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*The Jean Monnet Center for  
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## Jean Monnet Working Paper Series



JMWP 04/13

Tillmann Rudolf Braun

**Globalization-driven Innovation:  
The Investor as a Partial Subject  
in Public International Law  
– An Inquiry into the Nature  
and Limits of Investor Rights –**

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*J.H.H. Weiler, Director*

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**GLOBALIZATION-DRIVEN INNOVATION:  
THE INVESTOR AS A PARTIAL SUBJECT IN PUBLIC INTERNATIONAL LAW  
– AN INQUIRY INTO THE NATURE AND LIMITS OF INVESTOR RIGHTS –**

By Tillmann Rudolf Braun \*

**Abstract**

Given the current remarkable state of development of international investment law, it is surprising that to date neither the *actual nature* of the investor's rights resulting from investment treaties nor the possible *consequences* which arise for the investor, the states and international law, have been sufficiently defined. This is all the more astounding as the intrinsic *nature* and the possible *limits* of the investor's rights are not only of theoretical interest, they are also decisive for the resolution of many substantial practical problems as well as for the positioning of international investment law within public international law. Furthermore, recent arbitration rulings concerning the fundamental question of whether the investor's rights are of a *direct*, a *derivative* or a *contingent* nature, *Archer Daniels* (2007), *Corn Products* (2008) and *Cargill* (2009), demonstrate diametrically differing approaches. This paper shows in its analysis that neither the procedural nor material rights of the investor are simply derived from the home state but are – in clear contrast to the model of diplomatic protection – in fact to be understood as *individual direct rights*. The investor is elevated to the status of a (partial) subject in international law. Of course, the states are, and remain, the 'masters of the treaties' and can correct or even revoke these at any time with prospective effect. However, as long as investment treaties confer distinct rights on the investor, arbitral

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tribunals and states have to recognize these direct rights and the states must accept that these can also be applied against them.

The *direct rights paradigm* could have consequences for – inter alia – the continued validity of ‘survival’ clauses in favor of the legal position of the investor even in the case of a mutual revocation of the investment treaty by *both* treaty states, the limits which the rights of the investor put on declarations and interpretations made by the treaty states during ongoing arbitration proceedings, the interpretation of investment standards more strongly based on human rights elements due to the investor’s international legal personality, and the effect on the validity of the interpretation maxim *in dubio mitius*. The investor’s rights are *limited*, however, by the relations between the respective states in international law. Therefore, the investor has to accept permissible countermeasures, yet the *quality* of its individual direct rights can be seen in the fact that the investor is possibly entitled to receive compensation for this acceptance and the immediate injury suffered. The investor can indeed exercise its rights but, due to the superior interests of the states in the inviolability of the investment treaties they have concluded and their resulting ordering function, cannot impinge on these rights through a waiver. The paradigm of the elevation of the investor to partial subject in international law can be understood as a *manifestation of globalization* and can be embedded in the broader development of international law. The recognition of the investor by investment treaties as an effective unit in international law contributes to international law itself becoming a realistic and modern legal order not only for states but also for non-state actors.

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*“[...] international [economic] institutions play a dual role. They are tools that states use to reassert and regain sovereignty; yet they also promote processes that help erode state autonomy and power.”<sup>1</sup>*

*“[...] few could have foreseen the extent to which the individual or the corporation would acquire status as independent actors on the international stage. For decades the procedural incapacity of non-State entities was proclaimed as an article of faith. Today that incapacity is scarcely recognizable. (...) Yet while it is possible to contemplate changes in [substantive] standard, it is difficult to see the denial to individuals of the procedural competence that has now been so widely conferred to them. It is an old maxim that freedom once conferred cannot be withdrawn. [...] while the procedures will stay there because they are a reflection of the major societal move toward the acknowledgement of the individual as the ultimate unit of our international community.”<sup>2</sup>*

## **I. Introduction**

For a long time, the sovereign state was not only the creator of but also *the* main actor in modern international law.<sup>3</sup> Today, however, it is impossible to ignore the *denationalizing* effect of globalization and the resulting world-wide economic integration and consolidation, interlinked international capital markets, the emergence of challenges beyond national borders and the rise of non-state actors in international relations. What consequences do these developments have for the sovereignty of states, the formation of international law in the 21st century and indeed for international law itself? It is apparent that areas of international law have emerged which react in very different ways to the electrifying force of globalization. At times it seems that international law can barely keep up with the pace of globalization, on other occasions it tries to react to the exigencies of globalization and there are further cases in which globalization is formed and influenced by international law.

This last category applies especially to international investment law which began, in its modern form, with the signing on 25 November 1959 of the world's first bilateral

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<sup>1</sup> Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 JIEL (2003), 841 (862).

<sup>2</sup> E. Lauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEG. STUDIES (1997), 259 (275/276).

<sup>3</sup> D'Amato, *INTERNATIONAL LAW: PROCESS AND PROSPECT* (Irvington, 1995), 148 ('*creator-subject*').



investment treaty of its type between Germany and Pakistan.<sup>4</sup> Once seen as an ‘exotic’<sup>5</sup> area of international law, international investment law has gained considerably in practical importance since the late 1990’s. It belongs to the most dynamic areas of international law<sup>6</sup> and has established itself as an independent pillar for the containment of economic globalization processes in public international law.<sup>7</sup> The increasing stream of investment was accompanied by a remarkable densification of cross-border investment protection, the evolution of which into modern international investment law was based on the complex interaction of around 2,800 bilateral investment treaties currently in existence and more than 300 regional, often plurilateral, treaties<sup>8</sup> involving a total of around 180 states together with the numerous rulings of international arbitral tribunals.

It is the task of investment treaties to ensure the protection of foreign direct investment against possible ‘sovereign risks’ through treaty standards and rights in international law. International arbitral tribunals are responsible for balancing the interest of investors in protecting their foreign involvement against the interest of host

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<sup>4</sup> Treaty for the Promotion and Protection of Investments, Protocol, F.R.G.-Pak., Nov 25, 1959, 457 U.N.T.S. 24; a new, modernized investment protection treaty between Germany and Pakistan was signed in Frankfurt on 1 December 2009; *Daily Regional Times*, ‘Germany & Pakistan sign new bilateral investment treaty’, <http://www.regionaltimes.com/02dec2009/moneynews/germany.htm>. – Modern international investment law as it is currently understood began with the ‘discovery’ and application of investor-state arbitration clauses (for the first time granted in the 1968 Netherlands-Indonesia and 1969 Italy-Chad BITs) in the 1990’s.

<sup>5</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*: Report of the Study Group on the Fragmentation of International Law, finalized by M. Koskenniemi, UN Doc A/CN.4/L.682 (2006), No. 8 “(...) and even such exotic and highly specialized knowledges as “investment law.”

<sup>6</sup> 73% of all known arbitration rulings were made in the last five years alone [as of 2009], Sachs / Sauvant, *BITs, DTTs and FDI flows: An Overview*, in: Sauvant / Sachs (eds.), *THE IMPACT OF BILATERAL INVESTMENT TREATIES AND DOUBLE TAXATION TREATIES ON FOREIGN DIRECT INVESTMENT FLOWS* (2009), xxxix.

<sup>7</sup> In addition to international trade law and international finance and currency law.

<sup>8</sup> After a rise of bilateralism of international investment treaties one could now perhaps even speak of a – parallel – rise of *regionalization* as chapters in international investment law are increasingly negotiated and concluded in Preferential Trade and Investment Agreements between regional groupings, Braun, *Comments on Preferential Trade and Investment Agreements and the Trade / Investment Divide: Investment chapters in future European Preferential Trade and Investment Agreements – two Universes or an integrated Model?*, in: Hofmann / Tams / Schill (eds.), *PREFERENTIAL TRADE AND INVESTMENT AGREEMENTS: A NEW ORDERING PARADIGM FOR INTERNATIONAL INVESTMENT RELATIONS?* (2013), 131.

states in pursuing possible regulatory interests.<sup>9</sup> Currently, over 500 such investment disputes between investors and host states are being – or stand to be – dealt with. It is clear that investor-state arbitral proceedings<sup>10</sup> are still considered, by the investors and by the majority of states, to be the most suitable instrument for the definitive legal resolution of such disputes,<sup>11</sup> despite criticism<sup>12</sup> of the possible length and cost of such proceedings and concerns about the consistency and predictability of their awards.

The remarkable willingness of the treaty states to enable the investor in modern investment treaties to independently seek to enforce these treaty standards at the level of public international law against the host state, and to demand compensation for their violation, has been a decisive factor in the development of international investment law to date. The essence of legal safeguards in modern investment protection for investors is the guarantee of access to legal redress through arbitration.<sup>13</sup> Modern international investment law obviously breaks with conventional principles of ‘Westphalian’ public international law which – notwithstanding its development to a law of coordination,<sup>14</sup> a law of cooperation,<sup>15</sup> and up to and including any possible constitutionalization of international law – probably still enjoy fundamental validity. The acceptance of

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<sup>9</sup> *Saluka Investments BV (The Netherlands) v Czech Republic (Partial Award)*, UNICTRAL, Partial Award (17 March 2006), para.306 “(...) a weighing of the [investor’s] legitimate and reasonable expectations on the one hand and the [host State’s] legitimate regulatory interests on the other.”

<sup>10</sup> Since the first ruling of an arbitral tribunal on the basis of an investor-state clause in a bilateral investment treaty, *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* (27 June 1990), 4 ICSID Rep 246; Newcombe, 20 Years of Investment Treaty Jurisprudence, <http://kluwerarbitrationblog.com/blog/2010/06/27/20-years-of-investment-treaty-jurisprudence/>, “AAPL turned out to be the launching point for a body of distinct investment treaty jurisprudence and the first of over 350 investment treaty cases that have arisen over the past 20 years.”, [all websites quoted as of 1 May 2013].

<sup>11</sup> UNCTAD, Latest Developments in Investor-State Dispute Settlement, Issues Note, No. 1, 2013, March 2013, “In 2012, 62 new cases were initiated, which constitutes the highest number of known treaty-based disputes ever filed in one year and confirms that foreign investors are increasingly resorting to investor-State arbitration. (...) The total number of known treaty-based cases reached 518 in 2012.” Since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher.

<sup>12</sup> Summarized and discussed in Brower / Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. (2008-2009), 471, see also Gaukrodger / Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, No. 2012/3.

<sup>13</sup> *National Grid plc v. The Argentine Republic* (UNCITRAL), Decision on Jurisdiction, (20 June 2006), No. 49 “[A]ssurance of independent international arbitration is an important—perhaps the most important—element in investor protection.”; *Eastern Sugar BV v. Czech Republic* (UNCITRAL), SCC Case No. 088/2004, Partial Award and Partial Dissenting Opinion (27 March 2007), No. 165.

<sup>14</sup> Friedmann, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1963), 61.

<sup>15</sup> Mosler, *Völkerrecht als Rechtsordnung*, 36 ZAÖRV (1976), 6.

investor-state arbitration in investment treaties marks a departure from the principle that disputes concerning rights and duties contained in treaties in international law shall be dealt with through intergovernmental proceedings.<sup>16</sup> The diplomatic protection of the individual and mediation by the home state has been superseded, since in international investment law it is not the home state, but the investor itself who is able to take the dispute to an investor-state arbitral tribunal. Finally, the principle that the restoration of *status quo ante* is the primary aim in the case of violations of international law (*restitutio in integrum*) is seldom observed in international investment law as apparently investors, host states and arbitral tribunals agree that the payment of monetary damages is *the* legal consequence of any granting arbitration award.

Against the backdrop of this impressive development the question arises not only of the precise *nature* of the rights bestowed on the investor by bilateral and plurilateral investment treaties, but also of the extent to which those rights might be *limited*. Any attempt to answer these questions and to formulate the possible concrete consequences will also encounter the problem of the current lack of theoretical substance and understanding that investment arbitration and international investment law is occasionally accused of.<sup>17</sup> This paper aims to make *one* contribution to a more dogmatic positioning of the character of the rights arising from investment treaties and of international investment law within public international law. This account diverts the attention of the inventory of international law towards *investors* as ‘actors’ capable of performing in international law<sup>18</sup> in the role bestowed upon them by international investment law. The investor makes a direct claim for the implementation of treaty standards in international law primarily out of self-interest; however, at the same time,

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<sup>16</sup> For example proceedings before the International Court of Justice or before arbitral bodies such as the *Dispute Settlement Body* of the WTO; the NAFTA in Chapter 20 also provides an arbitration mechanism for disputes between the states party to the agreement regarding the application and interpretation of the agreement; obligatory arbitration mechanisms were unknown in classical public international law, arbitration only occurred if a state subjected itself to an arbitration body.

<sup>17</sup> Bering / Braun / Lorz / Schill / Tams / Tietje, *General Public International Law and International Investment Law - A Research Sketch on Selected Issues* (2011), 1 “(...) *many conceptual questions relating to international investment law remain insufficiently studied.*”

<sup>18</sup> Mosler, *Die Erweiterung des Kreises der Völkerrechtssubjekte*, 4 BDGVR (1961), 1 (7, 45, *Wirkungseinheit*).

the investor also indirectly serves the public interest in the effective application and enforcement of international law.<sup>19</sup>

The question regarding the intrinsic *nature* and *limits* of the rights granted to the investor by investment treaties is not only of theoretical interest, it is also of decisive practical importance, for example for the relationship between international investment law and the law of state responsibility. Are these rights *direct* rights independent of any other relations in public international law between the host and home state or do they remain as *derivative* rights dependent on these relations? Can the infringement of the legal position of the investor be justified as a countermeasure and does the investor have to accept such an infringement, or is the investor perhaps even entitled to compensation for such an acceptance? Is it possible for an investor to waive *its* rights resulting from an investment treaty in international law and their enforcement in investor-state arbitral proceedings? Finally, what further consequences result for the investor, the states and international law from the paradigm of an elevation of the investor to partial subject in public international law?

Three recent arbitration awards: *Archer Daniels* (2007) and the further arbitration cases in the same matter, *Corn Products* (2008) and *Cargill* (2009), take fundamentally differing approaches regarding the qualification of these rights (II.). It depends, therefore, on the classification of the nature of the rights granted to the investor as a direct, a derivative or – a third possible interpretation between these two approaches – a contingent right (III.), it is necessary to define their relationship to the law of state responsibility and as a result their limits (IV.) and, finally, should the premise of an elevation of the status of the investor to a partial subject in international law be accepted, it is necessary to formulate the possible concrete consequences for the investor and for states (V.).

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<sup>19</sup> Alvarez, *Contemporary foreign investment law: an “empire of law” or the “law of empire”?*, 60 ALA. L. REV. (2009), 943 “*private attorney general*”; Dumberry / Labelle-Eastaugh, *Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration*, in: D’Aspremont (ed.), PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW (2011), 360; van Aaken, *Effectuating Public International Law Through Market Mechanisms?*, Working Paper No. 2010-08, 2 “(...) *private market actors have been neglected in the analysis – certainly as actors who are able to contribute to the effectuation of Public International Law.*”

## II. International investment law and the law of countermeasures

In the arbitration cases *Archer Daniels*, *Corn Products* and *Cargill*<sup>20</sup> the relationship between the legal position of the investor and the countermeasures taken by the states in public international law was decisive. If investment treaties were intended to create their own self-contained system, the standards contained therein could be considered to be *direct* rights of the investors which could not, for example, be violated through measures which are justified by states as countermeasures recognized in customary international law. If, on the other hand, the system of investment treaties is considered from the perspective of a coherent understanding of international law, then general international law remains the basis for this. This would mean that deviations from the law of state responsibility can only be accepted in as far as they are expressly desired by the states. If, therefore, the rights of investors are to be understood as intergovernmental commitments and *derivative* rights then these could be compromised by countermeasures taken by states.

While the arbitral tribunal *Archer Daniels* came to the conclusion that the investment protection standards contained in NAFTA <sup>21</sup> remain purely intergovernmental commitments which the investor can only enforce as derivative rights, the arbitral tribunals *Corn Products* and *Cargill* qualified these standards to be the direct rights of the investor. Therefore, according to *Archer Daniels*, it was fundamentally possible for a state to take countermeasures, which due to a lack of proportionality did not appear to be justifiable in that case, whereas *Corn Products* and *Cargill* generally proscribed the justification of a measure as a countermeasure as these are not permitted to infringe on the individual rights of third parties such as the material rights deriving from NAFTA in favor of the investor.

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<sup>20</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA), 26 September 2007; *Corn Products International, Inc. v. The United Mexican States*, (Decision on Responsibility), ICSID Case No.ARB(AF)/04/01, 15 January 2008; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, 18 September 2009.

<sup>21</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec 17, 1992 I.L.M. 605, contains in Articles 1101-1139 an investment chapter including an investor-state arbitration clause for the mutual protection of investments.

## 1. Background to the arbitration cases

The plaintiffs, the American companies *ADM* and *TLIA*, *Corn* and *Cargill*, are among the world's largest cereal processors. In the 1970's and 1980's they developed a sweetener from maize, high fructose corn syrup (HFCS), which could be manufactured more cheaply than sugar. This became the sweetener of choice for the American soft drinks industry replacing the sugar previously used in Coca Cola, Fanta and other bottled fruit drinks. Mexico, with its high consumption of carbonated alcohol-free drinks, had until then used sugar as a sweetener. In the mid 1990's American HFCS increasingly replaced sugar in Mexico too, the use of which, in turn, began to threaten the domestic Mexican sugar industry. Against this background Mexico began to instigate trade sanctions to combat the rise of American HFCS on the Mexican market and attempted to enter into the previously protected American sugar market.<sup>22</sup> On 31 December 2001 the Mexican parliament (despite the opposition of the Mexican government) introduced a new 20% tax on those soft drinks which contained a sweetener other than sugar (*HFCS Tax*).<sup>23</sup> In response *ADM* and *TLIA* filed an investor-state claim for arbitration against Mexico. The US government also started WTO proceedings against Mexico.

The American investors argued here that it is the aim of investment arbitration to depoliticize economic relations as, in contrast to diplomatic protection, the investor is granted individual rights which the investor can assert directly against the host state. As, in this case, these individual rights must also be independent of any other relations in international law between the host state and the home state:

*The Claimants' position is that qualified investors under Chapter Eleven [the investment chapter in NAFTA] are vested with direct independent rights and that they are immune from the legal relationship between the Member States. The investor's cause of action is grounded upon substantive investment obligations which are owed to it directly. A breach of these obligations does*

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<sup>22</sup> Mexico failed to justify the raising of the *HFCS Tax* before the WTO by referring to the claimed violation of the right to market access by the USA, WTO Panel Report *Mexico - Tax Measures on Soft Drinks and Other Beverages* (WT/DS308/R) / DSR 2006:I, 43; WTO Appellate Body Report *Mexico - Tax Measures on Soft Drinks and Other Beverages* (WT/DS308/ AB/R) / DSR 2006:I, 3.

<sup>23</sup> *Ley del Impuesto Especial sobre Producción y Servicios* (Law on the Special Tax on Production and Services), D.O., 1 de enero de 2002, p. 32.

*not therefore amount to a breach of an interstate obligation; thus the general rules of state responsibility — including those regarding the circumstances precluding wrongfulness — cannot be presumed. Accordingly, investors are to be compensated for the negative effects that measures adopted in breach of Chapter Eleven may have on their investments, including countermeasures between the Member States, if those measures, standing alone, constitute a breach of any of the rights addressed in Section A [the material investment protection standards of NAFTA] of Chapter Eleven. (...) The Claimants (...) maintain that NAFTA case law, negotiating history, and scholarly writings demonstrate that investors possess individual substantive rights that may not be superseded or diminished by countermeasures directed against a non-party to the dispute between Claimants and Mexico.<sup>24</sup>*

In response, Mexico took the view that the content of the legal position of the investor as derivative rights remained dependent on the relationship in international law between the host and home state. According to this understanding the *HFCS Tax* introduced by Mexico was justifiable as a countermeasure recognized in customary international law to the previous violation of international law on the part of the United States.<sup>25</sup> The USA had not only denied the Mexican sugar industry access to the American market<sup>26</sup> but had also rejected the appointment of an arbitration panel in accordance with Art. 2008 NAFTA<sup>27</sup> and, as a result, failed to fulfill its obligations under NAFTA.

*However, if the substantive investment obligations under Section A [the material investment protection standards of NAFTA] remain inter-state, the issue of whether the host State breached any of these obligations vis-à-vis qualified investors is to be considered in the context of the treaty relations with the other Member States. This approach is supported by a traditional derivative theory—pursuant to which when investors trigger arbitration proceedings against a State they are in reality stepping into the shoes and*

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<sup>24</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 162, 165 (author's emphasis).

<sup>25</sup> Mexico did not invoke Art. 2019 NAFTA which enables retaliatory measures after a panel ruling, but instead based its argument on the right to take countermeasures in customary international law; probably because the NAFTA arbitral tribunal constituted here according to Chapter 11 does not have jurisdiction over the measures in Chapter 20 NAFTA.

<sup>26</sup> And indeed against the obligations in 703.2, Paragraphs 13-26 of Chapter 7 (Agriculture) NAFTA.

<sup>27</sup> Article 2009.1 NAFTA stipulates explicitly: “*The Parties shall establish and maintain a roster of up to 30 individuals who are willing and able to serve as panelists.*”; such a list did not exist at that time and would also have required the agreement of all 3 NAFTA treaty states, Art. 2011 NAFTA.

*asserting the rights of their home State—and an intermediate theory—whereby investors are vested only with an exceptional procedural right to claim state responsibility under Section B [ the investor-state arbitration mechanism of NAFTA] before an international arbitral tribunal, deciding the dispute in accordance with the rights and obligations defined under Section A, which remain inter-state.<sup>28</sup>[...] [T]he substantive obligations are obligations that each NAFTA Party has assumed vis-à-vis the other Parties. They do not cease to be interstate obligations just because an investor has been granted a right of action. [...] [I]nvestment 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 owed only to the State of the investors' nationality.<sup>29</sup>*

## **2. Archer Daniels and Tate & Lyle v. The United Mexican States Award (2007)**

In their award, the majority of the arbitrators indeed admitted the justification of the tax introduced by Mexico as a countermeasure recognized in customary international law. However, they did not consider the necessary preconditions for a countermeasure to have been fulfilled, especially concerning proportionality and suitability. The purpose of the HFCS tax was obviously

*to protect the domestic cane sugar industry, rather than inducing the United States to comply with the NAFTA [and was thus] not a valid countermeasure within the meaning of Article 49 of the ILC Articles on State Responsibility. (...) a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures*

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<sup>28</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 163 (author's emphasis).

<sup>29</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 164, 167. Mexico quoted the arbitral rulings *Loewen Group, Inc. & Raymond v. United States of America*, ICSID Case No. ARB(AF)/98/3 (June 26, 2003), para. 233: "There is no warrant for transferring rules derivative from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states" and Canada's defense in the case *S.D. Myers Inc. v. Government of Canada* before the Court of Ottawa, The Attorney General of Canada v. S.D. Myers. Inc., T-225-01, para. 67 "(...) the 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 (...)".



*enunciated in article 49. (...) Therefore the Tax was not necessary and reasonably connected with the aim purportedly pursued.*<sup>30</sup>

Unlike the third arbitrator *Rovine*, the majority of the arbitrators, *Cremades* and *Siqueiros*, differentiated in their ruling between the procedural and material rights of the investor. In the context of NAFTA the investor has only procedural, not substantial, individual rights. Therefore, the content of material rights still remains dependent on the general relationship in international law between the host and home country.<sup>31</sup> Whereas the investment treaty standards of NAFTA (“Section A”) remain intergovernmental obligations, the investor-state arbitration mechanism (“Section B”) only has the function of enabling the investor, as a representative of the home state, to instigate legal proceedings on the basis of these derivative rights. This makes investors only “*objects or mere beneficiaries*” of those intergovernmental rights. Whereas the investor can waive their procedural rights, this is not possible in the case of material treaty standards as intergovernmental obligations.<sup>32</sup> The positions of the parties to NAFTA in previous arbitration cases were evidence of the unwillingness of the treaty states to bestow immediate material rights on the investor.

*When interpreting the NAFTA, tribunals should recall that the NAFTA is a treaty among three Parties, namely the sovereign states of the United Mexican States, the United States and Canada. The obligations undertaken by the three Parties, including those under NAFTA Chapter Eleven obligations, are owed by the Parties to one another and are subject to the dispute settlement procedures in NAFTA Chapter Twenty. They are not owed directly to individual investors. Nor do investors derive any rights from obligations owed to the Party of which they are nationals. Rather, the disputing investor must*

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<sup>30</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 144/148/152/153 (emphasis added).

<sup>31</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 171 “[...] *the fundamental difference between Chapter Eleven of the NAFTA and human rights treaties in this regard is, besides a procedural right of action under Section B, that 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.*” (emphasis added).

<sup>32</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 174, 178.

*prove that the Party claimed against has breached an obligation owed to another Party under Section A [...].*<sup>33</sup>

The majority of the arbitrators concluded from this that the question (in this case to be answered in the negative) merely concerned whether these procedural rights of the investor were infringed on by the countermeasures.<sup>34</sup> They came to the conclusion that the investor did not have individual material rights, nor had its procedural rights been impaired by the countermeasures. Nevertheless, they ruled that the tax introduced by Mexico as a countermeasure (*HFCS Tax*) on the United States was not permissible since the necessary proportionality and suitability were not given. While the whole arbitral tribunal agreed in its ruling that the tax introduced by Mexico did not present a justifiable countermeasure, the majority of the arbitral tribunal, *Cremades* and *Siquieros*, did not address the question of whether the procedural rights of the investor can be relinquished at all, as claimed by the defending party Mexico.<sup>35</sup> The arbitrator *Rovine*, in his separate opinion, focused largely on the fact that this question remained unanswered.

### **3. The concurring opinion of arbitrator Rovine**

In his concurring opinion, *Rovine* emphasized that the rights of the investor are, in all cases, fundamentally individual rights. Therefore, even if the investor is simply viewed as being no more than a '*third-party beneficiary*', it is not permissible that the countermeasures in international law taken by Mexico against the United States suspend or eliminate these rights of the investor:

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<sup>33</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 176 (underlined in the original).

<sup>34</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 179.

<sup>35</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 177 "(...) *the investor [is] the holder of a procedural right, irrespective of whether this right may be suspended by the NAFTA Parties.*"

*I disagree with my colleagues' formulations addressing NAFTA investors' individual rights under Chapter Eleven, diplomatic protection, and the implication concerning the possible suspension or defeat of NAFTA investors' rights through countermeasures. (...) Chapter Eleven investor rights to remedies belong to the investor, not the state, and cannot, under the circumstances of this case, customary international law and NAFTA, be suspended or eliminated by countermeasures taken against the state of the investor.*<sup>36</sup>

Concerning the limits of countermeasures it is emphasized in the commentary to Art. 49 of the ILC Articles on State Responsibility<sup>37</sup>, an authoritative formulation of existing customary international law, that these may indeed affect third-party states or other parties but only if these do not have their own individual legal rights.<sup>38</sup> This makes clear that it is neither possible to differentiate between procedural rights which are permitted to be superseded by countermeasures and material rights to which this does not apply nor should it be possible to differentiate between individual direct rights and derivative rights. Instead the “*individual rights in the matter*” describe the limits of countermeasures. Contrary to the opinion of the defending state Mexico, the concept – according to the conventional model of diplomatic protection – no longer applies that the investor has no individual material rights but simply has the possibility to instigate

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<sup>36</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), *Concurring Opinion of Arthur W. Rovine Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, 64 para. 82 / 83.

<sup>37</sup> Art. 49 Para. 1 ILC Articles [*Object and limits of countermeasures*]: “*An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two*”; Para. 2: “*Countermeasures are limited to the nonperformance for the time being of international obligations of the State*”, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10(A/56/10).

<sup>38</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), *Concurring Opinion of Arthur W. Rovine Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, Paragraph 4 referring to Art. 49 margin note 5 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10(A/56/10) also referring to the commentary to Art. 22 of the ILC Articles, Paragraph 22 margin note 4 “*indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside of the scope of Article 22.*”

proceedings to pursue the rights of the home state against the host state. Instead this model has been superseded for good reason – the states, in the light of the possible deficiencies of diplomatic protection, knowingly concluded bilateral investment treaties and NAFTA in order to thereby confer rights on the investors.

*Yet, as is generally known, well before NAFTA, the international legal system had developed structures and processes establishing rights for investors permitting them to move directly against governments at their own initiative to protect their own individual investment interests rather than those of their home state, and to do so independently of their home state. [...] Instruments such as treaties between states, both bilateral and multilateral, and agreements between and among States and private parties, provided an evolving legal framework for investor protection that differed in many respects from certain of the rules of diplomatic protection.<sup>39</sup>*

After all, the legal logic and the origin and purpose of NAFTA show that the possibility for the investor, in the case of an infringement of the protection standards contained therein, to claim compensation represents a material and individual right of the investor.<sup>40</sup> This is not altered by the fact that the treaty states are the ‘masters’ of these treaties and that they can, therefore, be amended or even repealed at any time, as

*(...) the legal capacity of governments to amend or repeal rights of non-state actors does not signify that the rights were never there, and do not remain as long as the rights are not amended or terminated. (...) But so long as they have*

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<sup>39</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), *Concurring Opinion of Arthur W. Rovine Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, Paragraphs 22-23 (emphasis added), para. 30 / 31 “Among the central purposes of NAFTA and the system of Bilateral Investment Treaties is precisely to have the States Parties disengage from key ongoing initiative decisions concerning investor protection, and to grant such decisions directly to investors, while establishing a system of obligations to be enforced by investors.”

<sup>40</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), *Concurring Opinion of Arthur W. Rovine Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, para. 46-49; see also Paragraphs 74-76 “In my view, the States Parties to NAFTA intended to and did override the customary espousal rules of diplomatic protection for investors to enforce State obligations. A system that “assures” an investor within the NAFTA framework of “due process before an impartial tribunal” and that entitles the investor to bring a claim “on its own behalf” expressly overrides for NAFTA the system of claims espousal by investors’ governments under the mechanism of diplomatic protection.”

*not done so, the enforceable right not to have that contract breached remains. Repeal of the right to a remedy does not signify that there was no right to a remedy to begin with.*<sup>41</sup>

#### **4. *Corn Products International, Inc. v. United Mexican States Award (2008)***

A further arbitral ruling in the same matter *Corn Products International, Inc. v. United Mexican States* rendered a decision on responsibility. According to this decision, the *HFCS Tax* introduced by Mexico did not fulfill the definition of an expropriation, Art. 1110 NAFTA, nor did it contravene the prohibition of certain performance requirements, Art. 1106 NAFTA. The measure did, however, infringe on the national treatment standard in Art.1102 NAFTA.<sup>42</sup> The tribunal in *Corn Products International* in its reasoning, if not in its ruling, came to the exact opposite conclusion to that of the majority of the arbitrators in *Archer Daniels Midland*. The arbitrators, *Greenwood, Lowenfeld, Serrano de la Vega*, unanimously rejected<sup>43</sup> the possibility of the justification of the tax introduced as a countermeasure:

*The Tribunal has concluded, however, that the doctrine of countermeasures, devised in the context of relations between States, is not applicable to claims under Chapter XI of the NAFTA. Those claims are brought by investors, not by States. A central purpose of Chapter XI of the NAFTA was to remove such claims from the inter-State plane and to ensure that investors could assert rights directly against a host State. The Tribunal considers that, in the context of such a claim, there is no room for a defence based upon the alleged*

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<sup>41</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), *Concurring Opinion of Arthur W. Rovine Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, para. 51.

<sup>42</sup> *Corn Products International, Inc. v. The United Mexican States*, (Decision on Responsibility), ICSID Case No.ARB(AF)/04/01 (Additional Facility), 15 January 2008, para. 11 “*fails to accord CPI, and its investment, treatment no less favourable than that it accorded to its own investors in like circumstances, namely the Mexican sugar producers who were competing for the market in sweeteners for soft drinks.*” The – non-published – award of 18 August 2009 resulted in compensation amounting to more than US\$ 58m, *Global Arbitration Review Briefing*, 21. August 2009, Second corn syrup award against Mexico.

<sup>43</sup> The *Separate Opinion of Andreas F. Lowenfeld* supports the argumentation of the arbitration tribunal as such and formulates the rejection of a justification as countermeasure even more vehemently.

*wrongdoing not of the claimant but of its State of nationality, which is not a party to the proceedings.*<sup>44</sup>

In its reasoning, the tribunal supported the argument formulated in *Rovine's* separate opinion in the *Archer Daniels* award. This stated that the right to take countermeasures does not justify those measures which infringe on the rights of third parties as the justifying effect of the countermeasure is *relative*, it is only effective in the legal relationship between the injured state and the state responsible but not, however, in the case of third parties who are not responsible for the action against which the countermeasures were taken.<sup>45</sup> While it is permissible and well established in world trade law that the interests of third parties may be affected by countermeasures,<sup>46</sup> countermeasures may not infringe upon their rights. These rights are found here in the form of the material and individual rights in favor of the investor conferred by NAFTA.

*(...) In the Tribunal's view, the NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals.*<sup>47</sup>

Against this background the tribunal examined the understanding of investor rights as derivative rights resulting from diplomatic protection and highlighted that it is no

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<sup>44</sup> *Corn Products International, Inc. v. The United Mexican States*, (Decision on Responsibility), ICSID Case No.ARB(AF)/04/01 (Additional Facility), 15 January 2008, para. 12 (emphasis added).

<sup>45</sup> *Corn Products International, Inc. v. The United Mexican States*, (Decision on Responsibility), ICSID Case No.ARB(AF)/04/01 (Additional Facility), 15 January 2008, para.163-164, 168, referring to the commentary of Crawford, *The ILC Articles on State Responsibility* (2002), Article 49 ILC Articles, 285.

<sup>46</sup> Bronckers / van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 JIEL (2005), 101 (103-104).

<sup>47</sup> *Corn Products International, Inc. v. The United Mexican States*, (Decision on Responsibility), ICSID Case No.ARB(AF)/04/01 (Additional Facility), 15 January 2008, para. 169/176 “(...) *In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them. The notion that Chapter XI conferred upon investors a right, in their own name and for their own benefit, to institute proceedings to enforce rights which were not theirs but were solely the property of the State of their nationality is counterintuitive.*”

longer a necessity to maintain such a fiction as the investor can now instigate claims of its own.<sup>48</sup>

### 5. *Cargill, Inc. v. United Mexican States Award (2009)*

Finally, a third arbitration case in this matter was ruled upon, *Cargill, Incorporated v. United Mexican States*,<sup>49</sup> with an award on 18 September 2009 amounting to US\$ 77.3m. This similarly rejected Mexico's argument that the tax introduced (*HFCS Tax*) was a permissible countermeasure.<sup>50</sup> The tribunal focused particularly on the *Archer Daniels* award and formulated its decision largely without further reference to the *Corn Products Award*, as it apparently only became aware of this shortly before its own ruling;<sup>51</sup> nevertheless, it came to the same conclusion as *Corn Products*. The tribunal determined that the right to take countermeasures does not justify measures which infringe upon the rights of third parties and rejected the differentiation between procedural and material rights.

*Countermeasures may not preclude the wrongfulness of an act in breach of obligations owed to third States. The Tribunal is similarly of the opinion that countermeasures would not necessarily have such effect in regard to specific obligations owed to nationals of the offending State, rather than to the offending State itself.*<sup>52</sup>

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<sup>48</sup> *Corn Products International, Inc. v. The United Mexican States*, (Decision on Responsibility), ICSID Case No. ARB(AF)/04/01 (Additional Facility), 15 January 2008, para. 169, 173 “*The pretence that it was asserting a claim of its own was necessary, because the State alone enjoyed access to international dispute settlement and claims machinery. However, there is no need to continue that fiction in a case in which the individual is vested with the right to bring claims of its own.*”

<sup>49</sup> *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (NAFTA), which was not published until 24 February 2011; Mexico's attempt to dispute the arbitration ruling (in NAFTA proceedings the equivalent to ICSID *annulment* regularly before a state court of the respective non-involved state, in this case Canada), failed, *Judgment of the Ontario Superior Court of Justice on application to set aside award* (26 August 2010).

<sup>50</sup> *Investment Arbitration Reporter*, 19 September 2009, Vol. 2, No.15, In the largest NAFTA award to date, Cargill prevails in claim against Mexico.

<sup>51</sup> *Cargill, Incorporated v. United Mexican States*, ICSID No. ARB(AF)/05/2 (NAFTA), 18 September 2009, 109 para. 380 Fn. 102.

<sup>52</sup> *Cargill, Incorporated v. United Mexican States*, ICSID No. ARB(AF)/05/2 (NAFTA), 18 September 2009, 122 para. 422 (emphasis added); para. 426, “*It is not fruitful, in the Tribunal's view, to characterize the issue as whether the rights conferred upon the investor are substantive or merely procedural. The fact is that it is the investor that institutes the claim, that calls a tribunal into existence, and is the named party in all respects to the resulting proceedings and award.*”

### III. Derivative rights, direct rights or contingent rights paradigm?

The question regarding the relationship between the legal position of the investor and countermeasures in international law taken by states and, as a result the intrinsic nature and limits of the legal position conferred upon the investor, also gains in importance for the reason that there is an apparent trend to appeal on the basis of justification in public international law<sup>53</sup> in investment arbitration cases. In addition to the right to take countermeasures there are structurally similar cases, particularly the Argentinean arbitration cases,<sup>54</sup> in which, within the framework of a legal dispute involving state necessity (Art. 25 ILC Articles on State Responsibility), the question was posed as to whether a state would be unable to claim state emergency if the (individual) rights of non-state actors, for example private third parties such as investors, were affected:

*Be that as it may, in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations, as explained by the English court case in OEPC noted. The essential interest of the Claimants would certainly be seriously impaired by the operation of Article XI or state of necessity in this case.*<sup>55</sup>

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<sup>53</sup> In this context the question often arises as to whether the relationship between the rules of state responsibility which were tailor-made for intergovernmental relations can be applied at all in the same way to investor-state relations; as an immediate application does *not* come into consideration an analogous application is used, Kriebaum, *Restitution in International Investment Law*, in: Hoffmann / Tams (eds.) *INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION* (2011), 201 (202).

<sup>54</sup> Schill, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. INT'L ARB. (2007), 265; Albites-Bedoya, *Recent Investment Arbitrations Filed Against Latin American Countries January 2006 – September 2009*, 6 TDM (2009) 1.

<sup>55</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award (22 May 2007), ICSID Case No. ARB/01/3, Nos. 303, 342; *BG Group Plc v. Argentina*, Award (24 December 2007), UNCITRAL, No. 408; the arbitration tribunal's award left this matter open as the tribunal assumed that even if the justification of an act of necessity in international law was available, the measures taken by Argentina would not have fulfilled the demanding preconditions required, see no. 411; *Sempra Energy International v. The Argentine Republic*, Award (28 September 2007), ICSID Case No. ARB/02/16, no. 344, 391, the decision was annulled on 29 June 2010, *Decision on the Argentine Republic's Application for Annulment of the Award*.

In a structurally similar case concerning the extent to which a state act of necessity in international law can also be applied in relations to private persons, the German Federal Constitutional Court held that no general rule of international law exists which would justify the state to deny the fulfillment of claims for payment in private law on the basis of a declaration of necessity due to insolvency. It should be pointed out concerning the separate opinion in this ruling and the overwhelming opinion contained in the literature, that a state act of necessity in international law is not only applicable in



In substance both interpretations – direct or derivative rights – are possible. It is possible for states, within the framework of a treaty, to delegate procedural rights for the enforcement of material rights. Accordingly, the standards in international law are merely intergovernmental obligations which the investor can assert as derivative rights as a proxy of the home state. Alternatively, states can also confer immediate rights in international law upon individuals through treaties in international law. If individuals are in any event, in principle, capable of being subjects of international law, treaties in international law can confer individual material rights on individuals. The investor then acquires such direct rights from investment treaties and is elevated to a partial subject in international law whose rights remain – possibly – independent of any other relations in international law between the host and home country.

Even at this point, however, there is doubt whether the categorical approach of both awards do sufficient justice to the question of the relationship between international investment law and general international law.<sup>56</sup> The stance of *Archer Daniels*, that the matter simply concerns derivative rights of the investor can be countered with the argument that other conduct in international law between the states – here in the form of (for the investor) the unforeseeable and uncontrollable application of countermeasures – could lead to the investor being held collectively ‘liable’ or ‘punished’ and simply being reduced to a case of collateral damage in, in this case, a trade war between the United States and Mexico.<sup>57</sup> The stance taken by *Corn Products* on the other hand, that the investor has inviolable individual rights, would result in a

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intergovernmental relations but can also justify a state to temporarily suspend obligations towards private persons in as far as this appears necessary to take fundamental requirements of public interest in the debtor state into account, BVerfG 118, 112 (ruling of 8 May 2007), NJW (2007), 2610.

<sup>56</sup> Similar Alvarez, *Are Corporations “Subjects” of International Law?*, New York University Public Law and Legal Theory Working Paper 238 (2010), 36 and 38 “(...) *to what extent are the underlying rules of customary international law, which now often apply as valuable gap-fillers unless expressly ousted by the terms of a treaty, affected by investor personhood? (...) Neither of these black/white outcomes dictated by a finding of person/subject-hood is desirable.*”

<sup>57</sup> Crawford, Third Report on State Responsibility, A/CN.4/507 Add.3, para. 312 d: “*A more persuasive justification for sub-paragraph [Art. 50 ILC (Prohibited countermeasures) (d) Any conduct which derogates from basic human rights] is the point that countermeasures are “essentially a matter between the States concerned” and that such measures should “have minimal effects on private parties in order to avoid collective punishment.”*”; Borchard, Reprisals on Private Property, 30 American Journal of International Law (1930), 108, 112, fairness of ‘*punish[ing] a few private aliens ... because of a grievance against [their state]*’ is a legitimate concern.

remarkable degree of further protection of investor rights. This would enable the investor to nullify the effects of *all* countermeasures in international law by referring to the investment treaty. This could be especially disadvantageous for ‘weaker’ states which would frequently have hardly any other possibility to defend themselves against ‘stronger’ states which have violated international law other than to take countermeasures affecting the nationals and companies of such states.<sup>58</sup> Such complete protection would also be extremely wide-ranging as it would protect not only private investors against countermeasures but possibly also state investors if these are to be understood as being investors in the respective investment treaty.<sup>59</sup> Protection of this nature from countermeasures taken against state-controlled investments would appear somewhat strange as the countermeasure is specifically intended to affect this state and, thus, also ‘its’ companies.

Therefore, the question concerning the extent to which the rights conferred on the investor in bilateral investment treaties remain dependent on the relations in international law between the home and host states has to be looked at in the context of the tension between general international law and the increasingly important special areas of international law. This, in turn, gives rise to the question – when considering the rights of the investor as its own while these at the same time continue to depend in their content on the relations of the states in international law – as to whether the investor is entitled to receive compensation for the acceptance of state countermeasures and if, particularly due to this entitlement, a possible *quality* of its own individual legal rights is thereby demonstrated.

## **1. Derivative rights paradigm**

According to the understanding of derivative rights, the rights bestowed in an investment treaty, both material and procedural, are rights of the state which the investor can claim as a proxy of the home state against the host state:

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<sup>58</sup> Tomuschat, *Are Countermeasures Subject to Prior Recourse to Dispute Settlement Procedures?*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW (1994), 77, 78.

<sup>59</sup> Such as according to the US Model BIT (2004), Article 1: Definitions “*investor of a Party’ means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party,*” (emphasis added), <http://ita.law.uvic.ca/documents/USmodelbitnov04.pdf>.

*There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states.*<sup>60</sup>

On the issue of state responsibility the rapporteur of the ILC, Crawford, stated that the rights contained in investment treaties strengthened ‘in some sense’ diplomatic protection and remained the rights of the state:

*(...) a standard bilateral or regional investment treaty is an interstate agreement, to which individual investors are not privy. It is a matter of interpretation whether the primary obligations (e.g., of fair and equitable treatment) created by such treaties are owed to the qualified investors directly, or only to the other contracting state(s). (...) an interstate treaty may create individual rights, whether or not they are classified as “human rights”. (...) on the other hand, one might argue that bilateral investment treaties in some sense institutionalise and reinforce (rather than replace) the system of diplomatic protection, and that in accordance with the Mavrommatis formula, the rights concerned are those of the state, not the investor.*<sup>61</sup>

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<sup>60</sup> *The Loewen Group Inc. (Can.) v. United States*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), No. 233 (emphasis added); even if the arbitral tribunal keeps to the diplomatic model of derivative rights it appears, nevertheless, to concede that the investor, in any event, has its own procedural rights, (Nos. 222-223) “Chapter Eleven of NAFTA represents a progressive development in international law whereby the individual investor may make a claim on its own behalf and submit the claim to international arbitration as [the Loewen Group] has done in the instant case.” - The Loewen-arbitral ruling expressly repudiates *Occidental Exploration and Production Co. v. Republic of Ecuador*; English Court of Appeal (2005), EWCA Civ. 1116, No. 22; 2 Lloyd’s Rep. 707; also repudiating: *Yukos Universal Limited (Isle of Man) v Russia*, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009), para 551.

<sup>61</sup> Crawford, *The ILC’s Articles on Responsibility of States for International Wrongful Acts: A Retrospect*, 96 AJIL 2002, 874 (888) (emphasis added); *Wintershall Aktiengesellschaft v Argentina*, ICSID Case no ARB/04/14, Award, 8 December 2008, No. 112 “Article 33(2) of the ILC’s Articles, however, acknowledges the “possibility” (as yet only a possibility – the ILC having taken no definite stand on this) of a “secondary obligation” arising from a breach of a treaty accruing directly in favour of person or entity other than a State – as to which Mr. James Crawford says: “(...) at some level, a modern bilateral investment treaty disaggregates the legal interests that were dumped together under the Mavrommatis formula – though it is not accompanied by any detailed regulation in the Articles of the ways in which State Responsibility may be invoked by non-State entities.” ; *CMS Gas Transmission Company v. Argentine Republic*, Decision on Objections to Jurisdiction, 17 July 2003, ILM 42 (2003), 788-810, para. 45.

Bilateral investment treaties, which can be seen as the successors to the Friendship, Commerce and Navigation Treaties (FCN Treaties), indeed contain, in comparison, firm protection standards in investment law and have a clear economic purpose to promote mutual investment. Nevertheless, they did not directly address the private investor – any authorization and obligation remained a matter for the treaty states. The investor could, at best, attempt to claim on the basis of a violation of these home state’s treaty agreements; the home state may, however, decide to refrain from taking action for diplomatic-political reasons. After the introduction of investor-state arbitral proceedings in investment treaties as a means of settling disputes, the investor only had the possibility to claim the violation of state law in the state’s stead.<sup>62</sup> The USA<sup>63</sup>, Mexico<sup>64</sup> and Canada<sup>65</sup>, when facing claims, are keen to adopt this view in NAFTA proceedings. Doubts can be raised as to whether this position represents a general understanding and is not simply put forward as a means to escape potential liability; certainly it is to be regarded with some caution.<sup>66</sup> Furthermore, the formulation of the

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<sup>62</sup> Also characterized as a ‘*delegated espousal*’ paradigm, Anderson, *Ascertained in a Different Way: The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. (2001), 189, 243; Sornarajah, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (1994), 266–267.

<sup>63</sup> Reply of the United States of America to the Counter-Memorial of the Loewen Group, Inc., on Matters of Jurisdiction and Competence (26 April 2002), 33, 55.

<sup>64</sup> Mexico’s position in *re Arbitration Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United States* (B.C. Sup. Ct. 2001), cited according to Brower, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 Colum. J. Trans’l L. (2001-2002), 43, 63, 70.

<sup>65</sup> Amended Memorandum of Fact and Law of the Applicant, the Attorney General of Canada, *The Attorney General of Canada v S.D. Myers* (2004), Inc, Court File No. T-225-01, para. 67 „*The 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.*”. Compare the strong words of the Canadian Federal Court: „*The position of the Attorney General is a narrow, legalistic, restrictive interpretation contrary to the objectives of NAFTA and contrary to the purposive interpretation which NAFTA Article 2.01 and article 31 of the Vienna Convention stipulate.*”, cited from: Lowenfeld, *Countermeasures, Diplomatic Protection, and Investor-State Arbitration*, in: *Fernandez-Ballesteros / Arias* (eds.), *Liber Amicorum Bernardo Cremades* (2010), 747 (755 Fn. 2264).

<sup>66</sup> *Sempra Energy International v. The Argentine Republic*, Objections to Jurisdiction ICSID No. ARB/02/16, (11 May 2005), para. 146 „[c]ounsel representing the State in arbitration proceedings have the duty to put forward all the arguments they deem appropriate to defend their position, but a tribunal could not presume that each of those arguments constitutes the expression of a unilateral act that obligates the State.”; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 48; Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States* (2010), 79 “*Although states have dual roles as treaty parties and respondents, when submitting pleadings they are wearing their respondent hats more clearly than at any other time. There is a legitimate concern that they might be*

material-legal protection guarantees has remained largely unchanged from the first investment treaties to the present day and would also not have been amended as a result of this new procedural path for the enforcement of guarantees.<sup>67</sup>

## 2. Direct rights paradigm

The *Iran/US Claims Tribunal* has already concerned itself with the question of legal quality:

*While this Tribunal is clearly an international tribunal established by treaty and while some of its cases involve the interpretation and application of public international law, most disputes (including all those brought by dual nationals) involve a private party on one side and a Government or Government controlled entity on the other, and many involve primarily issues of municipal law and general principles of law. In such cases it is rights of the claimant, not of his nation, that are to be determined by the Tribunal.*<sup>68</sup>

The fact that the states granted investors concrete material rights and formal claim procedures in their modern investment treaties demonstrates that the treaty states wanted to provide a basis for individual and immediate rights of investors. This view was also taken by the English Court of Appeal in its ruling *Occidental Exploration and Production Co. v. Republic of Ecuador* and by other arbitration tribunals as the preferred interpretation:

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*adopting expedient interpretations in order to avoid liability in particular cases rather than considered interpretations that they would wish to have general application.”*

<sup>67</sup> Cautiously *Société Générale v Dominican Republic*, LCIA Case UN 7927 (Preliminary Objections to Jurisdiction, 19 September 2008), margin note 109; in comparison, vehemently Wälde, *Interpreting Investment Treaties: Experiences and Examples*, in: Binder / Kriebaum / Reinisch / Wittich (eds.), INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, Essays in Honour of Christoph Schreuer (2009), 724 (748) “*The reaction – introduction of direct investor-State arbitration, first adjudicated in AAPL v. Sri Lanka – fundamentally changed the character of BITs.*”

<sup>68</sup> *Islamic Republic of Iran and United States* (Case A/18) (Dual Nationality) (6 April 1984), DEC 32-A18-FT, (1984), 5 Iran-US CTR, 251 (261) (emphasis added); also no previous exhaustion of redress to national law was required; on the other hand, for the interpretation as derivative rights, Mohebi, THE INTERNATIONAL LAW CHARACTER OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1999) 378; Briner, *The Iran-United States Claims Tribunal and Disputes Involving Sovereigns*, 18 ARB. INT’L (2002), 299 (300); in general Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AJIL (1990), 104 (105–107).

*[T]he 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. (...) The case is not concerned with an attempt to invoke at a national legal level a Treaty which operates only at the international level. It concerns a Treaty intended by its signatories to give rise to rights in favour of private investors capable of enforcement, to an extent specified by the Treaty wording, in consensual arbitration against one or other of its signatory States. (...) both artificial and wrong in principle to suggest that the investor is in reality pursuing a claim vested in his or its home State.<sup>69</sup>*

It is this granting of individual rights that makes the protection intended in investment treaties effective. It is no longer necessary to maintain the fiction of derivative rights arising from diplomatic protection as the investor can now claim its own rights within the framework of investment treaties.

### **3. Contingent rights paradigm**

The possibility of a third interpretation (*'intermediary theory,'*<sup>70</sup> *'procedural direct model'*<sup>71</sup>) between these two approaches will be examined where a distinction is made between material investment standards and the procedural right to arbitration. According to this approach, the material protection standards contained in the investment treaty remain at an intergovernmental level while the procedural right to arbitration is applied to the investor as its own right after the filing of a notice of arbitration.

*Another possible approach to direct theory of rights under investment protection is to distinguish between the substantive obligation of investment*

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<sup>69</sup> *Occidental Exploration and Production Co. v. Republic of Ecuador*, English Court of Appeal (2005), 12 ICSID Rep 129, 137-8/20, 147-8/37 (emphasis added); *MTD Equity Sdn. Bhd. and MTD Chile S. A. v. Republic of Chile*, ICSID Case No ARB/01/07, Decision on Annulment, 21 March 2007, No. 99; *British Caribbean Bank Limited v. The Attorney General of Belize* (Civil Appeal No. 6 of 2011) Court of appeal of Belize, Decision, August 3, 2012, para. 153; Paulsson, *Arbitration without Privity*, 10 ICSID Rev. (1995), 232 (256); Wälde, *Investment Arbitration under the Energy Charter Treaty*, ARB. INT'L (1996), 429 (435-437).

<sup>70</sup> *Cargill, Incorporated v. United Mexican States*, ICSID No. ARB(AF)/05/2 (NAFTA), 18 September 2009, 119 para. 415.

<sup>71</sup> Parlett, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* (2011), 110.

*protection and the obligation to submit to investor/state arbitration upon the filing of a notice of claim by claimant investor.(...) Upon the claimant's filing of a notice of arbitration, the claimant investor perfects the host state's unilateral offer to arbitrate, and the two parties thus enter into a direct legal relationship in the form of an arbitration agreement.*<sup>72</sup>

The investor's individual possession of this procedural right is apparently to be understood as a type of entitlement which is (initially) realized by the filing of a notice of investor-state arbitration and is, therefore, *contingent*.<sup>73</sup>

#### **4. Interpretation**

Sovereign states were classically seen as the main legal subjects in international law. The individual first became relevant when the home state acted for the individual against other states within the framework of diplomatic protection. Yet this view began to change during the 20<sup>th</sup> century – particularly following the Second World War.<sup>74</sup> While public international law is – still – considered to be essentially intergovernmental law and the states remain its most important actors, the 'expansion of the circle of subjects in international law'<sup>75</sup> creating immediate recipients of international law is also, in principle, possible.<sup>76</sup> Thus breaking with the principle of the mediation of the individual, natural and legal persons can also be partial subjects in international law if – and because – they are conferred with immediate rights and responsibilities.

If individuals are, at least in principle, capable of being recognized in international law, then treaties in international law can also confer rights on individuals with the result that the purpose of a treaty may be '*the adoption by the parties of some*

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<sup>72</sup> Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009), 35 para. 73 (emphasis added).

<sup>73</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para 179.

<sup>74</sup> Report of the International Law Commission, 58<sup>th</sup> Session (1-9 May; 3 July; 11 August 2006), UN Doc. A/61/10, p. 25-26 [*Draft Articles on Diplomatic Protection*]; Orakhelashvili, *The Position of the Individual in International Law*, 31 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL (2001), 241 (244); Oppenheim, *INTERNATIONAL LAW*, Vol. 1 (1955), 636.

<sup>75</sup> Mosler, *Die Erweiterung des Kreises der Völkerrechtssubjekte*, ZAÖRV 22 (1962), 1 (39).

<sup>76</sup> Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2008), 554.

*definitive rules creating individual rights*.<sup>77</sup> The question of whether the existence of procedural rights is absolutely necessary as a distinguishing criterion of individual rights,<sup>78</sup> (as otherwise these would simply remain a legal reflex in individual protection) can in any case be left open, if, as in this case, such procedural rights for the individual already exist as an important indication<sup>79</sup> of the desire of the states to grant individual rights. The important material standards classically contained in current bilateral investment treaties are sufficiently defined and unconditional in order to be immediately applied.<sup>80</sup> In the past, many of these rights, such as the standard of national treatment, compensation for expropriation and the guarantee of free transfer were not necessarily a part of the customary international law of diplomatic protection and the law relating to aliens. This is also an indication of the transformation of international investment law from its beginnings in customary international law to its emergence as an independent system of treaties in international law.<sup>81</sup> The procedural unpredictability of diplomatic protection in customary international law and the

<sup>77</sup> *The Jurisdiction of the Courts of Danzig, Advisory Opinion*, PCIJ Report Series B, (1928), No 15; *LaGrand (Germany v United States) (Merits)* (2001) ICJ Reports 466, 483; Jennings / Watts, *OPPENHEIM'S INTERNATIONAL LAW* (1992), Vol 1, Nos.2-4, 847/848; Verdross / Simma, *UNIVERSELLES VÖLKERRECHT* (1984), 256.

<sup>78</sup> Postulating also the possibility of law enforcement: Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* (1966), 143, 231, 282; Shaw, *International Law* (2003), 232 "*participation plus some form of community acceptance*"; similarly Higgins, *General Course on Public International Law*, 230 RCADI V (1991), 81.

Regarding the sufficiency of the granting of rights as such for recognition in international law not least since ICJ, *LaGrand Case*, EuGRZ (2001), 287 (290, No. 77) importantly: *English Court of Appeals, Judgment 2005 EWCA 1116 (Civ)* (9 September 2005), margin note 18; PCIJ, *Peter Pázmány University Case*, Ser. A/B, No 61 (1935), 231 "*It is scarcely necessary to point that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself.*"; Lauterpacht, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950), 27 "*The fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them.*"; McCorquodale, *The Individual and the International Legal System*, in: Evans (eds.), *INTERNATIONAL LAW* (2006), 304.

<sup>79</sup> Dahm / Delbrück / Wolfrum, *VÖLKERRECHT* (2002), Vol. I/2, 261; Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BYIL (2003), 151 (181).

<sup>80</sup> Buergenthal, *Self-executing and non-self-executing Treaties*, 235 RdC (1992 IV), 301. To clarify the terminology: the term "immediate application" is not used here in connection with the question whether in dualistic systems national acts of transformation are present which assist in the internal effectiveness of international law and e.g. then allow individuals to invoke international law in national law, Orakhelashvili, *The Position of the Individual in International Law*, 31 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL (2001), 241 (264).

<sup>81</sup> ILC, *Diplomatic Protection: Text of the Draft Articles with Commentaries thereto* (Dugard), Report of the International Law Commission on its Fifty-eighth Session (1 May–9 June, 3 July–11 August 2006) Official Records of the General Assembly Sixty-first Session, Supplement No 10, UN Doc A/61/10, 89-10.



uncertainty of the material standards of general international law, which were mainly tailored for *intergovernmental* relations, became clearer during the process of globalization during the 20<sup>th</sup> century and led to an increasing desire, not only among non-state economic actors but also among states themselves, to develop new specific forms of protection and arbitration for international investment relations, where in the opinion of those involved, these were not provided to a sufficient extent by customary international law.<sup>82</sup>

**a) Monitoring the claim**

The fact that an investor makes decisions alone and exclusively concerning claims arising from an investment treaty speaks for its *individual direct* right. The investor is not legally bound to inform its home state before, during, or after arbitration of its claim to enforce treaty standards in international law. During the negotiations on the drafting of the ICSID Convention, it was suggested that a request made by a national of an ICSID contracting state to open arbitration proceedings would have to be authorized by his/her home state.<sup>83</sup> This suggestion, however, was rejected; the states clearly intended to grant the investor its own right and not a right derived from its home state. Equally, the home state cannot compel the investor to request the initiation of proceedings;<sup>84</sup> the investor's right is independent from the home state. By claiming, the investor acts in its own interests. Any possible compensation is paid directly to the investor and is only due to the investor.<sup>85</sup> Similarly, only the investor has to pay for the costs of arbitration.<sup>86</sup>

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<sup>82</sup> In conclusion, the principal differentiation between the actual possession of a subjective legal position and the viewpoint of its procedural enforcement should be pointed out. At the latest since the *LaGrand* ruling of the ICJ it should be sufficiently well-known that individual rights can also exist if no immediate right of the individual to arbitration in international law against the state is envisaged, ICJ, ruling of 27 June 2001, *LaGrand*, ICJ Rep. 2001, 466, para. 42, 77: In his *LaGrand* ruling he concluded, as is generally known, that Article 36 Paragraph 1 b of the Vienna Convention on Consular Relations, in the authentic language of Art. 79 Vienna Convention: "*his rights*" or "*ses droits*", confirm the subjective rights of individuals.

<sup>83</sup> International Centre for the Settlement of Investment Disputes, Documents Concerning the Origin and Formulation of the Convention History, Vol. II Part 2 (Washington, 1968), 982.

<sup>84</sup> *AMT v. Zaire*, Case No. ARB/93/1, Award, 21 February 1997, para. 5.18: "*the two States cannot, by virtue of Article 25 of the Convention, compel any of their nationals to appear before the centre; this is a power that the Convention has not granted to States.*"

<sup>85</sup> The investor can also have recourse to its *secondary* claim under international law, its compensation claim: *CMS Gas Company*, which was awarded compensation against Argentina in arbitration, handed collection of the award over to a subsidiary of Bank of America, Ryan, *Discerning the Compliance*

This is in clear contrast to the procedure of diplomatic protection based on an understanding of the derivative rights of the home state: Under this framework the home state has complete control of the claim. It is the home state which has sole discretion whether and how it enforces possible rights against the host state.<sup>87</sup> The home state can modify the claim, it can also settle for partial compensation or it can even relinquish such enforcement. The home state may make any compensation payable to itself as there is no obligation for the home state to transfer any compensation received to the investor.<sup>88</sup>

The concept of derivative rights, which remain at an intergovernmental level and which the investor claims as a proxy of the home state against the host state, in contrast, amounts to a double fiction.<sup>89</sup> The classical initial fiction is that of diplomatic protection whereby the rights concerned are those of the home state, and the further fiction is that

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*Calculus: Why States Comply with International Investment Law*, Georgia Journal of International Law 38 (2009), 63, 84.

<sup>86</sup> Art. 5 (3) of Austria's model investment protection treaty already clearly stipulates: "An investor of a Contracting Party which claims to be affected by an expropriation by the other Contracting Party shall have the right (...)." UNCTAD Compendium (2002), Vol. VII, 262; Art. 13(2) Energy Charter Treaty; Parlett, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW (2011), 109, "Where the language is that of direct right (such as the investor 'shall have the right'), that entitlement to treatment apparently involves an individual right arising directly from the terms of the BIT."

<sup>87</sup> ICJ, *Barcelona Traction, Light and Power Limited (Belgium v. Spain)*, 5 February 1970, I.C.J. Reports (1970), Rep. 4, No. 79.

<sup>88</sup> Administrative Decision No. V., Mixed Claims Commission—United States and Germany: Opinion Dealing with Germany's Obligations and the Jurisdiction of the Commission, *Parker*, 19 AJIL (1925), 612 (626-627); the ILC Commission submitted a recommendation in Article 19(c): "A State entitled to exercise diplomatic protection according to the present draft articles, should: c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.", Report of the International Law Commission, 58<sup>th</sup> Session, UN Doc. A/61/10, 94, [Draft Articles on Diplomatic Protection].

<sup>89</sup> Whether such a multiple fiction can be maintained at all in the long-term in the light of reality is to be doubted, Morrison, *Discussion*, in: Hofmann (ed.), NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW (1999), 85 "One of the things one learns in the common law legal system is that when legal fictions begin to multiply, you are approaching a point at which the substance of law will change. I think we are seeing an increasing number of these legal fictions that are covering the peculiar status of non-state organizations. At some point soon, the substantive law will change formally to recognize that development." – Interestingly, in a further decision after *LaGrand*, the ICJ indicates a possible interdependence of the rights, ICJ *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment (31 March 2004), ICJ (General List No. 128), margin note 40 "(...) violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual."; International Law Association, Diplomatic Protection of Persons and Property-Final Conference Report (2006), 4 "The state may still act as a conduit, an agent, or on behalf of the individual but no longer substituting for his rights."

the investor enforces these rights as a proxy of the state even though it concerns the investor's own rights.<sup>90</sup> If, within the framework of investment treaties, it is indisputably the investor who has control of the resulting claims, then this is hardly compatible with the interpretation above. Furthermore, there have even been cases in which the *home* state – in this case the United States and Canada<sup>91</sup> – each attempted unsuccessfully to prohibit the enforcement of these rights by an investor of its own country.<sup>92</sup> In this matter the arbitral tribunal in *Corn Products International, Inc. v. United Mexican States* stated:

*The State of nationality of the Claimant does not control the conduct of the case. (...) The individual may even advance a claim of which the State disapproves or base its case upon a proposition of law with which the State disagrees. That occurred in GAMI, in which the United States filed a submission that the Tribunal lacked jurisdiction with regard to certain shareholder claims advanced by the Claimants. The Tribunal disagreed and held that it had jurisdiction with regard to all the claims. Yet if GAMI, as an investor of the United States, was doing no more than asserting the substantive rights of the United States, it is difficult to see how such a conclusion could have been reached.*<sup>93</sup>

The fact that the investor has complete control of claims emphasizes that the rights conferred in modern investment treaties belong to the investors and not the states.<sup>94</sup>

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<sup>90</sup> Juratowitch, *The Relationship between Diplomatic Protection and Investment Treaties*, 23 ICSID - FILJ (2008) 10, 24.

<sup>91</sup> On the basis of Art. 1128 NAFTA [Participation by a Party]: “On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.”

<sup>92</sup> *Gami v. United States of Mexico*, Submission of the United States of America (30 June 2003), Final Award (15 November 2004), para.29-30, 43; *Mondev International v. United States of America*, Second Submission of Canada (6 July 2001); Award (11 October 2002), 6 ICSID Reports, 192.

<sup>93</sup> *Corn Products International, Inc. v. The United Mexican States*, Decision on Responsibility, ICSID Case No. ARB(AF)/04/01 (Additional Facility), 15 January 2008, para. 173 (emphasis added); also see Alvarez, *The Public International Law Regime Governing International Investment* (2011), 48.

<sup>94</sup> Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BYIL (2003), 151 (169); van Haersolte-van Hof / Hoffmann, *The relationship between International Tribunals and Domestic Courts*, in: Muchlinski / Ortino / Schreuer (eds.), *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (2008), 962 (994).

## **b) Exhaustion of local remedies**

In almost all bilateral investment treaties it is not necessary for the investor to previously exhaust domestic legal remedies in order to pursue investor-state arbitration. Although the treaty states would be free to agree on such a requirement, this occurs comparatively seldom.<sup>95</sup> Therefore, the arbitration tribunals have recognized that the investor has direct access to international arbitration without having to exhaust domestic remedies. This also differs from diplomatic protection for which the exhaustion of local remedies is compulsory,<sup>96</sup> partly in order to give the sovereign host state the opportunity to correct any errors but also to relieve the home state, in the case of a successful correction, from the introduction and implementation of further diplomatic protection measures which are frequently more costly and are associated with international friction.<sup>97</sup>

If the investor were to enforce the rights of the home state against the host state simply as a proxy, it is apparent that the states would also have a genuine interest in regularly agreeing the previous exhaustion of local remedies in their investment treaties according to the model of diplomatic protection.

*It has long been the case that international lawyers have treated as a fiction the notion that in diplomatic protection cases the State was asserting a right of its own - violated because an injury done to its national was in fact an injury to the State itself. It was a necessary fiction, because procedurally only a State could bring an international claim, but the fact that it did not reflect substantive reality showed through not only in the juristic writing but also in various rules of law surrounding diplomatic protection claims. (...) the local remedies rule is applicable in general international law to claims brought by a State by way of diplomatic protection but not to claims in which it enforces obligations owed directly to it. Yet if the notion that the rights being enforced*

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<sup>95</sup> *Lanco International Inc. v. Argentina*, Decision on Jurisdiction (8 December 1998), ICSID No.ARB/97/6, para. 39; *Generation Ukraine v Ukraine*, Award, ICSID ARB/00/9 (16 September 2003), Nos. 13.1-13.6.

<sup>96</sup> ICJ *Interhandel (Switzerland v. United States)*, 21 March 1959, I.C.J. Reports 1959, 6, 27: "Before resort may be made to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."

<sup>97</sup> Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (2004), 61.

*in diplomatic protection claims were the rights of the State itself, it is difficult to see why the two categories of cases should be treated differently.*<sup>98</sup>

**c) Evaluation of damages**

Within the framework of investment arbitration, the evaluation and calculation of damages is carried out exclusively on the basis of the economic injury suffered by the investor. Other damages, for example those possibly suffered by the home state or other investors from this state due to actions taken by the host state, are not taken into consideration. In contrast to this, the calculation of damages within the framework of diplomatic protection can take other considerations into account as the Permanent Court of International Justice in the case *Chorzów Factory* formulated as early as 1928:

*Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation to the State.*<sup>99</sup>

The fact that damages in investment arbitration are evaluated exclusively on the basis of the economic injury suffered by the investor, unlike the calculation of damages in interstate claims, is a further argument that the rights conferred by investment treaties are those of the investor.<sup>100</sup>

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<sup>98</sup> *Corn Products International, Inc. v. The United Mexican States*, Decision on Responsibility, ICSID Case No. ARB(AF)/04/01 (Additional Facility), 15 January 2008, para. 170-171; Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BYIL (2003), 151 (179); Hoffmann, *The Investor's Right to Waive Access to Protection under a Bilateral Investment Treaty*, 22 ICSID Review (2007), 69 (87).

<sup>99</sup> *Chorzów Factory-Fall* (Germany v. Poland), Merits, 13. September 1928, PCIJ Series A, No. 17 (1928), 28 (emphasis added).

<sup>100</sup> Wälde / Sabahi, *Compensation, Damages, and Valuation*, in: Muchlinski et al. (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (2008), 1056 (1057 Fn. 22); Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BYIL (2003), 151 (179); van Haersolte-van Hof / Hoffmann, *The relationship between International Tribunals and Domestic Courts*, in: Muchlinski et al. (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (2008), 962 (1001).

#### d) Subrogation

Investment treaties contain a subrogation clause for the case that the investor has secured its investment with an investment guarantee and, in the event of loss, makes use of this guarantee. In these cases the claim resulting from the investment treaty against the host state is usually subrogated from the investor, as the previous claimant, to the home state as guarantor.<sup>101</sup> In numerous identical clauses in model investment treaties which all refer to “*the rights of an investor*”,<sup>102</sup> the states recognize the transition of these rights contained in the investment treaty against the other treaty state to the respective home state. On this basis, the states assume that it is the investor – and not the state – which possesses these rights, otherwise such a subrogation clause in an investment treaty would be simply unnecessary.

*Furthermore, the latter Contracting State shall recognize the subrogation of that Contracting State to any such right or claim (assigned claim), which that Contracting State shall be entitled to assert to the same extent as its predecessor in title.*<sup>103</sup>

Further examples on the basis of which the interpretation of *direct* rights of the investor can be seen are the provisions concerning the nationality of the claimant,<sup>104</sup> the

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<sup>101</sup> Art. 6 Clause 1 of the German model treaty (2009), “*If either Contracting State makes payment to any of its investors under a guarantee it has assumed in respect of an investment in the territory of the other Contracting State, the latter Contracting State shall (...) recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim from such investors to the former Contracting State.*”, [http://www.hjr-verlag.de/imperia/md/content/hjr/produktinfo/cfmuller/978-3-8114-9610/9783811496101\\_sonstige\\_informationen\\_90.pdf](http://www.hjr-verlag.de/imperia/md/content/hjr/produktinfo/cfmuller/978-3-8114-9610/9783811496101_sonstige_informationen_90.pdf).

<sup>102</sup> For example, Art. 15 of the model treaty of Canada, <http://ita.law.uvic.ca/investmenttreaties.htm>; Art.10 of the model treaty of Great Britain, Dolzer / Schreuer, THE PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008), 382; Art. 7 of the model treaty of Switzerland, UNCTAD, International Investment Instruments: A Compendium Vol. III (1996), 177 (180); Art. 7 of the model treaty of Italy, UNCTAD, International Investment Instruments: A Compendium Vol. XII (2003), 295 (302).

<sup>103</sup> Art. 6 clause 2 of the model treaty of Germany (2009) expressly stipulates that the states claim here their *assigned* transferred rights; Peters, *Dispute Settlement Arrangements in Investment Treaties*, 22 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW (1991), 91 (143 and Fn. 153) “(...) *they allow intergovernmental arbitration by way of exception if there has been an assignment of rights to the subrogated home State.*”; Juratowitch, *The Relationship between Diplomatic Protection and Investment Treaties*, 23 ICSID - FILJ (2008), 10 (26).

<sup>104</sup> *Siag v. Egypt*, Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, para. 205.

applicable procedural law, fork in the road-clauses, and the contestability and enforcement of the arbitration ruling.<sup>105</sup>

### **5. Result: Direct rights and the elevation of the investor to partial subject**

The interpretation of the enforceable rights conferred on the investor shows,<sup>106</sup> especially according to systematic criteria, that the states want not only to create intergovernmental obligations or simple legal reflexes,<sup>107</sup> but also to establish individual and immediate rights for the investor against the host state.<sup>108</sup> This applies not only to the investor's access to investor-state arbitration tribunals but also includes material standards. This interpretation of *individual direct rights* also corresponds to the two considerations in favor of the direct nature of rights the ICJ has provided in the *LaGrand* case: Such an interpretation is in particular then justified when a treaty rule is formulated in a manner that its application is conditional upon the individual's conduct (here the investor's autonomy to submit a treaty claim) and secondly, the formulation of unconditional obligations by the state in the language of individual rights.<sup>109</sup>

By way of contrast, the conception that the investor merely has rights derived from its home state could have some peculiar normative consequences: if the investor asserts a responsibility towards its home state as its representative, wouldn't it then be possible for the actions of the representative (the investor) to be attributed to the entity being represented (the home state) and to count as state practice? This would be an

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<sup>105</sup> van Haersolte-van Hof / Hoffmann, *The Relationship between International Tribunals and Domestic Courts*, in: Muchlinski et. al. (eds.), *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (2008), 962 (994).

<sup>106</sup> According to the Rules of Interpretation in Art. 31 of the Vienna Convention on the Law of the Treaties "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (Para. 1) and also the "subsequent agreement" and "subsequent practice" (Para. 3) of the treaty states, UNTS Vol. 1155, 331; unless in individual cases the rules of these treaties expressly state otherwise.

<sup>107</sup> Parlett, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* (2011), 110 "(...) *neither the language of BITs (...) nor the practice of investment treaty tribunals support this model.*"

<sup>108</sup> *Occidental v. Ecuador*, English Court of Appeal (2005) EWCA Civ 1116, 2 Lloyd's Rep (2005), 707; Hertzfeld / Legum, *Pre-Dispute Waivers of Investment Treaty Arbitration: A Practical Approach*, in: Hobér / Magnusson / Öhrström (eds.), *BETWEEN EAST AND WEST: Essays in Honour of Ulf Franke* (2010), 183 (184); Spiermann, *Individual Rights, State Interests and the Power to waive ICSID Jurisdiction under Bilateral Investment Treaties*, 20 *ARB. INT'L* 2 (2004), 179, 185: "*It would take an excessively narrow, albeit not unprecedented standard of interpretation to find that bilateral investment treaties do not vest rights in the investor as a subject of international law.*"

<sup>109</sup> ICJ, *LaGrand*, 27 June 2001, ICJ Rep. 2001, 466 para. 77.

interesting consequence, and one which the contracting states would be unlikely to accept should such a claim be asserted against them.<sup>110</sup>

The idea that the only individual right conferred on the investor is that of *procedural* arbitration while the material standards of the investment treaty remain at an intergovernmental level (*'contingent rights,' 'procedural-direct model'*),<sup>111</sup> is also unconvincing, as in this case it is difficult to comprehend how these applicable adjudicative standards of state responsibility are to be understood. If the investor brings a claim on the basis of a responsibility towards him, the question arises as to where the violation of procedural law, according to this understanding, takes place. Corresponding to this view, the arbitration tribunal in *Archer Daniels* states:

*It therefore follows that the only individual rights investors enjoy under Chapter Eleven is the procedural right under Section B to invoke the responsibility of the host State. (...) The Arbitral Tribunal believes that the countermeasure did not impair the Claimants' procedural right to bring a claim against the Mexican State, as the countermeasure had no relation whatsoever with the Respondent's offer to submit the present dispute to arbitration.*<sup>112</sup>

If, on the other hand, the violation of a material obligation is concerned which only exists in respect of the home state, this is also, in principle, a model of derivative rights against which, as shown above, considerable counterarguments exist.<sup>113</sup> This certainly brings to mind the legal institution of representative action in which a right can be enforced in one's own name on another's behalf, as a result of which the separation between procedural and material rights appears, at least fundamentally, possible. But is it really possible to separate subjective 'material' and 'procedural' rights? Is it not the

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<sup>110</sup> Paporinskis, *Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law*, in: Broude / Shany (eds.), *MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW* (2010), 11 Fn. 61.

<sup>111</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 173; Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009), 35 para.73.

<sup>112</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), para. 179 (author's emphasis).

<sup>113</sup> Also repudiating: Paporinskis, *Investment Protection Law and Systemic Integration of Treaty and Custom*, SIEL (29 June 2010), 12.



quintessence of subjective rights that a person is granted a material right that can also be independently enforced procedurally by that person? This internal connection applies particularly in the case of international investment law.<sup>114</sup> Furthermore, access to an investment arbitration tribunal should not be seen simply as a procedural arbitration clause but instead should be qualified as being in itself a material right to protection.<sup>115</sup> If the access of an individual, for example to the European Court of Human Rights according to the European Convention on Human Rights, or access to a national constitutional court according to the respective country's constitution, is denied by a state, this contravenes – as in the case of other material rights – the convention or the constitution. Against this background it appears curious to differentiate between “material” and “procedural” subjective rights as it is the mutual, material aim of investment protection to uphold both.

Thus, investment treaties, in as far as nothing else has been explicitly agreed other than the individual treaty norm contained in the investment treaty,<sup>116</sup> can be

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<sup>114</sup> This has also been regularly adhered to by many arbitration tribunals, *AWG Group Ltd. v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, para. 59; *RosInvestCo U.K. v. Russia*, SCC Case No.Arb.V079/2005, Award on Jurisdiction (October 2007), para. 132; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No.ARB/97/7, Award on Jurisdiction, 25 January 2000, para. 54, 55; *Siemens AG v. Argentine Republic*, ICSID Case No.ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 102.

<sup>115</sup> *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No.ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, para. 29; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No.ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, para. 29, 31; *The Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. (1963), 83 (101, 107); Schill, *Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas*, JIDS (2011), 353.

<sup>116</sup> An exception to this principle is to be made in the case of US and Canadian treaty practice in view of the expropriation standard concerning *taxation* measures taken by the host state: The regular agreement there of a previously arranged state procedure of the tax authorities (*joint tax veto*) within the framework of property protection guarantees signals that the investor claims the expropriation standard in international law as a derivative right against the host state. This gives rise to a further argument *e contrario* for the fundamental interpretation of rights as the investor's *own* rights: if one were to follow the approach whereby the investor enjoys in general only derived rights arising from the right to diplomatic protection, then such a right of transfer for the states would already be a given and would automatically exist for all investment disputes. An explicit joint tax veto relating to material rights would therefore be unnecessary. The fact that such clauses exist is another indication that all other cases involve the assertion of the investor's own claims, Braun, *AUSPRÄGUNGEN DER GLOBALISIERUNG: DER INVESTOR ALS PARTIELLES SUBJEKT IM INTERNATIONALEN INVESTITIONSRECHT – QUALITÄT UND GRENZEN DIESER WIRKUNGSEINHEIT* (2012), 105.

understood as treaties in international law which confer direct rights on individuals.<sup>117</sup> Therefore, the resulting elevation of the investor to a partial subject in international investment law, in comparison to customary international law, is to be considered as a ‘new paradigm’.<sup>118</sup>

#### **IV. Nature and limits of the investor’s partial subject quality**

Should the understanding of *direct* rights of the investor now mean that these rights are ‘sacrosanct’ concerning the legal relationships of states to each other and that, as a result, the law of investment treaties could prove to have a ‘blocking effect’ in respect of the law of countermeasures? The question of whether, and to which extent, the rights conferred on the investor in investment treaties continue to be dependent on the relations in international law between the home and the host state is an indication of the tense relation between general international law and the increasingly specific areas of international law which frequently have their own features and rules.

##### **1. Relationship between the law of bilateral investment treaties and the law of state responsibility**

Can international investment law be read as being a quasi *self-contained regime*<sup>119</sup> in which general international law plays no additional role in the interpretation of the rules of international investment law<sup>120</sup> or is it to be understood as a part of general international law with the result that the rules of investment law can indeed be interpreted in the light of general international law?<sup>121</sup> The most important characteristic of such *self-contained regimes* is that they are designed to exclude the

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<sup>117</sup> Spiermann, *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties*, 20 ARB. INT’L 2 (2004), 179, 186 “(...) archetype of treaties conferring rights to individuals.”

<sup>118</sup> *BG v Argentina*, Award (24 December 2007), UNCITRAL, para. 145; Schreuer, *Paradigmenwechsel im internationalen Investitionsrecht*, in: Hummer (ed.), *PARADIGMENWECHSEL IM VÖLKERRECHT ZUR JAHRTAUSENDWENDE* (2002), 237.

<sup>119</sup> The term as such was coined by the Permanent Court of International Justice, *S.S. Wimbledon*, PCIJ, Ser. A, No. 1, 23 (24).

<sup>120</sup> Per *Waste Management Inc. v. United Mexican States*, ICSID No. ARB(AF)/00/2, Final Award, 20 April 2004, No. 85.

<sup>121</sup> See *Enron Corporation and Ponderosa L.P. v. Argentine Republic*, ICSID No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, No. 46.

application of the general law of state responsibility and recourse to the law of countermeasures.<sup>122</sup> Certainly, the procedural formation of investor-state arbitration, for example within the framework of the ICSID Convention, displays a *lex specialis* characteristic. However, international investment law on the whole can hardly be understood as a self-contained regime but rather as a part of general international law.<sup>123</sup> Hence, a basic principle applies which had already been formulated in the first arbitration ruling on the basis of an investor-state arbitration clause in an investment treaty, *Asian Agricultural Products Ltd. v Sri Lanka*, in 1990 in respect of the relationship between bilateral investment treaties and the rules of general international law.

*The Tribunal emphasized that bilateral investment treaties are “not a self-contained legal system” but have to be “envisaged within a wider juridical context in which rules from other sources are integrated though implied incorporation methods, or by direct reference to certain supplementary rules (...).<sup>124</sup>*

Due to the lack of an expressly formulated declaration of intention there is little evidence that states, when concluding investment treaties, wish to actually relinquish

<sup>122</sup> Simma / Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, EJIL 17 (2006), 483, 495 “*The principal characteristic of a self-contained regime is its intention totally to exclude the application of the general international law on state responsibility, in particular resort to countermeasures by an injured state. The question that immediately follows in practice is whether such a complete exclusion of all secondary rules of general international law is in fact intended by the regime in question.*”; for international investment law in relation to diplomatic protection see Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BYIL (2003), 151; in this matter see again Leben, *La responsabilité internationale de l’État sur le fondement des traités de promotion et de protection des investissements*, 50 AFDI (2004), 683 (691-697).

<sup>123</sup> Bering / Braun / Lorz / Schill / Tams / Tietje, *General Public International Law and International Investment Law – A Research Sketch* (2011), 1; ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (*Koskenniemi*), UN Doc A/CN.4/L682 (13 April 2006), margin note 414; Leben, *The International Responsibility of States based on Investment Promotion and Protection Treaties*, in: Leben, *THE ADVANCEMENT OF INTERNATIONAL LAW* (2010), 43 (56); McLachlan, *Investment Treaties and General International Law*, 58 ICLQ (2008), 361 (366).

<sup>124</sup> Newcombe, *20 Years of Investment Treaty Jurisprudence*, <http://kluwerarbitrationblog.com/blog/2010/06/27/20-years-of-investment-treaty-jurisprudence/> regarding *Asian Agricultural Products Ltd. v Sri Lanka*, Award (27 June 1990), 4 ICSID Reports, 250 with regard to NAFTA, not only is NAFTA Chapter XI *not* self-contained, but Article 1131 expressly establishes the applicability of international law, “*Governing Law. 1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*”

the possibility of having recourse to the right recognized in customary international law to take countermeasures, for example in the form of economic sanctions.<sup>125</sup> This understanding of the relationship between the law of investment treaties and the law of state responsibility is confirmed by the historical development of international investment law from its beginnings in customary international law to a system based predominantly on international treaties. The aim was to develop new tailor-made forms of protection and arbitration for international investment relations, something which customary international law, in the view of those concerned, did not provide to a sufficient extent.<sup>126</sup> On the other hand, there are no indications that the states intended to develop a self-contained regime detached from general international law.

## **2. The legal position of the investor and the law of countermeasures**

If international investment law is to be understood as being a part of general international law, then this has the following consequences for the relationship between the law of investment treaties and the law of state responsibility, as demonstrated convincingly in the ruling of the Annulment Committee (Arbitrator *Guillaume / Elaraby / Crawford*) in *CMS Gas Transmission Company v. Argentine Republic* regarding the problem of state of emergency in cases involving Argentina:<sup>127</sup>

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<sup>125</sup> The parties to the treaty can deviate in their treaty from customary international law (of state responsibility); such a deviation and exclusion, however, cannot be tacitly accepted – an expressly formulated statement is required in the wording of the treaty, with regard to the law of state responsibility the *lex specialis* rule of Article 55 *ILC Articles on Responsibility of States for Internationally Wrongful Acts* stipulates: “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act (...) are governed by special rules of international law.” ICJ, *Case Concerning Elettronica Sicula (USA v. Italy)* (20 July 1989), ICJ Rep. 1989, 15, No. 50.

<sup>126</sup> It should be pointed out, in opposition to Douglas’ theory of the states concluding the treaty ‘*opting out*’ of the law of state responsibility, that diplomatic protection and investment arbitration do not exist in a mutually-exclusive relationship but exist fundamentally alongside one another, Pellet, Yearbook of the ILC 1998 Vol. IA/CN.4/SER.A/1998 8, 21: “*diplomatic protection (...) operated in (...) areas (...) such as the protection of private economic interests, where it existed side by side with other mechanisms like ICSID, which gave private individuals direct access to international law.*”; Dugard, Fifth Report on Diplomatic Protection, A/CN.4/538 20-21, 44.

<sup>127</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No.ARB/01/8, Annulment Decision (25 September 2007), para. 134; *BG Group v. Argentine Republic*, Final Award (24 December 2007), para. 382; ICJ, *Gobcikovo-Nagymoros-Project*, Judgement (Merits), 25 September 1997, ICJ Reports 7, para. 47; Binder, *Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis*, in: Binder / Kriebaum / Reinisch / Wittich (eds.), INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, Essays in Honour of Christoph Schreuer (2009), 608, 624, 628.

- (1) Initially the issue is whether a violation of the treaty, in this case the bilateral investment treaty which defines the content and extent of the actual obligations in international law as a *primary rule*, has actually occurred.
- (2) If the action of the state has violated the (investment) treaty, the system of state responsibility comes into effect as a *secondary rule* concerning any possible legal consequences of the violation of the primary rule in order to determine whether the non-fulfillment of the primary rule can be justified.

If there has been a violation of the investment treaty, the question arises whether, within the framework of state responsibility, this can be justified by the right to take countermeasures. In *Corn* und *Cargill* this position was countered with the argument that a possibly justifying effect of countermeasures can only become effective in the legal relations between the injured state and the state responsible, and not in the case of third parties which are not responsible for the act against which countermeasures have been taken. At most, countermeasures may only impact negatively on third party states or other parties if these do not have their own individual legal rights which can be injured by countermeasures.<sup>128</sup> However, with a view to the overwhelming opinion in the literature, it is doubtful whether *all* individual rights of third parties should be excluded from the possible negative consequences of countermeasures.<sup>129</sup> It would be more appropriate to assume that only certain rights of third parties are concerned, for example, the rights of the uninvolved nationals of third states,<sup>130</sup> or international organizations such as the United Nations.<sup>131</sup> *These* third parties are clearly further removed from the intergovernmental dispute than the nationals of those states

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<sup>128</sup> *Corn Products International, Inc. v. The United Mexican States*, (Decision on Responsibility), ICSID Case No.ARB(AF)/04/01 (Additional Facility), 15 January 2008, para.163-164, 168.

<sup>129</sup> Paparinskis, *Investment Arbitration and the Law of Countermeasures*, SIEL (2008), 66; Pellet, Yearbook of the International Law Commission (2000), 273 para. 57, as opposed to Crawford's, Commentary on the ILC Articles ILC Articles on State Responsibility (2002), Chapter II: Countermeasures, Art 22 para. 4 "*directed against a third State (...) [or] involve an independent breach of any obligation to (...) third parties.*"

<sup>130</sup> *Cysne Case*, 2 UNRIAA (1930), 1052 (1056–57).

<sup>131</sup> For example, the closing of the PLO office at the United Nations by the USA as a countermeasure to the PLO's terrorist activities. As in this case the rights of a third party, the United Nations, were injured, this countermeasure was seen as illegitimate, Reed, *Reviving the Doctrine of Non-Forcible Countermeasures*, 29 VIRGINIA JOURNAL OF INTERNATIONAL LAW (1988), 175 (176).

immediately involved. Therefore, the term *third parties* rightly cannot mean all individual third parties.

The understanding formulated here, whereby the rights of investors are indeed their own but remain, in their content, dependent on relations in international law and are, as such, not shielded from reprisals, is similarly supported by the considerations laid out in the ‘Obligations not affected by countermeasures’ contained in Art. 50 Para.1 b) of the ILC Articles on State Responsibility.<sup>132</sup> According to these, all injuries caused by countermeasures to those human rights which are immediately related to the person (physical integrity, freedom) are excluded and, therefore, removed from the unilateral access of the state carrying out countermeasures.<sup>133</sup> There is a certain amount to be said for not completely excluding restrictions through countermeasures in the economic sphere.<sup>134</sup> The *LaGrand* ruling of ICJ has indicated that a distinction should indeed be made between the two legal spheres – the rights of foreign nationals and the rights of individuals on the one hand and human rights on the other. In its ruling the ICJ in fact recognized Article 36 Paragraph 1 b of the Vienna Convention regarding consular relations as being an individual right but was, however, conspicuously reticent concerning the argument put forward by the German side that Article 36 is not only an individual right but also has the character of a human right:<sup>135</sup>

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<sup>132</sup> Article 50 ILC Articles, “1. Countermeasures shall not affect: [...] (b) Obligations for the protection of fundamental human rights.” Similar the list of non-derogable rights mentioned in General Comment 29 of the Human Rights Committee regarding derogations during states of emergency, Human Rights Committee, *General Comment 29: States of Emergency (article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 7.

<sup>133</sup> De Hoogh, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES (1996), 262; Forlati, *Economic Sanctions in International Law*, in: Forlati / Sicilianos (eds.), ECONOMIC SANCTIONS IN INTERNATIONAL LAW (2004), 125 (133).

<sup>134</sup> Paparinskis, *Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law*, in: Broude / Shany (eds.), MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW (2010), 8; Dahm / Delbrück / Wolfrum, VÖLKERRECHT, Band I/3 Die Formen völkerrechtlichen Handelns, Die inhaltliche Ordnung der internationalen Gemeinschaft (2002), 989; Frowein, in: Fiedler / Klein / Schnyder, GEGENMAßNAHMEN, BDGV, Band 37 (1998), 110.

<sup>135</sup> ICJ ruling dated 27 June 2001, *LaGrand*, ICJ Rep. 2001, 466, para. 78 “(...) was not only an individual right but has today assumed the character of a human right (...)”, However, Germany’s legal representative, *Simma*, used the qualified formulation ‘human rights of foreigners’, Request for Indication of Provisional Measures, 2 March 1999, Oral Pleadings of Germany, Mr Simma, CR 2000/27.

*The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, it does not appear necessary to consider the additional argument developed by Germany in this regard.*<sup>136</sup>

The International Law Commission was also restrained in its guidance concerning Art. 50 Para.1 b) of the Articles on State Responsibility.<sup>137</sup> Therefore, despite all of the ‘elevation of the human rights’<sup>138</sup> of companies and property in recent decades, investment protection standards arguably (still) do not belong to the ‘*fundamental human rights*’<sup>139</sup> as understood in Art. 50 Para.1 b) of the ILC Articles on State Responsibility, with the result that the direct rights of investors, as such, are not shielded from reprisals.

### **3. The investor’s possible claim for compensation**

This means regarding our initial question of the actual contours of the investor’s rights conferred by investment treaties that the investor does indeed have individual direct rights but that these are *limited* by the relations in international law between the respective states. If a countermeasure infringes and injures investors’ rights and – contrary to the arbitration cases analyzed here – fulfills the demanding conditions contained in Art. 49 ILC Articles for a permissible countermeasure, this does indeed justify the state action, however it does not eliminate the temporary injury and

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<sup>136</sup> ICJ ruling dated 27 June 2001, *LaGrand*, ICJ Rep. 2001, 466, para. 78; ICJ *Avena and other Mexican Nationals vs. USA* (31 March 2004), ICJ Rep. 2004, para. 124, regarding Mexico’s assertion that the individual right in Article 36 is to be understood as a human right,“(…) *neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in that regard.*”

<sup>137</sup> Arangio-Ruiz, Fourth Report on State Responsibility, Yearbook of the ILC 1992, Vol. II(1) A/CN.4 SER.A/1992/Add.1, 83 “(…) *the human rights which should be considered inviolable by countermeasures—the “more essential” human rights—are not understood to include property rights.*”; in this regard the ILC consensus could only find that protection against reprisals does not apply to all human rights but only to these *fundamental human rights*, 70, 188.

<sup>138</sup> The European Court of Human Rights had indeed recognized that companies too could, in principle, invoke human rights, *Société Colas Est. v. France*, ECHR Judgment (16 April 2002); *Comingersoll SA v. Portugal*, ECHR Judgment (6 April 2000); *Austronic AG v. Switzerland*, ECHR Judgment (22 May 1990).

<sup>139</sup> The pre-state reasoning of human rights could be expressed here, unlike many others, Alvarez, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* (2011), 61 “*Respect for human rights is, after all, a deontological goal that is worthy of respect simply because human beings and their dignity are worth protecting at all costs.*”

derogation of the investment treaty which continues to exist (Art. 27 (a) ILC Article).<sup>140</sup> The question arises whether the *quality* of direct rights is demonstrated by the fact that the state has an obligation to pay compensation to the investor for the acceptance of permissible countermeasures according to Art. 27 (b), Art. 22, 49 ILC Articles.<sup>141</sup>

In this case the state would be liable to pay the investor<sup>142</sup> not full compensation but instead only ‘*compensation for any material loss caused by the act in question.*’ This would, above all, be relevant regarding loss of profit which is to be restituted within the scope of claims for damages but not within the scope of compensation.<sup>143</sup> That the investor should not be considered collectively liable for the application of countermeasures by the host state, a situation which the investor can neither predict nor control, is an argument in favor of claims for compensation in favor of the interest in the integrity of the investment.<sup>144</sup> Therefore, investment treaties, for example in the case of emergency measures, provide for compensation which occasionally has been expressly

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<sup>140</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10(A/56/10), Comment before 49 margin note 4 “*Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken.*”; Bjorklund, *Emergency Exceptions: State of Necessity And Force Majeure*, in: Muchlinski et. al. (eds.), *OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (2008), 459, 515: “(...) temporarily suspended, rather than extinguished.”

<sup>141</sup> Article 27 [Consequences of invoking a circumstance precluding wrongfulness] “*The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to (...) (b) the question of compensation for any material loss caused by the act in question.*”; confirmed by the ICJ, *Gabcikowo-Nagymoros*, Judgement (Merits), 25 September 1997, ICJ Rep. 7, 39, para. 48 (that the finding of a state of necessity) “*would not exempt it from its duty to compensate its partner*”; *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10(A/56/10), Art. 27 para. 5.

<sup>142</sup> The investor can make a claim on the basis of this obligation to pay compensation: Dolzer / Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008), 170.

<sup>143</sup> Regarding the difference between ‘*damnum emergens*’ and ‘*lucrum cessans*’ in cases of legal and illegal expropriation *Case Concerning the Factory at Chorzów (Claim for Indemnity)*, Judgment (13 September 1928), PCIJ Reports 1928 (Ser. A No.17), 4, 46-47; *Amoco Int’l Fin. Corp. v. Iran et al.*, 15 Iran-U.S. Claims Trib. Rep. (1987), 189, margin notes 189-206.

<sup>144</sup> *Corn Products International, Inc. v. The United Mexican States*, (Decision on Responsibility), ICSID Case No.ARB(AF)/04/01 (Additional Facility), 15 January 2008, *Separate Opinion of Andreas F. Lowenfeld*, para. 1-2 “*It follows that (...) the investor cannot be held responsible for the actions of its host state.*”



set out in a treaty.<sup>145</sup> Recent arbitration tribunals have affirmed a duty to pay compensation resulting from customary international law in such cases.

*The Tribunal is satisfied that Article 27 establishes the appropriate rule of international law on this issue. (...) the plea of state of necessity may preclude the wrongfulness of an act, but does not exclude the duty to compensate the owner of the right which had to be sacrificed. (...) It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due.*<sup>146</sup>

Although the countermeasure is imposed on the investor, the quality of the investor's individual rights is shown in the balanced manner in which the investor is compensated (only) for the immediate damage arising to its investment but not for the loss of its profit.<sup>147</sup> The criterion of proportionality could also be usefully applied for the more exact configuration and assessment of such a claim for compensation as already formulated in the pre-conditions for a countermeasure and is also being increasingly discussed – with all due care – in international investment law.<sup>148</sup> Such a consideration, which would also take into account the legal consequences concerning the amount of the claim for compensation according to the criterion of proportionality, would, in respect

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<sup>145</sup> Art 5 (2) of the convention dated 30 March 1998 between the Federal Republic of Germany and Brunei Darussalam regarding the Promotion and mutual Protection of Investments, 14 January 2004, in effect since 15 June 2004, BGBl. (2004) II, 40 "(...) shall be accorded restitution or fair and adequate compensation."

<sup>146</sup> *CMS Gas Transmission Co v. The Argentine Republic*, ICSID, ARB/01/08 (Award, 12 May 2005), para. 388-394 (emphasis added); recently confirmed in *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1177 "(...) the successful invocation of the necessity defense [under customary law] does not per se preclude payment of compensation to the injured investor for any damage suffered as a result of the necessity measures enacted by the State; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 345; otherwise *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 264.

<sup>147</sup> Approving of the cases of emergency Hobe / Griebel, *New Protectionism – How Binding are International Economic Legal Obligations During a Global Economic Crisis?*, 2 GOETTINGEN JOURNAL OF INTERNATIONAL LAW (2010), 423 (433-434); Bjorklund, *Emergency Exceptions: State of Necessity And Force Majeure*, in: Muchlinski et. al. (eds.), OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (2008), 459 (515); Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Options in Recent ICSID Cases?*, 8 JWIT (2007), 191, 207-208.

<sup>148</sup> Especially in the case of judgment of the obligation to pay compensation for expropriations see, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 122; *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 312.

of the compensation for the investor affected, in accordance with the wording of Art. 51 ILC Article, take “*into account the gravity of the internationally wrongful act and the rights in question*”. When calculating the amount of the claim for compensation it should, however, also be borne in mind that a state which has defended itself by way of a countermeasure has not been prevented from implementing such a measure against an act in violation of international law.

This view also indicates that it may be doubtful whether such an understanding of Art. 27(b) ILC Article actually complies with the purpose of countermeasures in the international economic sphere.<sup>149</sup> If it is the sense and purpose of countermeasures to put economic pressure on another state to comply with certain obligations in international law through measures which, in effect, violate international law, then this sense and purpose would possibly be circumvented due to the fact that the investor would have to be compensated for the injury caused by the countermeasure taken. The quality of the *individual direct rights* of the investor is demonstrated in the obligation of the state to pay compensation within a scenario where the expropriation was permissible as a countermeasure.

## **V. The investor as a partial subject in international law: interpretation and consequences**

### **1. For the investor**

#### **a) Nature and limits of the rights in the investment treaty**

The investor is no longer merely the catalyst for an intergovernmental entitlement and, as a result, is no longer forced to rely on diplomatic protection and the accompanying mediation of the individual. The classification of the investor as a partial subject in international law can be understood as a legal characteristic and a recognition of the protection not only of public interests but also of private economic interests in the process of globalization and, thereby, build a bridge which enables the entrepreneurial,

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<sup>149</sup> The commentary to Art. 27 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10(A/56/10), Art. 27 para. 4, is also generally reticent regarding the concrete configuration of this obligation to pay compensation which could indicate that the ILC wanted to develop international law further here.

non-state actor to cross from the sphere of international relations to that of international law. The effects of this new paradigm were construed in *Plama Consortium* as “(...) for investors, [each investment treaty is] marking another step in their transition from objects to subjects of international law.”<sup>150</sup>

It is clear how the elevation of the investor to partial subject in international law with individual rights resulting from investment treaties both utilizes and advances a developmental trend in international law which has been shaping that legal field since the Second World War whereby individuals are also recognized and included as actors at an international level – as shown, for example, in the legal standing conferred to individuals in regional human rights protection. Mechanisms in international law for the settlement of disputes are becoming increasingly institutionalized, not only at an intergovernmental level, but they are also occasionally transferred to those individuals.<sup>151</sup> In international investment law in particular, the individual appears to enjoy status as a subject in international law and, importantly, the capacity to instigate proceedings, which could potentially represent an improvement compared to the situation in human rights law and consular law.<sup>152</sup>

If the rights conferred on the investor by states in investment treaties are to qualify as individual direct rights then these certainly have tangible consequences. The states remain, of course, the masters of the treaties and can correct or repeal these at any time with prospective effect. But as long as states’ investment treaties confer clearly distinct rights on investors, the arbitral tribunals and states have to recognize these

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<sup>150</sup> *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No.ARB/03/24, Decision on Jurisdiction (8 February 2005), para. 141.

<sup>151</sup> ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, 35 ILM (1996) 32, para. 97 “A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.”; Orrego Vicuna, INTERNATIONAL DISPUTE SETTLEMENT IN AN EVOLVING GLOBAL SOCIETY—CONSTITUTIONALIZATION, ACCESSIBILITY, PRIVATIZATION (2004), 29; Buergenthal, *Proliferation of International Courts and Tribunals: Is it Good or Bad*, 14 Leiden JIL (2001), 267.

<sup>152</sup> Regarding the protection of investments by the ECHR, *Sovtransavto Holding v. Ukraine* (25 July 2002), Nos. 71, 90, see Emberland, *The European Convention on Human Rights as a Means for the Protection of Foreign Investment: A Look at Sovtransavto Holding v. Ukraine*, in: Tietje (eds.), INTERNATIONAL INVESTMENT PROTECTION AND ARBITRATION – THEORETICAL AND PRACTICAL PERSPECTIVES (2008), 107; Tomuschat, *The European Court of Human Rights and Investment Protection*, in: Binder / Kriebaum / Reinisch / Wittich (eds.), INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY – Essays in Honour of Christoph Schreuer (2009), 636.

individual direct rights and, where necessary, states must allow these rights to be enforced against themselves.<sup>153</sup>

The conferring of the investor with individual direct rights through investment treaties does, however, have limits. It is apparent that this only takes place in accordance with the functional “*needs of the international community*.”<sup>154</sup> The investor becomes – in a multifaceted manner – a *partial* subject in international law, whereby, at the same time, the *limits* of its subjectivity are also defined: the investor only receives particular, designated rights in international law because they are necessary for the protection of its investment. It is true that investors can invoke these rights immediately, but they cannot enforce them with the classical means of international law such as reprisals or retaliation. The investor has in any case to fundamentally accept countermeasures which are taken by the respective states in international law. The states, therefore, only confer on investors a personality in international law to the extent they consider it functionally necessary for the order of international relations. This means that there are subjects in international law with differing degrees of quality.<sup>155</sup> However, this does not diminish the importance of this paradigm change, but refers to

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<sup>153</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05 (NAFTA) (26 September 2007), *Concurring Opinion of Arthur W. Rovine Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, Para. 51; cautiously Alvarez, *Are Corporations “Subjects” of International Law?*, New York University Public Law and Legal Theory Working Paper 238 (2010), 15 “(...) *investment treaties appear to recognize the distinct “personhood” of their third party beneficiaries, whose rights appear to be delineated in these treaties as distinct from those of the state parties to such treaties.*”; McCorquodale, *The Individual and the International Legal System*, in: Evans (eds.), *INTERNATIONAL LAW* (2006), 307 (313); Daillier / Pellet, *DROIT INTERNATIONAL PUBLIC* (LGDJ 2002), 649.

<sup>154</sup> For the interpretation of the ICJ dictum in *Reparation for Injuries Suffered in the Service of United Nations*, ICJ Reports 1949, 174, 178/179: “*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States*” in the sense of a *functional* approach, according to which the actual extent of the rights and obligations of the subject in international law depend upon its functions and tasks, Green, *Fragmentation in Two Dimensions: The ICJ’s flawed Approach to Non-State Actors and International Legal Personality*, 9 MELB. J. INT’L L. (2008), 47 (56).

<sup>155</sup> As the ICJ stated in *Reparation for Injuries Suffered in the Service of United Nations*, ICJ Reports 1949, 179, in respect of the conferring of the status of personality in international law on the United Nations, “[t]hat was not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of State (...) What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”

the fact that the extent of the legal capacity of such subjects and their individual direct rights in international law, for example those of the investor, are, in any event according to the current conception of public international law, determined by the function and tasks which has been allocated to it by the international community.<sup>156</sup>

The *consequences* which result from the interpretation of individual direct rights arising from the investment treaty and the personality of the investor in international law are for example the exclusive control of these rights by the investor, the maintenance of the period of after-effect including in the case of the mutual cancellation of the investment treaty by both states, the limits which the rights of the investor put on the declarations and interpretations made by the treaty states during ongoing arbitration proceedings, an interpretation of investment standards more strongly based on human rights due to the individual direct rights bestowed on the investor as a partial subject in international law, the possibility for the investor to waive *its* rights, and the effect on the further validity of the interpretation maxim *in dubio mitius*. The following consequences and the possible effect on state sovereignty will be discussed in more detail here.

### **b) Waiver of rights arising from the investment treaty?**

If the investor's rights are *direct* rights which come into being upon the conclusion of the investment treaty then it must be possible, in principle, for the investor to *waive* the assertion of its rights before an international arbitration tribunal on the basis of the investment treaty,<sup>157</sup> as the disposal, or waiver, can only take place on the basis of

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<sup>156</sup> This may raise the additional question of whether in modern times it remains appropriate to focus on subjective rights, recognized by and directed against states, Peters, *Das subjektive internationale Recht*, 59 Jahrbuch des öffentlichen Rechts (2011), 411; Colliot-Thélène, *Après la souveraineté: que reste-t-il droit subjectifs?*, Jus Politicum: Revue de droit politique (2008) (<http://www.juspoliticum.com/>).

<sup>157</sup> An express waiver could, for example, exist in the form of one of the 'Exclusive Jurisdiction Clauses' included in a private contract with the host state which forms the basis for the investment, *Azurix Corp. v. Argentine Republic*, ICSID No. ARB/01/12, Decision on Jurisdiction (8 December 2003), No. 26, "[T]he court for contentious-administrative matters of the city of La Plata shall have jurisdiction over all matters arising out of the bidding, waiving any other forum, jurisdiction or immunity that may correspond."; an implied waiver could be, for example, formulated as follows, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Objections to Jurisdiction (29 January 2004), No. 137, "All actions concerning disputes in connection with the obligation of either party to this Agreement shall be filed at the regional Trial Courts of Makati or Manila"; finally, a waiver could also be formulated in a law of the host state 'Domestic Forum Selection Clause', if and

individual direct rights.<sup>158</sup> The question arises whether a contractual dispute settlement clause in a national investment contract can create a claim of exclusivity in respect of *all* claims arising from an investment relationship.<sup>159</sup> If such a waiver is possible and valid, an arbitration tribunal would have to reject the request for arbitration due to a lack of jurisdiction. Whether it is possible to waive the enforcement of treaty rights has been mentioned in individual cases of arbitration but it seems to date it has never been deemed necessary to issue a ruling on the matter.

*Assuming that parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective. Given that it appears clear that the parties to ICSID arbitration could jointly agree to a different mechanism for the resolution of their disputes other than that of ICSID, it would appear that an investor could also waive its rights to invoke the jurisdiction of ICSID. However, the tribunal need not decide this question in this case.*<sup>160</sup>

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because the investment contract was based on such a clause. In investment arbitration and literature the effect of such contractual dispute settlement clauses is contentious, regarding the possible interpretations in detail see Braun, AUSPRÄGUNGEN DER GLOBALISIERUNG: DER INVESTOR ALS PARTIELLES SUBJEKT IM INTERNATIONALEN INVESTITIONSRECHT – QUALITÄT UND GRENZEN DIESER WIRKUNGSEINHEIT (2012), 72.

<sup>158</sup> In particular, by means of a broad dispute settlement clause (generally: Art 10 (1) of the German Model Investment Treaty (2009): „*Disputes concerning investments between a Contracting State and an investor of the other Contracting State [...]*“ or explicitly: Art 24 (1) of the US Model BIT (2004): „[...] a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached a) an obligation under Articles 3 through 10, b) an investment authorization, or c) an investment agreement [...],“ <http://ita.law.uvic.ca/investmenttreaties.htm>) or an umbrella clause in an investment treaty, it is also possible to extend the protection of an investment treaty in international law to include contractual legal positions, with contract claims thus being transformed into treaty claims.

<sup>159</sup> *Wiss / Rosenberg*, Avoiding Waiving a Right to ICSID Arbitration in the Negotiation of a Concession Agreement, Int'l A.L.R. (2010), 8, 11: “(...) *that there is no clear consensus among ICSID tribunals regarding the effects of an express waiver provision or forum selection clause (...).*”

<sup>160</sup> *Aguas del Tunari S.A. v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction (21 October 2005), No. 118; van Haersolte-van Hof / Hoffmann, *The relationship between International Tribunals and Domestic Courts*, in: Muchlinski et. al. (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (2008), 962, 984; *Azurix Corp. v. Argentine Republic*, ICSID CASE No. ARB/01/12, Decision on Jurisdiction (8 December 2003), No. 85 “*The Commissions* (this refers to the mixed arbitration commissions in *Woodruff v. Venezuela* und *North American Dredging Company of Texas v. United Mexican States*, Author's note) *that decided these cases recognized that an individual could commit himself to submit his contractual claims to the local courts, but at the same time they differentiated these claims from the claims of their States under international law which they, as individuals, could not have waived.*”

The question arises, however, whether (in the case of an implied waiver, for example, through an exclusive arbitration clause in the investment contract) a quasi prohibition of such a waiver in an investment treaty in international law can be assumed due to reasons of *public policy*. The sense and purpose of investment treaties would support the impermissibility of an implicit waiver since – according to one view – it would not reflect the wish of the states to overturn the protection of the investor conferred in international law through the subsequent formulation of investment contracts in civil law. As the arbitration tribunal in *Société Générale de Surveillance S.A. v. Republic of the Philippines* found:

*It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals they will normally do so in order to achieve some public interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract.*<sup>161</sup>

This may also lead to a renewed politicization as the absence of the possibility to instigate proceedings would make recourse to diplomatic protection more desirable. Another possible argument would be that the investment treaty in international law has precedence over the national contract (or law) which contains the waiver.<sup>162</sup> The expected imbalance of the parties in many cases could also be put forward as an argument against ascertaining a waiver implicit in an agreement contained in a civil law

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<sup>161</sup> *Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Objections to Jurisdiction (29 January 2004), No. 154.

<sup>162</sup> Cautious in this direction see Hertzfeld / Legum, *Pre-Dispute Waivers of Investment Treaty Arbitration: A Practical Approach*, in: Hobér / Magnusson / Öhrström (eds.), *BETWEEN EAST AND WEST: Essays in Honour of Ulf Franke* (2010), 183 (191); *Mexican Union Railway (Limited) v. Mexico*, 5 RIAA (1930), 178, has already addressed this consideration: “Redress of internationally illegal acts and protection against breaches of international law are regarded by the Commission as being of such high importance to the community of civilized States that their preclusion would invalidate the stipulation.”

investment contract.<sup>163</sup> Finally, a comparison with international human rights protection could speak for the impermissibility of such an implied waiver.<sup>164</sup>

Another view which could be used as a counter-argument is that it is questionable whether the interest and the desire, especially of the home state, to override the investor's party autonomy manifested in such a waiver is a suitable strategy. The analogy with international human rights protection does not bear much comparison here. Firstly, international human rights protection differs from international investment protection in that, in the former, the human rights violation claim is usually directed at the home state itself, whereas, in the latter, the claim of investor rights is usually directed against the host state.<sup>165</sup> Therefore, the European Court of Human Rights also recognizes that a

*waiver [of one of the rights attested in the ECHR; Author's note], which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention.*<sup>166</sup>

It is possible only to a limited extent to compare human rights which are derived from human dignity with those rights which are conferred by an investment treaty. This

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<sup>163</sup> It is true that this argument concerning possible economic coercion in international law has, to date, been applied with great caution, which is referred to by Hertzfeld / Legum, *Pre-Dispute Waivers of Investment Treaty Arbitration: A Practical Approach*, in: Hobér / Magnusson / Öhrström (eds.), *BETWEEN EAST AND WEST: Essays in Honour of Ulf Franke* (2010), 183 (189 Fn. 19), however, a clear tendency to carefully examine the permissibility of a waiver especially in view of failed attempts to protect rights can be implied from the ruling of international (arbitration) tribunals, Caflisch, *Waivers in International and European Human Rights*, in: Arsanjani / Cogan / Sloane / Wiessner (eds.), *LOOKING TO THE FUTURE: Essays in Honor of W. Michael Reisman* (2010), 407.

<sup>164</sup> In view of the European Convention on Human Rights, the European Court of Human Rights determined thus, *Albert and Le Compte v. Belgium*, Judgement (10 February 1983), ECHR Series A No. 58, No. 35, that "[...] *the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them, but the same cannot be said of certain other rights.*"

<sup>165</sup> Crawford, Article 29, Draft Articles of State for Internationally Wrongful Acts, International Law Commission, UN Document a/CN.4/498/Add.2 (1999), No. 240, "*In the field of human rights, it is not the case that the individual can waive the rights conferred by international treaties, but the individual's free consent is relevant to the application of at least some of those rights.*"

<sup>166</sup> *Deweert v. Spain*, Judgement (27 February 1980), ECHR Series A No. 35, No. 49; *Oberschlick v. Austria*, Judgement (23 May 1991), ECHR Series A No. 204, No. 51.; App. No. 5826/03, *Idalov v. Russia*, [GC] (2012) ECHR Judgment of 22 May 2012, paras. 172–173 (a waiver of the right to fair trial is possible if it is unequivocal, given with full knowledge of the facts and with foreseeable consequences, and is attended by minimum safeguards).



provides all the more reason for allowing an investor significantly greater scope to waive its rights than would be the case in the context of international human rights protection.<sup>167</sup> After all, the general legal concept in international investment law, that the interests of the home state should be held in abeyance as soon as the investor has accepted the offer of arbitration through a request for arbitration arising from an investor-state arbitration clause<sup>168</sup> can be drawn from the ICSID Convention and numerous other investment treaties.<sup>169</sup> From this it can be concluded that these interests of the home state cannot override the investor's capacity to waive such an offer of arbitration proceedings.<sup>170</sup> In this case the investor, as an equal actor, can bear the consequences of such a waiver of rights conferred on it in the investment treaty.

The question of whether the investor can waive *its* rights and the corresponding question regarding the actual contours of this right can be explained by looking at the sense and purpose of investment treaties. The interest and wish of the treaty states is to arrive at a legal settlement for investment disputes between the host state and the investor by conferring material rights and providing an arbitration mechanism. If a dispute settlement clause in a civil law investment contract were given exclusive effect, then the *ordering function* of investment treaties<sup>171</sup> which is, after all, desired by the states, would be undermined. The recognition of such a waiver would also provide a possible incentive for the host state to award a contract to that investor which is most

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<sup>167</sup> Spiermann, *Individual Rights, State Interests and the Power to waive ICSID Jurisdiction under Bilateral Investment Treaties*, 20 ARB. INT'L (2004), 179 (207); Hoffmann, *The Investor's Right to Waive Access to Protection under a Bilateral Investment Treaty*, 22 ICSID - FILJ (2007), 69 (94).

<sup>168</sup> Art. 27 Para. 1 of the Convention of 18 March 1965 for the Settlement of Investment Disputes between States and the Nationals of Other States, UNTS Bd. 847, 231, "*No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention [...].*"

<sup>169</sup> See the reference to the corresponding clauses in numerous Model BITs in Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BYIL (2003), 151 (190 Fn. 189).

<sup>170</sup> Thus, concluded Broches, the initiator of the ICSID Convention, at the time within the context of the ICSID Convention: Broches, ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention* (1968), Vol. II, 24, "*It would seem to be a natural concomitant of the recognition of the private party's right of direct access to an international jurisdiction, to exclude action by its national state in cases in which such access is available under the Convention.*"

<sup>171</sup> Schill, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009), 17.

prepared to waive investment protection in international law.<sup>172</sup> If such a waiver were to be considered permissible then the expectation of the home state when concluding an investment treaty, that the investor is able to instigate investor-state arbitration according to the investment treaty, would be let down.<sup>173</sup> In such an interpretation, the host state of the investment could be accused of inconsistency if it requested, on the one hand, a waiver of that dispute settlement mechanism in the contract on which the investment is based although it has just, on the other hand, agreed and enabled such a mechanism in its investment treaty in international law with the home state of the investor.<sup>174</sup> Finally, the effectiveness of an explicit waiver should also depend on whether the agreement in civil law with the host state, the investment contract, which contains such a waiver, was concluded before or after the investment treaty.

In practical terms, regarding the effectiveness of a waiver, it remains immaterial whether the rights are direct rights of the investor or derivative rights of the state as such a waiver is not possible in either case and, therefore, the *limits* of these rights are defined: in dogmatic terms, however, there is indeed a difference. This means, concerning the initial question regarding the actual outlines of the rights conferred on

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<sup>172</sup> Douglas, *Nothing if Not Critical on Investment Arbitration, Occidental, Eureko and Methanex*, 22 ARB. INT'L (2006), 27 (37) "*intuitively disturbing*"; Newcombe / Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES (2009), 513 "*contrary to international public policy*"; also, with a different reasoning, Duijzentkunst, *Treaty Rights as Tradable Assets: Can Investors Waive Investment Treaty Protection?*, ICSID – FILJ (2010) 2, 409 (420).

<sup>173</sup> This understanding is emphasized by the fact that e.g. since 1987 the United States has expressly stated in its investment model treaty that such a contractual waiver clause should not impair the freedom of choice of the investor to initiate investor-state arbitration proceedings on the basis of an investment protection treaty in international law, Alvarez, *The Once and Future Foreign Investment Regime*, in: Arsanjani / Cogan / Sloane / Wiessner (eds.), LOOKING TO THE FUTURE: Essays on International Law in Honor of W. Michael Reisman (2010), 608, 617 "(...) *the possibility that host states may have successfully induced an investor to waive its right to international arbitration through an investment contract. The new U.S. model treaty of 1987 clarified that its guarantee of investor-state dispute settlement would, at the option of the investor, prevail over any clause in an investment contract stipulating other forms of dispute settlement (including local courts)*."

<sup>174</sup> *TSA Spectrum de Argentina S.A. v. Argentine Republic*, (Award), ICSID No.ARB/05/5 (19 December 2008), para. 63, "*Furthermore, in a more general manner, the Arbitral Tribunal observes that Argentina's interpretation, if generally applied, would make it possible for governments to avoid their treaty obligations as regards important matters such as expropriation by the simple expedient of inserting clauses in their contracts that vitiated the right to international arbitration, thereby effectively rendering the arbitration provisions of a bilateral investment treaty a nullity. This would seem inconsistent with a state's basic obligation under international law to implement its treaty obligations in good faith*." Bjorklund, *Private Rights and Public International Law: Why Competition among International Economic Law Tribunals is not working*, HASTINGS LAW JOURNAL (2007), 101 (128).

the investor, that the investor's subjectivity in international law cannot only be described as 'partial' because it only includes certain rights (and possibly obligations) but also because it enables rights to be exercised while at the same time preventing these from being affected by a waiver.

## 2. For the states

### a) Period of after-effect also in the case of an amicable cancellation?

States can indeed at any time cancel investment treaties which they have concluded and have recently exercised this possibility as clearly shown by the examples of Ecuador, Venezuela and other states.<sup>175</sup> A significant legal consequence of such a unilateral cancellation is that the investment treaties (not least against a background of the long-term nature of investments and the protection of confidence of the investors) provide, in the form of '*survival*' or '*sunset*' clauses, for the continuance of investment protection in international law long after the actual cancellation. This period of after-effect, as a balance between the treaty states' necessary leeway to act and the equally necessary protection of confidence for the stability of, usually, long-term investments, lasts, from the date of cancellation, for between 10<sup>176</sup> and 15 years,<sup>177</sup> and sometimes 20 years.<sup>178</sup>

In this context, the question arises whether the states can also *mutually* and *jointly* revoke not only an investment treaty but also waive the period of after-effect described above? While, from the point of view of investors, questions arise regarding the protection of legitimate expectations in their investment, from the perspective of the states, the question arises whether it can indeed be right that states confer rights on the investor but that these cannot be revoked by the treaty states through a mutually-agreed

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<sup>175</sup> Tietje, Nowrot, Wackernagel, *Once and Forever? The Legal Effects of a Denunciation of ICSID*, Beiträge zum Transnationalen Wirtschaftsrecht, Heft 74 (2008).

<sup>176</sup> Art. 22 (3) Model BIT US 2004, <http://ita.law.uvic.ca/investmenttreaties.htm>.

<sup>177</sup> Art. 15 (2) Model BIT India 2003; Art. 52 (3) Model BIT 2004 Canada; Art. 35 (2) Draft Model BIT Norway 2007, all at <http://ita.law.uvic.ca/investmenttreaties.htm>.

<sup>178</sup> Art. 15 (4) of the German-Chinese Investment Treaty 2003, see Braun / Schonard, *The new Germany-China Bilateral Investment Treaty - A Commentary and Evaluation in Light of the Development of Investment Protection under Public International Law*, ICSID - FILJ (2007), 258; Art. 13 (2) of the German Model Treaty 2009 and Art. 11 (3) of the French Model BIT 2006; concerning periods of after-effect in investment treaties: Carska-Sheppard, *Issues relevant to the Termination of Bilateral Investment Treaties*, 6 JOURNAL OF INTERNATIONAL ARBITRATION (2009), 755 (761, 768 [Annex]).

regulation? This, in turn, leads to the overriding question concerning the *limits* and *extent* of the individual direct rights conferred on investors.<sup>179</sup> While in the case of a *unilateral* cancellation, the regulation contained in a *survival* clause (whereby the protection of the investment continues for a period of after-effect for the investors of both states) is unambiguous, in the case of a *mutual* cancellation the situation is initially unclear due to the lack of an expressly-stated regulation in the investment treaties. This already arises from general international law, Art. 54(b) of the Vienna Convention on the Law of Treaties.<sup>180</sup> However, the *survival* clause could have the result that the treaty states have tied themselves to the observation of the period of after-effect in the interest of the investor and have thereby created a legal position for the investor which the states are *not* able to revoke through even a mutual regulation. There is a lot to be said for the position that the *survival* clause not only applies in the case of a unilateral cancellation but is also the expression of a general legal principle which is applicable also to other, initially unstated, reasons for cancellation.

If it is the sense and purpose of investment treaties to give investors legal certainty for their investments, then this must also apply in the case that the home state, in cooperation with the host state, wishes to repeal such a treaty. This applies all the more so if, as shown, not only the procedural rights of the investor but also the material protection standards of the investor constitute its *individual direct* rights. Legal certainty can only be achieved if, also in this regard, a self-commitment of the home state occurs. From the investor's individual personality in international law and the reliability of the investment protection, the interpretation arises that the states, even in the case of a mutual cancellation, have, as it were, relinquished the sphere of control in respect of the *period of after-effect*.

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<sup>179</sup> Wälde, *Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State*, 26 ARB. INT'L (2010), 3 (16 Fn. 55) "Theoretically, both states parties could agree to terminate an investment treaty. There has been so far no precedent or in-depth analysis to determine the position of investors who have made an investment under a subsequently terminated BIT after the treaty has been terminated."

<sup>180</sup> UNTS Vol. 1155, 331, "The cancellation of a treaty or the resignation of a party to the treaty can take place a) according to the regulations contained in the treaty or b) at any time if mutually agreed by all parties to the treaty following consultation with the other treaty states."

## b) State sovereignty

Mirroring the elevation of the investor to partial subject in international law the question arises regarding the effect of investor-state dispute settlement on state sovereignty. In this regard, the states involved in investment disputes frequently demonstrate a lack of understanding for the fact that an arbitration tribunal has the jurisdiction to make a ruling concerning possible compensation to be paid from taxation without there being, at least in some cases, an international or national court of appeal to review this ruling.<sup>181</sup> This means – according to their argumentation – that these arbitration tribunals have greater jurisdiction than the national constitutional court whose legitimacy, however, is to be considered as being far greater.<sup>182</sup> Therefore, the states frequently claim that their sovereignty is limited by the regulations concerning the protection of the investor when negotiating investment treaties and in cases of arbitration. Does this mean that the introduction of international obligations for the protection of international investments leads to a loss of sovereignty?

The question to what extent international law has limited state sovereignty has been fundamentally answered in favor of the ‘immediacy in international law’ of the states whereby the states are sovereign because they subordinate their power to the primacy of (international) law.<sup>183</sup> According to a modern and fitting conception, the term ‘state sovereignty’ is relativized because the power of the state, both internally and externally, is subordinated to international law.<sup>184</sup> This is in accordance with the

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<sup>181</sup> The Argentinian Minister of Justice, Rosatti, was quoted as saying the following after Argentina’s defeat in the arbitration case *CMS Gas v. Argentina*, *BBC Monitoring Latin America* – Political, supplied by BBC Worldwide Monitoring (17 May 2005): “*We have been insisting that this tribunal is out of its depth here, that it is not prepared to handle such a quantity of cases involving a single country, that it has a pro-business bias, and that it is not qualified to judge a country’s economic policy.*”

<sup>182</sup> Van Harten, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); *passim.*; critical see: Newcombe, *Book Review* (2007), 71 *MLR* (2008), 147; Sornarajah, *The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty*, in: Shan / Simons / Singh (eds.), *REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW* (2008), 199.

<sup>183</sup> Epping, in: Ipsen (ed.), *VÖLKERRECHT* (2004), Paragraph 5 margin note. 7; Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organisation*, 53 *YALE LAW JOURNAL* (1944), 207 (208) “(...) *the legal authority of the States under the authority of international Law.*”

<sup>184</sup> Mosler, *The International Society as a Legal Community*, *RdC* 140 (1974), 1 (21) “*Of course, the extent to which claims of internal and external sovereignty correspond to reality depends on the state of development of international society. (...) The trend of history is towards relative sovereignty.*”; Boutros-Ghali, *An Agenda for Peace-Preventive Diplomacy, Peacemaking, and Peace-Keeping*, Report of the Secretary-General, UN Doc. A/47/277-S/24111 (1992), No. 17: “*The time*

historical recognition that the realization of sovereignty was, in any case, a gradual process marked by conflict – sovereignty had to regularly adapt to changing conditions as seen, for example, in the comparison of current globalization processes with colonial trading companies and the high level of worldwide exchange in earlier epochs.<sup>185</sup>

What does this mean for our original question whether the assumption of international obligations and the conferring of individual direct rights on the investor for the protection of international investments indeed entails a loss of sovereignty? Investor-state arbitrations in modern investment treaties are enabled by the sovereign consent of both states in favor of all nationals of the treaty states. Arbitration tribunals exercise the mandate conferred upon them in order to settle disputes within the legal framework of the investment treaties concluded by the states, from the generally accepted sources of international law and the law of the host state. Such a state delegation and commitment to obligations in international law as found in arbitration rulings is to be understood as an *exercise* of sovereignty.<sup>186</sup> The Permanent International Court of Justice declared in 1923 concerning treaty commitments in its *Wimbledon* ruling:

*The court declines to see in the conclusion of any treaty by which a state undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain*

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*of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.”*

<sup>185</sup> McCorquodale, *Beyond State Sovereignty: The International Legal System and Non-State Participants*, INT. LAW REV. COLOMB. DERECHO (2006), 103 (112) “*In fact sovereignty has always changed with changed relationships.*”

<sup>186</sup> Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims against the State*, 56 ICLQ (2007), 371, 379, “*By acting on the general consent a tribunal exercises authority that is delegated by states: only the state can grant to an individual the authority to adjudicate a regulatory dispute within its territory. This authority to delegate is inherently sovereign because it stems from the representative status of the state in relation to the population and political group that is associated with its territory.*” (emphasis added); Brower / Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. (2008-2009), 471, 490: “*(...) the consent to arbitration in investment treaties is itself a sovereign act of the state. Consequently, the basis of the arbitrators’ authority in investment treaty cases is founded in a public office which is conferred upon them based on international treaties.*”

way. But the right of entering into international engagements is an attribute of State sovereignty.<sup>187</sup>

Not only are the possibilities of the states to enter into international engagements emphasized according to this understanding of sovereignty as the freedom of the states within the framework of international law. According to this formal understanding sovereignty can only apply as far as the states have not placed limits upon it in international law – or, conversely, states can choose to submit themselves to more regulations in international law *without*, in a legal sense, compromising their sovereignty.<sup>188</sup> Furthermore, the states can ‘retrieve’ this ‘*delegated authority*’ in the framework of investor-state arbitration proceedings at any time for the future.<sup>189</sup>

Concerning the protection of investments, states remain at liberty to exempt certain sectors or standards from the jurisdiction of investment treaties if they consider this to be absolutely necessary for the maintenance of their ‘policy space’.<sup>190</sup> The standards in international law themselves, for example the principle of fair and equitable treatment, also offer the possibility to balance the interests of the host state and the investor. The states react as masters of the treaties to the rulings of the arbitration tribunals in international investment law with the revision or even cancellation of their investment treaties. Their consent can be *taken back* at any time and, therefore, the states involved have the final decision when adjusting the future extent and effect of investor-state arbitration based on investment treaties.

<sup>187</sup> *Case of the SS Wimbledon (UK, France, Italy, Japan and Poland (intervening) v. Germany)*, PCIJ Rep Series No 1 (1923), 15 (emphasis added); pointedly see Klabbers, *Clinching the Concept of Sovereignty: Wimbledon Redux*, 3 AUSTRALIAN REV. INT’L EUR. L. (1998), 345, 347: “(...) *state can become bound precisely because it is sovereign.*”

<sup>188</sup> Peters, *Privatisierung, Globalisierung und die Resistenz des Verfassungsstaates*, in: Mastonardi / Taubert (eds.), *STAATS- UND VERFASSUNGSTHEORIE IM SPANNUNGSFELD DER DISZIPLINEN* (2006), 100 (120); Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, 1 J INT. DISP. SETTLEMENT (2010), 341 (343) [„(...) *that the capacity to agree to binding limitations on sovereignty is an attribute of that same sovereignty (...)*“]. It should clearly not be underestimated that international investment law can also shape internal law and the regulatory autonomy of the host state.

<sup>189</sup> Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, JIEL 6 (2003), 841, 846/847 “*But when delegated powers can in fact be withdrawn, by definition states retain the ultimate power to decide an issue or choose a policy. (...) The key point is that revocable delegations do not implicate sovereignty, though they nearly always represent the acceptance of temporary limits on the exercise of sovereign power.*”

<sup>190</sup> UNCTAD, *Preserving Flexibility in International Investment Agreements: The Use of Reservations* (2006).

The actual result of a sovereign 'delegation of authority' also includes the arbitration ruling. This also applies to the arbitral rulings from ICSID proceedings in which state jurisdiction plays no role at all,<sup>191</sup> thus the losing state fundamentally does not now have the domestic possibility to effect a revision. This is because it is the injury to the rights of an investor which has triggered the obligation for redress in international law: a successful arbitration ruling in ICSID proceedings (only) determines this. It is international law which inherently forms state sovereignty. Consequently, the theory could be put forward that the submission to investor-state arbitration and protection standards in international investment law embodies the international 'rule of law' which *per definitionem* does not represent a loss of sovereignty as the states are sovereign for the very reason that they submit their power to the primacy of law.

A further interesting aspect arises: it is in particular the network of bilateral investment treaties and the formulation of the standards contained therein that enables the states involved to gain additional and new powers to also shape the regulation of *transborder* investment relationships.<sup>192</sup> The states' important role as a 'custodian' responsible for the ultimate safeguarding of the *transborder rule of law*, legitimized by the system of investment protection, arises not only in respect of the jurisdiction delegated to these arbitration tribunals. As a result the states, according to this perception, not only pursue their own immediate interests but also assume, quasi as trustees,<sup>193</sup> general responsibility for the integrity of the investor-state system in

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<sup>191</sup> With the exception of the regulations concerning the rejection of enforcement due to immunity; ICSID arbitration can well be described procedurally as '*self-contained*', as here no state court would be able to instigate annulment proceedings or challenge on the basis of bias; conversely, ICSID proceedings offer review mechanisms which take the place of state courts in the form of *annulment* proceedings and through the systems of examination of challenges of bias contained in the convention (Art. 57 in conjunction with 14 Para. 1, 58 ICSID Convention, Arbitration Rule 9).

<sup>192</sup> Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, JIEL 6 (2003), 841, 862, 871: "International institutions are, paradoxically, saviors of sovereignty. (...) The international institutions which assist states in instantiating their sovereignty – in realizing the status of sovereign – are those institutions that help states manage the challenges of globalization, address needed public goods, and meet the demands contemporary societies place upon them."; Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNATIONAL LAW (1998), 7, 10.

<sup>193</sup> Hobe, *Discussion*, in: Hofmann (ed.), *NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW* (1999), 75 ["(...) that the state becomes more and more an intermediate entity (...), which as a trustee (...)."].



international law. This role can be an expression of a ‘new’ sovereignty of the states in globalization and the international community.<sup>194</sup>

## VI. Outlook for the future

Arising from the perception of investment arbitral jurisdiction which determines state responsibility concerning non-state actors,<sup>195</sup> it could be said that one of the most important features of this jurisdiction is that the violation of the rights of the investor in international law does not have the same legal consequences as the violation of international law concerning a state. Under general international law such legal consequences primarily concern the restitution of the *status quo ante* as expressed in the *Chorzów* ruling of the Permanent Court of International Justice.

*The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*<sup>196</sup>

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<sup>194</sup> Chayes / Handler Chayes, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995), 27 “*It is that, for all but few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonable good standing on the regimes that makes up the substance of international life. (...) The only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.*”; Alvarez, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* (2011), 438 “*Participation and compliance with them [by this such legal regimes are meant] is, increasingly, the only option States have.*”; Slaughter, *Sovereignty and Power in a Networked World Order*, *STAN. J. INT’L L.* 40 (2004), 283, 285; for German jurisprudence see Hobe / Nowrot, *Whither the Sovereign State*, *GYIL* (2007), 243.

<sup>195</sup> As opposed to state responsibility between the states see, van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, in Schill (ed.), *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* (2010), 721 (722) “*It is state liability law for foreign investors.*”

<sup>196</sup> *Permanent Court of International Justice, Factory at Chorzów (Germany v Poland), Merits*, 13 September 1928, *PCIJ Series A, No 17*, 47 (emphasis added), “*Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*”; Art. 35 of the Law of State Responsibility [‘Restitution’] “*A State responsible for an internationally wrongful act is under an*

Contrary to this, investors, host states and arbitration tribunals apparently agree in international investment law that monetary compensation is *the* legal consequence of a granting arbitration award<sup>197</sup> although this is not expressly stated in investment treaties.<sup>198</sup>

*In the absence of restitution or agreed renegotiation of contracts or other measures of redress, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party.*<sup>199</sup>

If investment arbitration proceedings are originally based on international law but their legal consequences remain restricted to the payment of monetary compensation, would this not result in a possible alteration of *structural elements* in international law as a whole? There would then no longer be a ‘standardized’ catalogue of legal consequences for all types of violations of international law, and international law, beyond its conventional role as a balancing order between states,<sup>200</sup> would increasingly exhibit – in any case – elements of an *economic compensation code* between states and non-state actors.

With the modern international investment law states have not only – in their understandable self-interest – conferred individual direct rights on the investor and offered the individual investor itself the possibility to more effectively enforce these

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*obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed (...).”*

<sup>197</sup> Of course, *in rem restitution* is not always possible but this alone could not explain the phenomenon of monetary compensation; it is also possible that comparatively high compensation payments in particular have the *indirect* result that the defending state changes its legislation or policy. – There are a few exceptions to this which were probably due to the special features of the respective case, *Antoine Goetz and Others v Republic of Burundi*, ICSID No ARB/95/3, Award, 10 February 1999; *Nycomb v. Latvia*, Award, 16 December 2003, there 5.1., 5.2., para. 166-168; *ADC v. Hungaria*, Award, 2 October 2006, para. 479-500; *Micula v. Rumania*, Decision on Jurisdiction, 28 September 2008; Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT’L (2004), 325.

<sup>198</sup> Exceptions are Art. 1135 Para.1 NAFTA, Art. 54 ICSID Convention and Art. 12 Para. 2 and Art. 26 Para. 8 of the Energy Charter Treaty.

<sup>199</sup> *Sempra Energy International v. Argentina*, ICSID No. ARB/02/16, Award, 28 September 2007, No. 401 (emphasis added).

<sup>200</sup> Mosler, *Die Erweiterung des Kreises der Völkerrechtssubjekte*, 22 ZAÖRV (1962), 1 (2, 18, 44, ‘Ausgleichsordnung’).

direct rights, and, as a result, strengthen the participation (at least indirectly) of these non-state actors in the development of modern international law. Through the investor-state dispute settlement system states also promote the stability of international economic relations and remain equally indispensable as custodians of a cross-border rule of law. The paradigm of the elevation of the investor to a partial subject in international law can be understood as a manifestation of the globalization process and can be embedded in the broader development of international law. The recognition of the investor by investment treaties as an effective unit in international law contributes to international law itself becoming a legal system not only of the states but also of non-state actors in international relations.<sup>201</sup> Should modern international law be willing to look behind legal fictions and embrace this economic reality, then these non-state actors may be understood as a part of the international community in a wider sense. Thus, international investment law, as an ‘international law of globalization’,<sup>202</sup> represents a realistic and contemporary form of international law.

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<sup>201</sup> Spiermann, *Twentieth Century Internationalism in Law*, 18 EJIL (2008), 785, 811 (“(...) *investment arbitration may constitute the first proper field in which relationships between states and individuals are taken to be horizontal in kind.*”)

<sup>202</sup> Hobe, *New Trends of International Law in the Era of Globalization*, 3 The Xiamen Academy of International Law, Collected Courses 2010 (2011), 3, 24; Petersmann, *International Economic Law in the 21st Century: Need for Stronger ‘Democratic Ownership’ and Cosmopolitan Reforms*, EUI Working Papers LAW no 2012/17, 23 ‘*a more cosmopolitan system*’.

