Constructing Investors' Substantive Rights in International Investment Law:

An Introduction

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I. Introduction

Classical international law viewed States and (relatively recently) International Organizations as subjects of international law, possessing rights and obligations under it. Individuals were only understood to have the status of objects, who may be merely affected by international law through the acts of their States, do not themselves possess any international law rights and duties.[1] This affected their capacity to bring claims in international law.

Progressively, international law jurisprudence evolved to recognize the rights and obligations of individuals that were bestowed by international treaties.[2] In the period following World War I, international regimes such as the International Labour Organization,[3] the Permanent Mandates Commission,[4] and mixed arbitral tribunals[5]

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[1] Anzilotti, *Cours de droit international: premier volume*, translated by Gilbert Gidel based on the third Italian edition (Paris, 1929) 134; Hafner, *The Emancipation of the Individual from the State Under International Law* (Leiden, 2013) 288 ff; Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge, 2011) 62 ff; Manner, 'Object Theory of the Individual in International Law' (1952) *American Journal of International Law* 428 (428 f); Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, translated by Jonathan Huston (Cambridge, 2016) 54 ff; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 177 f; Schwarzenberger, *The Fundamental Principles of International Law* (Leiden, 1955) 217 f.

[2] In 1928, the Permanent Court of International Justice ("PCIJ") in its *Reparations for Injuries* Advisory Opinion recognized that treaties could confer substantive rights directly on individuals. See: *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration)*, Advisory Opinion, 1928 PCIJ Series B no 15, 17–18; Parlett, *The Individual in the International Legal System* 70 ff; Peters, 'Before Human Rights: The Formation of the International Legal Status of the Individual, 1914–45' in Peters and Sparks (eds), *The Individual in International Law, The History and Theory of International Law* (Oxford, 2024) 119 (144 ff).

[3] The ILO Constitution provided for representations by industrial associations (employers/workers) to the Governing Body regarding failure to observe conventions.

[4] Under Article 22 of the League Covenant, mandatory powers were obliged to promote the well-being of inhabitants in mandated territories. A right to petition for the inhabitants was introduced in 1923 by the League Council to much controversy, with the concern being avoiding the appearance of litigation. The procedure on petition was instead meant for information gathering. See: Peters, *Beyond Human Rights* 128 ff; Parlett, *The Individual in the International Legal System* 287 ff.

[5] See, discussion on mixed arbitral tribunals in: Peters, *Beyond Human Rights* 139 ff; Parlett, *The Individual in the International Legal System* 72 ff, Appendix III.

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emerged, which allowed individuals to engage more directly with international law. Post 1945, it came to be accepted that individuals could acquire the procedural capacity to directly enforce the international law obligations of States before international tribunals. The proliferation of human rights treaties and development of international criminal law solidified the status of the individual as a subject of international law.[6]

The rise of international investment law, with the signing of the first investment treaty between Germany and Pakistan in 1959,[7] added another significant dimension to this evolution. Investment treaties, through investor-state dispute settlement mechanisms, granted foreign investors the right to bring claims directly against host States for violations of the standards of treatment set forth in said treaties before international arbitral tribunals.[8] There has been no consensus, however, on the nature of rights of the investor.[9] Under the classical approach, scholars argue that investor's rights are "*derivative*", i.e. a harm done by the host State to the investor's investment is in fact a harm to the home State of the investor. As such, investors only have the procedural power to enforce the right of their home State to redress that harm.[10] Under the modern approach, scholars argue that the investor's rights are autonomous, "*direct[ly]*" enforceable substantive rights that are held by the investor under

[6] Hafner, *The Emancipation of the Individual* 333 ff; Parlett, *The Individual in the International Legal System* 26 ff.

[7] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 1959.

[8] Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) *British Yearbook of International Law* 151 (163); Bjorklund, 'Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working' (2007) *Hastings Law Journal* 241 (252 f).

[9] Douglas, (2003) *BYIL* 151 (163 f).

[10] The classical view that an injury to a national is seen as an injury to the State itself was proclaimed by Vattel in 1758 and endorsed by the PCIJ in the *Mavrommatis Palestine Concessions* case, which held that "*by taking up the case of one of its subjects and by resorting to diplomatic protection 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*". See: Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, republication of the 1797 translation (Indianapolis, 2008) 189; *Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Judgment, PCIJ Reports 1924 Series A no 2, 12; Dugard, *Articles on Diplomatic Protection*, United Nations Audiovisual Library of International Law (United Nations, 2013) 1 ff; Douglas, (2003) *BYIL* 151 (162 ff); Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) *American Journal of International Law* 874 (887 f); Sornarajah, 'State Responsibility and Bilateral Investment Treaties' (1986) *Journal of World Trade* 79 (93).

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investment treaties.[11] Notably, Article 33(2) of the Responsibility of States for Internationally Wrongful Acts also recognizes such direct accrual of rights to individuals.[12] The "*direct*" rights model conceptualizes investment treaties as contracts between States which create obligations towards third parties, which in the case of investment treaties are investors. In their capacity as beneficiaries of the contract between the States, investors also receive the right to enforce the obligations of the contracting States to the investment treaty.[13]

This paper offers an introductory overview of this debate. It situates the status of the investor in investment treaties within the broader evolution of the individual in international law. It suggests that investment arbitration cannot be understood merely as an institutionalized form of diplomatic protection, and that the choice between construing investors' rights as "derivative" or "direct" has concrete consequences for the operation of investment treaties.

The aim of this paper is deliberately introductory. The construction of investors' substantive rights cuts across general international law, the law of treaties, the law of State responsibility and investment treaty practice, and each of these strands has generated a substantial body of scholarship and case law. Within the confines of a conference paper, no attempt is made to resolve the debate or to offer an exhaustive treatment of any one of these strands. Rather, the paper seeks to map the field: to set out the conceptual origins of the two competing models of investors' rights, to present the principal authorities relied upon in support of each, and to illustrate why the choice between them matters in practice. It is thus intended to serve as a point of entry for readers who are new to the subject, and as a framework for further and more focused research on the questions it identifies.

The overview proceeds in four steps. Section II traces the evolution of the individual's status in international law from object to subject, thereby providing the conceptual

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[11] Peters, *Beyond Human Rights* 306 ff; Douglas, (2003) *BYIL* 151 (168 ff); Bjorklund, *Hastings LJ.* 241 (266 ff).

[12] Responsibility of States for Internationally Wrongful Acts (2001), Art. 33(2) ("*This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.*" (emphasis added)). The commentary of the International Law Commission that accompanies this explicitly refers to investment treaties as one of the procedures where a primary obligation is owed to an individual. See: International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) vol II(2) *Yearbook of the International Law Commission* 95.

[13] See: Douglas, 'Instead of Principles, Slogans' (2023) *ICSID Review* 7; Bjorklund, *Hastings LJ.* 241 (265 f); Douglas, (2003) *BYIL* 151 (184); *Occidental Exploration and Production Co v Republic of Ecuador* [2005] EWCA Civ 1116, [20].

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background to the debate about the nature of investors' rights. Section III revisits the classical doctrine of diplomatic protection and shows how it informed the derivative conception of individual rights. Section IV introduces the investment treaty regime as a *lex specialis* that depoliticises investment disputes and grants investors direct procedural access to international tribunals. Sections V and VI then develop, respectively, the derivative and direct models of investors' rights, drawing explicit connections back to the general international law framework set out in Sections II and III. Finally, Section VII demonstrates the practical significance of this conceptual choice by examining its implications for waiver of rights, the operation of countermeasures, and the effect of treaty termination.

II. The Evolution of the Individual's Status from Object to Subject of International Law

A. Individual as an Object of International Law

The orthodox view of international law is that international law was exclusively state-centric. Oppenheim, in his influential treatise, articulated the classical position unequivocally: "*[s]ince the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.*"[14]

It is therefore no surprise that the classical theorists of public international law were almost unanimous in maintaining that international law does not grant any right to individuals. In their view, the function of international law is to only and exclusively govern the international conduct of States.[15] The individual is but a mere object of international law, not its subject.[16] In other words, an individual is no different from other objects in international law such as territories, ships, boundaries or rivers, that could benefit or be restrained by international law as implemented through domestic legislation. Even where individuals such as heads of States, diplomatic envoys, or citizens are granted rights in accordance with international law while on foreign territory, classicists do not consider these rights to be granted directly by international law. Rather, such individual rights are domestic law rights. According to classicists, States have an international law obligation to enact domestic legislation that is line with its international law obligations. As such, domestic law incorporates treaty

[14] Oppenheim, *International Law: A Treatise*, vol 1, 2nd edn (London, 1912) 362 f.

[15] Oppenheim, *International Law* 365; Anzilotti, *Cours de droit international* 134; Schwarzenberger, *Fundamental Principles* 250; *Mavrommatis Palestine Concessions* 12.

[16] Oppenheim, *International Law* 365.

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provisions either automatically (by ratification of self-executing treaties) or through specific legislative enactments, thus granting rights to individuals that are in line with international law.[17]

The period following World War I saw the creation of new conventions and institutions that began to challenge classical doctrine. The redrawing of borders and the creation of new States led to novel international regimes for the protection of minorities, refugees, and inhabitants of mandated territories.[18] This was significant since ordinarily, matters pertaining to individuals were traditionally treated to be within the exclusive domestic legislative capacity of States. Yet, to say that these conventions and institutions created "rights" for individuals would be an exaggeration. In reality, they only created obligations for State to implement legislation to protect individuals. This is illustrative from the early labour and refugee conventions: between 1919 and 1939, 27 out of the 67 conventions on labour adopted contained the language of rights and entitlements for individuals, such as rights to accident compensation, medical treatment, pension, and maternity leave. These were not direct international rights of individuals but merely a textual reflection of bargains between capital and labour on concrete issues that created obligations within an inter-State framework. The entitlements themselves were ultimately governed by national law.[19] The early conventions for protection of refugees similarly aimed to secure a standard of treatment for them by imposing obligations on States, rather than by directly empowering the refugees themselves with international rights. For instance, while the 1933 Convention Relating to the International Status of Refugees granted refugees certain "*rights and privileges*," the language of the treaty did not actually create international rights for individual refugees; said rights and privileges were merely reflective of the obligations of States to legislate them into their domestic laws.[20]

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[17] Oppenheim, *International Law* 19 f, 363 f ("*[T]he Law of Nations is a law for the international conduct of States, and not of their citizens. Subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. An individual human being, [...] is never directly a subject of International Law. Therefore, all rights which might necessarily have to be granted to an individual human being according to the Law of Nations are not international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the respective State by International Law.*"). See also: *Mavrommatis Palestine Concessions* 12; Anzilotti, *Cours de droit international* 134; Schwarzenberger, *Fundamental Principles* 250.

[18] Peters, 'Before Human Rights' 119 (119 f).

[19] Peters, 'Before Human Rights' 119 (123); Parlett, *The Individual in the International Legal System* 294 f.

[20] Peters, 'Before Human Rights' 119 (124 f).

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B. Individual as a Subject of International Law

A significant development in this period that paved the way for the recognition of direct international law rights of individuals was the (Permanent Court of International Justice ("PCIJ") 1928 *Advisory Opinion on the Jurisdiction of the Courts of Danzig*. It confirmed the direct applicability of treaty provisions on individuals, stating that, "*it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.*"[21] Furthermore, several peace treaties that followed World War I established mixed arbitral tribunals that decided disputes between individuals and States for claims arising out of damages suffered due to war.[22] Notably, several arbitral awards of mixed arbitral tribunals established by the Treaty of Versailles of 28 June 1919[23] and the Geneva Convention of 15 May 1922[24] treated the rights of the individual claimants to be their individual rights, and not of their States.[25] That said, in awards made by mixed arbitral tribunals established under other treaties, such as by the US-Mexican General Claims Commission, the claims were considered to be those of the State, and not an individual.[26]

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[21] *Jurisdiction of the Courts of Danzig* 17 f.

[22] For a list of the treaties that established mixed arbitral tribunals in the period between 1919-1939, see: Parlett, *The Individual in the International Legal System,* Appendix III; Peters, 'Before Human Rights' 119 (139 ff); Parlett, *The Individual in the International Legal System* 72 ff.

[23] The parties to the Treaty of Versailles 1919 included: Germany, Portugal, Romania, France, Greece, Italy, Great Britain, Japan, Czechoslovakia, Yugoslavia, Siam, Poland, Belgium.

[24] Geneva Convention between Germany and Poland 1922.

[25] See: Parlett, *The Individual in the International Legal System*, Appendix III ("*French-German Mixed Arbitral Tribunal held that Treaty of Versailles conferred rights on individuals: Sigwald, Charles v. Germany, 27 August 1926, 3 ILR 337 [...] Anglo-German tribunal held that an individual's right to claim compensation was independent from the discretion of their state of nationality, granted directly to a national: Lederer v. German Government, (1924) Recueil des Décisions des Tribunaux Arbitraux Mixtes 762, 768 [...] Before the Mixed Commission, individuals had control of their claims. The Commission's President explained that the 'petitioner is granted the legal status of a litigant party': Official Collection of Opinions of the President of the Upper Silesian Mixed Commission. Before the mixed arbitral tribunal, individuals controlled their claims. They were entitled to be represented on the same footing as governments. Parties could be represented by barristers or professors of law, or represent themselves. Individuals were also permitted to bring an action against their state of nationality: Steiner and Gross v. Poland, Upper Silesian Arbitral Tribunal, 30 March 1929, 4 ILR 291.*")

[26] Parlett, *The Individual in the International Legal System*, Appendix III ("*States controlled claims. The convention provided for appointment of agents and counsel by governments who were to present evidence and arguments orally or in writing. Rules provided that all claims documents and evidence*

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The scourge of World War II brought the individual to the forefront of international law, with the preamble to the United Nations Charter beginning with people, and not States: "*WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war [...] and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person*".[27] The human-oriented approach, and the resulting development of international human rights jurisprudence, fundamentally altered the relationship between the individual, the State, and international law.[28] The Universal Declaration of Human Rights of 1948 ("UDHR"), which provided a basis for the interpretation of the principles related to the individual in the United Nations Charter, became the first international instrument to refer to the direct conferral of human rights upon individuals.[29]

The ICJ's *1949 Reparation for Injuries Advisory Opinion* established that entities other than States could have international legal personality, paving the way to later support arguments for the international legal personality of individuals.[30] The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 was transformative in its use of declaratory language that "*everyone has the right to [...]*", indicating that rights directly belonged to, or were conferred upon, individuals.[31]

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were to be filed by governments and agents. However, memorial was to be signed by individual claimant or their attorney. Commission held that a state could press claim on mere proof of nationality and the individual need not have sought aid of government: Melczer Mining Company. Awards were to be paid in lump sum to government after offset. Decisions of commission on character of claims suggested that these were diplomatic protection claims. In Dickson Car Wheel Co., the commission held that the injury is wrongful act against state of nationality. In William A. Parker, the commission held that the private claim was not property of nation but it was controlled by state when espoused.")

[27] Preamble, United Nations Charter <https://www.un.org/en/about-us/un-charter/full-text> accessed on 1 September 2025.

[28] See: Hafner, *The Emancipation of the Individual* 319 ff, 333 ff; Jennings and Watts, 'Individuals' in Jennings and Watts (eds), *Oppenheim's International Law*, vol 1, 9th edn (Oxford, 2008) 846 (846 ff).

[29] Sperduti, *L'individu et le droit international* (Leiden, 1956) 804 f; Parlett, *The Individual in the International Legal System* 307.

[30] *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949,* 177-178*;* Schwarzenberger, *Fundamental Principles* 252*;* Parlett, *The Individual in the International Legal System* 29 f*;* Peters, *Beyond Human Rights* 36.

[31] See: Convention for the Protection of Human Rights and Fundamental Freedoms 1950 arts 2(1), 5(1), 6(1), 8(1), 9(1), 10(1), 11(1); Sperduti, *L'individu et le droit international* 742 f; Heydte, *L'individu et les tribunaux internationaux* (Leiden, 1962) 326 f.

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The *1981 Algiers Accords* executed by the US and Iran brought an end to a two-year hostage crisis and established the Iran-US Claims Tribunal (IUSCT) to resolve existing disputes between the two States and their nationals.[32] Notably, while the IUSCT was organizationally and functionally an international tribunal constituted pursuant to a treaty, and enjoyed an international law character, it allowed individuals the procedural capacity to directly bring claims against the State.[33]

Finally, the International Court of Justice's ("ICJ") 2001 judgment in the *LaGrand* case[34] affirmatively confirmed the existence of direct rights of individuals in international law. The case concerned the failure of the United States to inform two German nationals of their right to consular assistance under Article 36 of the Vienna Convention on Consular Relations (VCCR) following their arrest. Germany argued that this failure violated not only its own rights as a State, but also the individual rights of the two German nationals.[35] The ICJ agreed with Germany and concluded that Article 36(1) of the VCCR created "*individual rights*".[36] This was significant since it confirmed that an interstate treaty may create individual rights, irrespective of whether or not they were classified as human rights, thus affirming the broad nature of rights that could be granted to and held by an individual pursuant to a treaty.[37]

Notably, the *LaGrand* case confirmed that an internationally wrongful act can simultaneously violate the rights of a state and the rights of its nationals.[38] In the

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[32] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran 1981; Charlotin, 'A Data Analysis of the Iran–US Claims Tribunal's Jurisprudence – Lessons for International Dispute-Settlement Today' (2019) *Journal of International Dispute Settlement* 443 f.

[33] Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (The Hague, 1999) 377 ff.

[34] *LaGrand (Germany v United States of America)*, Judgment, ICJ Reports 2001, 466 ff.

[35] *LaGrand* 473 f.

[36] *LaGrand* 494.

[37] International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) vol II(2) *Yearbook of the International Law Commission* 95; Crawford, (2002) *AJIL* 874 (887 ff); Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' (2004) *Arbitration International* 179 (184 f).

[38] García Olmedo, 'Redefining the Position of the Investor in the International Legal Order and the Nature of Investment Treaty Rights: A Closer Look at the Relationship between Diplomatic Protection and Investor-State Arbitration' in Summers and Gough (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Boston, 2018) 158 (170).

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subsequent *Avena* case, the ICJ in its 2004 judgment further elaborated on this and found that the rights of the individual and the State were interdependent.[39] A violation of the rights of an individual could entail a violation of the rights of the individual's State, and this may also operate vice versa.[40]

III. Diplomatic Protection and the Rights of Individuals in International Law

Having traced the individual's evolution from object to subject of international law, this Part examines two competing frameworks for understanding individual rights: the classical model of diplomatic protection (Section III.A), which treats individual claims as derivative of State rights, and the modern recognition of direct individual rights (Section III.B). These frameworks provide essential background for understanding the contemporary debate over investor rights in Part V and VI.

A. The Theory of Diplomatic Protection

The conception of the individual as a mere object of international law necessitates a specific procedural mechanism for redress. The dualistic and interdependent right of an individual and their State arising out of an internationally wrongful act brings us to the theory of diplomatic protection. This is a legal fiction as per which an injury to a national is considered an injury to the individual's home State, as the only mechanism for the protection of individuals against internationally wrongful acts of States.[41] The theory of diplomatic protection can be traced back to Emer de Vattel's classical treatise, where he explained that in international law, the private property and rights of individual citizens are considered to belong to a nation as a whole, when considered with respect to other States. When another State exercises its rights over the rights or property of a foreign individual, then in Vattel's view, the home State of that foreign individual gains an indiscriminate right against the other nation's properties until the debt for the harm inflicted on the foreign individual is discharged. In other words, an individual's rights in relation to other States are purely *derivative* and exist only through the rights of the individual's home State.[42]

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[39] *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, ICJ Reports 2004, 36.

[40] Parlett, *The Individual in the International Legal System* 96.

[41] Oppenheim, *International Law* 366 f; Vattel, *The Law of Nations* 189.

[42] Vattel, *The Law of Nations* 192 f ("*[T]he property of the individuals is in the aggregate, to be considered as the property of the nation, with respect to other states. [...] She is interested in that property by her obligation to protect all her members. In short, it cannot be otherwise, since nations*

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The classical formulation for diplomatic protection has been provided by the PCIJ in the *Mavrommatis Palestine Concessions* case, where it held that: "*[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law.*"[43] This was affirmed and further elaborated by the ICJ in the *Barcelona Traction* case, by stating that: "*[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. [...] The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease.*"[44] The legal situation of an individual in international law is thus one of double dependence: on the State of her nationality for stepping in to assert diplomatic protection, and on the internationally responsible State's consent to jurisdiction of a court or tribunal for adjudicating the individual's home State's diplomatic protection claim.[45]

B. Evolution Towards Direct Rights of Individuals in International Law

However, as previously noted, the individual does not always need to rely on diplomatic protection to assert rights in international law in response to a State's internationally wrongful acts. It is now accepted that treaties may expressly allow individuals to bring claims directly before international judicial bodies, thereby enabling direct enforcement of rights in international law by individuals.[46] The commentary to the *Articles on Responsibility of States for Internationally Wrongful Acts* ("*Articles on State Responsibility*") acknowledges as much, that where a primary obligation is owed by States to a non-State entity, there may be a procedure which

act and treat together as bodies, in their quality of political societies [...]. All those who form a society, a nation, being considered by foreign nations as constituting only one whole, one single person [...]. [...] By an immediate consequence of this principle, if one nation has a right to any part of the property of another, she has an indiscriminate right to the property of the citizens of the latter nation, until the debt be discharged.")

[43] *Mavrommatis Palestine Concessions* 12.

[44] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962),* Judgment, ICJ Reports 1970, 44.

[45] Heydte, *L'individu et les tribunaux internationaux* 326; Crawford, (2002) *AJIL* 874 (887 f).

[46] Jennings and Watts, 'Individuals' 846 (846 ff); Spiropoulos, *L'individu et le droit international* (Leiden, 1929) 222 ff; Parlett, *The Individual in the International Legal System* 14 ff.

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allows that entity to invoke responsibility of the State on its own account, without the intermediation of any State.[47] Unlike the rights bestowed upon individuals by domestic laws legislated in accordance with treaties, such rights are bestowed directly by treaties and enable individuals to directly invoke said rights against a State before judicial bodies constituted pursuant to the relevant treaty.

There is little agreement on the precise nature of the rights directly asserted by an individual against a State in accordance with procedures set forth in a treaty. The debate has been split into two main schools of thought: the "derivative rights" theory and the "direct rights" theory. These schools of thought can arguably be traced back to a debate between two classicists, Giulio Diena and Lassa Oppenheim, regarding the nature of rights that would be created by the *Hague Convention XII of 1907* ("*1907 Hague Convention*"), which granted individual subjects of the contracting States a right to appeal against the judgments of national courts to the International Prize Court.[48]

The direct rights theory was advocated by Diena. He recognized that although international law primarily governs relations between States and traditionally does not grant individuals direct rights, individuals can nonetheless acquire rights under international law, such as through treaties that provide procedural avenues for direct claims before international tribunals. He referred to the right to appeal to the International Prize Court as an example.[49] For Diena, the mechanism by which individual subjects could appeal against national court judgments was revolutionary, since it allowed individuals to directly exercise rights based in international law by bringing claims against a foreign State before an international tribunal operating on rules of international law. He emphasized that these rights stemmed directly from the treaty and not from any domestic law that implemented it. Moreover, he refuted the view that such rights were derivative from the rights of the contracting States. To him, this reality made the classical theory of international law completely bankrupt.[50] In other words, Diena argued that individuals could directly acquire and possess

[47] International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) vol II(2) *Yearbook of the International Law Commission* 95.

[48] Diena, 'L'individu devant l'autorité judiciaire et le droit international' (1909) *Revue générale de droit international public* 57 (62, 73, 76, 78, 79); Convention (XII) relative to the Creation of an International Prize Court, The Hague 18 October 1907 arts 3-7. The convention was signed, but never ratified, due to which the International Prize Court was also never established.

[49] Diena, (1909) *RGDIP* 57 (62, 73, 76, 78, 79).

[50] Diena, (1909) *RGDIP* 57 (76 ff).

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substantive rights in international law that are not derivate of a State's rights and are directly enforceable against States.

To explain their mechanism, Diena drew parallels between treaties which aim to grant certain rights to individuals which they can directly invoke against the contracting States and contracts which stipulate benefits for third parties and as such, allow such third parties to acquire their own directly enforceable rights. He explained that while treaties appear to confer rights upon individuals, in principle, only the contracting States acquire rights and obligations vis-à-vis one another. Individuals do not acquire rights against States themselves by virtue of international law. Instead, where rights are recognized for individuals, those rights exist only in relation to the specific international organ (such as an international court or commission) that is created by the treaty. This means that the legal relationship is not between the individual and the State(s), but between the individual and the international organ established by the collective will of the States. [51]

Oppenheim, on the other hand, endorsed the derivative rights theory. He disagreed with Diena's characterization of the rights available to an individual under the 1907 Hague Convention. He maintained that international law does not guarantee any so-called rights of individuals, since individuals cannot be its subjects. [52] He argued that these are not truly international rights of individuals, but are rights belonging to their home State, which in turn can demand for its nationals to be allowed to bring appeals to the International Prize Court. He viewed the terms "*rights and duties*" to be linguistically convenient in this context, rather than a legal reality of relations between States or rights under domestic law. [53] In other words, Oppenheim argued that an individual can only procedurally enforce *derivative* substantive rights held or acquired by their home State in international law.

To summarize Oppenheim's and Diena's characterizations of how an individuals' rights in international law are created: Diena viewed individuals to have their own rights and standing under treaties, and Oppenheim viewed individuals to be substituting the State in asserting the State's rights in international law. Therein lies the genesis of the debate between "direct" and "derivate" theories of rights of individuals in international law. This debate remains relevant in the context of investment treaties.

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[51] Diena, (1909) *RGDIP* 57 (78 f).

[52] Oppenheim, *International Law* 365.

[53] Oppenheim, *International Law* 365.

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IV. Investment Treaties

Investment treaties provide individuals a direct-access procedure to invoke the responsibility of the internationally wrongful State without having to rely upon diplomatic protection. In fact, the framework of investment treaties was established as a *lex specialis* to overcome the perceived inefficiencies of diplomatic protection. The system of diplomatic protection proved unworkable as a way to protect business interests in contemporary international economic life. Moreover, it was perceived to be a politicised and unpredictable remedy.[54] Now, with the proliferation of investment treaties as the primary mechanism for investor protection, diplomatic protection is relegated to a residual mechanism which is exercised only in absence of other procedures that enable direct invocation of rights by individuals.[55]

Investment treaties are bilateral or multilateral international agreements between States which provide a framework for the promotion and protection of investments made in one contracting State by investors from the other contracting State/States. They aim to protect the interests of foreign investors and to create a conducive environment for the host State of investments to attract foreign capital.[56] Typically, this is achieved by treaty obligations on the host State to encourage investments, to accord fair and equitable treatment to investments, accord national or most-favoured nation treatment to investors and investments, to guarantee unrestricted transfer of investment and returns, and to not expropriate investments except for public interest and on payment of prompt, adequate and effective compensation.[57]

When a host State's actions or omissions breach its obligations under an investment treaty, it commits an internationally wrongful act, giving rise to its responsibility. The resulting legal relationship that is established is directly between the investor and the internationally responsible host State, thus bypassing the investor's home State.[58] The injured individual investor can in such cases exercise its rights under the investment

[54] Paulsson, 'Arbitration Without Privity' (1995) *ICSID Review – Foreign Investment Law Journal* 232 (255 f); Sornarajah, (1986) *JWTL* 79 (80 ff).

[55] Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (Cambridge, 2019) 214; Spiermann, (2004) *Arb. Int'l* 179 (181 f).

[56] Dolzer, 'Standards of Protection' in Dolzer, Kriebaum and Schreuer (eds), *Principles of International Investment Law* 3rd edn (Oxford, 2022) 26-30; Douglas, *The International Law of Investment Claims* (Cambridge, 2009) 1-2.

[57] See: Peters, *Beyond Human Rights* 315; Parlett, *The Individual in the International Legal System* 103 f; Dolzer, 'Standards of Protection', 186.

[58] Crawford, (2002) *AJIL* 874 (887 f).

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treaty by bringing a treaty claim of reparation against the responsible State.[59] Investment treaties prescribe judicial forums to bring such claims, which generally include domestic courts and arbitral tribunals constituted under various institutional and ad-hoc systems/ rules of the International Centre for Settlement of Investment Disputes (ICSID), United Nations Commission on International Trade Law (UNCITRAL), International Chamber of Commerce (ICC), Stockholm Chamber of Commerce (SCC), Cour Commune de Justice et d'Arbitrage (CCJA), or other agreed ad-hoc settlement procedures.[60] The most common remedy sought by investors in investor-State disputes is for compensatory damages paid directly to the investor to repair the harm inflicted by the responsible State.[61]

The nature of the rights of investors created by investment treaties continues the scholarly debate on the two opposing theories: the "derivative rights" model and the "direct rights" model.

V. Derivative Rights of Investors

The theory of diplomatic protection, examined in Section III.A above, provides the conceptual foundation for the 'derivative rights' approach to investment treaties. This Part examines how this classical framework has been applied and contested in the specific context of international investment law

The derivative rights theory is rooted in the traditional framework of public international law which considers States to be its principal subjects, and only allow diplomatic protection as a remedy for injured nationals of States. The derivative rights theory argues that investment treaties institutionalize the system of diplomatic protection, and only confer the standing upon the individual investors of the contracting States to enforce treaty obligations. However, the right itself is retained with the State, and does not transfer to the individual investor. Put differently, the individual investor only has a procedural right to bring claims against the responsible

[59] The obligation to make reparations for a breach of an investment treaty survives its termination. See: International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) vol II(2) *Yearbook of the International Law Commission* 99; Peters, *Beyond Human Rights* 332.

[60] Zachary Douglas provides a list of examples of treaties that prescribe each type of forum described in the text for settlement of investor-State disputes. See: Douglas, *The International Law of Investment Claims* 3-5.

[61] International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) vol II(2) *Yearbook of the International Law Commission* 95, 99; Peters, *Beyond Human Rights* 332.

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State, without holding any substantive rights, and without becoming privy to the inter-State relationship.[62]

Investment treaty tribunals have acknowledged the investor's procedural standing to be a mere practical modification of the otherwise cumbersome process of diplomatic protection.[63] The arbitral tribunal in the *Loewen v. USA* case recognized this, stating that "*claimants are permitted for convenience to enforce what are in origin the rights of Party [S]tates.*"[64] That said, the view articulated by this tribunal may be arguably specific to the North American Free Trade Agreement 1992 (NAFTA) on account of its structure. NAFTA's Chapter XI is divided into two sections: Section A, setting out the substantive obligations between the contracting States, and Section B, setting out the procedural mechanism for investors to bring claims.[65] Indeed, the contracting States to the NAFTA, i.e. the United States, Canada, and Mexico, have repeatedly advanced the argument that the obligations, and commensurately, the rights under Chapter XI of NAFTA are owed to States, and not investors. For instance, in its challenge to the NAFTA award in *SD Myers v. Canada* before a Canadian court, Canada argued that "*obligations listed in Section A of NAFTA Chapter Eleven are not owed directly to individual investors. Rather, the disputing investor must prove that the NAFTA Party claimed against has breached an obligation owed to another NAFTA Party under Section A and that the investor had incurred loss or damage by reason of or arising out of that breach.*"[66] Similarly, in *ADM v. Mexico*, it was argued by Mexico that "*Section A of Chapter Eleven sets forth substantive obligations which remain inter-State, without accruing individual rights [...].*"[67]

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[62] See: Douglas, (2003) *BYIL* 151 (163 f); Crawford, (2002) *AJIL* 874 (887 f); Peters, *Beyond Human Rights* 301 ff; Sornarajah, (1986) *JWTL* 79 (93).

[63] See, for instance: *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, para. 178; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 233.

[64] *Loewen Group Inc* para. 233.

[65] See: North American Free Trade Agreement (NAFTA), 1992, chapter XI available at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/11.aspx?lang=eng&_ga=2.126086792.46692278.1759140911-1451538800.1759140911> accessed on 1 September 2025.

[66] Amended Memorandum of Fact and Law of the Applicant, Attorney General of Canada, *The Attorney General of Canada v SD Myers Inc*, Court File No T-225-01, para. 67, cited in *ADM v Mexico* para. 167.

[67] *ADM v Mexico* para. 168.

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Importantly, in its award in *ADM v. Mexico*, the arbitral tribunal acknowledged both the derivative and direct rights theories regarding the nature of investors' rights under investment treaties. It described the derivative theory as "*the proposition that investment treaties provide a set of obligations which require the State to treat investments of qualified investors in accordance with the standards of the treaty; but these obligations are only owed to the State of the investor's nationality. If a breach of any of these standards occurs, the investor may bring the host State to an international arbitration in order to request compensation, but the investor will be in reality stepping into the shoes and asserting the rights of the home State.*"[68] While acknowledging that under specific circumstances, international law may "*confer direct rights on individuals*", the tribunal emphasized that "*the proper interpretation of the NAFTA does not substantiate that investors have individual rights*"[69] since "*Chapter Eleven does not provide individual substantive rights for investors, but rather complements the promotion and protection standards of the rules regarding the protection of aliens under customary international law.*"[70] The tribunal explained the structure of the NAFTA by stating that, "*the obligations under Section A remain inter-state, providing the standards by which the conduct of the NAFTA Party towards the investor will be assessed in the arbitration. All investors have under Section B is a procedural right to trigger arbitration against the host State. What Section B does is to set up the investor's exceptional right of action through arbitration that would not otherwise exist under international law, when another NAFTA Party has breached the obligations of Section A.*"[71] To further demonstrate the difference between the substantive obligations in Section A and procedural rights in Section B of Chapter XI of the NAFTA, the tribunal explained that while an investor can waive its Section B procedural rights at the time of accepting the host State's offer to arbitration, the substantive obligations cannot be waived since they remain at an inter-State level.[72]

On the domestic side, both the French and German constitutional courts have interpreted investment treaties to read the obligations due under them to be inter-

[68] *ADM v Mexico* para. 169.

[69] *ADM v Mexico* para. 170.

[70] *ADM v Mexico* para. 171.

[71] *ADM v Mexico* para. 173.

[72] *ADM v Mexico* para. 174.

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State only.[73] The French constitutional court was addressing an appeal by an Algerian national which stemmed from the decision of France to refuse to issue him a long-stay visa. In his visa application, the appellant had stated that he was a majority shareholder in a French company. The appellant relied on Article 3 of the Algeria-France BIT, which mandates the contracting States to provide fair and equitable treatment in accordance with international law, to investments of nationals of the other contracting State, to argue against the decision of France to refuse him an entry visa.[74] The French constitutional court dismissed this argument, stating that the Algeria-France BIT only created obligations between the two signatory States, due to which he could not rely on it as an individual to appeal against the visa refusal.[75]

The proceedings before the German Federal Constitutional Court concerned referrals from the lower courts regarding questions of international law arising in lawsuits brought by German investors against Argentina ("Argentina Bondholders Case"). The bondholders were seeking payment of their Argentinian government bonds, while Argentina relied on a national state of necessity in international law to justify the temporary suspension of this payment to the investors.[76] The central question before the court was whether a State could invoke an international law defense of necessity against bondholders in what may arguably be characterized as a private law dispute.[77] Therefore, the court referred to international law jurisprudence where such defense had been raised against claims brought by individual investors. In that context, it was necessary to analyse whether the investors' rights were direct, i.e. akin to those granted by a contract like that between the bondholders and Argentina, or whether they were derivative. The court found that the substantive rights asserted by investors in investment treaty cases were owed by the host State not directly to them, but to the home State of the investors in its capacity as a contracting party to the investment treaty, even if the protective purpose of the treaty was directed

[73] Conseil d'État, 7ème sous-section jugeant seule, 21 December 2007, 280264; BVerfG, 2 BvM 1/03, Ruling of the Second Senate, 8 May 2007, para. 51; Peters, *Beyond Human Rights* 305.

[74] Agreement between the Government of the French Republic and the Government of the Democratic and Popular Algerian Republic on the Reciprocal Encouragement and Protection of Investments 1993 art 3 ("*Each Contracting Party undertakes to provide, in its territory and in the maritime area, fair and equitable treatment in accordance with the principles of international law, to investments of nationals and companies of the other party, ensuring that the exercise of the right thus recognized is hampered in either law or in fact, by unjustified or discriminatory measures that would affect the management, maintenance, use, enjoyment or disposal of such investments.*").

[75] See: Conseil d'État, 7ème sous-section jugeant seule, 21 December 2007, 280264.

[76] BVerfG, 2 BvM 1/03, paras. 1 ff.

[77] BVerfG, 2 BvM 1/03, para. 23.

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at the interests of the private investors. Rather, the court characterised the rights of the investors to bring a claim to be merely procedural, and as such, derivative of the rights of their home State.[78]

Such caselaw in support of the derivative rights theory notwithstanding, there is equally academic and judicial jurisprudence which rejects the derivative theory, and advocates for the theory of direct rights of investors.

VI. Direct Rights of Investors

In contrast to the derivative rights theory rooted in diplomatic protection, the 'direct rights' theory builds upon the recognition of individual rights in international law discussed in Sections II.B and III.B. This Part examines how this progressive framework applies to investment treaties.

The inadequacies of diplomatic protection are the raison d'être for investment treaties.[79] The direct rights theory represents a fundamental shift from the traditional model of diplomatic protection. As per this theory, individual investors are effectively third party beneficiaries of investment treaties, with substantive rights directly conferred upon them. That treaties can go beyond their privity to grant rights to States that are not a party to that treaty is uncontroversial.[80] Article 36 of the Vienna Convention on the Law of Treaties 1969 (VCLT) recognizes this explicitly.[81] The granting of treaty benefits to individuals may be viewed as functionally similar, albeit with certain, less obvious characteristics. Certainly, objects of international law such as investors cannot participate in the creation of rights in international law. In most

[78] BVerfG, 2 BvM 1/03, paras. 51 ff.

[79] Paulsson, (1995) *ICSID Rev.* 232 (255 f); Sornarajah, (1986) *JWTL* 79 (80 ff); Douglas, (2003) *BYIL* 151 (182); Kokott, 'Interim report on "the role of diplomatic protection in the field of the protection of foreign investment"' in International Law Association (ed.), *Report of the Seventieth Conference held in New Delhi, 2–6 April 2002* (London, 2002) 259.

[80] Even when a treaty cannot impose obligations on third States, it may confer rights upon it, and such a situation is perfectly compatible with the sovereignty of the third State. See: d'Argent, '1969 Vienna Convention: Article 36 Treaties providing for rights for third States' in Corten and Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford, 2011) 929; David, '1969 Vienna Convention: Article 34 General rule regarding third States' in Corten and Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford, 2011) 887.

[81] Vienna Convention on the Law of Treaties 1969 art 36(1) ("*1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provdides. [...]*").

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cases, investors do not consent in a particular form like States do to benefit from a particular form of protection under treaties. Yet, the act of qualifying for protection and the exercise of rights under the regime benefiting objects such as investors may be read as their assent to be conferred with the beneficiary status under a treaty. Moreover, much like Article 36 of the VCLT, assent of individuals to be beneficiaries of treaties may also be presumed unless indicated to the contrary.[82]

As such, a cause of action advanced by an individual investor against a State is based upon the vindication of the individual's own rights, and not those of the State.[83] The direct rights theory is of course a significant departure from the diplomatic protection framework set out in the *Mavrommatis* case, and the derivative theory of investor's rights that follows it. Instead, it finds its support in the ability of individuals to directly acquire treaty rights, as established in the *Danzig* case,[84] and affirmed in the *LaGrand* case.[85] In other words, per the direct rights theory, it is not a mere procedural right, but a substantive right in international investment law, that is held and exercised by an individual investor. In fact, the power to institute investor-State dispute settlement proceedings has been compared with the guarantee of access to justice available in regimes such the European Convention on Human Rights 1950 (ECHR) and national constitutions, emphasizing its substantive nature.[86]

The text of investment treaties also reflects the substantive nature of rights conferred upon individual investors. The common substantive guarantees in international investment law, such as fair and equitable treatment (FET), full protection and security (FPS), and protection against unlawful expropriation, are obligations formulated in a way that makes the individual investors the rights-holder. When such guarantees are breached, the individual investors become the owners of the resulting

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[82] See: Paparinskis, 'Analogies and Other Regimes of International Law' in Douglas, Pauwelyn and Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford, 2014) 73 (81); Stewart and Reisman, 'Who Thinks Treaties Are Like Contracts? Not John Marshall' (2023) *The American University International Law Review* 937 (962); *RosInvestCo UK Ltd v Russia*, SCC V 79/2005, Award on Jurisdiction (SCC, November 2008), para. 153; *Wintershall A.G. v Argentina*, ICSID Case No. ARB/04/14, Award (ICSID, 8 December 2008), para. 114.

[83] Douglas, (2003) *BYIL* 151 (182).

[84] *Jurisdiction of the Courts of Danzig* (n 2) 17-19. ("*[i]t cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and enforceable by the national courts.*")

[85] *LaGrand* 494.

[86] Peters, *Beyond Human Rights* 292.

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substantive claim.[87] For instance, the language of the Austrian Model Bilateral Investment Treaty (BIT) 2008 specifically uses the language of the "rights" of an investor arising out of the substantive obligations of the contracting States to the Austrian Model BIT. In the provision for protection against unlawful expropriation, the text of the Austrian Model BIT states that "*[a]n investor [...] shall have the right.*"[88] Similarly, the text of Article 21 of the Austrian Model BIT is clear in stating that it is an "*infringement of rights if an investor which that investor [...] submit[s] to arbitration*" under the BIT;[89] such rights of the investor of course arise out of the State's corresponding substantive treaty obligations to the investor.[90] The subrogation clauses in several BITs also acknowledge that substantive rights under BITs belong to investors.[91]

The direct rights theory has also been endorsed by international arbitral tribunals constituted pursuant to investment treaties.[92] In *Corn Products v. Mexico*, the arbitral tribunal interpreted Chapter XI of the NAFTA to find that it conferred "*substantive rights directly upon investors.*"[93] The tribunal explained that the traditional diplomatic protection model was merely a "necessary fiction" since only States could historically bring international claims, and argued that the substantive reality in fact was that when States brought diplomatic claims, they acted on behalf of their nationals instead of

[87] Peters, *Beyond Human Rights* 306 f.

[88] Austrian Model BIT 2008 art. 7(3).

[89] Austrian Model BIT 2008 art. 21.

[90] See also, for instance: Energy Charter Treaty 1998 art. 13(2) ("*The Investor affected shall have a right to prompt review [...]*").

[91] See, for instance: Germany–India BIT 1995 art 8 ("*In case one Contracting Party [...] has guaranteed any indemnity against non-commercial risks in respect of investments by its investors in the territory of the other Contracting Party and has made payment to such investors in respect of their claims under this Agreement, the other Contracting Party recognises that the former Contracting Party [...] is entitled by virtue of subrogation to exercise the rights and assert the claims of its own investors. The subrogated rights or claims shall not exceed the original rights or claims of such investors.*"). See also: India–United Kingdom BIT 1994 art. 8; India–Republic of Korea BIT 1996 art. 7; Austrian Model BIT 2008 art. 10.

[92] See: *Corn Products International Inc v United Mexican States*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility, 15 January 2008; *ADM v Mexico* (n 63); *Camuzzi International SA v The Republic of Argentina*, ICSID Case No ARB/03/7, Decision on Objections to Jurisdiction, 10 June 2005; *LG&E Energy Corporation v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Objections to Jurisdiction, 30 April 2004.

[93] *Corn Products* para. 169.

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asserting their own rights.[94] To demonstrate this, the tribunal gave examples of the local remedies rule and the continuous nationality doctrine. The local remedies rule, the tribunal explained, applied to diplomatic protection claims brought by States on behalf of their nationals, but not when the States otherwise directly brought claims against another State, suggesting that it was the right of the nationals that was asserted in the former case. Moreover, the tribunal suggested that the continuous nationality doctrine, requiring nationals to maintain citizenship from injury to award, would be irrelevant if it were indeed the State asserting its own rights through diplomatic protection.[95] To further emphasize their point, the tribunal stated that investors not only control their own case and receive compensation directly, but may even pursue claims against their home State's wishes, as had happened in *GAMI v. Mexico*, where the US opposed its own investor's jurisdictional arguments.[96] Importantly, the tribunal also clarified that its findings on the direct nature of investors' rights was not contrary to the finding of the tribunal in *Loewen v. USA*. It explained that the decision was actually in support of the direct rights theory. For them, the *Loewen v. USA* decision merely made a restrictive point on investors' rights having their origin in the rights that were traditionally owned by States.[97]

Notably, the concurring opinion of Arbitrator Arthur Rovine in *ADM Mexico* departs from the position set forth in the award regarding the derivative rights of investors, and supports the direct rights theory.[98] Rovine emphasized that Chapter XI of NAFTA "*creates substantive investment protections that are enforceable in arbitration by the individuals directly impacted by any breach of such protections.*"[99] He referred to Article 24 of the US Model BIT 2004 which authorised a claimant investor to submit to arbitration a claim "*on its own behalf*" for a breach of the substantive obligations under the treaty, to emphasize that the language was not indicating that States were protecting their nationals, but that nationals were protecting themselves by invoking their rights to enforce the obligations of States under

[94] *Corn Products* paras. 170 f.

[95] *Corn Products* paras. 171 f.

[96] *Corn Products* paras. 173 f; *GAMI Investments Inc v United Mexican States*, UNCITRAL, Submission of the United States of America, 30 June 2003.

[97] *Corn Products* para. 75.

[98] The majority decision in *ADM v. Mexico* has been discussed at Section V above.

[99] *ADM v Mexico*, Concurring Opinion of Arbitrator Arthur Rovine, 21 November 2007, para. 31.

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investment treaties.[100] Moreover, he rejected the characterisation made by the tribunal in *Loewen v. USA* that investors are merely permitted for convenience to enforce what are in origin the rights of Party states, since in his view it is treaty law that creates rights for investors and permits them to enforce the obligations of States, not diplomatic protection.[101]

On the domestic front, in its 2005 judgment in *Occidental Exploration and Production Co. v. The Republic of Ecuador*, the England and Wales Court of Appeal made a significant finding on the nature of investor rights in international investment law, concluding that investors can and do possess direct rights under investment treaties, rather than merely acting as proxies for their home states under the traditional doctrine of diplomatic protection.[102] The court rejected the derivative rights theory, stating that it was both artificial and wrong in principle to suggest that an investor is merely pursuing a claim vested in its home State, as this would make the protection dependent on the "*continuing benevolence*" of that State.[103] Instead, it explicitly endorsed the view put forth by Zachary Douglas that the "*fundamental assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State.*"[104] The court also acknowledged the controversial nature of the NAFTA tribunal's award in *Loewen v. USA*, and disagreed with any analysis that suggested its interpretation to mean that rights conferred under an investment treaty are of the same character as the rights of a State when bringing claims for diplomatic protection.[105] In the civil law world, the Argentina Bondholders Case saw a strong dissent by Judge Lübbe-Wolff that departed from the support of the German Federal Constitutional Court for the derivative rights theory. Judge Lübbe-Wolff argued that the derivative rights theory ignored the reality of modern international investment law. Referring to the caselaw of ICSID tribunals, she stated that the rights

[100] *ADM v Mexico, Concurring Opinion* para. 36.

[101] *ADM v Mexico, Concurring Opinion* paras. 60 ff.

[102] *Occidental Exploration* paras. 16 ff.

[103] *Occidental Exploration* paras. 17 ff.

[104] *Occidental Exploration* para. 20; referring to Douglas, *The International Law of Investment Claims* 32 f.

[105] *Occidental Exploration* para. 22.

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under the bilateral investment treaty are rights of the investor, not merely rights of its home State.[106]

VII. Practical Consequences of the Construction of Investors' Rights

The distinction between the direct and derivative rights theories in international investment law is not merely theoretical. The theorized construction of individual investors' rights has doctrinal and practical consequences. Whether the rights are held directly by the investor or derivatively through the investor's home State determines who can waive, modify, or extinguish them, how they interact with inter-State remedies such as countermeasures, and the limits on state practice in termination of treaties.

A. Waiver of Rights

Under the direct rights theory, the individual investor is the holder of the secondary rights arising out of a breach of their primary, substantive rights under an investment treaty. The investor can thus dispose of them, including by contractually agreeing to an exclusive dispute resolution forum with the host state. Moreover, an investor has the discretion to waive their right to invoke international arbitration, unless the relevant treaty explicitly specifies otherwise.[107] Importantly, since the investors are the direct holders of substantive rights, their home State cannot waive them on the investors' behalf.[108]

By contrast, in the derivative rights model, the rights at issue are those of the state, not the investor. As such, the investor should not be able to compromise its home State's corresponding right by choosing a forum in the first place.[109] This logic stems from the treatment of clauses drafted pursuant to the Calvo doctrine, where tribunals consistently held that an individual could not contractually waive its home State's right to exercise diplomatic protection. For instance, the claims commission in *North American Dredging Company of Texas v. Mexico* found that such a waiver was

[106] BVerfG, 2 BvM 1/03, Ruling of the Second Senate, 8 May 2007, Dissenting Opinion of Judge Lübbe-Wolff, 8 May 2007, para. 73.

[107] *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Objections to Jurisdiction, 21 October 2005, para. 119; Spiermann, (2004) *Arb. Int'l* 179 (207 f).

[108] Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) *The European Journal of International Law* 617 (645).

[109] Douglas, (2003) *BYIL* 151 (177).

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ineffective because the right belonged to the State, not the individual.[110] This is because, as explained in the foregoing part of this article, the derivative theory treats the individual investor as merely a procedurally convenient agent who acts as the claimant for its home State, which remains the true holder of the substantive rights asserted.[111] In such a case, only the home State could validly waive the right to bring claims for a breach of an investment treaty, and any purported waiver by the investor would be ineffective.

B. Countermeasures

Countermeasures are actions taken by an injured State against the State responsible for the internationally wrongful act, with the purpose of inducing the internationally responsible State to comply with its international law obligations, including cessation of the wrongful act and reparations for the injury caused.[112] They may incidentally affect third parties, including individuals, resulting in an injury to them.[113] Per the direct rights theory, substantive rights under investment treaties are owed to the investor personally, and countermeasures in an inter-State dispute cannot be invoked to preclude wrongfulness vis-à-vis the investor, since the latter holds its own distinct substantive rights as a third-party beneficiary of investment treaty.[114] This view has been affirmed by investment treaty tribunals.[115] In *Corn Products v. Mexico*, for instance, the tribunal held that since the investor held direct substantive rights, a countermeasure by Mexico against the United States could not justify a breach of Mexico's NAFTA obligations owed to the investor.[116] Similarly, in *Cargill v. Mexico*, the tribunal found that "*countermeasures operate only to preclude the wrongfulness of an act that is not in conformity with an obligation owed to the offending state, not*

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[110] *North American Dredging Company of Texas v Mexico*, RIAA vol 4 (1926) paras 14-22; Spiermann, (2004) *Arb. Int'l* 179 (201 f).

[111] Paparinskis, *EJIL* 617 (625 f).

[112] International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) vol II(2) *Yearbook of the International Law Commission* 128 ff.

[113] *ADM v Mexico, Concurring Opinion* (n 98) 5.

[114] International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) vol II(2) *Yearbook of the International Law Commission* 130; Paparinskis, *EJIL* 617 (632); *ADM v Mexico, Concurring Opinion* para. 59.

[115] See: *Corn Products*; *ADM v Mexico, Concurring Opinion*; *Cargill Inc v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009; Peters, *Beyond Human Rights* 328 ff.

[116] *Corn Products* paras. 148, 161 ff.

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in regard to obligations owed to a third state nor those, as here, owed to the nationals of the offending state."[117]

Under the derivative theory, by contrast, countermeasures against the home State could justify impairing the investor's position, since the rights enforced are fundamentally inter-State. This is because, per this theory, the investor is only procedurally enforcing a right which, in substance, belongs to its home State.[118]

C. Treaty Termination

Investment treaties generally contain sunset clauses that extend treaty protections for a set period after termination in respect of investments made while the treaty was in force. Often, the period of such protection is for a period between ten and twenty years from the termination of the treaty.[119] The question that follows is whether, if States mutually agree to terminate an investment treaty, can they bypass the sunset clause? If the direct rights theory holds true, then the substantive rights held by investors as beneficiaries of an investment treaty should remain valid for the period prescribed by the sunset clause. Indeed, here the very sunset clause itself is seen as a part of the benefit intended by the contracting States for the investors.[120]

However, if rights of investors are derivative, then since the substantive rights are in fact those of their home State, they can be extinguished by the mutual consent of the contracting Parties to the investment treaty. Under the framework, the home and host States remain the ultimate holders of rights, and as such, the masters of the investment treaty.[121]

VIII. Conclusion

The debate over the construction of an investor's substantive rights under international investment treaties is more than a theoretical exercise; it goes to the heart of how the international investment law regime is conceptualized and applied. The distinction between the classical derivative rights theory, which views the investor as a mere procedural agent for its home State, and the direct rights theory, which

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[117] *Cargill* para. 422.

[118] Paparinskis, *EJIL* 617 (632); García Olmedo, 'Redefining the Position of the Investor' 158 (160).

[119] Peters, *Beyond Human Rights* 323.

[120] Peters, *Beyond Human Rights* 323 f; Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) *Harvard International Law Journal* 353 (388, 408).

[121] Roberts, *Harv. Int'l L.J.* 353 (363 f); Paparinskis, 'Analogies' 73 (97).

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recognizes the investor as an autonomous holder of substantive rights, has practical consequences.

While the derivative rights theory finds support in some arbitral awards and state practice, it remains anchored in the traditional, state-centric model of diplomatic protection, the very system that modern investment arbitration was designed to overcome. It struggles to reconcile with the practical realities of investor-state dispute settlement, where investors prosecute claims in their own interest, control the proceedings, and receive compensation directly, sometimes even against the wishes of their home State.

In contrast, the direct rights theory offers a more coherent and progressive framework. By conceptualizing the investor as a third-party beneficiary of the investment treaty, this theory aligns with the broader trend of recognizing individual rights in international law. It acknowledges that the grant of direct procedural access to international arbitration is not merely a matter of convenience but an innovation that empowers investors with their own enforceable, substantive rights.

The practical implications of this distinction are critical. Adopting the direct rights model provides investors with greater legal certainty and autonomy. It confirms their ability to waive their own rights, protects them from inter-State political disputes involving countermeasures, and secures their vested protections against the premature termination of treaties. Ultimately, the move toward recognizing investors as holders of direct, substantive rights solidifies the depoliticized nature of investment arbitration and reinforces the stability and predictability that the investment treaty regime was intended to create. This construction not only reflects the ongoing emancipation of the individual in international law but also provides a more robust foundation for the future of international investment protection.

As mentioned at the outset, this article does not settle the debate on direct and derivative rights in international investment law but serves as an introduction to it. The issues examined in this introduction merit closer examination. In particular, it should be studied whether the theories of international legal personality are adequately considered by treaty drafters; whether the nature of investors' rights ought to be determined separately treaty by treaty, depending on the treaty text; whether there can be a uniform understanding of the nature of investors' rights; how the direct rights models draws on the rules on treaties and third parties; and how the construction of investors' rights may inform how they are impacted by the actions of the contracting States to investment treaties. The author hopes that this framework sets forth a useful starting point to address these questions.

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