INVESTORS’ RIGHTS QUA HUMAN RIGHTS? REVISITING THE ‘DIRECT’/ ‘DERIVATIVE’ RIGHTS DEBATE

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I. INTRODUCTION

In the context of contemporary mixed arbitration under international investment agreements (IIAs), giving rise to what has been eloquently characterized as *jurisprudence constante* of arbitral tribunals, the evolving role of foreign investors as non-State actors, seemingly participating *in par* with sovereigns, appears to challenge prevailing conceptions and understandings of the existing international legal framework. In his recent Hague Academy book on public international law rules protecting investments, José Alvarez masterfully identifies a substantial number of ‘legalistic questions’ raised by the role of investors in the investment regime, and *inter alia*:

...Is investor-State arbitration...a form of inter-State dispute settlement where inter-State rules should be presumed to govern, or a new kind of forum for resolving new international rights accorded directly to non-State parties? ... Should the subsequent practice of States really determine the rights of third-party beneficiaries to such treaties? Alternatively, can investors now waive their BIT rights *ex ante* by settling their claims such that their home States can no longer complain about the harms done to their nationals? If BITs intend to accord directly enforceable rights to non-State third parties, should not arbitrators take this seriously so that, for example, once

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1 Comprising of more than 3000 concluded bilateral investment treaties (BITs) and Free-Trade Agreements (FTAs) equipped with provisions on investment protection, as, e.g., the 1992 North American Free Trade Agreement, *ILM* 32 (1992): 289 (Parts. 1–3); *ILM* 32 (1992): 605 (Parts. 4–8), to which the US, Canada and Mexico are Parties, and whose Chapter Eleven provides protection for investors in NAFTA countries.
these parties have vested treaty rights these cannot be waived or altered by
the States as through a new inter-State interpretation of the treaty?3

The answer to each of the above and other similar questions may very
much depend on which side of the ongoing ‘direct’/‘derivative’ investors’
rights debate one takes, especially given that the ‘direct’ rights approach in
fact advocates an understanding of the rights afforded to individuals
under IIAs qua human rights, as the ones guaranteed under the European
Convention for the Protection of Human Rights and Fundamental
 Freedoms (hereinafter: ECHR) and its Protocols.4 Accordingly, the present
study will address this specific issue and attempt to draw the normative
line between rights under IIAs and human rights treaties. Although the
analysis will be mainly focused on international investment arbitration,
nonetheless the lessons learned and conclusions reached have bearing on
the application and interpretation of the ECHR.

This contribution does not aim to directly engage in the general discus-
sion on the constantly evolving role of the individual in the international
legal system, or its, occasionally supported, rise from the status of object to
that of a subject of international law; these problématiques are eloquently
discussed elsewhere.5 Nor does it aspire to delve into the possibility of
incorporating human rights consideration in investment arbitration,6 as a
matter of interpretation or application.7 Rather, the discourse herein will
focus on the practical aspects of the ‘direct’/‘derivative rights’ debate in

3 J-E. Alvarez, The Public International Law Regime Governing International Investment
4 213 UNTS 221.
5 See e.g. J. Spiropoulos, ‘L’individu et le droit international’, Recueil des Cours 30 (1929):
191–270; P-K. Menon, ‘The Subjects of Modern International Law’, Hague Yearbook of
International Law 3 (1990): 30–86; R. Hofmann (ed.), Non-State Actors as New Subjects of
International Law— from the Traditional State Order towards the Law of the Global Community: Proceedings of an International Symposium of the Kiel Walther-
Schücking-Institute of International Law, March 25 to 28, 1998 (Berlin: Duncker & Humblot,
1998); F-A. Satchivi, Les sujets de droit: contribution à l’étude de la reconnaissance de l’individu
comme sujet direct du droit international, (Paris: L’Harmattan, 1999); E. Roucounas, ‘Facteurs
Concept of International Legal Personality: An Inquiry into the History and Theory of
and the International Legal System’, in International Law, M-D. Evans (ed.) (Oxford: Oxford
University Press, 2006, 2nd edn.).
6 See e.g. P.–M. Dupuy, et al. (eds.), Human Rights in International Investment Law and
Arbitration, (Oxford: Oxford University Press, 2009); B. Simma, ‘Foreign Investment
Arbitration: A Place for Human Rights?’, International and Comparative Law Quarterly
7 For the crucial, but often neglected difference between the two normative processes,
see A. Gourgourinis, ‘The Distinction between Interpretation and Application of Norms in