

# **Investor Rights in International Investment Agreements: A Theory of Dependent Right?**

## **Sao Paulo, 24 April 2014**

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## Background

- Various systemic implications.
- Tribunals' inconclusive approaches:
  - *ADM v. Mexico*
  - *Cargill v. Mexico*
  - *Corn Products v. Mexico*
- Efforts to explain using Int'l Law cases
  - *La Grand* (Germany v. US)
  - *Avena* (Mexico v. US)

# Currents theories

## - **Derivative rights**

- Investors are not afforded rights, but indirectly benefit from the rights of their home states.

## - **Direct rights**

- Individuals enjoy direct rights, **independent** from their home states due to their control over the claim.
- *Corn Products v. Mexico* – rights under IIAs are inalienable (para. 173).

# Issues with current theories

- Investor rights = human rights?
- In human right treaties – granting or recognizing existing inalienable rights?

# Consequences of Direct Rights

- State parties' autonomy over the treaty.
- Clash of regimes – “countermeasures in int’l trade law and illegitimacy in int’l investment law”.

# Issues Unpacked

**Historical Development**

**Judicial remedies for breaches of rights**

# Historical Dev. in Int'l Law

- Granting of rights and obligations:
  - Treaty
  - Customary International Law
    - *Jus cogens*
- Enforcement of individual rights
  - Domestic court
  - International fora
    - Diplomatic protection
    - Mixed claims – Central American Court of Justice

# Theory of Dependent Rights

- **Individual rights in IEL**
  - Different frameworks of treaties may indicate intention to grant individual rights.



# Theory of Dependent Rights

Examples:

- **Obligation to protect**

“Each Party shall accord to investors of another party treatment no less favorable than it accords...” (NAFTA, Article 1102)

- **Granting of individual rights**

“Investment of nationals or companies of either Contracting Party shall not be nationalized...” (Indonesia – UK BIT, Article 5(1))

# Theory of Dependent Rights

- **Judicial remedies for breach of rights**

	<b>General Int'l Law</b>	<b>IAs</b>
Avenue	Domestic court – diplomatic protection	Possibility of direct access thru ISDS
Choice of forum	Reliance on the state of nationality	Depending on the ISDS provision

# Analysis

- Methods of conferral of rights:
  - Direct – treaties
  - Derivative – CIL and treaties
- Shortcoming in interpretation – the need to look into the intention of the parties.
- State parties to IIAs can amend, terminate the IIAs.

# Conclusion

- Method of judicial remedies in Int'l Law does not determine the nature of rights.
- Rights of investors are dependent on the states as the master of the treaties, e.g. amendment, suspension or termination of the treaties.

# Thanks for Your Attention

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