"The Right to Property in Human Rights and Investment Law: a Latin American Perspective of an Unavoidable Connection" [*]

Manuel Monteagudo[**]

Introduction

Once the traumatic effects of the 1980s debt crisis had passed, Latin American countries embarked on a general trend for their definitive insertion into the international economic system as a result of macroeconomic reforms based —in many cases— on an open market approach and financial and monetary stability.[1] Even though today it is possible to identify some remarkable political differences in the economic processes of Mexico, Colombia, Peru, and Chile *vis-à-vi*s countries like Venezuela and Bolivia. A preeminence of economic liberalization is evident in a considerable part of the continent, as shown by the growing number of Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) at both the intra- and extra-regional level.[2] But what is even more interesting is the fact that this period of economic stabilization has coincided with a time of dramatic evolution in the Inter-American System of Human Rights (IASHR) as a virtual supranational experience.

Such parallelism may have not been a mere coincidence, as it was not the case when, right after the end of the World War II, the international system embraced both the liberal program of Bretton Woods Accords (1944) and the Universal Declaration of Human Rights

[*] The author would like to express his gratitude to the State Secretariat for Economic Affairs (SECO) and the World Trade Institute (WTI), in particular its Academic Cooperation Project, for supporting this research project.

[**] Doctor in Laws, Université de Paris I, Panthéon-Sorbonne; LLM, University of Houston; BA, PUCP. Currently General Counsel of the Central Bank of Perú and Professor of International Law at PUCP. The author expresses his special recognition to Henry Zevallos and Enrique Cabrera, LLM candidates from the Pontificia Universidad Católica del Perú (PUCP), for their valuable support in researching the jurisprudential sources for this work. The views expressed in this article are the sole responsibility of the author. (Final edited draft dated 31August 2013)

[1] See: Latin America's Fiscal and External Strength: How Dependent Is It on External Conditions? In World Economic and Financial Surveys Regional Economic Outlook Western Hemisphere "Time to Rebuild Policy Space" IMF (May 2013), pp. 37 - 45. http://www.imf.org/external/pubs/ft/reo/2013/whd/eng/wreo0513.htm See also: Jeff Dayton-Johnson, Perspectivas Económicas de América Latina 2011 Centro de Desarrollo de la OCDE, p. 16 (http://www.latameconomy.org/fileadmin/uploads/laeo/Documents/E-book_LEo2011-SP_entier.pdf).

[2] Even Cuba has concluded as many investment protection agreements as has the United States (62). J. E. Alvarez, "A BIT on Custom," Vol. 42: 17 International Law and Politics (2009) p. 50.

(1948). In fact, economic liberalization and the *humanization* of international law[3] have redefined international law as a whole and in different directions. One of them has been the progressive presence and consolidation of individuals and multinational companies as new actors in the international scene, competing with governments in a variety of forums and new conflict resolution mechanisms like the Inter-American Court of Human Rights, the European Court of Human Rights, and the arbitral tribunals under the International Centre for Settlement of Investment Disputes (ICSID).[4] Another redefinition of international law has been the growing importance of international organizations as *new rule makers*,[5] promoting the harmonization or amendment of domestic legislation in areas as diverse as investment,[6] financial and monetary law,[7] governance,[8] and human rights.[9]

This combination of new actors and new rule makers in different fields of law (domestic and international) is also helping to redesign the nature and goals of international law, which is evolving from a system seeking to ensure the principle of sovereignty of States (in line with 16th century classics and the post-Napoleonic era) to a gamut of fragmented mechanisms (hard and soft) aimed at guaranteeing the enjoyment of civil, political and economic rights to individuals, communities, enterprises and even consumers, with extraordinary possibilities to promote a culture and practice of the rule of law. In Dupuy's view, the wide development of international human rights law replicates, at the international level, the special dynamics covering the relationship between governments and individuals, making international law a body of law that serves mainly human beings

[3] As proposed by Professor Pierre-Marie Dupuy since 1945, law has been oriented towards a new pole: the rights that are inherent to men and must be protected and promoted by States. Pierre-Marie Dupuy, « L'Unité de l'ordre juridique international". Cours général de droit international public (2000) », RCADI 2002 T 297, p. 399.

[4] The entrance of individuals or private entities in international public law systems and mechanisms has been incorporated into other branches of international law like international labor law, sea law, environmental law. See: Won-Mog Choi, "The Present and Future of the Investor-State Dispute Settlement Paradigm," p. 734

[5] In his article "Treaty rule makers", Professor José Álvarez refers to the growing power of international organization in the rule-creation process.

[6] In 1992 the World Bank approved the *World Bank Guidelines on the Treatment of Foreign Direct Investment*, which served as a sort of *law model* to attract foreign investment consecrating the basic treatment principles of foreign investment and to promote the access to international arbitration. See I. F. I. Shihata, "Legal treatment of foreign investment: the World Bank guidelines" (Martinus Nijhoff, 1993).

[7] For example, International Monetary Fund conditionality under its stand-by facilities promoted unification and harmonization of economic reforms during the debt crisis of the Third World (1980s), the transition of socialist economies into market economies (1990s and 2000s), and the Asian crisis (1990s). R. Lastra, "The role of the IMF as a global financial authority," p. 9 (SPECIAL PAPER 192), LSE FINANCIAL MARKETS GROUP PAPER SERIES, May 2010.

[8] The World Bank produces annually the Country Policy and Institutional Assessment (CPIA) covering economic management, structural policies, social integration policies and public sector and institutions. See the World Bank site of CPIA in http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21378540~menuPK:2626968~pagePK:51236175~piPK:437394~theSitePK:73154,00.html See Also : Habib Gherari, « Le Respect de l'État de Droit comme Elément de la Bonne Gouvernance en Droit International Économique »

[9] The Inter-American Commission on Human Rights has issued more than fifty reports on the Human Rights situation of country members promoting legislative initiatives to comply with human rights standards. See H. Faúndez, supra 133, pp. 35, 38; and Manuel Monteagudo, SIEL, Bogotá, Colombia.

rather than States.[10] Along these lines, as proposed by Slaughter and Burke-White, international law is becoming *domestic*, as it enters *directly* into the resolution of conflicts between national authorities and their subordinated individuals.[11] Moreover, international law is being *nationalized* in the name of higher principles as a new form of constitutionalism. Professor Petersmann considers that *the universal recognition of human rights calls for the constitutionalization of international law and foreign policies based on human rights and principles of rule of law, limitation and separation of government powers, social justice, 'democratic peace', and national as well as international constitutionalism*.[12] And he does not confine the broad role of international constitutionalism to the area of human rights, but considers it relevant for international investment law, inasmuch as international investment tribunals impose the application of standards such as non-discrimination, fair and equitable treatment, and protection of private property.[13]

Some other areas of international economic law have also experienced a considerable development in the name of *common protecting principles* to be applied domestically, such as international monetary and financial Law. Global and domestic responses to the recent international financial crises are founded in the goal of preserving monetary and financial stability as a *public international good;*[14] i.e., a good that is essential for exercising the economic rights and freedoms consecrated in the Universal Declaration of Human Rights. This is precisely the point made by Professor Rosa Lastra that the current global financial architecture does not meet the requirements of article 28 of the Universal Declaration (*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized*).[15]

In that context, it is unavoidable to find a *connection* between two of the most significant developments of the *internationalization* of domestic affairs in Latin America: foreign investment treatment and human rights protection. Latin America is experiencing the *revolution* of international law in *its* own *way*. It can be suggested that a connection between human rights and investment law is already in place, as reflected by the fact that

[10] Dupuy, op. cit., art 3, p. 413-414: *A l'inverse du « national » ou de « l'étranger ,» l'homme de la Déclaration universelle de 1948 et des conventions qui en découleront ne doit rien à l'État mais tout à lui-même*. Ibid. pp. 414 -415

[11] See Slaughter and William Burke-White, "The future of International Law is Domestic (or, The European Way of Law), Harvard International Law Journal, Volume 47, p. 2 (2006).

[12] E.-U. Petersmann, "Human Rights and International Economic Law in the 21st Century–the Need to Clarify their Interrelationships," JIEL 2001, 3.

[13] E.-U. Petersmann, "Introduction and Summary: 'Administration of Justice' in International Investment Law and Adjudication". In: Human Rights in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, and E.–U. Petersmann, eds.), p. 42, OUP 2009. Petersmann proposes as an example of rule of law promotion the case of the independent WTO memberships of China, Hong Kong, Macau, and Taiwan. China's acceptance of investor-state arbitration has promoted legal and judicial reforms that have enhanced the rule of law among these separate customs territories.

[14] In the middle of the financial crisis, there is a political and economical principle that to be reaffirmed: financial and monetary stability is a sort of universal public good. See M. Monteagudo, "*Evolución del Derecho Internacional Económico en América Latina: ¿la liberalización es solo económica?,"* (p. 17 from draft version)

[15] Rosa M. Lastra, "Global Financial Architecture and Human Rights", p. 11

some investment awards are beginning to refer to human rights case law. This happened in Técnicas Medioambientales TECMED S.A. v. Mexico,[16] when a tribunal assessed the reasonable proportionality that State measures affecting private property should comply with, quoting the European Court of Human Rights' (ECHR's) reasoning in *James and others* ("there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized…").[17] Additionally, inasmuch as the right to property is at the epicenter of international investment law (Liberti considers that currently BITs represent the most efficient means to protect the right to property against any form of *de jure* or *de facto* expropriation),[18] this right is expressly considered a human right in almost all Human Rights substantive international instruments and treaties.[19]

This *connecting* exercise might also show the potential for consistency and integration of two expressions of liberalism in Latin America's recent experience. A common feature in the political debate in the region is a disassociation between human rights and economic liberalization. They can even be thought of as opposite approaches to law and stability. In politics, economic liberalization has been frequently seen as a value of the "right" and human rights as a value of the "left". Some countries have also completely engaged in the internationalization of foreign investment treaties through BITs and FTAs, but remain reluctant to, and critical of, conferring amplified powers to the IASHR.[20] The U.S., which champions the dissemination of FTAs, has not yet ratified the Inter-American Convention, as is the case of Canada.

However, connections and common understandings of Human Rights and Investment Law can be rather surprising. Human rights are not only political and civil rights; as mentioned above, they also include economic rights (e.g., the right to property). And the protection framework in investment law is founded not only on economic liberalization, but also on legal principles —like the Fair and Equitable Treatment (FET) standard— that are quite close to human rights. Therefore, it is possible *that some investor-State claims will become vehicles for potentially innovative decisions concerning on how states are supposed to*

[16] TECNICAS MEDIOAMBIENTALES TECMED S.A. v. THE UNITED MEXICAN STATES ICSID CASE No. ARB (AF)/00/2.

[17] See Paragraph 50 and 75 of CASE OF JAMES AND OTHERS v. THE UNITED KINGDOM (Application no. 8793/79) JUDGMENT (STRASBOURG, 21 February 1986). See also Paragraph 122 of TECNICAS MEDIOAMBIENTALES TECMED S.A. v. THE UNITED MEXICAN STATES ICSID CASE No. ARB (AF)/00/2.

[18] L. Liberti, "Investissements et droits de l'homme", in P. Khan and T Wälde, « ASPECTS OF International Investment Law » (Leiden Nijhoff 2007), pp. 809–10.

[19] Article 17 of the Declaration of the Man and Citizen (1789), article 17 of the Universal Declaration of Human Rights (1948), article XXIII of the American Declaration of the Rights and Duties of Man (1948), Article 1 of the Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952), article 21 of the American Convention on Human Rights (1969). See texts of articles in page 10.

[20] Some Latin American countries led by Venezuela, Bolivia and Ecuador have proposed before the assembly of the American State Organization reducing some competences of the IAHR Court. See: "Países bolivarianos vuelven a arremeter contra la CIDH" Journal, El Comercio June 7th, 2013, A 23. Venezuela's strong opposition to the IAHRS has ended with its official exit of the system on September 10th 2013. See: http://elcomercio.pe/actualidad/1629709/noticia-venezuela-abandono-corte-idh-entre-preocupacion-internacional

comply with both their human rights and their BIT or FTA obligations (Professor José Enrique Álvarez).[21]

This article discusses the interplay between human rights and investment law through a theoretical reflection on the human and economic aspects of the right to property, identifying similarities and differences between human rights and investment law, and providing a rapid review of the synthesis provided by the European experience in this area (Part I). The discussion then focuses on the dialogue between human rights case law (within the Inter-American Human Rights system, with some references to the EHRC) and investment law *jurisprudence*, mainly through the review of some ICSID cases in Latin America that cross-refer to human rights law and some economic law principles of Human Rights Law (Part II).

The article is motivated by a double interest around the need to deepen integration of international law (as opposed to fragmentation). The first one is Professor Petersmann's demand for an increased *judicial dialogue* to find a wise equilibrium as proposed by the classics like Montesquieu,[22] a *proportionality balancing of governmental restrictions of property rights in order to promote other fundamental rights of citizens.*[23] The second one is related with Latin America's need to reach a frank reconciliation between economic and political freedom as complementary pillars of collective life.[24]

Finally, my academic interest in bringing together economic law and human rights comes also from my own engagement in monetary law. A fundamental claim in this respect was the German ordoliberals' claim that monetary stability should be a part of the body of fundamental rights.[25] If money provides a vehicle for the patrimonial rights of individuals, the stability of monetary instruments is a precondition for exercising those rights. At the end of the day I realized that monetary stability is a privileged instrument for both good economics and the exercise of fundamental economic rights.

[21] José Enrique Álvarez, "The Public International Law Regime–Governing International Investment", RCADI, 2009, V 344, p. 456

[22] See: A. Hauriou, "*Derecho constitucional e instituciones políticas*, pp. 239 – 240 (Barcelona: Ariel, colección Demos, 1971); P. Ardant, "Institutions politiques et droit constitutionnel," pp. 47 - 48 (11e édition, 1999 L.G.D.J). Simone Goyard-Fabre, "Montesquieu: la Nature, les Lois, la Liberté", p. 168 (PUF, 1993).

[23] See Pettersmann (Administration of Justice) supra note, pp. 35-42

[24] Amartya Sen, "Development as Freedom" (Alfred A. Knopf New York 1999), p. 9.

[25] Tietmeyer, H., *Economie sociale de marché et stabilité monétaire*, (Paris: Economica, 1999), 8-9. See also some references to German ordoliberals in M. Monteagudo, *Neutrality of Money and Central Bank Independence*, in International Monetary and Financial Law the Global Crisis (Oxford University Press, UK, 2010), p. 498.

I. THE RIGHT TO PROPERTY AND THE INTERFACE BETWEEN HUMAN RIGHTS AND INVESTMENT LAW

A. The human rights *nature* of the right to property

At first glance it may seem difficult to figure out how something apparently so material as property rights can be considered by major international legal bodies within a list of rights regarded as *consubstantial* to the condition of human beings. In any case, the condition of *being* should be clearly differentiated from the condition of *having*. In this section we review some of the arguments against and in favor of the notion that the right to property is a human right, with emphasis on the human *relational* content of the right to property. In fact, the right to property is instrumental in *interconnecting* individuals, thereby reaffirming their equal condition. Moreover, the right to property can also be used in *an adaptive way* as a valuable vehicle to recognize *a special* status of rights, as in the case of indigenous peoples' property rights. What follows is a review of this debate in international law, with emphasis on the relational nature of property rights.

i. Is the right to property a genuine human right?

For Héctor Fáundez the correct answer to this question should be negative. The right to property does not derive from the human condition, but rather from the fact that a given person owns or possesses a good.[26] This seems to be a conclusive statement that does not admit any discussion. However, one of the essential conditions for creating rights is human beings' capacity to establish different types of relations among themselves, with binding consequences. A good example of this mechanism is the relationship among individuals derived from the right to property. *Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always against one or more individuals.*[27] The right to property implies a relation (sometimes by opposition) with the rest of individuals (non-owners of the same good). Therefore, the right we are dealing with is not as material as it appears at first glance.

A material right not easily associated with human and political sensitivity: The problem is that such right is often associated with abundance. People who usually need human rights protection, *the most, own little or nothing…*and *historical evidence shows that property has been a privilege of the few.*[28] There are also some approaches biased towards not considering the right to property as a genuine human right, based on a closer examination of Latin America's experience and of the negotiation's background of some international human rights instruments. Pedro Nikken points out that human rights protection in Latin

[26] See Héctor Faúndez Ledesma, "El Sistema Interamericano de Protección de los Derechos Humanos aspectos institucionales y procesales." Tercera edición, IIDH (2004), pp. 70–73.
[27] Morris R. Cohen, "Property and Sovereignty," The Cornell Law Quarterly, p.12. *This becomes unmistakably clear if we take specially modern forms of property such as franchises, patents, good will, etc., which constitute such a large part of the capitalized assets of our industrial and commercial enterprises.* Id.
[28] Francis Cheneval, "Property Rights as Human Rights", in Realizing Property Rights (H. de Soto and F Cheneval), p. 11.

America has consolidated in the battlefield against dictatorships. In this light, the protection of economic rights is frequently regarded by the human rights community as overly sophisticated —if not somewhat frivolous. Nikken also stresses that the Calvo doctrine, having originated in Latin America, may have played an important role in building an *apprehension* of human rights courts to protecting economic rights.[29] It is possible to contest Nikken's argument proposing that the Calvo doctrine was primarily enounced and developed as a claim of self-determination founded in the idea that the State, enjoying full capacity to decide its own destiny, should have the right to administer justice and enforce its own laws within its territory, free from external pressure.[30] This *nationalistic* approach to foreign investment treatment was not necessarily opposed to the right to property (including aliens' rights) as a matter of principle.

The influence of the Calvo doctrine in this specific area is debatable, but there seems to be a consensus that a sort of apprehension against the right to property (as a fundamental right) has been strong in Latin America and other regions. This was aggravated during the cold war, as reflected by the negotiation of the International Covenant on Civil and Political Rights, *the main instrument in the field of classical freedoms*, which does not enunciate a right to property protection. Tomuschat mentions that in the period between 1948 and 1966, major divergences of opinion existed between western market economy countries and socialist countries regarding the function of property,[31] and there was a lack of consensus on the permissible restrictions to the right to property.[32] Something analogous happened with the negotiation of the original text of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), which did not include the right to property. This right was finally recognized as part of the list of human rights by Protocol 1 of the Convention (approved two years later[33]), together with the right to education and free elections.[34]

An interesting event that took place in France during in 1982, following the nationalization of banks and in the context of some alleged doubts about the validity of the right to property proclaimed by article 17 of the 1789 Declaration of the Rights of Man and of the Citizen (*Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid*). The French Constitutional Council confirmed the full and current constitutional status of the right to property. It did not view in this consecration, as some expected, an anachronism from the time of the French Revolution, when owners

[29] Pedro Nikken, in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni and E.–U. Petersmann, eds.), OUP, 2009, p. 247.
[30] Under the Carlos Calvo doctrine, many Latin Americans demanded during a large part of the 20th century that foreign investors be subject to national courts and domestic legislation. *See* DOMINIQUE CARREAU, DROIT INTERNATIONAL [INTERNATIONAL LAW] 428–30 (Pedone ed., 9th ed.2007).
[31] Christina Tomuschat, "The European Court of Human Rights and Investment Protection" in International Investment Law for the 21st Century, Essays in Honour of Christoph Schreuer (edited by C Binder, U. Krieebaum, A. Reinnisch, and S. Wittich, OUP, 2009), p. 638.
[32] Elle Desmet, "Indigenous Rights Entwined with Nature Conservation," International Law Intersentia 2011, p. 214.
[33] See Elle Desmet, supra note 32, p. 218. The European Convention was signed on November 4, 1950. Protocol 1 was signed on March 20, 1952.
[34] Id.

needed the assurance that theirs rights would survive in the new political era.[35] On the contrary, the Constitutional Council emphasized that the enjoyment of the right to property has notably evolved, as reflected in its application to new individual domains and also in its limitations based on the general interest.[36]

A different view of property: a connecting point among individuals: The right to property is allegedly one of the most decisive vehicles to *interconnect* individuals in modern societies. In fact, a person living in complete isolation does not need to worry about property rights.[37] When Amartya Sen refers to income and wealth as means *for having more freedom to lead the kind of lives we have reason to value,*[38] he is indeed evoking a *basic* instrumental role of property rights that can only be exercised *vis-à-vis* other individuals. The first element that permits that instrumental role to operate is the fact that for people to be able to *use* their own wealthy (property), they need to be entitled, recognized, and *protected* by the legal system as owners (individual or collective). Today it would be absolutely discriminatory that only a group of individuals were entitled to be owners and therefore able to *lead the kind of lives we have reason to value*. Cheneval refers to the *Entitlement theory of distributive justice* to conclude that the human rights nature of the right to property implies precisely that all human beings are entitled not to be excluded from the group of potential property owners for reasons of gender, race, social status, etc.; but not that the right to property guarantees anybody to become an owner (*it does not pay people's bills*). Other implication of the human nature of the right to property, not less important, is that it implies a mutual recognition of personhood that creates a sense of responsibility and dignity, putting the person in a position to be autonomous, thereby making it *a universal special right to the legal empowerment to everybody*.[39] For Hegel, property is the expression of personality, independence, and the self-government *vis-à-vis* third parties, thereby becoming an existential component of autonomy and of the social recognition of individuals.[40]

Additionally, approaching the right to property as a connecting point among individuals takes us to the concept of *excludability*. Barnes understands this concept as the legal right of owners to *exclude* others from their property, but pointing out that, precisely because property rights are a *relational construct*, the extent of excludability will depend on moral, social and institutional limits.[41] Along these lines, the use of property implies a degree of individual autonomy *vis-à-vis* the rest. Without this kind of mechanical dynamics the right

---

[35] J.–P. Colson, Droit Public Économique, pp. 46-47.
[36] Ibid. 48.
[37] Neil Meyer, "Introduction to property rights: A historical Perspective" (http://urbanext.illinois.edu/lcr/propertyrights.cfm)
[38] Amartya Sen, "Development as Freedom" (Alfred A. Knopf New York 1999), p. 14.
[39] Cheneval, supra note 28, p. 13.
[40] E.–U. Petersmann, "Human Rights and International Trade Law: Defining and Connecting the Two Fields, p. 49.
[41] Richard Barnes, "Property Rights and Natural Resources" (Oxford and Portland, Oregon 2009), pp. 28–29. Barnes also indicates that resources "may be incapable of propertisation in the face of powerful and compelling moral reasons." He quotes Gray's remark that in all societies there are certain resources which are regarded as such: *central or intrinsic to constructive human coexistence that it would be severely anti-social for these resources to be removed from the commons.* Ibid.

to property does not exist. Paradoxically, the right to property connects individuals through all possible contractual relations that can be built thanks to the opposing effect of excludability.

Another important element to identify the *relational* nature of the right to property is the fact that in many cases it is claimed in association with other fundamental rights that are equally relational, like the freedom to contract and commerce. For example, for the founders of the social market economy theory (which today is the doctrinal base of many national constitutions and multilateral systems, like the European Union[42]), the right to private property provides the five basic principles of the *Economic Constitution*, together with monetary stability, free access to markets, freedom to contract and macroeconomic policy continuity.[43] In that liberal universe, the recognition of property rights is a basic pre-condition for exercising the fundamental rights of freedom to contract and commerce,[44] which drive individuals towards other individuals, thereby promoting interactive and enterprising activities. As mentioned previously, human beings create and produce with others by exercising —in different ways— their property rights. When the present-day French Constitutional Council tested the right to property in *revolutionary* times, it stressed that freedom could not be preserved by itself if arbitrary and abusive restrictions were imposed on the freedom of enterprise.[45] Economic rights are efficient means for individuals to reach their personal aspirations in relation with others. Petersmann summarizes this association stating that "Modern economic theory rightly emphasizes the *instrumental role of human rights* for economic and personal development, e.g. as an incentive for saving and investing; as a legal precondition of professional freedom and transfer of property rights in an exchange economy; and as a defensive right promoting the 'internalization of external effects' through contractual agreements or court litigations."[46]

The right to property is also a mechanism to resolve conflicts: The debate of whether or not the right to property is consubstantial to human nature can be endless, but what cannot be denied is that it is a social mechanism that *naturally* links individuals, for good or bad. Being so linked to social life, property is also an *institutional* vehicle for reassigning wealth. Marxist theory proposed the abolition of private property, but in the benefit of the instauration of *common* or *collective* property.[47] On the opposite side, liberalism (particularly ordoliberalism, which is another denomination for the social market economy)

[42] For example, the social market economy is mentioned in the Constitutions of Peru (article 58) and in the Treaty of the European Union (article 3.3): "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive *social market economy*, aiming at full employment and social progress…"

[43] André-Gilles Latournald, "L'ordolibéralisme, les linéaments d'une synthèse entre l'histoire, le droit et l'économie politique", Mémoire DEA d'histoire de la pensée économique et d'épistémologie, Université Paris I, 1995, p. 29.

[44] D. Dickertmann and V. W. Piel, "Economía Social de Mercado: Principios Económicos y modo de Funcionamiento", in Diccionario de Economía Social de Mercado: Política Económica de la A a la Z (R Hasse, Hermann Schneider, and K Weiggelt, eds.), Konrad Adenauer Stiftung, 2004, p. 162.

[45] J.-P. Colson, supra note 35, p. 51

[46] Petersmann [21 century], supra note, pp. 10–11.

[47] See reference of the abolition of the market economy in Marx, "Critique du Programme de Gotha », 1875, W XIX, p. 19-20 cited by Kostas Papaioannou, "Marx et les marxistes" p.217 (Flammarion 1972).

considers *private* property as a basic principle for the Economic Constitution,[48] based on the idea that market mechanisms (property transfer rights) are the best way for reassigning wealth. [49] Interestingly, there is consensus among all parties that the individual concentration of property —more specifically in a context of scarcity— usually calls for public power intervention.[50] In the extreme, dominion over things can result "in *imperium* over our fellow human beings."[51] Regarding the problem of allocation, Waldron elaborates on how to determine who is to have access to which resources for what purposes and when, concluding that *the systems of social rules which I call property rules are ways of solving that problem.*[52] This is a very illuminating reflection, because the institution of property is not only seen as an attribute for individual autonomy, but also as a mechanism to resolve conflicts (individual and collective). Property law and the *modern* legal instruments that recognize the right to property as a human right have consistently established both the State's capacity to guarantee its free exercise and State's capacity to impose some limitations in the name of public interest. Pope Leo XIII's Rerum Novarum encyclical (1891) already summarized this balanced concept stating that *the right to possess private property is derived from nature, not from man; and the State has the right to control its use in the interests of the public good alone, but by no means to absorb it altogether*.[53]

The following paragraphs provide some important expressions of positive international law instruments consecrating the double meaning of the human right to property (these texts will be revisited in the following sections):

Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid (Article 17 of the Declaration of the Rights of Man and Citizen, 1789).

(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 (Article 17 of the Universal Declaration of Human Rights, 1948).

Every 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 (Article XXIII of the American Declaration of the Rights and Duties of Man, 1948).

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

[48] See references in notes 43-44.
[49] M. Aglieta, « la monnaie souverain » p. 155 (1998).
[50] *Undesirable or intolerable consequences would follow if one person, or a group of persons, was permitted to control the access to those resources… values such as the preservation of channels of communication and freedom of speech, national security, protection of cultural property and protection of the environment frequently shape the limits of property. Although excludability is at heart of private property, paradoxically an excessive focus on the private or exclusive function of property may result in a detriment to private rights.* Barnes, supra note 41, pp. 28–29.
[51] Morris R. Cohen, "Property and Sovereignty," The Cornell Law Quarterly, (1927 – 1928) p. 13.
[52] Jeremy Waldron, "The Right to Private Property", Clarendon Paperbacks, 1988, p. 32.
[53] Rerum Novarum (Paragraph 47)

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. (Article 1 of the Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1952)

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. 3. Usury and any other form of exploitation of man by man shall be prohibited by law (Article 21 of the American Convention on Human Rights, 1969).

The 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 (Article 14 of the African Charter on Human and Peoples Rights, 1981).

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected (Article 17 of the Charter of Fundamental Rights of the European Union, 2000).

Almost all of these texts consecrate —under a similar formula— the general principle of a genuine human right (*everyone has the right to property*) to be protected by the public power and, at the same time, the capacity of the said power to limit the right under certain conditions. But the connecting effect of the right to property operates in the sphere of relationships among individuals and not exclusively *vis-à-vis* public powers. In fact, the right to property is basically exercised among individuals and is protected (and eventually limited) by the State. As the right to property is not a *purely unilateral claim,*[54] when in a transaction one recognizes others' rights to property (a native community or a foreign investor), at least two practical and basic things occur: Both parties factually recognize their equal condition of human beings and, thanks to the transaction, contribute to ensuring the continuity of their right to property. This might explain why —as proposed by Cheneval— *property rights are inalienable human rights while the things owned are alienable. A person selling her patch of land does not alienate her property right. Quite the contrary, she exercises a transaction under the protection of property rights by asking and getting something in return for her possession. There is a continuity of property rights protection a mutual recognition in the transfer and exchange of property.*[55]

[54] Chevenal, supra note 28, p. 15.
[55] Ibid.

ii. The adaptive example of the right to property of indigenous peoples

Private transactions (contracts) are a fundamental mechanism for protecting the permanence of individuals' rights through this double effect of recognition and transformation (one property asset into another). In this context, it is interesting to notice that indigenous peoples have claimed —and often obtained— the recognition of their traditional rights, using —among other legal instruments— the right to property, as used by foreign investors in FTAs and BITs. Considering the connecting nature of property rights, *a priori*, those property rights claims of indigenous peoples can result in obvious mechanisms of integration and pacification. International Labor Organization (ILO) Conventions Nos. 107 (1957) and 169 (1989), which recognize ownership over the lands *traditionally occupied* by native peoples,[56] in combination with human rights case law, have outlined a special content of the right to property that promotes a further development of native peoples' rights, including other areas like environmental protection.[57] As the right to property is *relational territory* among human beings, it is also a perfect scenario to explore conflict resolution mechanisms, where it is key to balance individual, collective, and public interests.

ILO Conventions No 107 and 169 provide specific tasks for sovereign States regarding indigenous peoples' rights. First, States have the obligation to recognize the right to property of indigenous peoples (Article 11 of ILO Convention No. 107: *The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized*). Under a preliminary view, this international obligation does not add anything new to States' general obligation to recognize and guarantee the right to property according to human rights instruments. However, ILO Conventions as a *lex specialis* directly regulates the case of a specific group of beneficiary individuals (*vis-à-vis* the rest of individuals as one of the natural effects of the classical right to property) to enjoy a title of property over specific goods (*lands traditionally occupied*). Second, ILO Conventions mandate that the rights to property of indigenous peoples be recognized in line with their *special* content under the cultural and spiritual values of the peoples concerned (as a real effort of legal integration).

According to Desmet, ILO Conventions No. 107 to 169 on this matter represent a significant advance. While the first convention aimed at the eventual integration of indigenous peoples, who were perceived as "less advanced", the objective of the second convention was rather "to provide for the possibility of a separate land rights regime within the context of the national legal system",[58] thus paving the way for incorporating indigenous legal institutions that remained out of the juridical order into domestic law. The first obligation is provided by article 13(1) of ILO Convention No. 169, which states that *Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as*

[56] Article 14 (1) of ILO Convention 169.
[57] Regarding indigenous peoples, the Inter-American Commission and the Court of Human Rights have played a pioneering role in interpreting the right to property in a manner that is evolutionary and culturally appropriate, recognizing the collective ownership of indigenous peoples (and tribal communities) to their lands, territories, and resources. Desmet, supra note, p. 212.
[58] Desmet, supra note 32, p.215.

applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. Second, according to article 14 (1) of ILO Convention No. 169, governments are also mandated to recognize the resulting rights of *ownership and possession*, providing that *measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.*

Another difference between ILO Conventions 107 and 169 is the fact that the latter uses the expression "right to *possession*" in addition "right to *ownership*." This change reflects a more flexible approach, as many indigenous societies are not familiar with the concept of ownership, as well as the fact that the use of the phrase "traditionally occupy" in the present tense indicates that the occupancy must have a link with the present, even in the case of lost lands.[59]

In fact, the IACHR has invoked Article 21 of the IHR Convention, consistently with ILO Convention principles, in deciding several cases related to ancestral or communal property of indigenous or tribal peoples who live in strict adherence to their customs and even in cases in which the Court has ordered provisional measures under Article 63.2 of the Convention (*Saravaku v. Ecuador*).[60]. In this regard, the ICHR has recognized that indigenous peoples' *communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so it may preserve its cultural legacy and pass it on to future generations* (*Moiwana* case, paragraph 131).[61] This extended approach of property (which is not confined to its fungible character) implies that the payment of compensation in the event of an expropriation does not repair in any way the damage caused to the cultural aspects of the property (*Sawhoyamaxa* case, paragraph 210).[62]

The IACHR has reinforced its competence to resolve property conflicts involving indigenous peoples' claims in situations where the State has failed to fulfill its international human rights obligations an favoring restitution of ancestral lands (to indigenous communities) when they have been taken by private parties. *If the traditional territory is in private hands, the State must assess the legality, necessity and proportionality of expropriation or non-expropriation of said lands to attain a legitimate objective in a democratic society*. (Yakie, paragraph 217; and Sawhoyamaxa, paragraph 212).[63] The IACHR's commitment to protecting the property rights of indigenous peoples was evidenced by its ruling in Mayagna Awas Tingi Community v. Nicaragua in 2001 (enacted before the 2007 United Nations Declaration of the Rights of Indigenous Peoples), ordering governments in the region to *take proactive measures to delimit and demarcate the lands of the indigenous communities, and formally title those lands to said communities, in*

[59] Id. *Given the respect required by article 13 for the cultural values related to land, "a sufficient present connection with lost lands may be established by a continuing cultural attachment to them, particularly if dispossession occurred recently…* Id. (quote of Desmet from S. James Anaya, "Indigenous Peoples International Law," p. 144 (Second Edition, 2004). Oxford University Press.
[60] Niken, supra note 29, p. 261.
[61] Niken, supra note 29, pp. 261–262.
[62] Ibid.
[63] Niken, supra note 29, pp. 263-264.

recognition of the fact that, as a matter of international law, indigenous peoples have collective rights to the lands and natural resources they have historically used and occupied. The decision was based on the Court's reading of articles XXV (right to judicial protection) and XXI (right to private property) of the American Convention.[64]

It should also be mentioned that the special content of the right to property of indigenous peoples, including spiritual and cultural values, has been subject to criticism. For example, De Soto prefers to incorporate indigenous peoples' rights into the modern and general regime, because until ownership is universalized and formalized, and registration completed, a diversity of locally recognized arrangements prevents customary forms of ownership from generating capital, which is key to the process of wealth generation.[65] Rather than recognizing a special regime, the right to property of indigenous peoples must be integrated into western understanding of property rights to maximize its benefits.[66] But some economic and financial experiences, such as *Islamic finance*, show that the integration to *western* institutions (for example, commercial banks) of different spiritual and cultural values does not necessarily mean an anti-economic operation but, on the contrary, the development of a new and efficient financial industry.[67]

B. Points in common and differences between investment law and human rights law

The proximity between some foundations of the right to property as a relational mechanism, and human rights, can explain the evolving interplay between investment law and human rights law that is taking place as part of the evolution of international law. International jurisdictions in both cases are addressing conflicts that in the past were reserved to national states, appealing to shared principles like non-discrimination and the respect of due process. Even human rights law seems to be more linked to rule of law aspirations, international investment law —more economics-inspired— goes in a similar direction.

i. An evolving convergence?

International investment law and human rights are clear examples of the reinforcement of private individuals' power to challenge domestic public action internationally: Both international mechanisms provide private individuals —not previously identified— with the ability to act against the State to sanction the respect of a commitment of principles

[64] José M. Palli, "Property Rights and Human Rights in the Americas" in Realizing Property Rights (H. de Soto and F Cheneval), p. 158.

[65] David Lea, "Property Rights, Indigenous People and the Developing World, Issues from Aboriginal Entitlement to Intellectual Ownership Rights" (Martinus Nijhoff publishers), p. 82.

[66] Ibid supra, p. 87.

[67] See: Patrick Imam and Kangni Kpodar, "Islamic Banking: How Has it Diffused?" IMF Working Paper, (August 2010); Gopal Krishnan K Sundaram, "How Crisis resistant is Islamic Finance?" p. 392 in International Monetary and Financial Law the Global Crisis (M. Giovanoli and D. Devos eds.), (Oxford University Press, 2010); « Proposal – Group on Governing Law and Dispute Resolution in Islamic Finance », G. Affaki (Ed.), I. Fadlallah, D. Hascher, A. Pézard, F-X. Train, 21 September 2009.

already adopted under a treaty obligation.[68] This capacity of individuals is based —again, in both cases— on the idea that the protecting role of international law (in the benefit of producers, investors, traders, consumers or simple citizens) should fully operate against arbitrary interferences by governments and other forms of abuse of public power.[69] In fact, investment and human rights law operate under the recognition of an asymmetric legal relationship between sovereign states and individuals.[70]

In this regard, human rights and investment law are also part of the general trend in international law to making it a *protecting* body of law (*un derecho garantista*) in the direct benefit of individuals rather than States. It should be noticed that many of the economic liberties supported by FTAs or BITs are consecrated in national constitutions (as part of fundamental rights). That is the case of the principle of non-discrimination, which, stated as a basic human and civil right, constitutes the basis of investment law standards like national treatment, the Clause of the Most-Favored Nation (CMFN) and the Fair and Equitable Treatment (FET). This egalitarian principle plays a key role in both areas of law, even in cases where investment law host States retain some margin to limit foreign investment access to their territories.[71]

However, only in human rights the exhaustion of internal remedies is a condition for internationalizing conflicts: We are before two branches of law that differ in their objectives and pivotal principles. Even though the consolidation of investment law (and the continuous respect of investment standards) can reinforce the rule of law in host states, investment law constitutes a body of rules more focused on investment protection. Human rights law has a broader application and is more directly concerned with fundamental rights and the rule of law. This could justify the fact that the internationalization of both fields does not operate at the same tempo. International human rights courts (both the European and Inter-American courts) assume jurisdiction once internal remedies have been exhausted,[72] while in investment law for foreign investors it is possible to bring States to international arbitration without going through domestic procedures. Article 26 of the ICSID Convention has opened this possibility as a discretionary decision of host States (*A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention*), not prescribing prior exhaustion of local remedies as a *prima facie* principle.[73]

The immediate question that arises is why the reparation of a human rights infringement is subject to the time-consuming process of exhausting domestic protection, when a violation

[68] Liberti, "Investissements et droit de l'homme,» note 1.
[69] E.-U Petersmann, supra note 13, p. 31.
[70]Ibid., p. 16.
[71] Pierre-Marie Dupuy, supra note 71, p. 50.
[72] Article 35.1 of the EHRC establishes that the *Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.* Article 46.1.a. IACHR provides the same principle: *1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: (a). that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law…*
[73]Christina Tomuschat, supra note 31, p. 641.

of investment treatment principles prompts a direct appeal to international remedies. In other words, why does investment law treatment and protection seem to be more "international" than human rights protection?

We can find an answer by looking into the recent evolution of international investment law. It may be surprising that foreign investment treatment in Latin America, after decades of the Calvo doctrine's reign in national constitutions [74] and domestic codes (i.e., full submission of foreign investors to domestic jurisdiction), has become more internationalized than ever. In fact, after the waves of nationalizations in the 1970s and the 1980s debt crisis, many Latin American countries competed fiercely to attract foreign investment under an *open* doors approach.[75] This political and economic context facilitated since 1990 a massive ratification of the ICSID Convention, signed in 1965 with strong opposition from many Latin American countries. [76] The ICSID Convention and the successive BITs and FTAs go in the opposite direction of the Calvo Clause. Article 25.1 of the ICSID Convention recognizes the jurisdiction of the Centre (and international arbitration tribunals) in case of legal disputes between contracting States and investors of another contracting State,[77] once previous consent has been given by the parties (expressly by BITs and FTAs).[78] In fact, the internationalization of investment controversies has been one of the cornerstones of the revolutionary transformation of investment law in Latin America.

[74] The Calvo clause enounced as the general principle (recognizing exceptions) of mandating foreign investors to be submitted to domestic courts and legislation remains in Peru (Article 62 of the Constitution) and in Mexico (Article 27(1) of the Constitution). Both countries are opened to the internationalization of foreign investment treatment (even Mexico has not ratified the ICSID treaty).

[75] The open doors approach to foreign investment was echoed by the "World Bank Guidelines on the Treatment of Foreign Direct Investment" (1992). In Section II.3 of the guidelines devoted to Admission it is provided that *each State maintains the right to make regulations to govern the admission of private foreign investments*, but pointing out that *open admission, possibly subject to a restricted list of investments is a more effective approach that performance requirements*, which *often discourage foreign investors from initiating investment in the State concerned or encourage evasion and corruption*. See the text of the Guidelines in I. F. I. Shihata, "Legal treatment of foreign investment: the World Bank guidelines" (Martinus Nijhoff, 1993), p. 158.

[76] Lowenfled explained that, at the Annual Meeting of the World Bank in Tokyo in 1964, *all Latin American member states voted "no" – the first time in the Bank's history that a major resolution had met with substantial opposition on a final vote-'El no de Tokyo', as it became known in the Latin American Press*. Andreas Lowenfeld, "International Economic Law," (Oxford University Press 2002), p. 460.

[77] Article 25.1 reads as follows: *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

[78] *"Article 8.(1) of the Bilateral Investment Treaty, invoked as expressing Sri Lanka's consent to ICSID Arbitration*, reads as follows: *Each contracting Party hereby consents to submit to the International Center for the Settlement of Investment Disputes (…)* for settlement by conciliation or arbitration under the Convention on the settlement of Investment Dispute between States and Nationals of the Other States opened for signature at Washington on 18 March, 1965 any legal disputes arising between that Contracting Party and national or company of the other Contracting Party concerning an investment of the latter in the territory of the former." Paragraph 2 of Asian Agricultural Products LTD. (AAPL) v. Republic of Sri Lanka (ICSID CASE No. ARB/87/3) June 27, 1990.

Do the implementation and dissemination of economic principles tend to develop faster than political and legal principles (like the access to international jurisdictions in case of violations of human rights)? It is not possible to be conclusive in this area. *Humanization* of law and international law (with the dissemination of human rights values) operates at the national and international level. As in any supranational system, national States are the *first guarantors* of human rights protection.[79] This is clear enough under article 2.3 of the International Covenant on Civil and Political Rights, whereby each State party *undertakes* "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" before "competent judicial, administrative or legislative authorities, or by any other competent authority provided by the legal system of the State."[80] Therefore, in a first step national States assume the responsibility to repair any human rights violation; and only if this mechanism fails the victims are entitled to access the international mechanism through international organizations.

Investment and human rights laws have their own biases: The protection of the right to property is the basis of international investment law, which obviously is not the case of human rights law. Human rights courts have addressed the right to property, but mostly when invoked in association with other human rights.[81] This difference also implies that investor-State arbitrations tend to limit their examination to whether or not national States have recognized investors' rights under BITs or FTAs and not necessarily to matters associated with investors' conduct and harms inflicted on local populations or local consumers.[82]

The IAHRS (*vis-à-vis* investment law) confines its scope to natural persons' access to the system. This is a restriction based on the definition of *persons* in article 1.1 of the Convention: *every human being*. The exclusion of legal persons is an important difference with the broader access to investment arbitration accorded by most BITs and FTAs, which recognize access indistinctly to natural and legal persons.[83] However, the ECHR does not have such a limitation concerning the right to property, as article 1 of Protocol 1 of the European Convention refers expressly to legal persons (*Every natural or legal person is entitled to the peaceful enjoyment of his possessions.*…).

[79] See Barrios Altos case. Obligation of the states to guarantee the respect for human rights (reference by Faúndez).
[80] Sections (a), (b) and (c) of article 2.2 of the International Covenant on Civil and Political Rights.
[81] See P. de Sena, "Economic and Non-Economic Values in the case law of the European Court of Human Rights" in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni and E.–U. Petersmann, eds.), p. 208, OUP 2009, pp. 214–216. The IHRC *has not decided a single case in which the violation of the right to property has been autonomous or independent.* Nikken, supra note 29, p. 29.
[82] J. E. Álvarez, supra note 21, pp. 456-457.
[83] For example, Article 10. 28 of the FTA between Peru and the US defines the investor as *a Party or state enterprise thereof, or a national* [a natural person who has the nationality of a Party according to Annex 1.3] *or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality*.

ii. Some shared principles

Before analyzing some specific areas where investment law and human rights jurisprudence in Latin America have begun to dialogue,[84] it is important to highlight how both branches of law share a similar approach when confronting matters like the application of non-discrimination rules or the assessment of public interest. Some level of proved flexibility in investment case law shows that the FET standard or the notion of public interest could be completed by incorporating international human rights law.

The FET standard is one of the basic *principles* of investment law recognized in BITs, FTAs, international case law, and other international sources. Some of FET's varied expressions[85] are familiar to classical human rights principles, such as non-discrimination or the respect of due process. For Lowenfeld the FET standard means, at least, not discriminating in matters like access to judicial or administrative courts, and enforcement of taxes and regulatory measures. Moreover, a deeper understanding of the standard implies that it can be considered infringed without discriminatory conduct.[86] The World Bank's "Guidelines on the Treatment of Foreign Direct Investment" of 1992 enounces the FET standard as an obligation not to discriminate among foreign investors on grounds of nationality."[87] The U.S.-Peru FTA provides that *each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security,*[88] and defines the FET standard as including *the obligation not to deny justice in criminal, civil, or administrative*

[84] See Part 2.

[85] Marshall has identified up to seven types of formulations of FET according the legal authority in which the standard should be assessed:

1. FET without making any reference to international law or to any other criteria to determine the content of the standard (Cambodia and Cuba)
2. FET no less favourable than accorded to its own investors or to investors of any third State (Bangladesh and Iran)
3. FET with an obligation to abstain from impairing the investment through unreasonable or discriminatory measures (Hungry and Lebanon)
4. FET in accordance with the principles of international law" (France and Mexico)
5. FET in accordance with the principles of international law, but that in addition expressly identify some requirements of the standard (restriction to capital movements or purchase and sales of goods). (France and Uganda)
6. FET contingent on the domestic legislation of the host country (CARICOM and Cuba)
7. FET in accordance with the minimum standard of treatment under customary international law, pointing out that it does not create additional substantive rights (US's FTA)

See Fiona Marshall, "Fair and Equitable Treatment in International Investment Agreements" (Issues in International Investment Law, *Background Papers for the Developing Country Investment Negotiators' Forum*, Singapore, 2007), pp. 4-5.

[86] A. F. Lowenfeld, supra note 76, p. 475.

[87] Section III.3b of the World *Bank Guidelines on the Treatment of Foreign Direct Investment*, 1992, supra note 75. Section III.a of the Guidelines also establishes that "with respect to the protection and security of their person, property rights and interests, and to the granting of permits, import and export licenses and the authorization to employ, and the issuance of the necessary entry and stay visas to their foreign personnel, and other legal matters relevant to the treatment of foreign investors... will, subject to the requirement of fair and equitable treatment mentioned above, be as favorable as that accorded by the State to national investors in similar circumstances…" Ibid.

[88] Article 10.5.1 of the U.S.-Peru FTA.

adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.[89]

But it is through case law from arbitral tribunals that the content of the FET standard has progressively been completed. Dolzer finds that one of the most comprehensive definitions of the standard is provided by the TECMED award, which emphasizes foreign investors' expectations.[90] At the same time, he provides another case law definition based on a non-discrimination approach in the Waste Management v. Mexico NAFTA case: *Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process*.[91] In fact, such statement could be easily found in a human rights argumentation that understands that all those misconducts violate international obligations.[92]

Professor Dupuy points out that for the tribunal of the *Loewen* case the positive obligation bearing on the host state under international law is 'to provide a fair trial of a case to which a foreigner is a party,' emphasizing that this obligation does indeed correspond, within the human rights legal framework, to that of the State parties to the International Covenant on Civil and Political Rights.[93] Article 14.1 of the Covenant establishes that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The 1948 Universal Declaration also consecrates different articles around the principle of a judicial protection that could be encompassed within the FET standard in favor of foreign

[89] Article 10.5.2.a) of the U.S.-Peru FTA.

[90] In light of the good faith principle established by international law, the FET standard *requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.* TECNICAS MEDIOAMBIENTALES TECMED S.A. v. THE UNITED MEXICAN STATES ICSID CASE No. ARB (AF)/00/2, Paragraph 154. See also Dolzer's reference in R. Dolzer "Principles of International Investment Law," (R Dolzer and C. Schreuer). Second edition, p. 143. However, the concept of legitimate expectation has been limited by subsequent case law in the sense that expectations have to be supported by a degree of reasonableness according to circumstances (Saluka v. Czech Republic , PARTIAL AWARD March 17, 2006, paragraphs 304, 304 and 309) and that it would be legitimate to assume a complete immutability of domestic legislation (Parkerings v Lituania, AWARD Sep, 11 2007; paragraphs 331, 333, 335 and 342).

[91] ICSID Case N° ARB(AF)/00/3 Waste Management, Inc. v. United Mexican States, paragraph 98. See also Dolzer's reference in Dolzer, supra note, p. 144

[92] In *Chiriboga*, for example the ICHR established that Article 8(1) of the Convention establishes the guidelines of the so called "due process of law", which consists in the right of every person to be heard with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, for the determination of his rights. The reasonable time referred to in Article 8(1) of the Convention must be analyzed in relation to the total duration of the proceeding until a final judgment is rendered. Paragraph 56 of Salvador Chiriboga v. Ecuador Judgment of May 6, 2008.

[93] In fact Dupuy refers to this under article 15 of the Covenant. As mentioned in the text, there are other human rights provisions that also touch directly on this principle. See Dupuy, supra note, p. 51.

investors: “All are equal before the law and are entitled without any discrimination to equal protection of the law…” (Article 7); “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” (Article 8); and “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” (Article 10). The text of these articles proves the connection underscored by Professor Dupuy between investment treaty obligations and human rights provisions. Even more, there seems to be an interesting space for Human Rights Law to contribute to completing the assessment of whether a specific State’s conduct has been *fair* and *equitable* or whether some fundamental citizens’ rights could be in question due to a specific treatment in favor of investors.

Simma and Kill go further, proposing that considerations of fairness and equity under any circumstance demand that an investment tribunal take into account not only a State’s human rights obligations, but also citizens’ human rights in determining whether an investor has been treated equitably.[94] Actually, the *elasticity* or *vagueness* of investment guarantees and standards, like the FET standard, is ultimately a tool for arbitrators to rebalance States’ ability to regulate public interest and comply with international obligations, such as International Human Rights obligations.[95] The next sections will discuss how investment tribunals might interpret some investment guaranties, taking into account a State’s obligations under international human rights laws.[96] The EU-Caribbean FTA, which makes a general reference to human rights obligations, is one of the few examples of an investment treaty that establishes a direct and explicit link between human rights and investment.[97]

The effort to bring together investment law and human rights is an appeal to *public interest* or *public utility*: When the American Convention on Human Rights admits State intervention to affect private property, it refers to *reasons of public utility and social interest*, and to *the cases* (*and according to the forms*) *established by laws*.[98] Article 1 of Protocol 1 of the European Convention refers to *the public interest and subject to the conditions provided for by law and by the general principles of international law*.[99] The European Convention uses the term *general interest* to justify State’s control of property.[100] The Universal Declaration of Human Rights consecrates a general principle to justify the imposition of limitations to the exercise of all declared rights and freedoms, stating that they

[94] B. Simma and T. Kill, “Harmonizing Investment Protection and International Human Rights: First Steps Towards a Metodology” in International Investment Law for the 21st Century, Essays in honour of Christoph Schreuer (edited by C Binder, U. Krieebaum, A. Reinnisch and S. Wittich, OUP 2009), p.704.
[95] J. E. Álvarez supra note 21, pp. 464-5.
[96] B. Simma and T. Kill, supra note 94, p. 705.
[97] SEE: Petersmann in Introduction Summary OUP 2009, p. 26.
[98] Article 21.2 of the American Convention on Human Rights.
[99] Article 1 of the Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
[100] The complete text of second paragraph of article 1 of Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms is as follows: *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.*

should only be determined by law and *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.*[101]

BITs and FTAs employ the term *public interest* to address the capacity of States to expropriate. Article 10.7 of the U.S.-Peru FTA provides that no Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization, except for a *public purpose*, in a non-discriminatory manner, on payment of prompt, adequate, and effective compensation; and in accordance with due process of law and FET and FPS standards. Additionally, when the FTA tries to exclude States' regulatory actions from the concept of indirect expropriation, it alludes to *legitimate public welfare objectives* in an analogous sense of public purpose: *Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*[102]

The terms *public utility, social interest, public interest, public order* used by the referred Human Rights instruments are, in practice, interchangeable with the terms *public purpose* or *legitimate public welfare objectives* used in the U.S.-Peru FTA. In all these cases, state intervention affecting property rights is justified.

For Simma and Kill one possible method of transmission whereby international human rights law could affect the interpretation of the standard of expropriation is by establishing regulations exercised in pursuit of respect for human rights as part of a government's police power.[103] In fact, FTA authors have been sufficiently cautious to specify that the list of *legitimate public welfare objectives* established in Annex 10-B is not *exhaustive*,[104] considering the broad sense of those objectives that, as proposed, leave sufficient space for regulatory actions to protect human rights. Human rights law can be useful for interpreting investment law rules in two senses: reducing the uncertainty in the general definition of "public purpose";[105] and considering human rights protection measures as part of the list of *legitimate public welfare objectives.*

The U.S. FTA model covers *public welfare objectives* in greater detail. Liberti shows that, since the 1990s, the U.S. and Canada have negotiated many BITs and FTAs recognizing, in the preamble to treaty texts, that *the development of economic and business ties can promote respect for internationally recognized worker rights* and that the objectives of economic and development cooperation of investments *can be achieved without relaxing health, safety and environmental measures of general application.*[106] Liberti also mentions that during the negotiation of the Multilateral Investment Accord (MIA), promoted by the OCDE (at the end of the 1990s), there was a proposal to include in the draft a non-

[101] Article 29.2 of the Universal Declaration.
[102] Annex 10-B of the U.S.-Peru FTA.
[103] B. Simma and T. Kill, supra note 94, p. 705.
[104] Footnote 20 of Chapter 10 of the U.S.-Peru FTA .
[105] Dupuy, « Unification », supra note, p. 52.
[106] See L. Liberti, supra note 18, p. 807 and note 27. Liberti lists more than 20 treaties that in different ways proclaim the consistency of promoting investment and preserving social rights.

exhaustive list of fundamental labor rights (that eventually was disregarded). However, the final version of the text proposes in its preamble some commitments to labor standards.[107]

Today many BITs and FTAs include explicit interdictions to reduce their States' commitments on labor rights or environmental protection in order to attract foreign investment.[108] Regarding environmental measures, both NAFTA and the U.S.-Peru FTA provide that nothing in the [relevant] Chapter *shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns* and also that *the Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor*.[109] The U.S.-Peru FTA recognizes similar principles on labor law. For instance, in article 17.1 the parties reaffirm their obligations as members of the ILO and in Article 17.2 the parties also assume the commitment to adopt and maintain in their statutes, regulations, and practices the rights stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998).*[110]

Can foreign investors appeal to human rights?: The right to property and the principle of non-discrimination are profusely proclaimed by International Human Rights Law and, at the same time, upheld as pillars of international investment treatment and protection. It would seem that this sole reason is sufficient to respond the question affirmatively, as it is possible to bring part of the abundant human rights defense in favor of foreign investors. In addition, as a matter of principle, behind large corporations' interests there are human

[107] The final draft of MIA's preamble establishes: "Renewing their commitment to the Copenhagen Declaration of the World Summit on Social Development and to observance of internationally recognized core labour standards, i.e. freedom of association, the right to organize and bargain collectively, prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment, and noting that the International Labour Organisation is the competent body to set and deal with core labour standards worldwide". Ibid, p. 809 and note 29.

[108] J. E. Álvarez, supra note 21, p. 463.

[109] Articles 1114 (1), (2) of the NAFTA and 10.11 and 18.3 of the U.S.-Peru FTA.

[110] According to Article 17.2.1 those rights are: (a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labor; (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and (e) the elimination of discrimination in respect of employment and occupation. Article 17.2.2 establishes that Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph. In fact, the U.S.-Peru FTA has consecrated one of the most developed mechanisms to audit compliance with labor rights. *The highest protection given to workers in the context of FTAs is reflected in the most recently implemented FTA, the United States-Peru Trade Promotion Agreement of 2006, which addresses workers' rights more specifically and thoroughly than any other FTA.* Ranko Shiraki Oliver, "The Global Impact and Implementation of Human Rights Norm: Mexico's Dilemma: Workers' Rights or Workers' Comparative Advantage in the Age of Globalization?" p. 218, Pacific McGeorge Global Business & Development Law Journal (2012).

beings —shareholders who may be directly and indirectly affected in case of violations of property rights or discriminatory practices by host States.

Professor Álvarez even suggests that the diplomatic exchanges between Mexico and the U.S. leading to the *Hulle rule* are grounded on the same principle consecrated by modern BITs and FTAs providing for compensation upon expropriation: all persons' right to own property, as well as not to be arbitrarily deprived of it.[111] Thus, human rights arguments in favor of foreign investors should not be disregarded, if we consider that the protection of aliens and aliens' property is well rooted in history,[112] quite before the contemporary development of human rights law.[113] Dupuy points out that the rights of aliens, including their economic rights linked to property, can be perceived as the *precursors of human rights.*[114]

Nationality may not be a condition to claim protection before national or international jurisdictions. Human rights are recognized for all human beings no matter their nationality (no matter the legal connection that individuals can have with a State by the "jus standing"). *A l'inverse du « national » ou de « l'étranger,» l'homme de la Déclaration universelle de 1948 et des conventions qui en découleront ne doit rien à l'État mais tout à lui-même*[115] (In contrast with a "national" or a "alien", the human being of the 1948 Universal Declaration and conventions thereof does not owe anything to the State but to himself). A clear demonstration of this *humanism* (as opposed to *nationalism*) of human rights is thus the fact that national States are obligated to guarantee aliens' human rights within their territories.

In contrast, in investment law nationality is *the* connector to obtain protection and gain access to an international jurisdiction (under BITs or FTAs signed by their national States). [116] This is also a crucial distinction that reveals the larger dimension of human rights law. Specifically, foreign investors that have suffered a human rights violation in the territory of any ECHR member State, once domestic remedies are exhausted, are entitled to access the human rights jurisdiction without any *ex ante* support from their national States. In an investment conflict, access to international arbitration is restricted to nationals of those States that have signed a BIT or FTA with an express consent to arbitration.

It is evident that, in a complex controversy, a challenging task of tribunals is to attain a balance of interests when the human rights of different parties are in conflict. *A priori*, property rights of corporations do not have to be in a lower rank than other persons' rights.

---

[111] Álvarez, supra note 21, p. 462.

[112] Professor Carreau, reviewing the origins of international law principles, mentions that the condition of foreigners is a topic of many developments in Bible texts. That is the case of the principle of *equal treatment* of foreigners *vis-à-vis* nationals (national treatment) and the obligation to protect them. Dominique Carreau, "Droit International" (Pedone, Ninth edition 2007), p. 31. Professor Carreau refers to P. Weil, "le judaisme et le dévéloppement du droit international, R.C.AD.I., 1976 – III, pp. 253 - 272 – 300.

[113] Petersmann, Introduction, supra note, p. 14.

[114] Dupuy, Unification, supra note, p. 50.

[115] Dupuy, L'Unité, supra note, pp. 414 – 415.

[116] While in investment law the protection of aliens is still conditioned by the reciprocity of interstate relations, that is not the case with human rights law. See Dupuy, Unification, supra note 48.

In Anheuser-Busch Inc. v. Portugal, the ECHR recognized the property rights of multinational corporations as well as those of natural persons in a balance of competing interests (corporate intellectual property owners and individual users and consumers).[117] In any case, the right to property is not the only human right recognized in favor of foreign investors. The ECHR and the UN Human Rights Commission have recognized commercial enterprises' right to equitable process, the protection of private life, and freedom of speech.[118]

C. A European Utopia?

In the introduction it was mentioned that the right to property was not included in the drafting process of the European Convention;[119] this right is only considered in article 1 of Protocol 1 of the Convention. However, despite an initial hesitation, European human rights organizations have developed an extensive body of case law devoted to the right to property,[120] producing illuminating decisions in areas like the definition of property and expropriation. In a way this forum could be regarded, for the purpose of our research, as a juridical space where it is possible to identify areas of synthesis between human rights and investment law principles. This has also been possible because commercial corporations, as legal persons, have provided the chance to produce instructive *economic* jurisprudence.

The European human rights system is the only international mechanism corporations can access to submit directly their claims against foreign States (treaty members) other than ICSID tribunals, when they or their national States have explicitly approved its jurisdiction.[121] Professor de Sena argues that it is possible to identify new trends in investment law through ECHR decisions when violations of protected rights of considerable social interest come to the fore together with interferences with the right of property. *In those cases, the Court has tended both to extend the concept of property and judge disproportionate these interferences in the light of the social relevance of the individual interests at stake.*[122]

The ECHR has consistently held that article 1 of Protocol 1 of the Convention is composed by three basic rules, corresponding to each of its three paragraphs[123]: Enjoyment (*Every natural or legal person is entitled to the peaceful enjoyment of his possessions*), Deprivation (*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*) and State Control (*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*

[117] See discussion of this case in L. Helfer and G. W. Austin, Human Rights and Intellectual Property, Mapping the Global Interface, p. 218
[118] Liberti, supra note 810-811. See also case law analysis of the Second Part.
[119] See p.
[120] Desmet, supra note 32,218.
[121] Tomuschat supra note 31, p. 637.
[122] Petersmann, supra note, Introduction, p. 19.
[123] Desmet, supra note 32, pp. 220–221.

contributions or penalties). L. and I. Wildhaber specify that the three rules are not unconnected: "The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property, and should therefore be construed in the light of the general principle enunciated in the first rule (James et al v. UK, paragraph 37)".[124]

As a matter of principle, these explanations suffice to justify the pertinence of the European experience for analyzing and assessing the case of Latin America; however, it should be noticed that ECHR case law is constantly quoted by IACHR decisions and even those issued by some ICSID tribunals. By way of a preliminary guiding reference for Part Two, some ECHR cases related to the definition of property, indirect or *de facto* expropriation and the balance of interests are highlighted.

A broad understanding of property and possession: For the ECHR, the concept of possession is not limited to physical goods. It covers a large set of non-material assets, on which an applicant can claim a legitimate expectation of obtaining effective enjoyment of property rights. This criterion has permitted the Commission and the Court to include in the list of protected property rights activities as diverse as hunting and fishing rights,[125] commercial activities dependent on governmental authorization (for example, to operate a restaurant, manage an open-air cinema, or run a warehouse under a special customs regime, as well as licenses to serve alcoholic beverages or permits to extract gravel), commercial customers, goodwill for professional customers, tort claims against the State, claims to recover taxes unlawfully collected by the State, claims for tax refunds, excessively high fines or fees, and pension funds.[126]

The list of protected property rights is amplified by more classical non-tangible goods that may be found in FTAs, such as usufructs, trusts, goods to which a title is reserved, exclusive rights to use internet domain names, shares, trademarks, and intellectual property in general.[127] De Sena suggests that the notion of property has been extended due to the need to protect interests of considerable social importance. This happened in the *Stec case*, in which "a right to a non-contributory benefit" was considered within the scope of Article 1 of the Protocol, because it constitutes a welfare benefit based on criteria of social

[124] L. Wildhaber and I. Wildhaber, "Recent Case Law on the Protection of Property in the European Convention on Human Rights" in International Investment Law for the 21st Century, Essays in honour of Christoph Schreuer (edited by C Binder, U. Krieebaum, A. Reinnisch and S. Wittich, OUP 2009), p. 658.
[125] Desmet, supra note 32, pp. 218–219.
[126] See Tomuschat, supra note 31, p. 647, and also Wildhaber and Wildhaber, supra note, pp. 660-661. In the case of pension funds, Wildhaber and Wildhaber describe an interesting evolution of ECHR jurisprudence. *In some cases, it found that pensions or welfare benefits could be considered as 'possessions' only where special contributions had been made* [Kjartan Asmundsson v. Iceland, 2004, paragraph 39], *whereas in other cases, even welfare benefits in non-contributory schemes were considered as 'possessions' for the purposes of Article 1* [Koua Poirrez v. France, 2003 paragraph 37] *"Given the variety of funding methods and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Art 1… Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through payment of tax* [Stec et al v. UK, 2005, paragraph 50]. Wildhaber and Wildhaber , supra note, p. 663.
[127] Wildhaber and Wildhaber, supra note 124, pp. 660–661.

solidarity.[128] In fact, the ECHR is more willing to recognize the protection of article 1 of the Protocol in those situations where victims claim the violation of other human rights at the same time.[129] In the classical *Sporrong and Lönnroth v. Sweden* case (1982) the main discussion was around whether the facts showed that the State's limitations (expropriation permits and prohibition on construction) affected or not the right to property of applicants. However, claimants alleged that the State's actions also implied the violation of the right to a fair and public hearing within a reasonable time (Article 6), the right to an effective remedy (Article 13) and the principle of non-discrimination (article 14). The Court recognized the violation of the right to property and the right to a fair and public hearing within a reasonable time.

<u>*De facto or indirect expropriation:*</u> In *Sporrong and Lönrroth v. Sweden* the Court finally concluded that property rights had been *precarious* stating that *in the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of* (…) *Since the Convention is intended to guarantee rights that are "practical and effective"* (…), *it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants. In the Court's opinion, all the effects complained of (…) stemmed from the reduction of the possibility of disposing of the properties concerned. Those effects were occasioned by limitations imposed on the right of property, which right had become precarious, and from the consequences of those limitations on the value of the premises.*[130] The Court was confronted neither with deprivation nor control of property (rules 2 and 3 of article 1 of the Protocol), but with an interference with the applicants' enjoyment of their possessions (rule 1), concluding that applicants bore *"an individual and excessive burden which could have been rendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation."*[131]

To determine whether a *de facto* expropriation has taken place, the Court should make a detailed analysis of facts and the intensity of the State's intervention over the victim's property rights. In G v. France and Matos e Silva and Others v. Portugal, the Court denied the allegation of *de facto* expropriation. *The effects of the measures are not such that they can be equated with deprivation of possessions (…) The restrictions on the right to property stemmed from the reduced ability to dispose of the property and from the damage sustained by reason of the fact that expropriation was contemplated. Although the right in question had lost some of its substance, it had not disappeared. The Court notes, for example, that all reasonable manner of exploiting the property had not disappeared seeing that the applicants continued to work the land.*[132]

<u>*Balance of interests and proportionality*</u>: Since *Sporrong and Lönnroth* v. Sweden the ECHR has consistently held that, whatever restriction may be placed on property rights, the

[128] P. De Sena, supra note 81, pp. 210-211.
[129]Ibid, supra note, p. 214-216.
[130] Paragraph 63 of the Decision (*Sporrong and Lönnroth v. Sweden*, 1982)
[131] Paragraph 73 of the Decision (*Sporrong and Lönnroth v. Sweden*, 1982). See also Wildhaber and Wildhaber, supra note 124, p. 667.
[132] Paragraph 85 of G v. France, Matos e Silva, and Others against Portugal, ECHR (1996).

end result must be a fair balance between the interests at stake,[133] pointing out that *the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights* and that *the search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1.*[134] Desmet mentions that in some cases it has not been necessary for European human rights organs to determine whether there is a violation of the first rule of article 1 of the Protocol, when a fair balancing of interests has been attained.[135] In *Uuhiniemi and 14 Others v. Finland* [21343/93, 10 October 1994], the Commission concluded that a planned shoreline conservation project did not entail such serious consequences for the applicants' properties as to amount to *de facto* expropriation.[136]

In fact, the protection of the natural environment has been consistently considered as a matter of legitimate public or general interest. In Hammer v. Belgium the court established that *financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective. 80. Thus, restrictions on property rights may be allowed on condition, naturally, that a fair balance is maintained between the individual and collective interests concerned. 81. The Court therefore has no doubt as to the legitimacy of the aim pursued by the impugned measure: the protection of a forested area in which no building is permitted.*[137]

However, the ECHR has been confronted to complex situations —such as expropriations and compensation rules during the transformation into market-oriented systems of former socialist countries like Slovakia— calling for a finer balance of interests to reach a criterion for compensation and concluding, for example, that *legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Less than full compensation may also be necessary a fortiori where property is taken for the purposes of fundamental changes of a country's constitutional system or in the context of a change of political and economic regime*, stressing that even a total lack of compensation could be justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances.[138] However, in other cases like Broniowski v. Poland the Court has called attention on States' obligations to fully justify their actions against private property during transformation processes: *Whilst the Court accepts that the radical reform of the country's political and economic system, as well as the state of the country's finances, may justify stringent limitations on compensation for the Bug River claimants, the Polish State has not*

[133] Tomuschat, supra note 31, p. 647
[134] Paragraph 69 of *Sporrong and Lönnroth v. Sweden*, 1982.
[135] Desmet, supra note 32, 223.
[136] Id.
[137] Paragraphs 79, 80, and 81 of HAMER v. BELGIUM *(ECHR Application no. 21861/03), 2007.*
[138] Paragraph 115 of Of URBÁRSKA OBEC TRENČIANSKE BISKUPICE v. SLOVAKIA, final judgment *(Application no. 74258/01)* 02/06/2008.

been able to adduce satisfactory grounds justifying, in terms of Article 1 of Protocol No. 1, the extent to which it has continuously failed over many years to implement an entitlement conferred on the applicant, as on thousands of other Bug River claimants, by Polish legislation.[139]

As an element inherent to a fair balance of interests, proportionality is another decisive factor in ECHR decisions. Desmet has found eleven parameters influencing the assessment of proportionality in conservation cases (the extent of the interference, the impact on livelihood, the legally binding character of a nature conservation measure, reasons of conscience, the behavior of the State regarding the goal of nature protection, the state of mind and behavior of the applicant, the characteristics of property right, the availability of an alternative, compensation paid by the State, procedural safeguards, and the availability of an effective internal remedy).[140] However, as a general principle, in Former King of Greece v. Greece, the Court emphasized that *there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measure depriving a person of his possessions,*[141] concluding that in that case *the Government have failed to give a convincing explanation as to why the Greek authorities have not awarded any compensation to the applicants for the taking of their property. It accepts that the Greek State could have considered in good faith that exceptional circumstances justified the absence of compensation, but this assessment is not objectively substantiated.*[142]

This extraordinary *European* experience —very familiar with investment law— needs to be integrated into other bodies of law, notably European Union law. According to the Lisbon Treaty, foreign investment treatment has become a subject of exclusive competence of the European Union.[143] Article 6 of the EU Treaty declares that respect for fundamental rights and freedoms constitutes one of the basic principles on which the Union is founded; and article 7 provides a mechanism for sanctioning Member States that violate these principles in a grave or persistent manner. Nevertheless, these and other provisions were grafted into a system that for a long time focused largely on economic aims and objectives with little reference to other values.[144] The EU adopted the Charter of Fundamental Rights in 2000 (legally binding with the entry into force of the Lisbon Treaty in 2009); and many trade and

[139] Paragraph 183 of Judgment in BRONIOWSKI v. POLAND *(Application no. 31443/96)*, 22/06/2004.
[140] Desmet, supra note 32, pp. 232-257.
[141] Paragraph 89 of the Judgment in FORMER KING OF GREECE AND OTHERS v. GREECE (Application no. 25701/94) 23/11/2000
[142] Paragraph 98 of the Judgment in FORMER KING OF GREECE AND OTHERS v. GREECE (Application no. 25701/94) 23/11/2000
[143] According to the Treaty on the Functioning of the European Union (TFEU), common commercial policy is an area of exclusive competence of the European Union (Article 3 (1) e), and this area is based on *uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies* (Article 207.1).
[144] B. De White, "Balancing of Economic Law and Human Rights by the European Court of Justice in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, and E.–U. Petersmann, eds.), OUP 2009, pp. 198–199.

cooperation agreements with third countries contain a clause stipulating that human rights are an essential element in relations between parties.[145]

The Resolution of the European Parliament of 6 April 2011 on *the future European international investment policy* stresses that the EU's future policy *must also promote investment which is sustainable, respects the environment (particularly in the area of extractive industries) and encourages good quality working conditions in the enterprises*, requesting the Commission to include, in all future agreements, a reference to the updated OECD Guidelines for Multinational Enterprises.[146] The Resolution also points out that investment agreements should also be based on *investor obligations in terms of compliance with human rights and anti-corruption standards as part of a broader partnership between the EU and developing countries for the purpose of reducing poverty; calls on the Commission to assess viable future partners, drawing on Member State best practices with BITs*.[147] Regulation W of the European Parliament and of the Council of December 12, 2012 authorized the continuity of bilateral agreements with third countries signed before the Lisbon treaty and the national competence, under specific conditions, to negotiate new BITs.[148] However, the EU Commission preserves its capacity to review all existing bilateral agreements and to negotiate new ones in the name of the UE (as an area of exclusive competence) to verify, among other aspects, if an agreement is in conflict with EU law.[149]

The text of the FTA signed by the EU and Peru, negotiated before the approval of the European Parliament Resolution of 6 April 2011 and Regulation W, does not provide any specific rule making a direct link between investment treatment and human rights protection. However, the third consideration of the preamble of the EU-Peru FTA reaffirms both parties' *commitment to the United Nations Charter and the Universal Declaration of Human Rights*.

II. THE DIALOGUE BETWEEN HUMAN RIGHTS AND INVESTMENT LAW HAS ALREADY BEGUN

A. Possibilities of integration: applying human rights law to investment conflicts

A possible interplay between human rights and investment treatment can be identified from the immediate perspective of human rights violations by foreign investors or even by host States in the context of superposing investment treatment commitments. Peterson and Gray refer to cases in which a host State's treatment of an investor can be seen as enforcing certain human rights commitments (a sanction against violations of the human rights of local citizens) and cases where the host State and an investor appear to have been complicit

[145] See Rosa M. Lastra, "Global Financial Architecture and Human Rights," pp. 13-14.

[146] Paragraph 27 of the Resolution of the European Parliament of 6 April 2011 on *the future European international investment policy* (2010/2203(INI)).

[147] Paragraph 37 of the Resolution of the European Parliament of 6 April 2011 on *the future European international investment policy* (2010/2203(INI)).

[148] Articles 3 and 7 of Regulation W.

[149] Article 6 of Regulation W.

(by action or omission) in allowing human rights violations.[150] However, a previous point that needs to be clarified for the purpose of this assessment is whether in resolving an international investment conflict based on treaty obligations, international human rights commitments should also apply to resolve the conflict. In other words, is it possible to place a human rights contingency or human rights law considerations before an international investment tribunal?

i. A general internationalization of investment treatment (application of international law "in toto"?)

One of the major aspects of the *internationalization* of investment treatment is not only the prevalence of international arbitration tribunals in the resolution of conflicts between host states and foreign investors, with an aim to exclude these controversies from biased domestic judicial authorities and diplomatic protection,[151] but also the recognition of a *direct* application of international law to determine responsibilities associated with the internal and administrative conduct of national States. According to Article 42 (1) of the ICSID Convention, in the absence of an agreement among the parties, the arbitration Tribunal shall apply host State law *and such rules of international law as may be applicable*. What has happened in practice is that ICSID tribunals, since the Wena v. Egypt case (2002), have consolidated the old aspiration of some industrialized countries to apply supposed international law principles to investment treatment.[152] Professor Gaillard explains this evolution of ICSID case law, pointing out that up to before the Wena decision, international law was mostly *limited* to the supplemental and corrective functions under Article 42(1). However, the history of the Convention and the text of the article reveal that the rules of international law can be applied as the proper law in the same way as the law of the host State. This flexible criterion *is in line with the general evolution of modern arbitration law and the discretion given to international arbitrators*.[153]

The possible application of international law has been also ratified by the treaty conventions and especially by U.S.-promoted FTAs that refer to the application to *customary of international law*. Article 10.5 of the U.S.-Peru FTA provides that *each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security*. In Annex 10-A the parties confirm their shared understanding that "customary international law" *results from a general and consistent practice of States that they follow from a sense of legal obligation*.[154]

---

[150] L E Peterson and K R Gray, "International Human Rights in Bilateral Investment Treaty Arbitration" (IISD, April 2003), p. 16.
[151] Won-Mog Choi, Supra note 4, pp. 234 – 235.
[152] Carreau, T. Flory, and P. Juillard, « Droit International Économique, » pp. 632-648, (Paris: LGDJ, 1990).
[153] E. Gaillard and Y. Banifatemi, "The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process," ICSID Review-Foreign Investment Law Journal, vol. 18, p. 375 (2003). See also comments in Manuel Monteagudo, "*Construcción europea y liberalización económica en América Latina: desafíos comunes en la evolución del Derecho internacional económico*," Cuadernos europeos de Deusto, No. 43 (España, 2010), p. 112.
[154] The complete text of the Annex is as follows:
Customary International Law: The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of

At such a level of the internationalization of investment treatment it seems to be quite doubtful to exclude *ex ante* some branches of international law *universally* recognized or at least recognized by the concerned States in case of an investment conflict, when addressing issues like property rights or States' obligations *vis-à-vis* human rights law. Liberti has even stated that the obligation of member States to recognize and execute arbitration awards in their domestic jurisdictions, under mechanisms like the ICSID Convention,[155] compels arbitrators to apply international law as a whole, in order to assure that awards are in conformity (*in toto*) with international law.[156] This *full* entrance of international law to resolve investment conflicts opens new challenges for international law integration.

As we will see, many ICSID tribunals discuss the evolution of international law considering what happens at the level of human rights law. In the annulment procedure of the Vivendi case —where the arbitration Tribunal states that the characterization of a State's conduct as unlawful in international law cannot be affected by the characterization in domestic law— it highlights the case of injury to aliens and their property and of human rights where *the content and application of internal law will often be relevant to the question of international responsibility.*[157]

Argentina's defense in many of the investment conflicts that contested its emergency legislation on exchange controls and limitations to foreign exchange deposits ("el corralito") during the financial crisis of 2001, proposed that those measures constituted a defensible action needed to fulfill its international human rights obligations, such as its citizens' rights to access basic necessities, or to protect the right to a stable constitutional order that respects rights to public security.[158] Arbitration tribunals have not had consistent results in Argentina's case; however, at a conceptual level some ICSID tribunals have admitted the possibility of recognizing the effect of human rights law over national States' obligations in the context of an investment conflict. For example, in Impregilo S.p.A. v. Argentina, the Tribunal considered that, as a matter of principle, the obligations assumed by Argentina under investment commitments do not exclude obligations assumed under human rights treaties.[159]

States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

[155] Article 54 (1) of the ICSID Convention provides that "each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".

[156] Liberti, supra note 18, p. 824.

[157] Paragraph 97 of Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina, ICSID Case No. ARB/97/3. Annulment Award of 3 July 2002.

[158] Álvarez, supra note 21, p. 455.

[159] *Impregilo S.p.A. c. Argentina* (ICSID nº ARB/07/17, Award of 21 June 2011). *On the other hand, the obligations assumed by the Argentine Republic as regards investments do not prevail over the obligations assumed in treaties on human rights. Therefore, the obligations arising from the BIT must not be construed separately but in accordance with the rules on protection of human rights. Treaties on human rights providing for the human right to water must be especially taken into account in this case* (Paragraph 230).

It is probably a false dilemma to propose that BITs or FTAs derogate —as *lex specialis*— human rights obligations of host states (obligations which are not *jus cogens*). Simma and Kill indicate that the preambles to most investment treaties state that their goal is to promote investment or foster economic ties, so *it seems wholly appropriate to include promotion to Human Rights in the list of States' regulatory interests*.[160] Nothing in the preamble to the U.S.-Peru FTA can be construed as an aspiration of the parties to derogate or limit their human rights commitments. On the contrary, in -many parts of the treaty there are various references to social rights and rule of law principles such as: *create new employment opportunities and improve labor conditions and living standards in their respective territories; ensure a predictable legal and commercial framework for business and investment; protect, enhance, and enforce basic workers' rights, strengthen their cooperation on labor matters, and build on their respective international commitments on labor matters; implement this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters;* and *preserve their ability to safeguard the public welfare.*[161] South Africa's experience has been even more explicit, as after the end of apartheid it included explicit exceptions to the FET standard in its BITs with Chile, the Czech Republic, and Mauritius, for cases of discriminatory measures in favor of native Africans to facilitate their access to private property and business management.[162]

Professor Álvarez refers to a non-dogmatic reading of article 31 (3) (c) of the Vienna Convention that, for interpreting treaties, authorizes taking into account, together with the context (and the ordinary meaning to be given to the terms of the treaty), *any relevant rules of international law applicable in the relations between the parties.* Investor-State arbitrators would be thus permitted to consider, among the *relevant* rules, other international obligations between the State parties and also *erga omnes* obligations (as are most human rights) that need not be part of the subject matter of the BIT.[163]

ii. Liberal steps by investment and ICSID tribunals

The practical and theoretical problem is whether investment arbitrators, designed by the parties to address investment treatment conflicts, have sufficient *legitimacy* and competence to assess the degree to which human rights obligations and responsibilities are upheld. But even regarding the possibility of those limitations Dupuy is conclusive in maintaining that arbitrators have the capacity to apply human rights customary international law, and *may even have to refer, should the case arise, to the way in which the principles at*

[160] B. Simma and T. Kill, supra note 94, p. 705.
[161] Preamble of the U.S.-Peru FTA.
[162] Liberti, supra note 18, p. 818. *Ad* Article IV of the BIT model establishes that *Without the detriment to the provisions of this Agreement ensuring fair, equitable and non-discriminatory treatment, the provisions to paragraph (2) of Article IV* [Most Favored Nation treatment] *shall not be construed so as to oblige the Republic of South Africa to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.* Id. note 53.
[163] Álvarez, supra note 21, 466.

issue have been interpreted and applied by human rights courts… Depending on the terms of the compromissory clause *(whether or not it expressly mentions public international law as an applicable legal framework to dispute), the arbitrator may have the possibility to rely, in particular, on international rules of interpretation of treaties, to find technical means to take into account the potential relevance of a specific human rights element to the substance of the investment dispute.*[164] As any assessment of arbitrators' competence, the application of international law would depend on the content of the compromissory clause, an issue that is free of doubt in light of the multiple references to international law in FTAs and the ICSID Convention. Specifically, Article 10.5 of the U.S.-Peru FTA refers explicitly to customary international law and Article 42.1 of the ICSID Convention (which is one of the conflict resolution mechanism chosen by the parties according to Article 10.16 (3) (a)), also refers to the application of international law.

In the ICSID case *Spyridon Roussalis v. Romania*,[165] the foreign investor alleged the violation of the human rights to property and judicial protection and the Tribunal admitted the possibility that the European Convention on Human Rights is applicable under the terms of the BIT signed by Greece and Romania (for the tribunal the invoked rights were more specifically protected under the BIT). Article 10 of the BIT provided that *if the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable, prevail over this Agreement.*[166] The Tribunal did not exclude *the possibility that the international obligations of the Contracting States mentioned at Article 10 of the BIT could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights and its Additional Protocol No.1* [167] The Tribunal also pointed out that this question did not require an specific definition in the case given *the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments.*[168] However, the Tribunal finally left some doubts about their preliminary conviction when, after considering the references made in the text of Article 10 of the BIT *to "either Contracting Party," "between the Contracting Parties," and "investors of the other Contracting Party" refer to the Contracting Parties of the Romania-Greece BIT*, also concluded that all of those references *only encompasses international obligations between these two countries."* [169]

In *Biloune v. Ghana* (under UNCITRAL rules), where a Syrian investor had been arrested and held in custody for 13 days and finally deported, the arbitration tribunal concluded that

[164] Dupuy, Unification, supra note XX–62.
[165] *Spyridon Roussalis v.Romania.* ICSID case nº ARB/06/1, Award 7-12- 2011. See CRÓNICA SOBRE LA SOLUCIÓN DE CONTROVERSIAS EN MATERIA DE INVERSIONES EXTRANJERAS (ENERO - DICIEMBRE 2011) [F. J. Vives]
[166] Paragraph 310. *Spyridon Roussalis v.Romania.* ICSID case nº ARB/06/1, Award 7-12- 2011
[167] Paragraph 312. *Spyridon Roussalis v. Romania.* ICSID case nº ARB/06/1, Award 7-12- 2011
[168] Id.
[169] Paragraph 311. *Spyridon Roussalis v.Romania.* ICSID case nº ARB/06/1, Award 7-12- 2011.

an *independent claim* for a human rights violation fell beyond the scope of its competence according to the compromissory clause ("in respect of" the foreign investment). However, if, and to the extent that, the human rights violation affects the investment, it will become a dispute "in respect of the investment and must hence be arbitrable."[170] The Tribunal recognized that an illegal expropriation had occurred under considerations of international investment law, ordering the payment of compensation,[171] but did not accept to address the human rights law claim. According to Kleins this case exemplifies that investment tribunals are hesitant to exercise their jurisdiction in cases where human rights violations are *at the center of the dispute*; but this does not imply that human rights violations exclude the jurisdiction of investment tribunals. He concludes that *in cases in which an infringement of the right of an investor to full protection and security occurs, it is often times paralleled by a corresponding violation of a human right of the investor*.[172] Human rights violations against foreign investors are legal and factual elements that could configure a violation of the FET standard. Professor Álvarez refers to Raymond Lowen, who tried to file a NAFTA claim against the U.S. as an individual seeking personal remedy before a Human Rights court. Lowen —unsuccessfully— claimed that he had been discriminated or treated inequitably or unfairly by a U.S. court, in the same line of the *Chattin* and *Neer* cases that helped establish the international minimum standard and helped usher in the rise of the human rights regime.[173]

On the other end of the world, the arbitration tribunals of many of the *Argentinian* cases admitted the possibility of considering human rights commitments to assess the State's conduct *vis-à-vis* foreign investment treatment, despite the fact that in some cases Argentina's defense was rejected for different reasons. In *CMS* (2005), Argentina argued for the first time the thesis that the social and financial crisis of 2001 had affected basic human rights that the State needed to repair according to its constitutional and human rights commitments, which in any case prevailed over bilateral investment treaties.[174] The interesting result is that the Tribunal did not reject the theoretical reasoning of applying human rights; however, it did not find a *collision* between BIT rights and constitutional protecting rights: *firstly because the Constitution carefully protects the right to property, just as the treaties on human rights do; and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties.*[175]

As mentioned, in Impregilo S.p.A. v. Argentina,[176] Argentina opposed its human rights commitments to justify the measures adopted to nationalize the water distribution of the

[170] Clara Reiner and Christoph Schreuer, "Human Rights and International Investment Arbitration" in International Investment Law and Arbitration (P-M Dupuy, F. Francioni and E –U Petersmann ed), pp. 83-84 (OUP 2009).
[171] Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana Ad hoc Tribunal (UNCITRAL rules). See Case Summary (*S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008)).*
[172] Nicolas Klein, "Human Rights and International Investment Law: Investment Protection as Human Right?, Goettingen Journal of International Law 4 (2012) 1, p. 214.
[173] Álvarez, supra note 21, pp. 462-463.
[174] CMS GAS Transmission Company v. Argentina. ICSID Case No. ARB/01/8. Award 12-05- 2005. Paragraph 114. See also Álvarez, supra note, pp. 455-456.
[175] Paragraph 121.
[176] ICSID Case nº ARB/07/17, Award 21-6-2011.

province of Buenos Aires. The Tribunal considered that *the obligations assumed by the Argentine Republic as regards investments do not prevail over the obligations assumed in treaties on human rights. Therefore, the obligations arising from the BIT must not be construed separately but in accordance with the rules on protection of human rights. Treaties on human rights providing for the human right to water must be especially taken into account in this case*.[177] In the ICSID cases *Asurix*, *Siemens* and *Sempra*, Argentina used the same argumentation, eliciting analogous results from the arbitration tribunals. In *Asurix* (2006) the tribunal remarked *that the matter has not been fully argued, and that it failed to understand the incompatibility in the specifics of the instance case*.[178] In *Siemens* (2007), the Tribunal observed that the argument had not been developed by Argentina; and that without further elaboration it was not an argument that *prima facie* bore any relationship to the merits of the case.[179] In *Sempra* (2007) the Tribunal included in its award the following question: *would Argentina have been compelled because of the Inter-American Convention* [on HR] *to maintain its constitutional order towards the end of 2001, 2002, and afterwards? The answer from professor Reisman was yes*.[180] But the tribunal examined whether the constitutional order and Argentina's survival were imperiled by the crisis and concluded that the constitutional order was not on the verge of collapse. According to the Tribunal, even if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation.[181]

In *Total S.A.* v. *Argentina* (2010),[182] the Tribunal assumed this approach in favor of foreign investors because it considered that legitimate expectations can be protected, exceptionally, against legislative actions when human rights obligations are violated (right to property), as has been the line of thought followed by the European Court of Human Rights.[183]

---

[177] Paragraph 230.

[178] Moshe Hirsch, "Investment Tribunals and Human Rights: Divergent Paths" in International Investment Law and Arbitration (P.-M. Dupuy, F. Francioni, and E.–U. Petersmann, eds.), p. 97, OUP 2009, p. 103. In Paragraph 102 of the Award the Tribunal referring to ECHR *James* case quoted in TECMED concluded that human rights considerations of proportionality *provided useful guidance for the purposes of determining whether regulatory actions would be expropriatory and give rise to compensation.* ICSID case and Hirsch, supra, p. 103.

[179] Paragraph 354 of *Siemens* ICSID Case. Hirsch Supra note, p. 104.

[180] Paragraph 337 of *Sempra.* Hirsch Supra note, pp. 95, 105.

[181] Paragraph 332 of *Sempra.* Hirsch Id.

[182] *Total S.A.* v. *Argentina* ICSID case nº ARB/04/01, Award on Responsibility 27-12-2010. See: CRÓNICA SOBRE LA SOLUCIÓN DE CONTROVERSIAS EN MATERIA DE INVERSIONES EXTRANJERAS (ENERO - DICIEMBRE 2011) [F. J. Vives].

[183] *Total S.A.* v. *Argentina.* Paragraphs 129 and 130 are illustrative in this sense:

"129. In domestic legal systems the doctrine of legitimate expectations supports the entitlement of an individual to legal protection from harm caused by a public authority retreating from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation". This doctrine, which reflects the importance of the principle of legal certainty (or rule of law), appears to be applicable mostly in respect of administrative acts and protects an individual from an incoherent exercise of administrative discretion, or excess or abuse of administrative powers. […] However it appears that only exceptionally has the concept of legitimate expectations been the basis of redress when legislative action by a State was at stake. Rather a breach of the fundamental right of property as recognized under domestic law has been the basis, for instance, for the European Court of Human Rights to find a violation of the First Protocol to the European Convention on Human Rights protecting the peaceful enjoyment of property.

The ICSID awards just mentioned show how tribunals admit the concurrence of human rights instruments as a complementary source of law to resolve investment conflicts. This complementary approach has been used by ICSID tribunals in other circumstances (referring to other branches of international law) to clarify legal definitions and commitments. Professor Dolzer recalls the reasoning followed by the arbitration Tribunal in *Continental Casualty* to clarify whether IMF, OECD, or GATS rules modify or supersede a transfer rule contained in a BIT. In the *Continental Casualty* Award the tribunal recognized that a BIT rule would appear as *lex specialis*, but then it interpreted the BIT rule in the light of IMF terminology and classification *and not in accordance with the ordinary understanding of the text of the BIT itself.*[184] The tribunal considered that in IMF terminology and classification, *widely accepted beyond the Fund's ambit* (supported by the OECD Code of Liberalization of Capital Movements and European Directives on Capital Movements), the movement of capital at issue was more specifically a short-term deposit abroad; i.e., a transaction which may be subject to tighter controls than direct or portfolio investment transactions. This reasoning drove the tribunal to conclude that the *corralito*, as a short-term placement out of Argentina of the equivalent in U.S. dollars, was not a transfer related to an investment protected by the BIT.[185]

In the paradigmatic case *Sawhoyamaxa Community* v. Paraguay (2006) before the ICHR, the Court was confronted by the concurrence of Paraguay's human rights commitments and Paraguay's obligations under the BIT signed with Germany. The land claimed by the Sawhoyamaxa Community was exploited by German private investors and, as pointed by Niken, the ICHR attempted a balance that gave priority to the Human Rights Convention over the bilateral treaty. Germany investment in Paraguay could be nationalized for a public purpose and interest, which could justify land restitution to indigenous people. The Court preferred a standard of application of the Convention over the treaty: (1) the Convention 'is a multilateral treaty on human rights; (2) it stands in a class of its own'; (3) it 'generates

---

130. From a comparative law perspective, the tenets of the legal system of the European Community (now European Union), reflecting the legal traditions of twenty-seven European countries, both civil and common law (including France, the home country of the Claimant) are of relevance, especially since the recognition of the principle of legitimate expectations there has been explicitly based on the international law principle of good faith. Based on this premise, the Tribunal of the European Union has upheld the legitimate expectations of importers that the Community would respect public international law. According to the Court of Justice of the European Union ("ECJ") private parties cannot normally invoke legitimate expectations against the exercise of normative powers by the Community's institutions, except under the most restrictive conditions (which the Court has never found in any case submitted to it)".

[184] Rudolf Dolzer, "Transfer of funds: investment rules and their relationship to other international agreements" in International Monetary and Financial Law the Global Crisis (M. Giovanoli and D. Devos eds.), (Oxford University Press, 2010), p. 543. See. But professor Dolzer recognizes that in the categories of classical treaty law, the issue of a possible conflict between two treaties has never been resolved unambiguously. *The rules and principles proposed to solve such conflicts include the principles of lex posterior of Lex specialis, the concept of rules of a higher and a lower rank, and the notion of a preference for rules of a multilateral nature over bilateral treaties.. If one did apply the lex posterior rule in the present context, the IMF Rules would not prevail. To attribute a higher rank to IMF rules than to investment rules would not be easy to justify. Also, the preference for multilateral rules over bilateral ones is not supported by practice*. Ibid.

[185] Paragraph 244 of Continental Casualty v. Argentina. ICSID Case No. ARB/03/9. Award of September 5, 2008.

rights for individual human beings'; and (4) it 'does not depend entirely on reciprocity among States.'[186]

Finally, we must point out that in the future this concurrence of investment and human rights international law can generate new challenges for establishing States' obligations *vis-à-vis* foreign investors, in cases where human rights tribunals have previously identified or confirmed some specific obligations for the States that could affect investors' interests. For example, the ECHR has held that contracting states would have *positive* obligations to regulate economic activity in a manner which does not violate human rights, such as the right to respect for private and family life.[187] In *López Ostra* and *Guerra*, civilians denounced the failure of national states to adopt measures against industrial activities of private companies that were dangerous to the environment and the wellbeing of the local population. In both cases, the ECHR held that States had failed to comply with their obligation under the European Convention to prevent businesses from creating severe environmental pollution affecting citizens.[188] What would happen in a hypothetical situation in which, after such a decision, a State suspends or modifies a foreign investor's license? We have already seen that the model principle of Annex 10–B of the U.S.-Peru FTA excludes non-discriminatory regulatory actions designed and applied to protect the environment from prohibited indirect expropriations. A factual assessment would be necessary to determine the nature and proportionality of the adopted measure, but it is clear that the previous determination of a human rights obligation by an International Court could be a decisive element for the final investment arbitral decision.

[186] Paragraph 140 of the Decision *Sawhoyamaxa Community* v. Paraguay. March 29, 2006 (…*la Corte considera que la aplicación de acuerdos comerciales bilaterales no justifica el incumplimiento de las obligaciones estatales emanadas de la Convención Americana; por el contrario, su aplicación debe ser siempre compatible con la Convención Americana, tratado multilateral de derechos humanos dotado de especificidad propia, que genera derechos a favor de individuos y no depende enteramente de la reciprocidad de los Estados*). See also Niken, supra note 29, p.267. For Niken, the rules followed by the Court for interpretation of international law are not conclusive. The techniques applied in international law to resolve conflicts between norms are: first, that of hierarchy, according to which a rule of *ius cogens* prevails; second, that of specificity, according to which a lex specialis prevails over general rules; and, third, that of temporality, under which *a lex posteriori* prevails over an earlier law on the same subject. None of these techniques is present in the ideas set forth by the Court.

[187] Peterson and Gray, supra note 150, p. 22.

[188] Id. In López Ostra the Chamber considered that *having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life* (paragraph 58). López Ostra v. Spain ECHR (Application no. 16798/90) JUDGMENT STRASBOURG, 09 December 1994. In Guerra: *the Court reiterates that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely (…). In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory* (paragraph 60). Guerra and Others v. Italy. 19 February 1998.

B. *Economic* law principles founded on human rights case law: more frequent than we might imagine

The dialogue between investment and human rights case law has taken place largely in an indirect way. Human rights case law has freely developed a large conceptualization of property and the figure of *de facto* expropriation, both very much analogous to what we find in investment law. In addition, the human rights concepts of *proportionality* to assess state intervention in private property rights and the nature of compensation in favor of victims of violations of human rights are interesting spaces of interaction between the two bodies of law, even though there is not a perfect harmony between them. In the following sections we propose a summary of these developments.

i. A diversified conceptualization of property

In international investment law the conceptualization of private property has evolved in treaty provisions and case law. This evolution has developed from general definitions or examples in initial BITs to a non-exhaustive list of tangible and intangible assets considered as protected investments. According to the U.S.-Peru FTA, the forms an investment may take include: *(a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.* [189] Commentators and ICSID tribunals have also developed some approaches and *guidelines* to specify in which cases the types of investments defined in BITs and FTAs are in effect protected by those treaty commitments. That is the case of the *Salini test*[190] and its derivations (still in discussion),[191] which refer to some interdependent elements already proposed by the doctrine[192] to define an investment: a contribution, certain duration of performance, and a participation in the risk of the transaction.[193] In addition, the investment must imply *a contribution to the economic development of the country*[194] (as it is an express goal of many BITs and FTAs).

[189] Definitions of Chapter 10 of the U.S.-Peru FTA.

[190] SALINI COSTRUTTORI S.P.A. and ITALSTARDE S.P.A. v. The Kingdom of Morocco. ICSID Case No. ARB/00/4. Decision on jurisdiction. July 23, 2001.

[191] There have been other complementary criteria like: verifying if the investment really existed (*Cementownia*); in the economic operation the investor should have used his own financial resources and risks (*Toto v. Lebanon*); contributions must have an economic value (*Saimpem*); a low nominal price for the acquisition of the investment raises doubts about the existence of an investment (*Phoenix*). For further information see the document: "SCOPE AND DEFINITION," UNCTAD Series on Issues in International Investment, Agreements II UNITED NATIONS, New York and Geneva, 2011.

[192] Carreau Julliard and Flory, quoted in *SALINI* (paragraph 55) describes the three interdependent elements précising that can also be instrumental in distinguishing a commercial investment and industrial investment, being the last one the object of BITs' protection. See D. Carreau, T. Flory, and P. Julliard, "Droit International Économique," LGDJ (1990), pp. 559- 578.

[193] Paragraph 52 of SALINI COSTRUTTORI S.P.A. and ITALSTARDE S.P.A. v. The Kingdom of Morocco.

[194] Paragraph 57 of SALINI COSTRUTTORI S.P.A. and ITALSTARDE S.P.A. v. The Kingdom of Morocco.

The interesting thing is that human rights law has produced an analogous development, but from their own perspective and in the context of claims of violations of the right to property together with other human rights violations. Even the IACHR has considered various forms of private property entitled to be protected by the Convention; the Court has not decided a single case based solely on the violation of the right to property,[195] as has been the inclination of the ECHR.[196]

The first case in which the ICHR addressed a violation of the human right to property was the *Ivcher Bronstein* case (2001),[197] where the ICHR outlined the main elements of human rights protection to property that has been considered in subsequent jurisprudence and has inspired new evolutions in areas as copyright and the collective rights of indigenous peoples. Ivcher Bronstein was a businessman who, during the Fujimori regimen in Peru, owned a TV channel opposing and criticizing many government decisions. The regime annulled Mr. Ivcher's Peruvian nationality and, through a judicial precautionary measure (promoted by the government), made him lose his condition of majority shareholder. Following the argumentation of the Commission,[198] the ICHR established that the *goods* protected by article 21 of the Convention (*Everyone has the right to the use and enjoyment of his property*) can be defined as *those material and appropriable things and any right that can be part of a person's patrimony. This concept includes all mobile and non-mobile goods, tangible and intangible elements, and any other immaterial object able to have a value*.[199]

The wide understanding of property from *Ivcher Bronstein* —very much in line with investment treaties that also include tangible and intangible rights— has permitted the Tribunal to go forward in other Peruvian case, the *Five Pensioners*,[200] where the Court considered that the pensioners *acquired the right to property over the patrimony* effects of

[195] Nikken, supra note 29, pp. 254-255. Nikken points out that in *Ivcher the violation of the right to property took place in the framework of violations of the right to a nationality [Article 20 of the Convention], to due process (article 8), to judicial protection (article 25), and to freedom of speech (Article 13). In the Five Pensionists case, the protection of retired workers against an arbitrary reduction of their pensions was connected to the right to social security…* [in the Pan de Sánchez and Ituango massacres, the executions took place together with the vandalization of victims' property]. *In cases involving indigenous lands, the protection of property has been connected to the preservation of identity and socio-cultural values of the affected peoples, for whom restitution is particularly important.* Id.

[196] In situations in which State action affecting the enjoyment of property rights gives rise, *at the same time*, to the violation of another (non-economic) right protected by the Convention, the Court tends to deem the aforementioned restriction wrongful [as it happened in *Chassanogou*] on the basis that it lacks a reasonable relationship of proportionality to the aim pursued… non–economic interests, of both a *collective* and an *individual* nature, have played, sometimes an important role within the assessment of proportionality. P. De Sena, supra note, pp. 214–216.

[197] Ivcher Bronstein v. Peru. Judgment of February 6, 2001 (Ivcher Bronstein v. Peru). See Nikken, supra note, p. 249.

[198] Paragraph 117 of Ivcher Bronstein v. Peru.

[199] *Los "bienes" pueden ser definidos como aquellas cosas materiales apropiables, así como todo derecho que pueda formar parte del patrimonio de una persona; dicho concepto comprende todos los muebles e inmuebles, los elementos corporales e incorporales y cualquier otro objeto inmaterial susceptible de valor.* Paragraph 122 of Ivcher Bronstein v. Peru. Judgment of February 6, 2001.

[200] "Cinco Pensionistas v. Perú". Judgment of February 28, 2003. (Five Pensioners v. Peru).

their pension, from the very moment in which they selected their pension system.[201] The Court stressed that *according to an evolving interpretation of the international instruments that protect human rights*, when pensioners paid their contributions to the public fund and filed for the corresponding legal system, they obtained a right to property to be protected under the Convention.[202] In *Chaparro* (2007) and *Chiriboga* (2008), following an analogous reasoning, the Court explicitly declared that acquired rights (*derechos adquiridos)* were fully protected by the convention,[203] pointing out in *Chiriboga* that *acquired rights are those that have been incorporated into the patrimony of persons.*[204] The ECHR has also considered pensions as rights to be protected under the human right to property (Article 1 of Protocol 1 of the Convention). In *Pravednaya v. Russia* (2004), the ECHR reiterated that *the right to an old-age pension or any social benefit in a particular amount is not included as such among the rights and freedoms guaranteed by the Convention... However a "claim"—even concerning a pension—can constitute a "possession" within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceable.*[205]

The ICHR has also reaffirmed the protection to other non-tangible property rights like copyright and intellectual rights (consistently protected by the ECHR as well)[206] and the economic value derived from them. In *Matus Acuña* (2005), the Commission concluded in its Report that Alejandra Marcela Matus Acuña, author of "The Black Book of Chilean Justice," was a victim of the violation of her right to property as a consequence of the seizure of the book, which prevented her from obtaining the benefits of the sales of her work. The government claimed that the journalist's right to intellectual property "goes beyond the protective scope of the American Convention on Human Rights." However, the Commission replied that Article 21 of the Convention *covers all a person's proprietary assets, that is to say, those that have to do with material goods as well as intangible goods that are capable of value…* concluding *that the right of the author to market her work and*

[201] Paragraph 103 of Five Pensioners v. Peru.
[202] Id.
[203] See: Paragraph 174 of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Judgment November 21, 2007; Paragraph 55 of Salvador Chiriboga v. Ecuador. Judgment of May 6, 2008.
[204] Id.
[205] Paragraphs 37 and 38 of CASE OF PRAVEDNAYA v. RUSSIA *(Application no. 69529/01)* JUDGMENT 18 November 2004.
[206] Wildhaber and Wildhaber describe an evolutionary process in the ECHR's approach to consider social security claims within the protection of Protocol 1 of the European Convention: *In some cases, it found that pensions or welfare benefits could be considered as 'possessions' only where special contributions had been made, [Kjartan Asmundsson v. Iceland, 2004, paragraph 39] whereas in other cases, even welfare benefits in non-contributory schemes were considered as 'possessions' for the purposes of Article 1 [Koua Poirrez v. France, 2003 paragraph 37] "Given the variety of funding methods and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Art 1… Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through payment of tax [Stec et al v. UK, 2005, paragraph 50]*. Wildhaber and Wildhaber supra note 124, p. 663. See also Melnychuk v Ukraine (quoted in Pr 66 of) and Paragraph 66 and following of ANHEUSER-BUSCH INC. v. PORTUGAL *(Application no. 73049/01)* JUDGMENT. 11 January 2007.

to receive her share of the earnings derived from its sale is protected.[207] It is quite interesting that for a human rights-protecting body it is not difficult to develop a pure economic reasoning (as the right to market a work) in the context of a human rights analysis.

A similar assessment is found in *Palmara* (2005), another case against Chile, already in democracy. The government had seized the copies of Mr. Palmara's book, "Ética y Servicios de Inteligencia" (*Ethics and Intelligence Services*) and, after considering experts' opinions that concluded that the book did not affect the reserve and security of the Chilean army, the ICHR determined that a violation of the right to property had taken place against Humberto Antonio Palamara, among other human rights violations. According to the Court's opinion *within the wide conceptualization of "goods" to which their use and enjoyment are protected by the Convention are also included the works of the intellectual creation of a person… which covers, among others, the publication, exploitation, cession or sale of the work.*[208]

As said, the evolving conceptualization of the right property has also served the ICHR to reaffirm property rights in favor of indigenous peoples. In *Awas Tingni v. Nicaragua* (2001) the Court concluded that Nicaragua violated Article 21 of the Convention because of the State's failure to delimit the territorial rights —already recognized— of the Awas Tingni community. This failure made the community unable to freely use and enjoy their goods, as any other private rights protected by the Convention.[209] A similar reasoning was used in *Moiwana* (2005), where Suriname was considered to have violated the private rights of the Moiwana community, which was unable to *use and enjoy* its traditional territories, due to a lack of official delimitation.[210] In *Yakye Axa v. Paraguay* the Court was sufficiently clear in stating that *private property of both, particulars and indigenous people communities have the protection of article 21 of the Convention*. However, it pointed out that *a mere abstract or juridical recognition of lands, territories or indigenous resources has no sense if property has not established and physically delimited.*[211] To what extent does the Inter-American Human Rights system need to be more liberal to accept that the right to property, with all of its economic contents, is a genuine human right? Property to be recognized and to be freely used…

---

[207] Paragraph of the INFORME N° 90/05 CASO 12.142 (FONDO) ALEJANDRA MARCELA MATUS ACUÑA Y OTROS. CHILE (October 24, 2005).

[208] Paragraph 102 of Palamara Iribarne vs. Chile. Corte Interamericana de Derechos Humanos. Judgment of November 22, 2005.

[209] Paragraphs 152 -154 of Awas Tingni v. Nicaragua. Judgment August 31, 2001.

[210] Paragraphs 131–135 of Comunidad Moiwana v. Suriname. Judgment of June 15, 2005. ... *la jurisprudencia de esta Corte en relación con las comunidades indígenas y sus derechos comunales a la propiedad, de conformidad con el artículo 21 de la Convención, debe también aplicarse a los miembros de la comunidad tribal que residía en Moiwana: su ocupación tradicional de la aldea de Moiwana y las tierras circundantes – lo cual ha sido reconocido y respetado durante años por los clanes N'djuka y por las comunidades indígenas vecinas (supra párr. 86.4) – debe bastar para obtener reconocimiento estatal de su propiedad. Los límites exactos de ese territorio, sin embargo, sólo pueden determinarse previa consulta con dichas comunidades vecinas*. Paragraph 133.

[211] Paragraph 143 of Yakye Axa vs. Paraguay. Judgment of June 17, 2005.

ii. Indirect expropriation from a human rights perspective

One of main peculiarities of new international investment law is the *institutionalization*, in treaties and jurisprudence, of the concept of *indirect expropriation*. With the development of BITs between developed and developing countries, many of them began to use terms like *direct or indirect expropriation, expropriation through measures tantamount to expropriations*, or *similar to expropriations* to ensure that the so-called "creeping expropriation" be included within the provisions on expropriation.[212] Chapter IV of the 1991 World Bank Guidelines (on Expropriation and Unilateral Alterations or Terminations of Contracts) established that a *State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects*.[213] After the NAFTA experience, the U.S. has consistently incorporated in its subsequent FTAs an attempt to clarify the concept of indirect expropriation, establishing that there is an indirect expropriation *where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure*.[214] The determination of whether an action or series of actions constitutes an indirect expropriation requires a case-by-case, fact-based inquiry considering, among other factors, the economic impact of government action; the extent to which government action interferes with distinct, reasonable investment-backed expectations; and the character of the government action.[215] It has already been mentioned that the U.S. FTA model also establishes that *except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations*.[216] This criterion corresponds to a majority understanding that a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process, and which affects a foreign investment, is deemed neither expropriatory nor compensable, unless a specific commitment is provided by the host State.[217] The Iran-U.S. Claims Tribunal ruled in *Too v. Greater Modesto Insurance* that *a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within a police power of States, provided it is not discriminatory and is not designed to cause an alien to abandon the property to the State or to sell it at a distress price*.[218]

International human rights case law has developed a concept analogous to indirect expropriation from its own perspective. It has also been mentioned that the ECHR conceptualized *de facto* expropriation in *Sporrong and Lönnroth v. Sweden* (1982), a case where property owners in Stockolm were affected, for more than 20 years, by government prohibitions and limitations to build in their own property, driving the court to conclude that it was obligated to *look behind the appearances and investigate the realities of the*

[212] Lowenfeld supra note 76, p. 476.
[213] Section IV.1 of the World Bank Guidelines, supra note 75.
[214] See Annex 10-B of the U.S.-Peru FTA.
[215] Id.
[216] Id.
[217] Anne K Hoffmann, Indirect Expropriation in Standards of Investment Protection (August Reinisch, year), p. 165.
[218] Rudolf Dolzer & Christoph Schreuer, supra note 90, p. 120.

situation, in the absence of a formal expropriation.[219] This capacity and desire to consider realities rather than formalities is clearly motivated by the protecting role of human rights law and also by the way article 1 of Protocol I to the European Convention enounces the protection of the right to property. The first sentence declares that all natural or legal persons are entitled to the *peaceful enjoyment of [their] possessions*, which goes well beyond the formal title of property and proposes a factual verification (*peaceful enjoyment*). Then the second sentence of article 1 reaffirms the protection, stressing that 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*. For the ECHR to find a *de facto* deprivation, it must be evident that the *interference* deprives the applicant of all meaningful use of his property,[220] and that a balance has been *struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.*[221] In *Beldevere Alberghiera v. Italy* the ECHR (2000) reaffirmed that the Convention is intended to guarantee rights that are "*practical and effective"* as the reason to justify the figure of a *de facto* expropriation.[222] In the same line of thought, the ECHR has adopted a wide definition of confiscation, including in the case in which a group of the population owning an affected property has to shoulder a disproportionate share of the burden entailed by a public emergency situation.[223]

In *Ivcher Bronstein v. Peru* (2001) the ICHR took a step forward in the Inter-American system when, citing *Beldevere Alberghiera v. Italy*, it established that *to determine whether Mr. Ivcher was deprived of his property, the Court should not restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced.*[224] Based on the annulment of Mr. Ivcher's Peruvian nationality in July 1997 and on the legislation that required that owners of telecommunications media companies should be Peruvian nationals, a local judge ordered a precautionary measure that suspended the exercise of Mr. Ivcher's rights as majority shareholder, chairman of the company and board member, decided the election of new board members preventing the transfer of Mr. Ivcher's shares, and granted the minority shareholders provisional administration of the company. [225] The Court concluded that those precautionary measures obstructed Mr.

[219]Paragraph 63 of SPORRONG AND LÖNNROTH v. SWEDEN. ECHR *(Application no. 7151/75; 7152/75)* JUDGMENT. 23 September 1982. See section C

[220] Esmet supra note p. 222. *To find a de facto deprivation, the interference must "deprive [the applicant] of all meaningful use of his property. In G v. France, the Commission examined the expectations that the owner could reasonably have about the constructability of his plot, to determine whether the situation amounted to a de facto expropriation. The Commission considered first, that the rights of the applicant had long been limited by the construction regulations aimed at reducing negative effects on the natural environment. Moreover, the applicant never contested neither the declaration of public utility nor the classification of his land as a forest zone to be protected. Finally, the applicant was still in the possibility was still in the possibility to sell his land. Therefore, the Commission concluded that the prohibition on building could not be qualified as deprivation in the sense of Article 1…* Id.

[221] See paragraphs 69 and 73 of SPORRONG AND LÖNNROTH v. SWEDEN. ECHR *(Application no. 7151/75; 7152/75)* JUDGMENT. 23 September 1982.

[222] Paragraph 53 of Belvedere Alberghiera S.RE.L. v. Italy, Judgment of 30 May 2000.

[223] Tomuschat, supra note 31, p. 654.

[224] Paragraph 124 of Ivcher Bronstein v. Peru.

[225] Paragraph 126 of Ivcher Bronstein v. Peru.

Ivcher's use and enjoyment of his rights as a shareholder in violation of Article 21 (2) of the Convention,[226] and that there was no evidence or argument to confirm that those measures were *based on reasons of public utility or social interest; to the contrary, the proven facts in this case coincide to show the State's determination to deprive Mr. Ivcher of the control of Channel 2, by suspending his rights as a shareholder of the company that owned it.*[227]

iii. Proportionality

As has just been reviewed, to determine in investment law whether an indirect expropriation has taken place, BITs and specifically the U.S. FTA model have constructed some criteria that are analogous to the concept of *proportionality* in human rights law. U.S. FTAs —following a principle widely recognized in international law— establishes that expropriation must be based on a *public purpose*[228] as the major forcing idea familiar to proportionality, complemented by one of the *referential factors* to determine an indirect expropriation: *the extent to which the government action interferes with distinct, reasonable investment-backed expectations* (factor ii described in the *Annex 10 – B*).[229] In the *Chiriboga* case (2008), for example, the ICHR, discussing the expropriation of a private land in Ecuador, concluded that *in order for the State to legally satisfy a social interest and find a fair balance of an individual's interest, it must use the less costly means to damage, the least, the right to property of the person, subject-matter of the restriction.*[230] The ICHR adopts the principle of proportionality, for which the ECHR has consistently held that, whatever restriction may be placed on property rights, the end result must be a fair balance between the interests at stake.[231] But at the same time in *Chiriboga*, the ICHR subtly

[226] Paragraph 127 of Ivcher Bronstein v. Peru.

[227] Paragraph 129 of Ivcher Bronstein v. Peru

[228] *Tout en reconnaissant pleinement le droit de l'État de nationaliser, le droit international subordonne la validité de son exercice à trois conditions : la nationalisation devait répondre à un motif d'intérêt public, ne pas être discriminatoire, et être accompagnée d'une indemnisation*. P. Dailler et A. Pellet, Droit International Public (Nguyen Quoc Dinh), (6 édition, 1999), p.1042 Article 4 of the 1962 UN Resolution (Permanent Sovereignty over Natural Resources) refers to "on the grounds or reasons of public utility, security or the national interest." Section IV.1 of the 1991 World Bank guidelines uses the expression *in pursuance in good faith of a public purpose.*

[229] As mentioned previously, the three referential factors are: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

[230] Paragraph 63 of Salvador Chiriboga v. Ecuador. Judgment of May 6, 2008.

[231] Tomuschat supra note 31, p. 647. *This dictum, which appeared for the first time in the Sporrong and Lönnroth case of 1984 has been retained to this very day. But it has been particularized for a host of situations with the most diverse factual features*. Id. Tomuschat cites the *Zlínzat* case related to a unilateral prosecutor's decision suspending a public contract (the acquisition of a hotel): "these rules, which appear to be of general application, serve as a catchall, giving the prosecutor's Office unfettered discretion to act in any manner it sees fit, which may in some cases have serious and far-reaching consequences for the rights of private individuals and entities […] This discretion and the concomitant lack of adequate procedural safeguards such as elemental rules of procedure and […] review by an independent body, and the resulting obscurity and uncertainty surrounding the powers of the Prosecutor's Office in this domain, lead the Court to conclude that the minimum degree of legal protection to which individuals and legal entities are entitled under

emphasizes that the restriction should interfere "as little as possible" with the enjoyment of property using "the less costly" means to damage "the least" the right to property.[232] In fact, the *Chiriboga* decision provides a good analysis combining the principle of proportionality and the balance of interests, to conclude that a claim for a lack of judicial protection based on a non-justifiable delay of payment of a compensation for expropriation is founded and constitutes a violation of the right to property. This could perfectly be an analysis from the sole perspective of investment law.

The ICHR indicated *that there is no controversy among the parties regarding the object and purpose of the expropriation of the property belonging to Mrs. Salvador Chiriboga…*[233] *Nevertheless, this Tribunal considers that such payment does not comply with the standards required by the American Convention nor with the international standards and principles, and therefore, in more than 15 years, the State has neither fixed the final value of the property nor made the payment of a fair compensation to Mrs. Salvador Chiriboga*. It is interesting to notice that the ICHR in its reasoning did not confine itself to human rights law but also appealed to *international standards and principles* in general. Since the enunciation of the *Hull* doctrine,[234] the payment of compensation for expropriations has been the object of a long legal debate, which was nonetheless attenuated somewhat by BIT and FTA texts referring indistinctly to *prompt, adequate, and effective compensation*,[235] or *without delay*.[236]

As mentioned in the introduction to this article, in the *TECMED* ICSID case there is also an explicit reference and application of human rights principles to assessing the State's conduct, assuming naturally the principle of proportionality and the balance of interests. The tribunal stated that *there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by*

---

the rule of law in a democratic society was lacking. It follows that the interference with the applicant company's possessions was not lawful, within the meaning of Article 1 of Protocol No. 1". Tomuschat supra note p. 645

[232] Desmet, supra note 32, p. 260.

[233] Paragraph 76 of Salvador Chiriboga v. Ecuador. Judgment of May 6, 2008. In previous paragraphs 74 and 75 the ICHR develops its doctrine of general interest and the balancing of competing interests: 74. Similar to the social interest, the Court has interpreted the scope of the reasons of general interest established in Article 30 of the American Convention (scope of the restrictions), by pointing out that "[T]he requirement that the laws be enacted for reasons of general interest means they must have been adopted for the "general welfare" (Art. 32(2)), a concept that must be interpreted as an integral element of public order in democratic states, the main purpose of which is "the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness" (American Declaration of the Rights and Duties of Man, Introductory clause 1.). " 75. Furthermore, this Tribunal has pointed out that "the concepts of 'public order' or 'general welfare', as derived from the general interest, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the "just demands" of "a democratic society," which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention […]." Id.

[234] P. Dailler and A. Pellet, supra note 228, p. 1044.

[235] Article 10.7.1 c) of the U.S.-Peru FTA.

[236] See for example article 6 (2) of the BIT between Peru and the United Kingdom, article 4 (2) of the BIT between Peru and Argentina, article 7 (1) of the BIT between Peru and Australia, article 5 (3) of the BIT between Peru and Bolivia, article 13 of the BIT between Peru and Canada, article 6 (1) of the BIT between Peru and Chile.

any expropriatory measure, citing an ECHR's definition (from *James and Others*) to asses and consider the different factors that should be taken into account: *not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim « in the public interest », but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized...[...]. The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" [...] The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto.*[237] At this point it should not be surprising that human rights and investment law tribunals exchange concepts and principles to assess the administrative conduct of the State. Human rights argumentation can even be more liberal when examining State *vis-à-vis* individuals' interests. For example, in *Palmara* the IACHR considered an expert opinion concluding that Mr. Palmara's book undoubtedly affected the *institutional interest* of the Chilean Navy, but concluded that the deprivation of property on the grounds of an "institutional interest" is not in line with the Convention.[238]

In *Sawhoyamaxa*, besides analyzing the concurrence of a BIT and human rights convention (discussed in p.), the IACHR used a balance of interests assessment to refuse Paraguay's argument that the land claimed by indigenous people was already in private hands "for a long time" and had been "duly registered." For the IACHR, *when there be conflicting interests in indigenous claims, it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other.*[239] As can be seen, human rights courts tend to be *liberal* and creative regarding both criteria; i.e., justifying state intervention or upholding individual rights based on fair balance and on a test of proportionality. The ECHR has even extended its principles to areas not specifically considered in the Convention, as in the case of environment protection. In *Hamer v. Belgium*, related to a demolition order of a house based on environmental protection, the ECHR reiterated this idea, pointing out that [240] *the environment is a cause whose defense arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard… 80. Thus, restrictions on property rights may be allowed on condition, naturally, that a fair balance is maintained between the individual and collective interests concerned.*

iv. Compensation

In compensation for human rights violations, human rights law has developed some approaches not necessarily aligned with international investment law. The topic deserves an

[237] Paragraph 122 of TECNICAS MEDIOAMBIENTALES TECMED S.A. v. THE UNITED MEXICAN STATES ICSID CASE No. ARB (AF)/00/2.
[238] Paragraph 109 of Palamara Iribarne v. Chile. Corte Interamericana de Derechos Humanos. Judgment of November 22, 2005.
[239] Paragraph 138 of *Sawhoyamaxa Community* v. Paraguay. March 29, 2006.
[240] Paragraphs 79 and 80 of the CASE OF HAMER v. BELGIUM *(Application no. 21861/03)* JUDGMENT ECHR, 27 November 2007

independent and deep research; however, for the purposes of this article, we would like to make some final comments about how human rights law and case law understand the extent of compensation which according to different instruments and opinions is qualified as *just*, *reasonable* or even *ad integrum*, but not always *full*. Article 21.2 of the American Convention uses the expression *upon payment of just compensation*, something that —as suggested by Desmet— can justify a compensation of less than the total value.[241]

Without alluding to *just* or *full* compensation, article 1 of Protocol 1 of the European Convention makes a general reference to the *conditions provided by law and by the general principles of international law*. The ECHR considers as general principle that the amount for compensation be 'reasonably related to the value' of the property at issue. However, for Tomuschat this criterion does not imply that nationals have the right to *full compensation* because the beneficiaries of the principles of international law (on investment law) are aliens and foreign investors.[242] Liberti sees more clearly this difference of treatment, when a State deprivation is founded on the execution of a human rights obligation.[243]

However, in other circumstances human rights decisions have gone in the direction of compensating *at integrum*. This is precisely the criterion in *La Cantuta v. Peru* (2006), where the IACHR, as a consequence of the murder of a university professor and a group of students by military forces during the Fujimori's regime (as result of forced disappearances and extra-legal executions), was requested to declare that the Peruvian State had violated, among others, the rights to life, human treatment and personal liberty; and to order the reparation measures requested in the victims' application. In its judgment, which established the State's responsibility, the IACHR, following preceding decisions like *Velásquez Rodríguez v. Honduras* (1989),[244] considered that *the reparation of the damage flowing from a breach of an international obligation calls for, if practicable, full restitution (restitutio in integrum), which consists in restoring a previously-existing situation. If not feasible, the international court will then be required to define a set of measures such that, in addition to ensuring the enjoyment of the rights that were violated, the consequences of those breaches may be remedied and compensation provided for the damage thereby caused*.[245] For Nikken, this reasoning conforms to international law established in the International Law Commission articles on State responsibility, and to the universal standards on reparations for "violations to human rights" (principles 18 and 19 of the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of

[241] Desmet, supra note 32, 258.
[242] Tomuschat, supra note 31, p. 653
[243] « Si la mesure étatique, jugée équivalente à une expropriation ou lésant d'autres obligations de protection des investissements, est adoptée en exécution d'une obligation positive de protection des droits de l'homme qui ne relève pas de la catégorie du jus cogens (droit à l'eau, droit à la santé, droit à un environnement sain, droits des populations autochtones), le tribunal arbitral doit s'efforcer de trouver un équilibre entre la protection des intérêts des investisseurs et la protection des intérêts des communautés locales. Cela devrait jouer un rôle dans la détermination de l'indemnisation qui pourrait être détachée du standard de la *full compensation*. » Liberti, supra note, p. 833.
[244] Paragraph 27 of *Velásquez Rodríguez Case (Compensatory Damages)*, 1989 Inter-Am.Ct.H.R. (Ser. C) No. 7 (1990).
[245] Paragraph 201 of La Cantuta *v.* Perú. ICHR Judgment of November 29, 2006.

Gross Violations of International HR law and Serious Violations of International Humanitarian Law").[246]

It is interesting to note that, in *Rodríguez Velázquez,* the IACHR explained that the expression "fair compensation" used in Article 63 (1) of the Convention corresponds only to a part of the reparation and is in the benefit of the "injured party." Therefore, it is compensatory, not punitive. *Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.*[247]

CONCLUSION

The right to property is a human right not only because it has been consecrated as such —with some initial hesitations— in major contemporary international human rights instruments, but also because it has become a key relational vehicle between human beings. The right to property connects individuals through contractual relations that can be built through excludability. While it is not essential to human nature, it is a social mechanism that allows development of one of the expressions of *otherness*.

The exchange of property rights serves as a mechanism for protecting the permanence of individuals' rights through a double effect of recognition and transformation (of one property asset into another). Even though the right to property seems to be at the center of investment law, it can also be claimed in the context of human rights. That is why, due to the robustness of its *relational effect*, the right to property has allowed marginalized individuals, such as indigenous peoples, to claim —and often obtain— the recognition of their traditional rights in line with ILO Conventions.

The evolution of international law in the era of globalization is promoting a natural and progressive convergence between human rights and investment law. Both branches of law are the expression of the *internationalization* of domestic affairs, resulting in a new legal phenomenology oriented to protect individuals against arbitrary interferences by government and other forms of abuse of power (political, economic, and even physical).

Even more interestingly, human rights and investment law have developed in a way that can become complementary. The European experience in human rights shows how foreign investors that have suffered a human rights violation in the territory of any ECHR member State —once domestic remedies are exhausted— are entitled to access the human rights jurisdiction without any *ex ante* support from their national States. In an investment conflict, access to international arbitration is restricted to nationals of States that have

[246] Nikken, supra note 29, p.251.
[247] Paragraph 38 of the *Velásquez Rodríguez Case (Compensatory Damages)*, 1989 Inter-Am. Ct.H.R. (Ser. C) No. 7 (1990).

signed a BIT or FTA with an express consent to arbitration. Human rights jurisprudence has recognized a very large conceptualization of the right to property, recognizing different types of assets to be protected (physical and non-material rights) in a similar way as investment law.

Following the European experience, the dialogue between human rights and investment has already begun in Latin America. As explained in this article, different ICSID awards have recognized the possibility to apply human rights law to resolving investment conflicts. Finally, the old aspiration of industrialized countries to have investment treatment ruled by international principles should arrive to the point of applying international principles *in toto.*

There are many challenges to the consolidation of an integrated approach of investment and human rights law. In some cases international tribunals will have to choose between one protecting principle and the other, according to specific circumstances. We have seen, for example, that the IACHR has already tested the concurrence of human rights and investment law to the point, in *Sawhoyamaxa*, of preferring the application of the human rights Convention over the investment treaty. But these extreme circumstances do not imply that the IAHRS is far from developing rational and even *avant garde economic principles*, which are very close to those of international economic law in areas like indirect expropriation, proportionality, and the diverse conceptualizations of property. The integration of investment law and human rights could be well served by a substantial reform of the system allowing access of legal persons like the European system.

Major Latin American countries are part of this general trend thanks to the consolidation of the IAHRS and the enjoyment of a period of economic stabilization based on free market policies and openness to foreign investment. Even though Latin America has not produced an integrated regional network of human rights and investment, the dialogue already initiated by international tribunals provides the liberalization process in Latin America with the opportunity to reconcile human rights and free market aspirations.