection is made before adjudication begins, and is in that sense a prior commitment: it determines what the dispute is taken to be about. To select is no error. Adjudication would be impossible if every dispute demanded an account of everything which made it possible; a law which remembered everything would decide nothing; and no one supposes that a tribunal seised of a concession must write the history of the world. But in a dispute of this kind, to choose among causes is to settle who bears the cost of what is left out: someone gains by what is remembered, and someone pays for what is forgotten; and from which history the discipline abstracts, at whose cost, and upon what warrant, are questions which survive the concession that abstraction there must be.

The forgetting is selective. The discipline is perfectly prepared to look behind the investment where the investor's own conduct puts its provenance in issue: bribery may defeat enforcement; fraud or illegality in the making of the investment may defeat jurisdiction; and a corporate restructuring may constitute an abuse.[6] Those inquiries ask more than to whom misconduct is attributable: they ask whether the asset is one which

[6] *World Duty Free Co Ltd v Republic of Kenya*, ICSID Case No ARB/00/7, Award, 4 October 2006, para 157; *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006; *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 144.

the law ought to protect. No mechanical extension of them is proposed; they show only that the constituted investment is not, even for the discipline itself, an irreducible starting point. Where the provenance lies in the conduct of the investor's own State, the field offers no settled path along which the inquiry may proceed; and the answer which comes at once to hand is that responsibility is personal. For responsibility, the answer is sufficient. It is no answer to the other question.

The exclusion is seldom stated, because it operates before the merits are reached. No tribunal is forbidden to read the history; the inherited categories may leave the history with nothing to do. The investor's story needs no translation: reliance, expenditure and loss are the native tongue of the claim. The State's story must first be rendered into an admitted category before it is permitted to do any work: corruption, if there was a bribe; illegality, if a law was broken; duress, if a minister was threatened. For force directed at the political order — for the removal of a government, as distinct from the bending of a minister — there is no settled category which will receive it while keeping provenance distinct from responsibility. The asymmetry is plainest where the discipline is most accomplished. Tribunals reconstruct the world as it would have been but for the respondent's measure; whether there would have been an investment at all but for the antecedent intervention is liable to be treated as background. The two counterfactuals need not be of equal legal relevance; the difference between them may well be justified; but the justification is assumed where it ought to be articulated.

The case supposed is the limiting one: the force direct; the causal connection complete; the knowledge entire. Yet even there no one who signed was pressed: a transaction may be wholly voluntary within a political order which the State was not free to preserve. Nor does the difficulty end with the limiting case; for the antecedent pressure admits of degrees: a government removed by force; or by covert assistance to its opponents; or left in place and threatened; or brought, by the slow accumulation of economic pressure, to make the grant the price of relief. The whole of history cannot be reopened: law must choose among causes; and a reasoned line would have to choose among proximity, causal role, the investor's knowledge and the dependence of the granting government upon the intervening power. The question is whether the line which the discipline in fact observes follows articulated reasons; or whether it merely reproduces its prior starting point and is, in that sense, arbitrary.

IV. The Question of Neutrality

The charge is laid against categories; it is laid against no one who applies them: it concerns the neutrality of the law's framing, and leaves untouched the detachment of those who administer it. A tribunal may apply the inherited categories with complete independence and scrupulous fairness, and the charge would stand exactly where it stood; for it is the framing which distributes. The investor's reliance, expenditure and loss are admitted as native facts; the production of the entitlement is relegated to political background; and the burden of explanation is thereby laid upon the host State before the merits are reached, though every participant acts with perfect propriety. Directional effect alone establishes nothing: legal rules exist to prefer one claim to another. The difficulty is that the preference here enters through doctrines addressed to different questions, and then appears as the neutral application of elementary propositions. If the substitution is a prior commitment, can a discipline which carries it, upon a matter which divides the parties before it, describe itself as neutral between them?

The argument prescribes no outcome: it asks only that the choice of starting point be made visible and justified. The applicable law may attach no consequence whatever to the antecedent facts, and protection in full may be what it requires; but an award for the investor would then rest upon reasons addressed to those facts, which the investor's absence of responsibility does not, by itself, supply.

Return to Caracas. The concession is valid; the investor had no part in the intervention; and it has understood throughout how its opportunity arose. That the investor did not intervene establishes that it is not answerable for the intervention; it does not necessarily establish that the intervention is irrelevant to the protection of the entitlement knowingly acquired through it. The refusal to ask a question does not show that the question has no answer; still less that the facts to which it relates have gone away. It marks the point at which the discipline begins; and the point at which a discipline begins — what it receives as law already made, and what it leaves behind as politics — is the most candid statement of its prior commitments that it can make.

V. The Averted Gaze

What, then, are those commitments? They are to a picture of the world; and the picture is the one which liberal thought has always most wished to be true: that commerce is the realm of consent, and force the realm of politics; that the two realms do not overlap; and that a right acquired in the

first owes nothing to what was done in the second. Upon that picture property is innocent by definition: it begins in agreement, it lives by reliance, and it asks of the law only to be left in peace.

The law of investment was made in the image of that picture; and those who made it described what they had done as the depoliticisation of investment disputes.[7] The description is exact as far as it goes. The investor was given a right of action of its own, against the host State and before an international tribunal; it no longer needed the diplomatic protection of its own State; and that State, relieved of the burden of espousing the claim, left the proceedings. So much of politics was indeed removed. But it was the politics of one State only. The host State remained what it had always been: a political body, answerable for its political acts, every one of which lies open to examination. What went out of the room was the conduct of the investor's State: its pressure; its patronage; and, in the case supposed, its force. The investor was thus spared twice over: spared the need to have its State intercede; and spared the awkwardness, and the legal consequence, of answering, indirectly, for what its State had done. A plea which the host State might have raised against that State finds no place against the investor, who claims in its own right: there is, a tribunal has said, "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".[8] It is a disarmament of the respondent. Politics were taken out where they might have served the host State, and left in where they serve the claim against it. The depoliticisation was selective; and the selection is itself political.

That is the averting of the gaze. The discipline looks steadily at the host State: at what it promised, what it enacted and what it took. It looks, when it must, at the investor. From the investor's State, and from what that State did to bring the investment about, it turns away, by long habit and in no particular direction. What it does not look at, it does not see; and what it does not see, it does not remember. The conduct of States towards one another — the pressure, the patronage, the force — has a law of its own; but that law is kept between States, where it is seldom enforced, and nothing of it passes to the level at which the investor claims. There the same conduct is neither lawful nor unlawful: it is no legal fact at all. It is

[7] I F I Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 *ICSID Review — Foreign Investment Law Journal* 1.

[8] *Corn Products International Inc v United Mexican States*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, para 161, where the plea was of countermeasures against breaches of treaty by the investor's State; to the same effect, *Cargill Inc v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009. Compare *Archer Daniels Midland Co and Tate & Lyle Ingredients Americas Inc v United Mexican States*, ICSID Case No ARB(AF)/04/5, Award, 21 November 2007, paras 110–180, where the plea was entertained and failed upon its conditions.

denied relevance. The coercion characteristic of an anarchic international order finds no register in the law of investment. It founds no plea, shifts no burden and qualifies no right. The record is sanitised; and the rights which that coercion has helped to produce come before the tribunal with their political history scrubbed.

The purview of a field is seldom neutral; its memory rarely innocent; and politics never so present as where it has been declared absent.