

ARTICLE

# THE HUMAN RIGHT TO PROPERTY IN INTERNATIONAL INVESTMENT LAW

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## ABSTRACT

This article seeks to address part of the “legitimacy crisis” currently underway in the international investment regime. It identifies shortcomings in the jurisprudential coherence of investor-state arbitral awards in expropriation cases where the state defends its actions by invoking human rights considerations. This article suggests the interpretation of the scope and characteristics of investors’ property rights under investment law—as well as the property rights of non-parties to investor-state disputes, such as the ancestral land rights of Indigenous peoples—should be in line with the meaning of property rights under human rights law. This approach has the methodological benefit of incorporating to investment law human rights law theory’s, methods of interpretation and jurisprudence— which favours a balancing act and proportionality analysis, and provides a margin of appreciation to state authorities when addressing multiple human rights considerations. It provides consistent analytical tools to overcome the difficulties of broadly stating that human rights should apply to investment law, which can be insufficient as a guide to interpretation in the context of specific disputes.

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## INTRODUCTION

With the recent wave of protectionist sentiments emerging in the political sphere—including the new gains of Eurosceptic parties, Brexit, and tensions between the United States and its trading partners since the 2016 election—the legitimacy of the institutions at the foundation of the trade liberalization system are increasingly under pressure. The international investment regime has attracted much academic commentary, especially with regard to mechanisms for investor-state dispute settlement (“ISDS”). Though these mechanisms have been established through over 3,200 international investment agreements (“IIAs”), including bilateral investment treaties (“BITs”) and free trade agreements (“FTAs”),

observers have signalled many shortcomings in the functioning of the regime.<sup>1</sup> Some claim the system of international investment arbitration is undergoing a “legitimacy crisis.”<sup>2</sup>

Critics of ISDS point to considerations of independence, impartiality, and competence of private arbitrators hired from a pool of corporate lawyers to decide on public interests matters. Commercial arbitration, where the protection of confidential business information is a major concern, serves as the original basis of ISDS’ institutional setting. However, problems of transparency and public accountability emerge where important issues of public interest are being decided in a similar setting.<sup>3</sup> Beyond institutional concerns, an apparent and often irreconcilable contradiction can be identified from the various awards. This has been attributed in part to the fact that arbitration claims are awarded by *ad hoc* panels without a right to appeal. Some try to explain these contradictions by the personal biases of private arbitrators and/or the wide discretion they enjoy when making decisions based on vague treaty standards without adequate guidelines and consistent methodology in legal reasoning.<sup>4</sup>

The above shortcomings arguably translate in a structural bias in favour of the investors.<sup>5</sup> This issue is particularly apparent in cases involving claims of indirect expropriation for regulatory measures adopted by states in furtherance of public objectives such as the protection and fulfilment of human rights—where the investment regime is faced with a “flexibility-stability dilemma” between investment protection and the state’s right (or perhaps duty) to regulate.<sup>6</sup> Various proposals seek to address this perceived structural imbalance between investors’ interests and human rights considerations,<sup>7</sup> where

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- 1 Alfred-Maurice de Zayas, *Report of the Independent Expert on the promotion of a democratic and equitable international order*, UNHRCOR, 33d Sess, Agenda item 3, UN Doc A/HRC/33/40, (12 July 2016) at 3 [de Zayas, 2016 Report].
  - 2 See e.g. Silvia Steininger, “What’s Human Rights Got to do With it? An Empirical Analysis of Human Rights References in Investment Arbitration” (2018) 31:1 *Leiden J Intl L* 33 at 33-34 [Steininger]; Susan Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions” (2005) 73:4 *Fordham L Rev* 1521.
  - 3 See e.g. Jasper Krommendijk and John Morijn, “‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration” in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, eds, *Human rights in International Investment Law and Arbitration* (New York, NY: Oxford University Press, 2009) 422 at 449 [Krommendijk and Morijn]; Alfred-Maurice de Zayas, *Report of the Independent Expert on the promotion of a democratic and equitable international order*, Alfred-Maurice de Zayas, UNHRCOR, 30th Sess, Agenda item 3, UN Doc A/HRC/30/44, (14 July 2015) at paras 15-16 [de Zayas, 2015 Report]; de Zayas, 2016 Report *supra* note 1 at para 23; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties - Standards of Treatment* (Alphen aan den Rijn: Wolters Kluwer, 2009), Ch 1, section 1.49 [Newcombe and Paradell]; Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (London, New York: Routledge, 2016) at 228 [Mouyal].
  - 4 See e.g. Steininger *supra* note 2 at 5; Jeff Waicymer, “Balancing Property Rights and Human Rights in Expropriation” in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (New York, New York: Oxford University Press, 2009) 275 at 298, 304 [Waicymer]; Krommendijk and Morijn, *supra* note 3 at 303-04.
  - 5 See e.g. Julien Cantegreil, “Implementing Human Rights in the NAFTA Regime—The Potential of a Pending Case: *Glamis Corp v USA*” in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (New York: Oxford University Press, 2009) 367 at 369 [Cantegreil]; de Zayas, 2015 Report, *supra* note 3 at paras 15-16; Steininger, *supra* note 2 at 51.
  - 6 See e.g. Mouyal, *supra* note 3, especially ch 4.
  - 7 See e.g. Victoria Tauli-Corpuz, *Report of the Special Rapporteur of the Human Rights Council on the rights of Indigenous peoples on the impact of international investment and free trade on the human rights of Indigenous peoples*, UNGAOR, 70th Sess, UN Doc A/70/301, (2015) (discussing how Indigenous peoples bear a disproportionate burden of the systemic imbalances between investors’ rights and human rights).

investment protections risk hindering states' ability to impose human rights obligations on transnational corporations or regulate for the realization of human rights.<sup>8</sup>

Some of those proposals advocate for treaty-reform. In addition to reforms in the institutional setting of the regime, there are attempts aiming to include human rights considerations directly into investment agreements. In the same fashion, Alfred-Maurice de Zayas has called for a recognition that human rights must have precedence over investors' rights.<sup>9</sup> However, most IIAs—even recent ones—remain silent on matters of human rights and regulatory space of states. Nevertheless, a recent practice in treaty drafting can be identified where states are more inclined to safeguard their prerogative to regulate in matters relating to human rights, labour rights, and environmental, public health and safety matters against protection of foreign investment in a more balanced manner.<sup>10</sup> Such an approach was adopted in the recent FTA between the United States, Mexico and Canada (“USMCA”), where sections are devoted to the protection of Indigenous peoples' rights alongside labour rights, environmental protection, gender-related matters, and the promotion of corporate social responsibility.<sup>11</sup> Other examples include an exception in the Trans-Pacific Partnership Agreement (“TPP”) for the provision of more favourable treatment to the Maori people in accordance with New Zealand's obligations under the Treaty of Waitangi,<sup>12</sup> and the broad exception for measures adopted with respect to

8 Mouyal, *supra* note 3 at 140-41.

9 de Zaya, 2015 Report, *supra* note 3 at 1-2.

10 See e.g. the analysis of different approaches to treaty drafting by Mouyal, *supra* note 3 at 170-75.

11 *United States-Mexico-Canada Agreement*, 30 November 2011 (not yet ratified) [USMCA], art. 32.5 (Indigenous Peoples Rights), Chapter 24 (a comprehensive chapter on environmental protections including art. 24.15 on the protection of the knowledge and practices of Indigenous peoples related to the conservation and sustainable use of biodiversity), Chapter 23 (a comprehensive chapter on the protection of labor rights, including the protection of children and migrant workers and provisions addressing gender-related matters). Included in the investment chapter are an exception on the protection of the environment, health, safety, and other regulatory objectives (USMCA, art. 14.16) and a provision on the encouragement of voluntary corporate social responsibility standards for the protection of, *inter alia*, human rights and Indigenous peoples' rights (USMCA, art. 14.17). Confirming the statement made in this article that the investment regime is undergoing a crisis, the USMCA eliminates the investor-state dispute settlement section of the controversial NAFTA investment Chapter 11. However, an updated investment chapter (Chapter 14) is included which could be enforced in domestic courts or through the state-to-state dispute resolution mechanism (Chapter 31). In addition, a grandfather clause is included which provides that investors will be able to use the previous ISDS mechanism of NAFTA Chapter 11 for investments made before the termination of NAFTA for a period of three years following the termination of NAFTA (see USMCA, Annex 14-C). It remains to be seen whether the agreement will be ratified by the three State Parties as a number of political impediments are foreseeable. See e.g. Tom Blackwell, “Uphill battle to get USMCA through Congress could become ‘mountain’ after midterms” *Financial Post* (30 October 2018) online: <<https://business.financialpost.com/news/economy/intensive-tracking-of-u-s-congress-support-for-new-trade-deal-begins-one-analysis-finds-85-vote-shortfall>> archived at <<https://perma.cc/3QD8-JEFA>>: (“[i]t is an uphill battle to get a trade deal through Congress in an ideal political environment. [...] If we have a divided government (after the mid-terms) [...] that hill becomes a mountain. [...] Mexico won't ratify the deal as long as it faces U.S. steel and aluminum tariffs”).

12 Risa Schwartz, “Toward a Trade and Indigenous Peoples' Chapter in a Modernized NAFTA” (2017) Center for International Governance Innovation Paper No 144 at 9-10 [Schwartz]; Art. 29.6, *Trans-Pacific Partnership Agreement*, 4 February 2016 [TPP]. See “Consolidated TPP Text—Table of Contents,” online: <[www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng)> archived at <<https://perma.cc/3VPW-L8Y4>>. The *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* [CPTPP], 8 March 2018 (entered into force on 30 December 2018 among the first six countries to ratify the agreement—Canada, Australia, Japan, Mexico, New Zealand, and Singapore, and entered into force 14 January 2019 for Vietnam) incorporated most parts of the TPP and suspended the applications of some provisions. See Art. 2 of the CPTPP, online: <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpp/text-texte/cptpp-ptpp.aspx?lang=eng>> archived at <<https://perma.cc/J24Z-Y4R4>>.

Indigenous peoples under the 2017 Canadian Free Trade Agreement.<sup>13</sup> As will be detailed below, the most consistent trend in this respect is to include a provision that distinguishes non-compensable legitimate regulatory measures having a negative economic effect on investments from indirect compensable expropriation—based on the jurisprudential development of the police power doctrine.<sup>14</sup>

When drafting treaty provisions, achieving a proper balance between investors' interests and states' human rights obligations is a difficult endeavor as treaty negotiations typically result in open-ended norms. In addition, one might question whether including broad references to human rights is sufficiently helpful in guiding arbitrators in their assessment of concrete disputes given their lack of expertise in the field of human rights. Therefore, there is a real need for an appropriate legal methodology to deal consistently with investment protection disputes involving human rights concerns.

On this point, other attempts to redress the systemic imbalance between investors' rights and human rights considerations in the investment regime seek to achieve a more balanced and principled interpretation of treaty standards. For instance, The UN High Commissioner for Human Rights urges states to use human rights arguments in ISDS and advocates for an interpretation of investment agreements that takes the social context into account. This call aims at overcoming the absence of a dispute settlement mechanism for the protection of economic, social, and cultural rights and the lack of definition of investors' responsibilities towards the protection of such rights in the participation of private foreign investors to the provision of essential public services.<sup>15</sup> Drawing inspiration from international human rights law, Henckels, Krommendijk and Morijn advocate for a principled use of the concept of proportionality.<sup>16</sup> They also suggest using non-investment law obligations such as human rights for "(re)interpreting investment law provisions and principles" in a way that reduces the wide margin of discretion left to arbitrators.<sup>17</sup> Such an approach would help redress the isolationist trend in arbitrators' legal reasoning.<sup>18</sup> Others like Steininger and Vadi stress the benefits of a comparative approach between the sub-fields of international law to build coherence in the international law system.<sup>19</sup> In the same vein, Mouyal proposes applying the "gravitational pull theory" of international law, to steer the interpretation of the substantial standards of investment protection toward the harmonization of international human rights and investment law using external factors such as human rights concepts.<sup>20</sup> Clearly, those approaches target not only the discrepancies between the protection of investors' rights against human rights, but also the inconsistencies in arbitration tribunals' reasoning.

13 Schwartz, *supra* note 12 at 10, 14. *Canadian Free Trade Agreement*, Canada, Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland and Labrador, the Northwest Territories, Yukon and Nunavut, 6 April 2017, (entered into force 1 July 2017), [Canadian Free Trade Agreement] online: <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>>.

14 See e.g. *Canada-Peru FTA*, art. 812.1; *Canada-China FTA*, Annex B.10; *China-Tanzania BIT*, art. 6(2) and (3); *Comprehensive Economic and Trade Agreement (CETA)*, Annex 8-A; *US-Korea BIT*, Annex 11-B (3); TPP, *supra* note 12, Annex 9-B. Those agreements and others are available online at UNCTAD, "International Investment Agreements Navigator," *Investment Policy Hub* <<https://investmentpolicyhub.unctad.org/IIA/>> archived at <<https://perma.cc/R6LC-C2B3>>.

15 High Commissioner for Human Rights, *Human Rights, Trade and Investment*, UNESCROR, 2003, UN Doc E/CN.4/Sub.2/2003/9, (2 July 2003) at paras 41, 54–55.

16 Krommendijk and Morijn, *supra* note 3; Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge, UK: Cambridge University Press, 2015) [Henckels].

17 *Ibid* at 423, 426.

18 *Ibid* at 426.

19 Steininger, *supra* note 2 at 50; Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: Cambridge University Press 2015) at 18-ff.

20 Mouyal, *supra* note 3 at 215-ff.

Following this trend, this article suggests the interpretation of the scope and characteristics of investors' property rights under investment law—as well as the property rights of non-parties to investor-state disputes—should be in line with the meaning given to property rights under human rights law. As will be detailed below, using this approach in the context of expropriation claims offers many positive benefits to address the imbalance in investment arbitrations and remedy in part the legitimacy crisis and the flexibility-stability dilemma of the investment regime.

This imbalance in investment arbitration is not about normative irreconcilability between investors' rights and human rights, but rather a methodological issue. Indeed, states, third parties, investors and arbitrators alike have invoked—with varied success—human rights arguments to support their respective interpretation of the substantive protection and limitations of investors' rights in IIAs.<sup>21</sup> This is not a one-sided approach for the sole benefit of respondents in ISDS. Rather, human rights law theory and methods of interpretation present analytical tools to resolve the tension between regulation and investment protection in a consistent manner that takes into account the ultimate purpose of attracting foreign investment: to promote sustainable human and economic development.<sup>22</sup> The method suggested in this article thus takes the view that the sub-fields of international law like investment law and human rights law are systemically integrated with general international law and cannot be seen in isolation.<sup>23</sup>

One might question the appropriateness of corporate (non-human) investors benefiting from human rights arguments. That said, foreign investors already benefit from treaty protections which present structural similarities with human rights norms. Examples include the right to due process, fair and equitable treatment, and the protection of property rights. Using interpretive tools drawn from human rights legal methodology in circumscribing the scope and limitations of such investment protections could therefore infuse coherence in the legal analysis of investment disputes. As will be seen, recognizing the human right character of one actor's property rights is also a way to acknowledge the limits inherent in the enjoyment of such rights. Consequently, appropriate protection for investors' rights can be ensured, while preventing nationals from abuses by foreign investors of their property and safeguarding the legitimate exercise of state regulatory powers.

Such an approach can also resolve the difficulties of broadly stating that human rights should apply to investment law. Merely asking to take human rights considerations into account can be insufficient as a guide to interpretation in the context of specific

21 Steining, *supra* note 2; Krommendijk and Morijn, *supra* note 3 at 429; Mouyal, *supra* note 3 at 152-56.

22 See e.g. Krommendijk and Morijn, *supra* note 3 at 430-31 and footnotes 35-38 (with references to a number of preambles claiming international investment is in the benefit of sustainable development); Peter Muchlinski, "Holistic Approaches to Development and International Investment Law: The Role of International Investment Agreements" in Julio Faundez and Celine Tan, eds, *International Economic Law, Globalization and Developing Countries* (Cheltenham, United Kingdom: Edward Elgar, 2010) at 180.

23 See e.g. Prosper Weil, "The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois" (2000) 15:1 ICSID Review Foreign Investment LJ 401. Antonio R Parra, then Deputy Secretary General of ICSID, shares this view in "Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties" (2001) 16 ICSID Review-Foreign Investment LJ 20 ("[t]he treaty being an instrument of international law, it is I think also implicit in such cases that the arbitrators should have recourse to the rules of general international law to supplement those of the treaty" at 21). See also Krommendijk and Morijn, *supra* note 3 at 427; Mouyal, *supra* note 3 at 230 citing International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, online: <[http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf)> archived at <<https://perma.cc/8W6D-WNY9>> (concluding that "increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions" at 248-56).



disputes. Rather, incorporating property as a human right in investment law allows for cross-fertilization between investment law and human rights law in the interpretation of the normative relationship between the property rights of foreign investors and other conflicting human rights considerations.

This article is divided as follows. Part I discusses the contradictory approaches adopted by various arbitral tribunals with regard to the reception of human rights arguments in investment disputes, with illustrations of inconsistencies in the application of concepts such as police power, margin of appreciation, proportionality and the standard of compensation in expropriation cases. This discussion will help identify the gaps in investment arbitration jurisprudence where the interpretation of investors' and third parties' property rights as human rights can be helpful. Part II asks whether property is protected under positive international human rights law, and if so, what are the characteristics of the human right to property. Part III concludes with a discussion of the benefits of applying the view that property rights are part of the human rights catalogue to investment law.

## I. INVESTMENT ARBITRATION AND HUMAN RIGHTS: IMBALANCE AND INCONSISTENCIES

Many have observed inconsistencies in the interpretation of treaty norms in investment arbitration awards. This Part illustrates some of those contradictions expressed in the divergent views of arbitration tribunals regarding the relevance of human rights considerations in the analysis of investor-state disputes and the differences in reasoning in relation to standards of expropriation. With respect to human rights, two categories of cases are identified: (1) cases where human rights considerations were completely or partly disregarded, thereby adhering to an isolationist stand towards the relevance of human rights law to investment law; and (2) cases where arbitrators have adopted a human rights-friendly approach. The review of expropriation cases focuses on the uneven application of the concepts of police powers, margin of appreciation, proportionality, and the standards of compensation.

### A. Rejection of Human Rights Arguments

The applicability of international human rights law to investment arbitrations was dismissed in a number of cases. The two related cases of *Pezold v Zimbabwe* and *Border Timbers v Zimbabwe*,<sup>24</sup> and the *Glamis*<sup>25</sup> case under the North American Free Trade Agreement (“NAFTA”) Chapter 11 Arbitration<sup>26</sup> are illustrative in this respect.

#### i. The *Pezold* and *Border Timbers* Cases

The *Pezold* and *Border Timbers* disputes arose out of Zimbabwe's land reform where the government compulsorily acquired the properties of the claimants, European investors who operated timber plantations. Zimbabwe justified those expropriations as beneficial for the general public—especially for the Indigenous people who had been disadvantaged

24 *Bernhard von Pezold and others v Republic of Zimbabwe* (2015), ICSID Case No ARB/10/15 [*Pezold*]; *Border Timbers Limited and others v Republic of Zimbabwe* (2012), ICSID Case No ARB/10/25 [*Border Timbers*]. Most investment arbitration cases cited in this study are available online at <<https://www.italaw.com>> archived at <<https://perma.cc/LCD5-VWHF>>.

25 *Glamis Gold, Ltd. v United States of America* (2009), UNCITRAL NAFTA (Chapter 11 Arbitration Tribunal) [*Glamis*].

26 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 32 ILM 289 (entered into force 1 January 1994) [NAFTA]. See *supra* note 11 on the relationship between NAFTA Chapter 11 and the suppression of the investor-state dispute settlement mechanism in the new USMCA.

by the colonial system of land tenure—in order to remedy the uneven distribution of land and promote sustainable development.<sup>27</sup>

The tribunal refused an *amicus curiae* (impartial advisor) intervention. The application for intervention emphasized the international obligations of the investors and the respondent state towards Indigenous peoples. More specifically, they referred to Art. 26 of the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”)<sup>28</sup> as requiring Zimbabwe to give legal recognition and protection to their lands. They also targeted the responsibility of corporations to assess whether Indigenous peoples might have a claim to a specific territory under international law, and not assume that the absence of official title prevents the existence of their land rights.<sup>29</sup> The tribunal concluded that:

The Petitioners, in effect, seek to make a submission on legal and factual issues that are unrelated to the matters before the Arbitral Tribunals. The Arbitral Tribunals agree in this regard with the Claimants that the reference to “such rules of general international law as may be applicable” in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs.<sup>30</sup>

In the proceedings, Zimbabwe cited extensively the jurisprudence of the European Court of Human Rights (ECtHR) to support its position that the land reform was in the public interest. It contended that the tribunal should assess the legality of the expropriations on the basis of the wide margin of appreciation doctrine and the proportionality principle as developed in the ECtHR’s case law.<sup>31</sup> The wide margin of appreciation doctrine provides that national authorities are in a better position than an international decision-maker to appreciate what is in the public interest.<sup>32</sup> The proportionality principle aims at balancing the various interests involved, and assessing whether the measures adopted are rationally connected to their public interest purpose and do not disproportionately affect the interests of individuals.

The tribunal dismissed the proportionality argument by distinguishing its application in other investment cases<sup>33</sup> and rejected the margin of appreciation argument in these words:

Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law.<sup>34</sup>

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27 *Bernhard von Pezold and others v Republic of Zimbabwe* (2105), ICSID Case No ARB/10/15 at para 481 [*Pezold v Zimbabwe* (Award)].

28 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 UNGAOR 107th Plen Mtg UN Doc A/RES/61/295 (2007) [UNDRIP].

29 *Pezold and Border Timbers*, *supra* note 24, Procedural Order 2 (26 June 2012) at paras 25-28 [*Pezold and Border Timbers* (Procedural Order 2)]. See also European Center for Constitutional and Human Rights, “Human Rights inapplicable in International Investment Arbitration? A commentary on the non-admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID tribunal” (July 2012) online: ECCHR <[https://www.ecchr.eu/fileadmin/Kommentare\\_Konferenzberichte>Weiteres/Kommentar\\_ICSID\\_tribunal\\_-\\_Human\\_Rights\\_Inapplicable.pdf](https://www.ecchr.eu/fileadmin/Kommentare_Konferenzberichte>Weiteres/Kommentar_ICSID_tribunal_-_Human_Rights_Inapplicable.pdf)> archived at <<https://perma.cc/E4H4-9LFY>>.

30 *Pezold and Border Timbers* (Procedural Order 2), *supra* note 29 at paras 57-58.

31 *Pezold v Zimbabwe* (Award), *supra* note 27 at 453-54. See also Part II.B.1.b, below.

32 See e.g. *James and others v United Kingdom*, No 8793/79, [1986] ECHR 2, 8 EHRR 123, at para 46 [*James and others v UK*].

33 *Pezold v Zimbabwe* (Award), *supra* note 27 at para 460.

34 *Ibid* at paras 465-66.



The *Pezold* tribunal assumed that since no compensation was paid, it was not necessary to discuss most of Zimbabwe's arguments regarding the legality of the expropriations.<sup>35</sup> However, this understanding conflates the two distinct issues of whether the expropriations were legal and the compensation adequate, or whether the expropriations were illegal and therefore required restitution damages in the form of full reparation (*restitutio in integrum*) in accordance with the law on state responsibility.<sup>36</sup>

The approach adopted by the tribunal in *Pezold* is problematic on other levels. It explicitly rejected the application of human rights considerations from the analysis and preferred to adopt an isolationist position in dismissing the application for *amicus curiae* intervention, despite strong allegations that the property interests of Indigenous communities were being affected by the dispute.<sup>37</sup> Such an understanding of the relationship between human rights law and investment law threatens to undermine the protection of human rights interests in favour of an over-extension of foreign investors protection. It further renders ISDS less transparent by denying clearly interested non-disputing parties the right to participate in the proceedings.

The tribunal's refusal to engage in a balancing act as required by the margin of appreciation doctrine and proportionality principle prevented the appreciation of important state interests, such as the need to ensure an equal distribution of land to promote sustainable development and obligations of the state with regard to Indigenous peoples.

## ii. The *Glamis* Case

In *Glamis*, a Canadian mining corporation claimed that its investment had been expropriated.<sup>38</sup> According to the claimant, environmental protection legislation providing for the restoration of mining sites and regulations aimed at mitigating the adverse impact of mining operations on Indigenous peoples' sacred sites substantially deprived the value of its investments to an extent amounting to indirect expropriation.

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35 *Ibid* at para 498.

36 See e.g. Christian Tomuschat, "Case Comment: Tidewater v Venezuela, *The Award of 13 March 2015*" (2016) 31 ICSID Review 138. However, the argument could be made in *Pezold* that the absence of any compensation rendered the expropriation unlawful. Human rights arguments could nonetheless be considered under cases of direct unlawful expropriation to affect the amount of compensation as illustrated in the Partial Dissenting Opinion by Philippe Sands in *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21 [*Bear Creek v Peru* (Dissent)]. On restitution damages of state responsibility, see International Law Commission (ILC), *Responsibility of States for Internationally Wrongful Acts*, UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) [ILC Articles on State Responsibility] (art. 35 provides that "[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed"). See also R. Dolzer & C. Schreuer, *Principles of International Investment Law*, 2nd ed (Oxford University Press, 2012) ch. VI at 98-129 [Dolzer & Schreuer].

37 Interestingly, and despite comments on the non-applicability of human rights law to the dispute, the tribunal referred to a decision of the Inter-American Court of Human Rights (IACtHR) in its examination of the principles governing the valuation of moral damages. *Pezold v Zimbabwe* (Award), *supra* note 27 at para 910, 95 citing *Castillo-Paez v Peru* (1998), Reparation and Cost, Inter-Am Ct HR (Ser C) No 43, IACHR 8.

38 *Glamis*, *supra* note 25.

In this case, Julien Cantegreil perceived a potential to correct the imbalance between investors' rights and human rights in NAFTA jurisprudence. He noted that provisions in NAFTA are drafted in vague terms which led to "a competition of contradictory trends to the disadvantage of human rights" and that *Glamis* represented an opportunity to adopt a satisfactory approach to coordinate the conflict between states' international obligations to protect both investments and human rights.<sup>39</sup>

Cantegreil suggests that the property interests of the claimant corporation are not absolute property rights, but rather circumscribed by "background principles" of state law, such as principles protecting Indigenous peoples' sacred sites and environmental regulations.<sup>40</sup> In the context of *Glamis*, this means that the mining rights of the foreign investors are not mutually exclusive of the rights of Indigenous peoples' for the protection of their sacred sites.

In addition, Cantegreil argues that the expropriation claim should be examined under a balancing test, where the tribunal must weigh the economic consequences of the state measures in relation to both the investor's reasonable expectations and the nature of the measures, rather than focusing solely on the economic impacts.<sup>41</sup> This test has the advantage of incorporating various interests such as the human rights and environmental protection purpose of the state measures, and avoids an economic fundamentalist approach. Furthermore, a reasonable investor could have foreseen the possibility that regulations for the protection of Indigenous peoples' sacred sites and the environment could occur given the presence of many Indigenous peoples in the area.<sup>42</sup> Thus, the interests of the surrounding Indigenous communities should be included in the proposed balancing test.

Unfortunately, the tribunal in *Glamis* decided to base its examination of the dispute without addressing the related human rights concerns. While acknowledging the significant public interest involved, the *Glamis* tribunal expressed its intention not to engage with such issues.<sup>43</sup> The tribunal emphasized that it understood its mandate to be a case-specific analysis.<sup>44</sup> In doing so, it explicitly stated that it did not need to reconcile its reasoning with earlier cases and did not have to frame its decision in view of potential future disputes.<sup>45</sup> Arguably, it was unnecessary for the tribunal to engage in such a controversial analysis since it ultimately dismissed all claims of violations of NAFTA. More specifically, it found that the measures did not substantially deprive the investments of their value and thus could not amount to expropriation.

The tribunal's approach risks reinforcing the inconsistencies in investment arbitration which create further legal uncertainty. In the context of international investment, this can lead to a regulatory chill because states could fear costly litigation being triggered by foreign investors who take advantage of such uncertainty by filing a host of claims. Rather, had the tribunal decided to engage with human rights considerations, it could have resolved some of the contradictions in arbitration jurisprudence and contributed to

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39 Cantegreil, *supra* note 5 at 369-70. See also cases cited in *ibid* at 384. Interestingly, the provisional text of the USMCA includes a new comprehensive chapter on the protection of the environment, a broad exception for measures adopted to fulfil a Party's obligations to Indigenous peoples, and a provision in the investment chapter on the encouragement of voluntary corporate social responsibility standards. It remains to be seen whether the USMCA will be ratified, and how those provisions will be interpreted. See USMCA, *supra* note 11.

40 Cantegreil, *supra* note 5 at 374-77.

41 *Ibid* at 377-80.

42 See *Ibid* at 386-87 (Cantegreil discusses the international framework of protection for Indigenous rights).

43 *Glamis*, *supra* note 25 at para 8.

44 *Ibid* at paras 3-9.

45 *Ibid* at paras 3, 6.

a more principled and balanced analysis of the relationship between investors' property interests and other human rights interests, as suggested by Cantegreil.<sup>46</sup>

## B. Human Rights-Friendly Approach

The Argentinian financial crisis of 2001-2003 contributed to the development of a significant body of ISDS jurisprudence.<sup>47</sup> Those cases are interesting because Argentina raised human rights considerations to justify its measures in a number of instances.

In the *Suez*<sup>48</sup> case, Argentina defended its actions on the basis of the defence of necessity.<sup>49</sup> The premature termination of a concession agreement for the development and operation of water and sewage facilities was claimed as necessary to safeguard the human right to water of the inhabitants in the context of the financial crisis. The tribunal recognized that the provision of water and sewage services, in light of the human right to water, was an essential interest of the state.<sup>50</sup> However, it found that the Argentinian government could have adopted more flexible means to assure the protection of the right to water without violating the rights of foreign investors—the two not being mutually exclusive.<sup>51</sup> Additionally, the tribunal stated that the defence of necessity could not be relied upon since some exogenous contributing factors, including Argentina's own bad management, contributed substantially to the financial crisis.<sup>52</sup>

It is interesting to compare this case with *LG&E* where the state unilaterally imposed tariff adjustments on gas distributing companies.<sup>53</sup> Argentina was precluded from responsibility for the violations of investors' rights on the basis of the defence of necessity. In particular, and in direct contradiction with the *Suez* and *CMS* decisions, the tribunal found that Argentina did not substantially contribute to the crisis and that “an economic recovery package was the only means to respond to the crisis.”<sup>54</sup>

Similar to *Suez*, the *Urbaser*<sup>55</sup> case involved termination by Argentina of a concession agreement for the provision of water and sewage services. Interestingly, Argentina filed a counterclaim arguing that the investor failed to uphold the human right to water of

46 Cantegreil, *supra* note 5 at 369-70.

47 In 2015, the Argentina-United States BIT was the third treaty most frequently invoked in ISDS with 20 cases. See UNCTAD, “Annual Review of Investor-State Arbitrations Launched” (8 June 2016), online: *Investment Policy Hub* <<http://investmentpolicyhub.unctad.org/News/Hub/Home/504>> archived at <<https://perma.cc/3DEU-BT9C>>.

48 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic* (2010), ICSID Case No ARB/03/19 at paras 249-271 [*Suez*].

49 Art. 25, ILC Articles on State Responsibility, *supra* note 36 (article 25 of the ILC's Articles State Responsibility is the generally accepted definition of the defence of necessity under customary international law).

50 As opposed to the *Pezold* and *Border Limited* cases, the tribunal also considered an *amicus curiae* submission filed by a group of NGOs that further developed the relevance of the human right to water with regard to the dispute. *Suez*, *supra* note 48 at para 256.

51 *Ibid* at para 260.

52 *Ibid* at para 263-64. This reasoning on necessity is in line with the *CMS* majority decision. See *CMS Gas Transmission Company v Argentina* (2005), ICSID No ARB/01/8, 44 ILM 1205 at paras 323-24, 329, 331.

53 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic* (2006), ICSID Case No ARB/02/1 [*LG&E*].

54 *Ibid* at para 257. The tribunal in *Continental Casualty* made similar conclusions. See *Continental Casualty Co v Argentina* (2008), ICSID Case No ARB/03/9 at paras 189-236 [*Continental Casualty*]. It is interesting to note that recent FTAs such as the TPP and USMCA have general exceptions for temporary measures adopted in reaction to external financial difficulties and sovereign debt. See TPP, *supra* note 12 Annex 9-G; USMCA, *supra* note 11 s. 32.4.

55 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (2016), ICSID Case No ARB/07/26 [*Urbaser*].

inhabitants due to insufficient investment and difficulties in the operation of the project. The tribunal accepted that human rights law can be relevant and that:

The BIT cannot be interpreted and applied in a vacuum. [...] [It] has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.<sup>56</sup>

However, the tribunal found that no positive obligation was incumbent upon the investors regarding the right to water either under the BIT or under general international law. The only obligation on private investors in relation to international human rights is an obligation “not to engage in activity aimed at destroying such rights.”<sup>57</sup> Moreover, Argentina did not identify any legal ground that would justify an obligation to compensate for a violation of the human right to water by the investor.<sup>58</sup> The counterclaim was therefore rejected.

*Urbaser* illustrates that merely invoking human rights in a broad manner without grounding arguments on specific legal norms is insufficient to contribute properly to a balanced analysis. Nevertheless, the decision in *Urbaser* was unprecedented in finding jurisdiction for a state counterclaim based on human rights.<sup>59</sup>

Other decisions considered non-investment law sources in relation to human rights in ISDS such as cultural rights,<sup>60</sup> environmental law<sup>61</sup> and peremptory norms (*jus cogens*) like the prohibition on torture, genocide, slavery or human trafficking.<sup>62</sup> Those cases illustrate that human rights considerations and general international law have indeed been considered relevant by arbitration tribunals, contrarily to the decisions in *Pezold*, *Border Timber*, and *Glamis*. In the words of the tribunal in *Suez*, investors’ rights and human rights are not “mutually exclusive.”<sup>63</sup> This view is consistent with the broader normative framework of general international law which IIAs are embedded. The International Centre for Settlement of Investment Disputes (“ICSID”) Convention, which established the main forum for ISDS, explicitly refers to international law as part of the applicable law,<sup>64</sup> and Article 31(3)(c) of the Vienna Convention on the Law of Treaties (“VCLT”)

56 *Ibid* at para 1200.

57 *Ibid* at para 1999.

58 *Ibid* at para 1220.

59 The tribunal held that the requirement under Article 25 of the ICSID Convention, which provides that the arbitral tribunal only has jurisdiction to hear a “legal dispute arising directly out of an investment,” was established in light of the “manifest” factual links between the counterclaim and the investment under dispute. See *Urbaser*, *supra* note 55 at paras 1151-55. This is however inconsistent with the view exposed in other awards where counterclaims were required to be based on the “same contract” under dispute. See e.g. *Saluka Investment B. V. v The Czech Republic* (2004), UNCITRAL Arbitration Proceedings at paras 70-82, especially para 76 [*Saluka*].

60 See e.g. *Southern Pacific Properties (Middle East) Ltd v Egypt* (1992), ICSID Case No ARB/84/3 [*SPP v Egypt*]; *Parkerings-Compagniet AS v Lithuania* (2007), ICSID Case No ARB/05/8.

61 See e.g. *Maffezini v Spain* (2000), ICSID Case No ARB/97/7; *SD Myers, Inc v Canada* (2000), UNCITRAL NAFTA (Chapter 11 Arbitration Tribunal), 40 ILM 1408 [*SD Myers*]; *Compania del Desarrollo de Santa Elena, SA v Costa Rica* (2000), ICSID Case No ARB/96/1, 39 ILM 1317 [*Santa Elena v Costa Rica*].

62 *Phoenix v Czech Republic* (2009), ICSID Case No ARB/06/5 at para 78. However, this case refers only to severe violations of *jus cogens* norms and does not expand on the applicability of other human rights norms most often involved in investor-state disputes. See also Mouyal, *supra* note 3 at 147-50 for other illustrations of human rights norms considered in arbitral awards.

63 *Suez*, *supra* note 48 at para 260.

64 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1965, 575 UNTS 159 (entered into force 14 October 1966) (“[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”) [ICSID Convention].

expressly states that, in the interpretation of a treaty, “[t]here shall be taken into account [...] any relevant rules of international law applicable in the relation between the parties,” including human rights instruments and human rights norms and principles that form part of customary international law.<sup>65</sup> In the early case *Amco v Indonesia*, the tribunal has thus explained that: “international law is fully applicable and to classify its role as ‘only’ ‘supplemental and corrective’ seems a distinction without a difference. In any event, the Tribunal believes that its task is to test every claim [...] against international law.”<sup>66</sup>

Nonetheless, even between awards which recognized the applicability of human rights law and general international law to investment arbitrations, inconsistencies in factual and legal analysis remain. In addition, human rights-based arguments do not always manage to achieve a better balance between investors’ rights and states’ obligations to protect and fulfill the human rights of their inhabitants. One can explain these difficulties in the way human rights arguments are framed and analyzed: often in vague terms in a failure to properly ground those arguments in legal principles which would promote a balancing act between the specific human rights interests involved on both sides.

## C. Inconsistencies in Expropriation Cases

### i. Police Power, Margin of Appreciation, and Proportionality

The application of the concepts of “police power,” margin of appreciation, and proportionality in cases of expropriation represents an entry-point for a balanced analysis between the property rights of investors and other human rights considerations.<sup>67</sup> As Krommendijk and Morijn discuss, using these concepts to balance investors’ rights and human rights interests can help resolve the “practical problem of how interpretation of multiple norms in force simultaneously can be given meaning in parallel,”<sup>68</sup> while recognizing that investors should be afforded protection against abuse by the state of its regulatory power under both investment treaties and human rights law.

As detailed above, those concepts were rejected by the *Pezold* tribunal in the context of investment law.<sup>69</sup> Similarly, the tribunals in *Siemens*<sup>70</sup> and *Biwater*<sup>71</sup> rejected the application of the margin of appreciation doctrine. Those cases can be contrasted with the reasoning in *Continental Casualty* where the tribunal explicitly addressed the applicability of the margin of appreciation doctrine and referred to the *James and others* case decided by the ECtHR<sup>72</sup>:

An interpretation of a bilateral reciprocal treaty that accommodates the different interests and concerns [...] must contain a significant margin of appreciation for the State applying the particular measure [...].<sup>73</sup>

65 *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331 (entered in force 1980) [VCLT] (Article 38(1)(c) provides for the creation of obligations upon a third state when rules in a treaty become binding customary law).

66 *Amco Asia corporation, Pan American Development Limited and P.T. Amco Indonesia v The Republic of Indonesia*, (1990), ICSID at para 40.

67 See e.g. the approaches advocated by several authors like Krommendijk and Morin, *supra* note 3; Henckels, *supra* note 16; Waicymer, *supra* note 4.

68 Krommendijk and Morin, *supra* note 3 at 429.

69 *Pezold v Zimbabwe* (Award), *supra* note 27 at para 465-66. See Section II. A. above.

70 *Siemens AG v The Argentine Republic* (2007), ICSID Case No ARB/02/8 at para 354 [Siemens].

71 *Biwater Gauff (Tanzania) Ltd v The United Republic of Tanzania* (2008), ICSID Case No ARB/05/22 [Biwater].

72 *James and others v UK*, *supra* note 32.

73 *Continental Casualty*, *supra* note 54 at para 181.

A certain deference to such a discretion [...] may well be by now a general feature of international law also in respect of the protection of foreign investors under BITs.<sup>74</sup>

The concepts of margin of appreciation and proportionality have been considered in a number of cases dealing with the “police power” doctrine. This doctrine has been used to justify *bona fide*<sup>75</sup> regulatory measures of general application taken within the power of the state to regulate for the general public interest despite adverse impacts on the economic interests of foreign investors.<sup>76</sup> According to the doctrine, such regulations do not amount to expropriation.<sup>77</sup> A number of awards have confirmed that the police power doctrine is part of customary international law.<sup>78</sup>

The notion of police power contains the potential for the development of a consistent approach to the reconciliation of the legitimate need of governments to adopt regulatory measures to protect and fulfill the human rights of its inhabitants and the expectations of foreign investors regarding the profitability of their investments and protection of property rights. However, arbitration awards have not always been coherent in their approach on this issue.

In *Metalclad*, the establishment of an ecological zone by the Mexican government was held to constitute indirect expropriation.<sup>79</sup> The tribunal adopted the approach commonly known as the “sole effect” doctrine, whereby the focus of the analysis under a claim of expropriation is exclusively on the economic impact of the impugned state measure, and not on the intent behind those measures, such as the protection of human rights or another public interest purpose.<sup>80</sup> The *Metalclad* decision held that expropriation under NAFTA includes “also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.”<sup>81</sup>

Against the cases following the reasoning in *Metalclad* can be contrasted other decisions which attempted to achieve a more balanced approach between the interests of investors and the exercise of legitimate regulatory power by the state. In *Azinian*,<sup>82</sup> the claimants sought reparations under NAFTA for the termination of a contract by the Mexican city of Naucalpan for the treatment of city waste. The tribunal emphasized the need to screen

74 *Ibid* at fn 270. See also Yuval Shany, “Towards a General Margin of Appreciation Doctrine in International Law?” (2005) 16 *Eur J Intl Law* 907.

75 This is a Latin phrase which translates to English as “sincerely; without intention to deceive.”

76 An early iteration of this doctrine was formulated by the Iran-US Claims Tribunal in *Sedco v Iran*: “[It is a] principle of international law that a state is not liable for economic injury which is a consequence of bona fide ‘regulation’ within the accepted police powers of states.” *Sedco, Inc. v National Iranian Oil Co.* (1985), 9 Iran-US Claims Tribunal Reports 248 at para 275.

77 There remains a theoretical debate as to whether the police power doctrine precludes the measure from being qualified as an expropriatory act, or whether it merely provides an exception to the general rule that expropriation must be accompanied by compensation. See Mouyal, *supra* note 3 at 177.

78 See e.g. *Marvin Feldman v Mexico* (2002), ICSID Case No ARB(AF)/99/1 at para 103; *Saluka, supra* note 59 at para 254, 262, 272; *Too v Greater Modesto Insurance Associates* (1989), 23 Iran-US Claims Tribunal Reports 378 at para 26; *SD Myers, supra* note 61 at para 281; *Technicas Medioambientales Tecmed SA v United Mexican States* (2003), ICSID Case No ARB(AF)/00/2 at para 119 [*Tecmed*].

79 *Metalclad Corp v Mexico* (2000), ICSID Case No ARB (AF)/97/1, 40 ILM 36 [*Metalclad*].

80 See e.g. Dolzer & Schreuer, *supra* note 36 at 98-129.

81 *Metalclad, supra* note 79 at para 103. Other more recent cases following this approach include *Telenor v Hungary* (Award) (13 September 2006); *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1 (Award) (7 December 2011).

82 *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States* (2000), UNCITRAL NAFTA (Chapter 11 Arbitration Tribunal), ICSID Case No ARB (AF)/97/2, 39 ILM 537 [*Azinian*].



complaints of economic interference by the state for the adoption of legitimate state regulations in managing public affairs and added that:

[I]t is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities and disappointed yet again when national courts reject their complaints [...]. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.<sup>83</sup>

Similarly, in an oft-cited passage, the *Methanex* tribunal reiterated the police power doctrine:

[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.<sup>84</sup>

The tribunal in *Methanex* tried to distinguish earlier cases on the facts, saying that in those cases where otherwise legitimate regulatory measures were found to constitute expropriation, specific commitments were made by the state to the investor.<sup>85</sup> Dr. Lone Wandahl Mouyal, Associate at DLA Piper Denmark and legal scholar, coins the term “flexibility-stability dilemma” of international investment law to qualify the tension between the two objectives of (1) ensuring a stable and favorable regulatory climate to attract and retain foreign investment, and (2) safeguarding the state’s space of manoeuvre to regulate for public purposes. She argues that the concept of legitimate expectations of investors should be used as a tool to resolve this tension which can be adapted to specific situations—such as when specific commitments are made or where the investment concerns a heavily regulated industry.<sup>86</sup>

The *Tecmed* decision is generally considered as the leading case for incorporating the proportionality principle and the margin of appreciation doctrine into the analysis of whether a regulatory action can amount to a compensable expropriation.<sup>87</sup> The tribunal restated the application of the police power doctrine as excluding compensation in investment law as “undisputable.”<sup>88</sup> It went on to describe its understanding of the balancing interests at stake:

[T]he Arbitral Tribunal will consider, in order to determine if [regulatory measures] are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.<sup>89</sup>

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83 *Ibid* at para 83.

84 *Methanex Corp. v United States of America* (2005), UNCITRAL NAFTA (Chapter 11 Arbitration Tribunal), Case No ARB/98/3, 44 ILM 1343, Part. IV, Ch. D, para 7.

85 *Ibid*, Part IV, Ch. D, paras 6-9.

86 Mouyal, *supra* note 3 at 193-214.

87 *Tecmed*, *supra* note 78.

88 *Ibid* at para 119.

89 *Ibid* at para 122.

This balanced analysis allows for the considerations of human rights and other state interests while avoiding a blanket exception that would open the door to regulatory abuses by the state. Interestingly, the *Tecmed* tribunal referred extensively to the jurisprudence of the ECtHR. This approach has been praised by many commentators and the decision was relied upon by subsequent arbitration tribunals.<sup>90</sup>

As mentioned above, a recent trend in treaty practice emerges where the police power doctrine is codified in expropriation clauses of IIAs.<sup>91</sup> For instance, Annex 8-A of CETA describes indirect expropriation as a measure that “substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure” adding that:

2. The determination of [...] an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors:

a. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

b. the duration of the measure or series of measures of a Party;

c. the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and

d. the character of the measure or series of measures, notably their object, context and intent.

3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.<sup>92</sup>

This provision explicitly rejects the application of the “sole effect” doctrine while acknowledging that the economic impact of the measure has a bearing on the analysis. In addition, it expressly incorporates the proportionality principle by stating that legitimate regulatory measures must not interfere excessively with investments, considering the object, context, intent of the measure as well as reasonable investment-backed expectations. The TPP and USMCA contain similar provisions with a footnote providing factors to determine the reasonableness of investors’ expectations such as “whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.”<sup>93</sup>

Interestingly, the tribunal in the recent case *PMI v Uruguay*<sup>94</sup> stated that such provisions “reflect the position under general international law” and were drafted “*ex abundanti*

90 See e.g. *Azurix Corp. v The Argentine Republic* (Award), ICSID Case No ARB/01/12 (14 July 2006) citing *James and others v UK*, *supra* note 32 at para 50; References cited by Gebhard Bücheler in *Proportionality in Investor-State Arbitration*, (Oxford University Press, 2015) at 129, note 37 and 143, note 95 [Bücheler].

91 See *supra* note 14.

92 CETA, *supra* note 14, Annex 8-A.

93 TPP, *supra* note 12, Annex 9-B, footnote 36; USMCA, *supra* note 11, Annex 14-B.

94 *Philip Morris International v Uruguay* (2016), ICSID Case No ARB/10/7.

*cautela*.<sup>95</sup> In the absence of a similar provision in the applicable BIT, this tribunal concluded that the regulation of tobacco marketing practices was a legitimate state measure in furtherance of Uruguay's national and international obligations to protect public health and therefore a valid exercise of police powers.<sup>96</sup>

## ii. Standard of Compensation

Dr. Lahra Liberti, Head of Unit at Natural Resources for Development (“OECD”), asks whether and to what extent a measure of expropriation adopted by the state in furtherance of its human rights obligations bears any consequence on the quantum of compensation.<sup>97</sup> It is here suggested that in certain circumstances, non-investment considerations can impact the assessment of the standard of compensation. As will be seen, the jurisprudence of the ECtHR presents useful analyses in this respect.

In his critique of the approach in *Tecmed*, Dr. Gebhard Bücheler, Partner at Seven Summits Arbitration, points out that, contrary to the jurisprudence of the ECtHR, expropriation cases in investment arbitrations are “all-or-nothing” scenarios. Either an expropriation (whether lawful or not) has occurred and full compensation of the assets’ market value is required or the state measures are justified as legitimate regulatory measures and therefore do not amount to expropriation and no compensation is required.<sup>98</sup> This view is consistent with the decision in *Santa Elena v Costa Rica*<sup>99</sup> where the argument that the state’s international obligation to preserve an ecological site was rejected on the basis of the “sole effect” doctrine:

[T]he purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.

Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.<sup>100</sup>

Nonetheless, other arbitration tribunals did not follow this approach and allowed for the possibility of a reduction of the amount of compensation. In *Siemens*, Argentina claimed that the “the fair market value of an expropriated property as the measure of compensation for an expropriated investment is not always applicable when an expropriation becomes necessary for social policy reasons.”<sup>101</sup> Lahra Liberty argues that while the tribunal rejected Argentina’s contention on the basis of shortcomings in the argument, it did not rule out the idea as a theoretical impossibility.<sup>102</sup>

95 *Ibid* at para 301.

96 *Ibid* at paras 287-307.

97 Lahra Liberti, “The Relevance of Non-Investment Treaty Obligations in Assessing Compensation” in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, eds, *Human rights in International Investment Law and Arbitration* (New York: Oxford University Press, 2009) 557 at 557 [Liberti].

98 Bücheler, *supra* note 90 at 147.

99 *Santa Elena v Costa Rica*, *supra* note 61.

100 *Ibid* at paras 71-72.

101 *Siemens*, *supra* note 70 at para 346.

102 Liberti, *supra* note 97 at 559.

The award in *SPP v Egypt*<sup>103</sup> establishes that non-investment international obligations can be relevant in the assessment of the amount of compensation in expropriation cases. In this case, the fact that continuation of a project would have become internationally unlawful under the UNESCO Convention had an impact on the determination of the quantum of compensation for lawful expropriation.<sup>104</sup> A factor contributing to this finding was the conclusion that the claimant should have known the risk that the site could become protected under the World Heritage Sites, thereby linking the analysis to investors' reasonable expectations.<sup>105</sup>

This reasoning could be extended to situations where states directly or indirectly expropriate foreign investors' assets in furtherance of international human rights obligations, such as where the state formally recognizes the ancestral title of Indigenous people on a land already subject to a foreign investment project. The duty to compensate under such direct takings is unquestionable. However, the fact that the state acted in furtherance of other international human rights obligations and the ability of the state to compensate for costly projects could be taken into account in mitigating the amount of fair compensation.

An illustration of this issue arose in the *Bear Creek v Peru* case, where the Peruvian government adopted a decree having the effect of revoking the investors' mining rights for a specific project in the context of strong opposition from local communities and social unrest.<sup>106</sup> The Respondent state argued that the investor failed to obtain the necessary "social license" to pursue its project. The Majority decision held that continued support and endorsement of the project and outreach activities of the investor by the Peruvian government rendered the latter fully responsible for the loss incurred by the investor because of the decree.

In his dissenting opinion, Philippe Sands argued that responsibility for the loss incurred by the investor should be divided between the parties and the corresponding compensation reduced by half. It is interesting to contrast the reasoning in this dissent with the *Pezold* and *Santa Elena* cases, where it was held that environmental and human rights objectives pursued by the state measure did not matter in a finding of expropriation. According to Sands, the investor was partially responsible under ILO Convention 169 for failing to respect the consultation rights of Indigenous communities with respect to the land in the area. Although he recognized that the ILO Convention does not create positive obligations upon foreign investors, he emphasized that:

It may be the function of a State or its central government to deliver a domestic law framework that ensures that a consultation process and outcomes are consistent with Article 15 of ILO Convention 169, but it is not their function to hold an investor's hand and deliver a "social license" out of those processes. It is for the investor to obtain the "social license," and in this case it was unable to do so largely because of its own failures.<sup>107</sup>

#### D. The Way Forward

It is apparent from the above review that major inconsistencies remain between arbitration awards regarding the relevance of human rights considerations to investment law and the standards applied in expropriation cases. Decisions like *Pezold* that disregard human rights considerations in their analysis—despite human rights interests being clearly affected by

103 *SPP v Egypt*, *supra* note 60.

104 *Ibid* at paras 190-91.

105 *Ibid* at para 251.

106 *Bear Creek Mining Corp v Republic of Peru* (Award) (2017), ICSID Case No ARB/14/21.

107 *Bear Creek v Peru* (Dissent), *supra* note 36 at para 37.

the dispute—further contribute to the apparent imbalance between the protection of foreign investments and other state interests in the international investment regime. As in *Glamis*, such isolationist attitudes miss opportunities to infuse a more coherent and balanced approach to the public and private interests at stake in investment arbitrations. Even when tribunals do consider human rights arguments, there seems to be a failure by the parties and the tribunals to fully ground their assessment of the relevance of human rights in a balanced and principled approach that would adequately weigh the multiple obligations of the state concerning the protection of investments and human rights.

Expropriation cases are particularly relevant for the purpose of resolving the tension between ensuring legal certainty to attract foreign investment and safeguarding the ability of states to adopt measures to protect and fulfil human rights. They involve the property interests of investors, which could, as will be argued below, be considered as human rights. In addition, concepts such as police power, margin of appreciation, proportionality, and standards of compensation allow for the incorporation of human rights considerations in the analysis. Some tribunals have even referred to human rights jurisprudence in this respect. However, those concepts have not been applied consistently in investment arbitrations, which contributes to a regulatory chill.

There is no fundamental conflict between investors' property rights and human rights. Nonetheless, there is indeed a divergence of views concerning the applicability of human rights to ISDS and significant inconsistencies in interpretations of treaty standards between arbitration tribunals. Thus, there is a need for the jurisprudence to find core principles that establish objective and balanced criteria to weigh investors' property rights and other human rights considerations. It is argued here that one such criterion is to be found in the conceptualization of investors' and third persons' property rights as human rights.

## II. THE HUMAN RIGHT TO PROPERTY IN INTERNATIONAL LAW

This Part discusses the basic international and regional human rights instruments that address the protection of property. The drafting process of those instruments as well as their subsequent interpretation by international supervision mechanisms help distil the characteristics of property protections and limitations under international human rights law. A brief review of other sources of international law further emphasizes the importance of the protection of the property of nationals and non-nationals alike under international law.

### A. Global International Human Rights Law

Although human rights protections existed before, it is often acknowledged that the creation of the global international human rights regime began with the adoption of the *Universal Declaration of Human Rights* ("UDHR")<sup>108</sup> in 1948 and the subsequent signature of the *International Covenants on Civil and Political Rights* ("ICCPR")<sup>109</sup> and *Economic, Social and Cultural Rights* ("ICESCR")<sup>110</sup> in 1966. The drafting of those instruments arose out of concern for the atrocities committed during WWII and occurred in a period of growing consensus on the necessity to protect fundamental rights flowing from the notion of human dignity.<sup>111</sup> The early iteration of basic human rights norms in those

108 *Universal Declaration of Human Rights*, UNGA Res 217A(III) UNGAOR 3rd Sess. Supp No 13 UN Doc A/810 (1948) at 71 [UDHR].

109 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 6 ILM 368 (entered into force 23 March 1976) [ICCPR].

110 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 Can TS 1976 No 46 (entered into force 3 January 1976) [ICESCR].

111 See e.g. Henry J Steiner, "Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond," *Harvard Magazine* [September-October 1998] 45.

instruments reflect a desire of the international community to overcome ideological and cultural differences in order to reach an agreement on standards of protection of the most essential rights of human beings.

This context applies to the incorporation of the right to property under Article 17 of the UDHR. As we will see, although most nations agreed that property ought to be protected as a human right, achieving a consensus on the exact scope and wording of the provision posed difficulties. Major disagreements in the context of different cultural and ideological conceptualizations have left much to be desired on the scope and limitations of the right to property in global international instruments.

#### i. The Universal Declaration of Human Rights

The UDHR represents the first comprehensive catalogue of human rights. A number of resolutions in the UN context characterizes the civil and political rights, as well as the economic, social, and cultural rights included in the UDHR as universal, indivisible, and interdependent.<sup>112</sup> Viewed as the constitution of the international human rights regime, the UDHR arguably expresses customary international law, at least with regard to a number of its provisions.<sup>113</sup> The UDHR remains the only global human rights instrument that directly defines a broad standard of property protection.

The human right to property is expressed under Article 17 in the following terms:

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

Arguably, such a broad wording does not say much about the exact scope of protection that should be accrued to property. For example René Cassin, the then-French delegate, expressed his disappointment with the weak formulation of Article 17 and explained this was the consequence of a failed attempt by the drafters to find a compromise between the two mainstream conceptions of property: (1) an essential individual right, versus (2) the collectivization of the means of production for the social benefit the public.<sup>114</sup> A brief review of the *travaux préparatoires* helps understand why the right to property was drafted in such a manner, and what characteristics can be distilled from this definition.<sup>115</sup>

Theo van Banning highlighted the Soviet claim for the adoption of an abstract formula that would allow for a provision acceptable in all economic systems. The contributions of socialist countries such as the USSR led to the adoption of the phrase “as well as in association with others” which is clearly intended to protect collective forms of property rights.<sup>116</sup>

A major issue concerned the subjection of the right to property and its limitations to national law, which was strongly advocated by the USSR but strongly opposed by other

112 See e.g. *Proclamation of Teheran*, Final Act of the International Conference on Human Rights, UN Doc A/CONF.32/41 at 3 (1968) at para 13; *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993, UN Doc A/CONF/157/23 at para I.5 [Vienna Declaration (1993)].

113 Philip Alston & Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) at 144 [Alston & Goodman].

114 René Cassin, “La déclaration universelle et la mise en oeuvre des droits de l’homme” (1951) 79 *Collected Courses of the Hague Academy of International Law* 245 at 287.

115 See generally William A. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, (Cambridge University Press, 2013).

116 Theo R. G. Van Banning, *The Human Right to Property*, (Intersentia, 2002) at 37-38 [Van Banning].



delegates.<sup>117</sup> Indeed, a deprivation of property, otherwise legal under national law, can result in unacceptable violations of human dignity, as illustrated by the Apartheid South Africa. This explains the use of the term “arbitrarily” instead of “illegally” in the second paragraph of Article 17 of the UDHR.

An aspect of the debate concerned the “social function” of property, and the question of whether the right to property encompassed a positive duty on the state to promote the acquisition by individuals of a minimum standard of private property. Influential on this matter was the adoption of the American Declaration of the Rights and Duties of Man in May 1948 and its protection of personal property that “meets the essential needs of decent living.”<sup>118</sup> However, proposals in line with the American Declaration were finally dropped.<sup>119</sup>

Van Banning comments that the whole debate “reflected not only political positions, but also legal traditions and social convictions and circumstances at the time.”<sup>120</sup> It demonstrates how little consensus existed with regard to the internationally acceptable meaning of the right to property.

However, the mere incorporation of the right to property in such a foundational instrument as the UDHR is evidence of the shared view amongst the nations of the world that property deserves protection under the universal, interdependent and interrelated regime of international human rights. The addition of the phrase “as well as in association with others” is a recognition that property rights can take different forms of collective arrangements. The second paragraph with the adoption of the term “arbitrarily” instead of “illegally” confirms that property protection is a universal standard above national laws.

In addition, as a human right, one’s enjoyment of property rights should be limited with reference to the human rights of others. In this respect, Article 17 should be understood in light of the limitations under Article 29, more precisely:

(1) Everyone has duties to the community [...].

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society [...].<sup>121</sup>

This was confirmed in 1989 by General Assembly Resolution 45/98, proposed by the United States and the USSR among others, and adopted without a vote.<sup>122</sup> Van Banning observed that this resolution exemplified a change in tone in the international community following the fall of the Berlin Wall. Resolution 45/98 also recognized “the importance of

117 See *ibid* at 38-39. See also William A. Schabas, “The Omission of the Right to Property in the International Covenants” (1991) 4 Hague Yearbook of International Law 135 at 139-144 [Schabas, “The Omission of the Right to Property”].

118 *American Declaration of the Rights and Duties of Man*, OEA/Ser.L./V.II.23 doc. 21, rev. 6 (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V./II.82 doc. 6 rev. 1 at 17 [*American Declaration of the Rights and Duties of Man*].

119 Van Banning, *supra* note 116 at 40-41.

120 *Ibid* at 39.

121 Art. 29, UDHR, *supra* note 108. Those limitations have important implications for the right to property of foreign investors; see Part III, below.

122 Resolution 45/98 further elaborates on the content of the right to property under Article 17 of the UDHR.

enabling everyone to acquire property.<sup>123</sup> This phrase refers to positive measures adopted by states to create an enabling environment for securing property rights and could even justify land reforms if conducted in a fair manner. The Resolution also emphasized that:

[T]he right of everyone to own property [...] is of particular significance in fostering widespread enjoyment of other basic human rights and contributes to securing the goals of economic and social development enshrined in the Charter of the United Nations.<sup>124</sup>

It recognized that “there exist [...] many forms of legal property ownership, including private, communal, social and state forms.”<sup>125</sup> This confirms that the right to property is part of the global human rights catalogue and should be understood in interrelation with other human rights.

## ii. The Two Covenants

The ICCPR and ICESCR developed in further detail the rights included in the UDHR and added additional rights in the form of binding treaties. Those three instruments together form the International Bill of Rights—the foundation of the international human rights law regime.<sup>126</sup> However, the right to property was not included in either Covenant.

The incorporation of the right to property in the ICCPR was extensively debated. Some delegates felt that the right to property was better viewed as a socio-economic right, while others would have included it alongside the right to life as a civil right. The fruitless debate led to a proposition by Denmark not to include property in the ICCPR, which was accepted.<sup>127</sup>

France suggested including the right to property in the ICESCR as an alternative to its absence in the ICCPR. This proposal also sparked a debate. Most prominently among the objections against it was the view that the right to property would conflict with state sovereignty over natural wealth and resources.<sup>128</sup> The requirement of compensation for expropriation also attracted opposition, especially among socialist countries. There was also reluctance to subject expropriations to international review.<sup>129</sup> Nevertheless, a text was finally agreed upon in a sub-committee:

1. The states parties to this Covenant undertake to respect the right of everyone to own property alone as well as in association with others. This right shall be subject to such limitations and restrictions as are imposed by law in the public interest and in the interest of social progress in the country concerned.
2. No one shall be deprived of his property without due process of law. Expropriation may take place only for considerations of public necessity

123 Preamble, UNGA, *Respect for the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development of Member States*, UNGA Res 45/98, UNGAOR, 68th Plen Mtg, UN Doc A/RES/45/98 (1990) [Resolution 45/98].

124 *Ibid.*

125 *Ibid* at para 1.

126 See Alston & Goodman, *supra* note 112 at 139-44.

127 Schabas, “The Omission of the Right to Property,” *supra* note 117 at 149. See also van Banning, *supra* note 116 at 42-43.

128 See common Article 1 on Self-Determination in the ICCPR, *supra* note 109 and ICESCR, *supra* note 110.

129 Van Banning, *supra* note 116 at 43-44.

or utility as defined by law and subject to such compensation as may be prescribed.<sup>130</sup>

The text was subsequently put to a vote in five parts. All parts received majority votes in favour. However, the text was rejected as a whole by a close vote (7-6-5) and no further debate occurred.<sup>131</sup> As a result, the human right to property was never included in the Covenants nor was it included in another major international human rights convention. It should be noted however that the Commission on Human Rights later stated that “[n]o member [...] expressed opposition in principle to the inclusion of an article on the right to property.”<sup>132</sup> Van Banning further observes that there was a “general feeling among a substantial number of delegates that property was a social right.”<sup>133</sup>

William Schabas notes the decision not to include property in the Covenants did not result from ideological differences between the East and the West, but rather from the absence of consensus and clarity as to the exact characteristics of the right to property.<sup>134</sup> This is obvious from the divergent opinions expressed with respect to virtually every aspect of the right to property in the *travaux préparatoires*: the role of national law, the standard of compensation, the possible limitations, and so on.<sup>135</sup> Van Banning observes that this failure from Member States to agree on a definition of the right to property is regrettable in light of the experiences in the European context. He emphasizes that similar divergences of views were expressed at the time of drafting of the European Convention of Human Rights (“ECHR”), but in this instance a definition was ultimately agreed upon.<sup>136</sup> While also drafted in rather broad terms, the inclusion of the right to property in the ECHR led to the development of a substantial and balanced jurisprudence by the ECtHR which contributed to the construction of a large consensus on the characteristics of the human right to property.<sup>137</sup>

### iii. Other Global Human Rights Instruments in Relation to Property

Following the adoption of the UDHR, the decolonization process became a central focus in the international forums. Unsurprisingly, the attention was less about securing the property rights of individuals than about restructuring international power relationships through standards highlighting the sovereignty of newly independent states over their natural and industrial resources against control by foreigners which had been established during colonial times.<sup>138</sup> This process often involved large-scale nationalizations of agricultural and industrial assets. While there is an apparent conflict between the private property rights of individuals and the desire of newly independent states to reassert control over their resources, an analysis of some basic instruments of this period points to some degree of protection of property. For example, the General Assembly Resolution 1803 on the *Permanent Sovereignty Over Natural Resources* and the *Charter of Economic Rights and Duties of States* both confirm the customary international law requirement

130 *Ibid* at 44; Schabas, “The Omission of the Right to Property,” *supra* note 117 at 156.

131 Van Banning, *supra* note 116 at 44-45.

132 Commission on Human Rights, *Report of the 10th session, 23 February-16 April 1954*, ECOSOCOR, 18th Sess, Supp No 7, UN Doc E/CN.4/705 (1954) at para 40.

133 Van Banning, *supra* note 116 at 47.

134 Schabas, “The Omission of the Right to Property,” *supra* note 117 at 158.

135 *Ibid* at 148-57; Van Banning, *supra* note 116 at 45-46.

136 *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, Art. 1-P1 ECHR COETS 1.

137 Van Banning, *supra* note 116 at 45, 64-125. See also Part II.B.1.b., below. In contrast, the Human Rights Committee, charged with the implementation of the Covenants, rejected several complaints of violations because of the absence of the right to property in the Covenants. See cases listed in Annex 3 of van Banning, *supra* note 116 at 407.

138 See e.g. *ibid* at 47-48; Newcombe and Paradell, *supra* note 3 at ch. 1.

of compensation for expropriation, although they did not elaborate on the meaning of “adequate compensation.”<sup>139</sup>

The social function of property was first elaborated in the Declaration on Social Progress and Development (1969) which provides for:

[T]he establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people.<sup>140</sup>

Again, this statement confirms that states have positive obligations to foster the enjoyment of property for everyone, especially the more vulnerable. The interaction between the right to property and the right to equality was also addressed in a number of global human rights instruments.<sup>141</sup> The addition of property protection in equality rights instruments is clear evidence of the importance of property in international human rights law and the positive obligations of states in this respect. As part of the catalogue of human rights, the exercise of one’s right to property is also limited by the human rights of others and the prerogative of the state to regulate its use. However, those instruments cover respectively specialized fields of human rights.

The absence of a general standard incorporated in a global treaty on general human rights like the Covenants is regrettable. The *travaux préparatoires* explain that the decision not to include an article on property in the Covenants was not motivated by a feeling that property did not deserve protection, but rather by the divergence of views on the content and limitations of the right. As a result, global international human rights instruments do not elaborate much on the characteristics of the right to property beyond the text of Article 17 of the UDHR, and the interrelation between the right to property and equality rights. As we will see, the jurisprudence of regional human rights mechanisms has contributed to a better understanding of the human right to property.

## B. The Right to Property in Regional Human Rights Mechanisms

### i. The European Context

#### a. Drafting History

The right to property was included in Article 1 of Protocol 1 to the European Convention of Human Rights (“P1-1 ECHR”). A review of the debates leading to its adoption shows a degree confusion and divergence of views concerning the characteristics and limitations of the right to property which recalls the debates in the context of the drafting of the International Bill of Rights.<sup>142</sup>

A primary concern was the need to reconcile the individual right against arbitrary deprivations and the “social function” of property—the role of the State in pursuing the

139 *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII) UNGAOR 17th Sess. Supp No 17 at 15 UN Doc A/5217 (14 December 1962) para 4; Art. 2(2)(c), *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UNGAOR 29th Sess. UN Doc A/RES/29/3281 (12 December 1974).

140 *Declaration on Social Progress and Development*, GA Res 2542 (XXIV) UNGAOR 24th Sess. UN Doc A/RES/24/2542 at Art. 6 (11 December 1969).

141 See e.g. UDHR, art. 2; *Refugee Convention*, art. 13; *Convention on Stateless Persons*, arts 13-14; *Convention on the Elimination of All Forms of Racial Discrimination*, art. 5(d)(v); *Convention on the Elimination of all forms of Discrimination Against Women*, art. 16(1)(h); UNDRIP, *supra* note 28; *Declaration on the Rights of Disabled Persons* at para 4.

142 See Van Banning, *supra* note 116 at 64-76.

general interest in regulating the use and distribution of property.<sup>143</sup> French delegates emphasized that the right to property was one of the four pillars of the 1789 French *Déclaration des Droits de l'Homme et du Citoyen*, an essential inspiration to the human rights regime. Under French civil law, property is conceptualized as an extension of the human personality, and therefore an essential aspect of human development.<sup>144</sup>

P1-1 ECHR reads as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The inclusion of the phrase every “legal person” expressly extends the protection to corporate entities, including transnational corporations. The Secretary General of the Council of Europe commented that the divergences with regard to the standard of compensation has resulted in the phrase “subject to the conditions provided for by law.” However, this phrase should be understood as requiring compensation under most circumstances. The addition of the phrase “and by the general principles of international law” was intended to refer to the standard of compensation for expropriation of alien property under international law.<sup>145</sup>

Arguably, this creates a distinction where non-nationals are afforded a stronger protection in relation to expropriation. However, to the contrary, van Banning observes that “in the actual case law of the Court or the Commission, a distinction between nationals and non-nationals has not been applied.”<sup>146</sup> He adds that “the clause regarding the general principles of international law is becoming obsolete.”<sup>147</sup>

## b. Characteristics

A brief review of the characteristics of property protection under the European human rights jurisprudence offers some insights on how to correct the imbalance between the protection of investors’ rights and human rights in the investment context.

As a starting point, the ECtHR has consistently explained the structure of the right to property in three distinct but interrelated rules: (1) the right to the peaceful enjoyment of property; (2) the conditions for lawful deprivation of property, which could be equated to formal expropriations; (3) the right of states to regulate and control the use of property, which relates to the distinction drawn by the police power doctrine under investment law between non-compensable legitimate regulatory measures having a negative economic impact and indirect, *de facto* compensable expropriation.<sup>148</sup>

143 *Ibid* at 70-71.

144 *Ibid* at 70. French delegates made clear that they did not intend to introduce a Roman law conception of absolute property rights.

145 Council of Europe, *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights*, vol. VIII (Springer, 1985) at 10. This was confirmed by a resolution of the Committee of Ministers. Van Banning, *supra* note 116 at 76.

146 *Ibid* at 104. See also *James and others v UK*, *supra* note 32 at para 54.

147 Van Banning, *supra* note 116 at 128.

148 See e.g. *The Holy Monasteries v Greece* (1994), ECHR (Ser A) 301-A, 25 EHHR 640 at para 56 [*Holy Monasteries*].

Property under European human rights law has been given a wide meaning. Its conceptualization by the ECtHR and other international mechanisms accords with the “bundle of rights” theory of property.<sup>149</sup> This theory describes property as a collection of “vested rights” or “*droits acquis*,” which establishes a web of lawful relations among persons with regard to a resource. This understanding is often contrasted with the traditional Roman law conception of property rights as absolute ownership rights over a tangible object. It includes rights on tangible as well as intangible things such as shares in a company, intellectual property rights, tenancy rights, etc.<sup>150</sup> Of special relevance for our purpose are the recognition of common property rights such as hunting and fishing rights of Indigenous peoples,<sup>151</sup> and the protection of informal, unregistered property where it can be established that the applicants have a property interest on a land despite the absence of formal title.<sup>152</sup> Those are important considerations for the protection of the property interests of Indigenous populations who often live in common forms of property arrangements in accordance with their customary law.

The ECtHR has also developed a uniform and principled approach to cases of interference with the enjoyment of property, either under measures of control (regulatory measures) or deprivations (direct expropriations). While there is no positive obligation of the state to secure a minimum amount of property to its inhabitants, the Court has also recognized that in certain instances, the state has a positive duty to act in order to prevent interference by third parties on the property rights of others.<sup>153</sup>

The Court developed a general framework to assess justifications for interferences, which applies to both measures of control and deprivations. The interference must be (1) lawful, (2) in the public or general interest, and (3) proportional.

The criterion of lawfulness means that a regulation or expropriation must be lawful under domestic law, but also in compliance with the rule of law, thereby referring to the substantive quality of such laws which resonates with the due process criteria under investment law.<sup>154</sup>

The requirement that interference be in the public or general interest refers to the legitimate aim of a state measure and recalls a criterion of the police power doctrine. However, this requirement applies both to regulatory measures having a negative impact on the enjoyment of property as well as direct expropriatory acts. Therefore, European human rights law rejects the “sole effect” doctrine adopted in a number of investment arbitration awards. It should be noted that under the case law of the ECtHR, the state enjoys a wide margin of appreciation in defining the legitimate public purpose, and the Court will “respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is *manifestly without reasonable foundation*.”<sup>155</sup> Such a degree of deference towards state decisions seems justified by the fact that, as a supranational institution in search of asserting its legitimacy, the ECtHR must be mindful of the multiple social, economic, and political factors to balance in decisions of public interest, and avoid encroaching on state sovereignty when

149 See e.g. W. N. Hohfeld, “Some Fundamental Conceptions as Applied in Judicial Reasoning” (1913) 23:1 Yale LJ 16.

150 See Van Banning, *supra* note 116 at 83-88.

151 *Könkämä and 38 other villages v Sweden*, No 27033/95 (15 November 1996) [*Könkämä*].

152 *Holy Monasteries*, *supra* note 148.

153 E.g. *Antonetto v Italy*, No 15918/89, [2000] ECHR. Original text of the judgement available in French only from the European Court of Human Rights website at <<http://hudoc.echr.coe.int/>> archived at <<https://perma.cc/MAE2-P84R>>.

154 Van Banning, *supra* note 116 at 93-95. See also *James and others v UK*, *supra* note 32; *Spacek v Czech Republic*, No 26449/95 (9 November 1999), App (see requirement of publicity of the law at para 57). *Hentrich v France* 22/09/1994, A-296-A.

155 *Former King v Greece*, No 25701/94, [2000] at para 88 (emphasis added).



deciding on such issues. This justification should apply to investment tribunals as well. However, as was mentioned above, such a degree of deference is not always found in investment awards.<sup>156</sup>

The requirement of proportionality is often the heart of the matter in cases of interference with property rights. The proportionality test aims at achieving a fair balance between (1) the interests of the individual and the public interest, as well as between (2) the rights of the individual and the aims of the law. In other words, the state measures must be rationally connected to its purpose, and the individual should not bear a disproportionate burden. Here again, the ECtHR allows for a wide margin of appreciation in the way states devise their measures in order to achieve the intended public purpose, even leaving a margin for “unavoidable anomalies.”<sup>157</sup>

In European human rights law, the requirement of compensation is part of the proportionality analysis.<sup>158</sup> While there is no standard of compensation expressly stated in P1-1 ECHR except for the reference to general principles of international law, the ECtHR’s case law normally considers compensation as a necessary condition in cases of deprivation. This condition is similar to situations of lawful direct expropriation in investment law. However, the Court defers to the state’s decision in the appreciation of the terms of compensation, “unless reasonably without foundation.”<sup>159</sup> Furthermore, the Court has recognized that:

[P1-1] does not [...] guarantee a right to full compensation in all circumstances. Legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieved greater social justice, may call for less than reimbursement of the full market value.<sup>160</sup>

This reasoning echoes claims made by developing countries in the context of investment arbitrations where it was argued that the state was not in a position to provide full compensation for measures in furtherance of other international obligations, such as land reforms to secure a more equal distribution of property,<sup>161</sup> protection of cultural sites,<sup>162</sup> and implementation of an economic recovery package to ensure the viability of the socio-economic conditions of the population,<sup>163</sup> among others.<sup>164</sup>

The case law created by the ECtHR has contributed to the development of a well-balanced, widely accepted, and credible concept of the human right to property and has been relied upon by a number of investment arbitral tribunals.<sup>165</sup> This jurisprudence can be seen as resolving much of the controversies over the characteristics of property in the international debates of the 1950s and 1960s. Moreover, the ideological differences are less pronounced nowadays, as most communist regimes have undergone major reforms, and most countries

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156 See Part I, above.

157 *James and others v UK*, *supra* note 32 at para 66; *Mellacher and others v Austria*, (1989), 169 ECHR (Ser A) 25.

158 See Van Banning, *supra* note 116 at 100; Mouyal, *supra* note 3 at 111-14.

159 *Ibid* at 101 citing *Sundstrom and others v Finland*, No 20471/92 (15 April 1996).

160 *James and others v UK*, *supra* note 32 at para 54.

161 *Pezold, Border Limited*, *supra* note 24.

162 *SPP v Egypt*, *supra* note 60.

163 See claims of investor-state dispute settlement against Argentina in Part I, above.

164 On this point, Mouyal argued that the level of development of the host state could in certain circumstances constitute an element in a proportionality test in investment arbitrations. Mouyal, *supra* note 3 at 131-32. For instance, this could affect the quantum of compensation in order to avoid “catastrophic economic consequences.” See the discussion of the Separate Opinion by Ian Brownlie in the *CME* case in Mouyal, *supra* note 3 at 63-65, 217.

165 *Ibid* at 107; Van Banning, *supra* note 115 at 129-30.

adhering to investment agreements recognize the basic premise that secure property rights are essential for a well-functioning market.

It is argued here that international investment tribunals should take inspiration from concepts of this case law, which are easily transferrable to investment law. Indeed, as argued by Steininger, international human rights law and investment law share a number of characteristics including the “paramount status of the individual and their highly developed dispute settlement bodies” as well as the structural similarities in expropriation cases in view of the right to property under the ECHR.<sup>166</sup>

## ii. American Regional Human Rights Mechanisms

Other regional human rights instruments and supervision mechanisms contribute to the elaboration of the characteristics of the human right to property in international law.<sup>167</sup> In the American regional system, Article 23 of the American Declaration on the Rights and Duties of Man provides that “[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”<sup>168</sup> The wording of this provision points to the positive obligations of the state to promote an enabling environment for the enjoyment of property, if not an actual minimum amount of property to its inhabitants. In addition, Article 21 of the American Convention on Human Rights [ACHR]<sup>169</sup> subjects property to protections and limitations in a similar fashion to the ECHR:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

Of special relevance is the interpretation of Article 21 ACHR by the Inter-American Court of Human Rights (“IACtHR”) as incorporating protections for the traditional land and resources of Indigenous peoples.<sup>170</sup> *Awas Tingni* illustrates the potential of conceptualizing property as a human right in the context of international investments.<sup>171</sup> The Mayagna Sumo Awas Tingni Community (“Awas Tigni Community”), is an Indigenous community

166 Steininger, *supra* note 2 at 34-35, 46. One should however always be mindful of textual differences in the texts of applicable IAs. For instance, the USMCA provides that for the purpose of determining whether an expropriation occurred, “the *existence* of a property right is determined with reference to the domestic law of a Party” (emphasis added). USMCA, *supra* note 11, Annex 14-B, footnote 18.

167 In addition to the European and American systems, Article 14 of the African Charter on Human and Peoples Rights also protects property. However, property protections and limitations are subordinated to national law. *African Charter on Human and Peoples Rights*, 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5 1520 UNTS 217 21 ILM 58 (entered into force 21 October 1986) (“[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws). On the context leading to the adoption of this provision, see Van Banning, *supra* note 116 at 60-63.

168 Art. 23, *American Declaration of the Rights and Duties of Man*, *supra* note 118.

169 *American Convention on Human Rights*, 22 November 1969, OAS Treaty Series No 36 1144 UNTS 123 9 ILM 99 (entered into force 18 July 1978).

170 E.g. *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), Inter-Am Ct HR (Ser C) No 79 [*Awas Tingni Community v Nicaragua*]; *Yakye Axa Indigenous Community v Paraguay* (2005), Inter-Am Ct HR (Ser C) No 125; *Sawhoyamaya Indigenous Community v Paraguay* (2006), Inter-Am Ct HR (Ser C) No 146.

171 *Awas Tingni Community v Nicaragua*, *supra* note 169.

in Nicaragua. The government issued a licence to a Korean corporation to harvest timber resources on their territory. The Awas Tigni Community protested. However, the community lacked formal title to its property.

The IACtHR stated that Indigenous peoples' customary law should be considered in the analysis of whether the community had property interests on the licensed land. The court found that possession under customary practices was sufficient in the absence of formal title to recognize that the Awas Tigni Community had a property interest in the land under dispute. The court further concluded that, in issuing the licence to a foreign investor without consultation or compensation of the Indigenous people and by not complying with constitutional requirements for the demarcation and titling of Indigenous land, the State of Nicaragua was in violation of the property rights of the Awas Tigni Community.<sup>172</sup> This case was the first recognition by an international tribunal of the existence of communal rights on land in favour of Indigenous populations in interpreting the human right to property.<sup>173</sup>

### C. Other Sources of International Law on the Human Right to Property

Protection of property as a human right can be found in a number of other sources of international law. A detailed examination of those sources is beyond the scope of this article. Nevertheless, those sources point to the importance of the protection of property as a human right.

A number of works have catalogued state practices and constitutions with respect to the protection of property. From these studies, van Banning concluded that the protection of property has received almost universal recognition. The difficulty remains in ascertaining the forms and conditions of such protection.<sup>174</sup> Those difficulties illustrate however that while the protection of property is a universal value, such protection can take different forms.

International humanitarian law ("IHL") and international criminal law ("ICL") contain a number of provisions dealing with the protection of civilian and cultural property under situations of armed conflict and state emergency.<sup>175</sup> However, one should be careful in extending those protections to the general body of international human rights, as those are very specialized fields of international law. Nonetheless, an argument can be made that the rights protected under IHL and ICL are non-derogable human rights and, therefore, core human rights deserving special protection under all circumstances. While this argument has its value, the reasoning is not easily transferrable to the majority of investor-state disputes.

The law of state responsibility for injury to aliens developed from the 18th to the early 20th centuries could well be said to have preceded the current regimes of international investment law and international human rights law.<sup>176</sup> Most references to the minimum standard of treatment of foreign investors in customary law come from this period.<sup>177</sup> While

172 *Ibid* at paras 151-53.

173 Claudio M Grossman, "Mayagna (Sumo) Awas Tingni Community v Nicaragua Case" (December 2006, Max Planck Encyclopedia of Public International Law) online: Oxford Public International Law <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1793>> archived at <<https://perma.cc/92VC-ZTKU>>.

174 See Van Banning, *supra* note 116, ch 3 at 131-67.

175 Loukès G Loukaidès, "The Protection of the Right to Property in Occupied Territories" in *The European Convention on Human Rights: Collected Essays* (Martinus Nijhoff: 2007) at 121-42.

176 See e.g. Hugh M Kindred et al., *International Law Chiefly as Interpreted and Applied in Canada*, 8th ed (Edmon Montgomery, 2014) at 413-40; Frédéric Mégret, "Mixed Claim Commissions and the Once Centrality of the Protection of Aliens" [unpublished]; Newcombe & Paradell, *supra* note 3 at ch 1.

177 See e.g. *Glamis*, *supra* note 25 at para 21 citing the *Neer Claim (United States v Mexico)*, General Claims Commission (1926), 4 RIAA 60.

this regime focused exclusively on standards of protection of foreigners, its significance had been lessened nowadays due to the extensive protections afforded to both nationals and non-nationals in international human rights law.

### III. POTENTIAL CONTRIBUTIONS OF THE HUMAN RIGHT TO PROPERTY TO INTERNATIONAL INVESTMENT LAW

#### A. A Balanced Approach to Expropriation

Part I illustrated the imbalance between the protection of foreign investors' property compared to the protection of the human rights of nationals in ISDS. It unfolded some of the inconsistencies in the application of concepts such as police power, margin of appreciation, proportionality and the standard of compensation for expropriation. Part II described the characteristics of the human right to property, especially as developed in the European and American context. This Part integrates those considerations in a discussion on the analytical benefits of considering property as a human right in order to address the legitimacy crisis of the international investment law regime.

As a preliminary remark, the jurisprudence of the ECtHR illustrates that the right to property deserves protection as an autonomous human right. It also showed that protection under national law is not always sufficient to safeguard the property of nationals and foreigners alike against unjustified interferences by the state. Indeed, legal protection in national laws cannot guarantee protection against unfair laws as long as the right to property is not elevated to an international legal standard. Similarly, the right to property of nationals deserves international recognition in order to situate such protection as part of the integrated system of state obligations under general international law. Such an understanding is necessary to prevent a situation where the property rights of foreign investors are given primacy over the property rights of nationals.

In human rights theory, all human rights are seen as an extension of the concept of human dignity. Accordingly, those rights are universal, indivisible, and should be enjoyed in interrelation and interdependence: they cannot be seen in isolation and any impairment of one right affects all the other rights.<sup>178</sup> This view opposes the fragmentation and vertical subdivision of rights following an alleged hierarchy.<sup>179</sup> Similarly, the enjoyment of one's human rights are limited by the rights and freedoms of the others.<sup>180</sup>

As evidenced in the decisions in *Holy Monasteries, Könkämä*, and *Awes Tingni Community v Nicaragua*,<sup>181</sup> human rights law also favours a wide understanding of property rights which encompasses plural forms of property arrangements. Property rights include informal customary land rights, and hunting and fishing rights of Indigenous peoples. This understanding is particularly relevant in the context of developing countries where a large section of society lives under customary law and do not hold formal title to their properties.<sup>182</sup>

178 Vienna Declaration (1993), *supra* note 112 at para I.5.

179 J D van der Vijver, "Property in International Human Rights Law" in G E van Maanen & A J van der Walt, eds, *Property Law on the Threshold of the 21st Century* (Antwerpen: Maklu, 1996) at 438.

180 Art. 29 UDHR, *supra* note 108.

181 See Part II, above.

182 On the importance of formal title for the protection of property and economic development in developing countries, see e.g. Hernando De Soto, *The Mystery of Capital* (Bantam Press, 2000) at 39; The World Bank, *World Development Report 1990: Poverty* (Oxford University Press, 1990); The World Bank, *World Development Report 1996: From Plan to Market* (Oxford University Press, 1996) at 44-66, 87-98); UNDP, *Human Development Report, 1997* (Oxford University Press, 1997) at 5-ff.

In addition, it is often claimed that the ultimate purpose of the international investment regime is to foster sustainable human and economic development.<sup>183</sup> While the benefits of foreign investment for the promotion of economic development is hardly contested, a number of studies have questioned the relevance of IIAs for sustainable development, and some even suggest that the international investment regime as currently constituted might be detrimental to the protection of human rights.<sup>184</sup> In contrast, economic development studies have emphasized the importance of secured property rights on land, credit, and housing to foster sustainable human and economic development, promote the enjoyment of all human rights, and alleviate extreme poverty.<sup>185</sup>

In a similar fashion, the understanding of property as a human right also redirects the focus of the economic efficiency argument on legal protection of property towards the promotion of the human dignity and economic development of the most vulnerable. This understanding stands in stark contrast against the view that property rights are instruments for the protection of the most powerful in a way that crystallizes the uneven distribution of wealth. Instead, the protection of the human right to property of both foreign investors and nationals serves to promote foreign investment for the advancement of human and economic development in a sustainable way that takes into account the protection of the human rights of others.

As mentioned throughout this article, the international and regional human rights supervision mechanisms contribute to the interpretation, refinement, and application of human rights norms. The mechanisms for ISDS present a similar opportunity for the development of a consistent body of jurisprudence in investment law. However, such a degree of consistency has not yet been attained. It is argued here that the structural similarities between the two regimes—especially with regard to the right to property in expropriation cases—offer potential for cross-fertilization regarding unjustified interference by the state with property, and the relativization of investors' rights against the property rights of nationals or Indigenous peoples.

The integrated approach of the ECtHR regarding interference with property, and the inclusion of the requirement of compensation in the proportionality analysis could be beneficial to investment law. It could help resolve the apparent contradictions between the application of the police power and the “sole effect” doctrines. The police power doctrine is invoked to justify legitimate regulatory measures that affect negatively foreign investments. Such regulatory measures, if implemented under the conditions of the police power doctrine, are deemed not to be expropriatory.<sup>186</sup> Therefore, no compensation is required. However, opponents to this blanket exception claim that this could lead to regulatory abuses by states. Others prefer to apply the “sole effect” doctrine, whereby a measure that

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183 See note 22 above.

184 de Zayas, *2015 Report*, *supra* note 2 at paras 7-14; de Zayas, *2016 Report*, *supra* note 1 at paras 18-42.

185 See e.g. Michael P Todaro & Stephen Smith, *Economic Development*, 12th ed (Pearson, 2015) ch 9, 15; Karlan Dean & Jonathan Zinman, “Observing Unobservables: Identifying Information Asymmetries with a Consumer Credit Field Experiment” (2009) 77:6 *Econometrica* 1993; Mark M Pitt & Shahidur R Khandker, “The Impact of Group-Based Credit Programs on Poor Households in Bangladesh: Does the Gender of Participants Matter?” (1998) 106:5 *Journal of Political Economy* 958; Markus Goldstein & Christopher Udry, “The Profits of Power: Land Rights and Agricultural Investment in Ghana” (2008) 116:6 *Journal of Political Economy* 981; Abhijit V Banerjee, Paul J Gertler & Maitreesh Ghatak, “Empowerment and Efficiency: Tenancy Reform in West Bengal” (2002) 110:2 *Journal of Political Economy* 239.

186 See however the theoretical debate as to whether the police power doctrine precludes the measure from being qualified as an expropriatory act, or whether it merely provides an exception to the general rule that expropriation must be accompanied by compensation in Mouyal, *supra* note 3 at 177.

has the effect of depriving substantially an investment of its value is deemed expropriatory and requires compensation, whatever the intention behind the state measure might be.

Instead, the integrated proportionality test of the ECtHR aims at achieving a fair balance between the legitimate public interest and its impact on property or foreign investments. On the one hand, if the regulatory measure does not have the effect of depriving the owner from the enjoyment of his property, then it is not expropriatory and does not require compensation. However, a state could still be found in violation of the right to property if such regulatory measures do not conform to the proportionality test, and would therefore be liable to pay compensation.<sup>187</sup> In this sense, the measure must still be justified as proportionate in its aims, means and effects analyzed through the lens of the reasonable expectations of investors. This approach provides stronger protection to international investments against regulatory abuses by the state than the police power doctrine as currently applied.

On the other hand, a clear expropriation of property—or a regulation amounting to deprivation—could be found to be proportionate, and thus lawful, if adequate compensation is provided having regard to the public interest involved as well as the burden supported by the investor or owner. In such situations, the amount of compensation could vary according to the context. Finally, the recognition that states deserve deference in their decisions concerning the public interest and amount of compensation through the wide margin of appreciation doctrine should be adopted by arbitration tribunals in order to uphold their legitimacy as supranational institutions.

The understanding of the property rights of foreign investors according to the above conceptualization of human rights supports the view that the actions of the state in furtherance of its obligations to promote and fulfill the human rights of others—which may affect the property rights of investor—are to be assessed according to a balance that takes into account the rights of both investors and third persons. Furthermore, a flexible approach to the standard of compensation in expropriation cases—similar to the *SPP v Egypt* case, the jurisprudence the ECtHR and the dissent in *Bear Creek v Peru*—could integrate such a balanced understanding of the human rights involved on both sides.

## B. Case Study: The Constitutional Protection of Indigenous Rights in Canada

Given recent Supreme Court of Canada jurisprudence, there is a real risk that an Indigenous ancestral title will be recognized by a Canadian tribunal on a land after a foreign investment was made on the same land.<sup>188</sup> Such a situation would create a genuine conflict between the constitutional obligations of Canada towards Indigenous peoples and its international obligations for the protection of foreign investments. In the absence of a general exception like section 32.5 USMCA, if Canada favoured Indigenous rights over investors' interests, claims of violations of investors' protection could arise.<sup>189</sup>

187 See e.g. *Chassagnou v France*, No 25088/94, [1999] ECHR 22, 29 EHHR 615; *Immobiliare Saffi v Italy* No 22774/93, [1999] ECHR 65.

188 See e.g. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44. Whereas the term "Aboriginal peoples" is the proper constitutional legal terminology in Canada, the term "Indigenous peoples" is used throughout the text for consistency purposes.

189 See Schwartz, *supra* note 12 at 7-8.



Risa Schwartz identifies the recent dispute in *China Minerals Mining Corp v British Columbia (Minister of Forests et al.)*<sup>190</sup> as an illustration of the conflicting duties of the Canadian state with respect to the constitutional protection of Indigenous peoples and investors' protection under investment law. In this case, China Minerals sought a declaration by the tribunal that its procedural rights were violated because they were not consulted in the process leading to the land claim agreement signed between British Columbia and First Nations. China Minerals took a paradoxical position given that, under Canadian and international law, Indigenous people possess the right to be consulted. In any event, the matter had become moot because the First Nations no longer claimed the disputed lands. However, once concluded, the agreement between British Columbia and the First Nations would have become constitutionally protected under article 35 of the Constitution Act of 1982.<sup>191</sup> Had Canada respected its obligations under the treaty with the First Nations, China Minerals could have raised a claim for violations of investors' rights under investment law.<sup>192</sup>

## CONCLUSION

The international investment regime needs a consistent methodology to deal with human rights issues that emerge in ISDS. Either IIAs lack clear provisions for the protection of human rights, or the exceptions actually codified are drafted in vague terms—leaving much to be interpreted by *ad hoc* arbitration panels. In the absence of specific human rights exceptions incorporated in IIAs, this article advocates for an approach that provides a coherent methodology to deal with investment disputes where the property rights of investors are in conflict with the property rights of third parties or other human rights concerns.

To illustrate the benefits of this approach, it is useful to consider a hypothetical conflict between the property rights of a foreign investor and the rights of an Indigenous community on the same land. Under UNDRIP and ILO Convention 169, the traditional land rights of Indigenous peoples are dense and interrelated.<sup>193</sup> They include consultation, cultural and property interests that are crucial for the human development and dignity of members of the Indigenous community. On the other hand, the interests of foreign investors are difficult to describe otherwise than in pure economic terms. From a human rights perspective, it becomes clear that the protection of investors' property interests cannot go without consideration of those Indigenous rights that are fundamentally tied to the dignity of the Indigenous peoples.

However, this approach does not mean that investors should not be compensated for the expropriation of their investments made in good faith in reliance of state assurances—even in a case of direct conflict with Indigenous land rights. This being said, a state would not be found in violation of an investment treaty if it expropriates foreign investments in furtherance of its obligations towards Indigenous peoples, provided that adequate compensation is being paid. Depending on the circumstances, such as whether the investor

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190 *China Minerals Mining Corp v British Columbia (Minister of Forests et al.)*, 6 June 2016, Vancouver Registry No S-160923 (BCSC) (amended petition); "China Minerals Reports Court Decision" (18 January 2017) online: Accesswire <[www.accesswire.com/453042/China-Minerals-Reports-Court-Decision](http://www.accesswire.com/453042/China-Minerals-Reports-Court-Decision)> archived at <<https://perma.cc/MJE6-F9NG>>.

191 *Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

192 A claim could have been raised under the investor-state dispute settlement mechanism under the *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, 8 September 2012, Can TS 2014/26 (entered into force 1 October 2014).

193 On the density of Indigenous rights in relation to their ancestral land, see e.g. Cantegreil, *supra* note 5 at 386-87; UNDRIP *supra* note 28.

complied with corporate social responsibility obligations with regard to such duties as the consultation of Indigenous peoples, the amount of compensation could vary—as illustrated in the dissent in *Bear Creek v Peru*.<sup>194</sup>

The understanding of the property rights of investors and nationals—including Indigenous peoples—as human rights offers the benefit of a balanced and principled analysis of the multiple interests and state obligations at stake in expropriation claims before ISDS mechanisms.

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194 See Section II.C. above.