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The Role of Human Rights in International Investment Law

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I. INTRODUCTION

Human rights norms interact with international investment law in at least five different ways. First, the investor might commit, or be complicit in, violations of human rights. Second, the State might violate the investor's human rights. Third, the State might adopt a human rights-motivated measure that interferes with the property rights of the investor. Fourth, a party in the proceedings might invoke the practice of international human rights courts on issues of procedure. Lastly, a party may invoke international human rights norms in the application or interpretation of investment protection obligations.

Despite this interplay the two branches of international law remain distinct. But how separate are they from one another? If both seek to protect individuals and groups in order to achieve the highest level of welfare in a given society, how relevant then is human rights law to investment protection? The answer remains unclear. Different tribunals have had different ideas as to the applicability and usefulness of interpreting or applying human rights law to an investment treaty dispute. Human rights law, some say, should have a limited role in investment treaty arbitration as the two branches of international law are designed for different purposes. This view is often affiliated with those who believe that the investment treaty system is a self-contained regime which prohibits investment treaty tribunals from incorporating into the applicable treaty another set of legal rules. In the absence of express language in the treaty, they argue, investment treaty tribunals shall presume that investment treaties were intended to limit the influence of human rights

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law in investment treaty arbitration. According to this view, an investment treaty is organically disconnected from human rights law.

The opposite view reflects an approach of unity of international law in a way in which investment law should not be interpreted in isolation of environmental, human rights and social development contexts.¹ This school of thought adopts the view that human rights should be taken into consideration when interpreting and applying the standards of protection under investment treaties.

Whether one takes the former or the latter approach, or something in between, clearly the problem does not fade away. The protection of a human right, for example the right to water, at times may be in conflict with the right to property. As noted by the tribunal in *Sempra v Argentina*, what is at issue is the 'complex relationship' between investment protection and human rights.² This relationship has created a considerable misconception among some stakeholders about the investment treaty system and how an investment treaty should be interpreted. Some have suggested that unless human rights are expressly incorporated in investment treaties, such instruments have the potential to restrict the State's capacity to regulate in the public interest.³ Unsurprisingly, the result is a notable level of opposition towards the investment treaty system. An approach to clarify this 'complex relationship' aims to incorporate a statement of human rights obligations into investment treaties. Some States have taken this path, but, will this incorporation to treaties resolve the complex question of the role of human rights law in investment arbitration? Of course it will depend on the content of what is inserted into the treaty but a mere reference to human rights obligations would hardly resolve the substantial question concerning the role of human rights in investment protection. Leaving aside the theoretical discussion concerning the different ways the regimes interplay, the most difficult problem tribunals face is to determine the circumstances in which a State would be in breach of the investment treaty in cases where investors have suffered loss or damage to their investments as a result of legitimate policy measures. When do the investor's interests outweigh the public interest? It is of course uncontroversial that in case of direct expropriation governments must pay compensation. However, difficulties arise when determining the cases in which under international law the public interest requires the damage of an investor to go

¹ P Sands, 'Treaty, Custom and Cross-fertilization' (1998) 1 *Yale Human Rights & Development Law Journal* 89.

² *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) 332.

³ The UN High Commissioner for Human Rights has noted that '[t]o the extent that broad interpretations of expropriation provisions could affect States' willingness or capacity to introduce new measures to promote and protect human rights, then the use and interpretation of expropriation provisions is a cause of concern.'

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uncompensated or get less than full compensation. This chapter will address this question and will offer an approach that could assist tribunals to balance these competing concerns.

The proposition is that international human rights law should play an important role in interpreting standard obligations of foreign investment. Human rights case law has been particularly important in giving content to rules of international law relating to the protection of property rights, such as the right to remedy, the right to fair trial, and the protection of economic and social interests. The interplay between these principles and concepts is central to the current question on how human rights and investment law can interact. The relationship is not a one-way street but rather a connection of various routes. The issue is not of choice between investment protection and human rights norms. The test must be focused upon striking a fair balance between public and private interests. This balancing of interests is well-rooted in international human rights law and investment law should therefore recognize the important contribution that human rights law can provide to the development and understanding of international investment law.

II. A COMMON BACKGROUND

Human rights and investment protection had much in common at their origin. I will not dare to even suggest when international law started to pay attention to the treatment of aliens,⁴ but it is fair to say that the notion of State responsibility for injuries to aliens was established as a separate branch of international law in 1916.⁵ This obligation, imposed on States for injuries suffered by the State itself or its nationals, was exercised through diplomatic protection.

During the nineteenth and twentieth centuries, international claims were submitted to arbitral bodies that developed a set of legal theories for the protection of aliens. One of these theories is the notion that aliens should be treated according to international minimum standards. This theory was not overwhelmingly accepted in the twentieth century.⁶ Despite this, the Permanent Court of International Justice began to recognize the existence of the minimum standard of treatment.⁷ With the conclusion of the Second

⁴ Some say Vattel is the father of the concept of State Responsibility.

⁵ E Borchard, *The Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Company 1914); see also C Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Martinus Nijhoff Publishers 2001) 36.

⁶ Especially in developing countries.

⁷ *Mavrommatis Palestine Concessions Case* in 1924 and *Case Concerning Certain German Interests in Polish Upper Silesia* in 1926.

World War, diplomatic protection and human rights began to take different paths. In 1945, States started to recognize certain norms of fundamental human rights that were binding on all individuals. From this moment in time, human rights became part of international law. International treaties were adopted, including the Universal Declaration of Human Rights in 1948, the European Convention on Human Rights in 1950, the International Covenant on Civil and Political Rights in 1966, the Inter-American Convention on Human Rights in 1969, and the African Charter on Human Rights and People's Rights in 1981.

Investment protection also grew. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) in 1965 and many bilateral investment treaties adopted since have led to the development of a particular set of rules for the protection of property held by foreign investors.

As both branches developed separately, the influence of human rights in investment arbitration became more limited. This chronological history perhaps explains why investment treaties are silent on the role of human rights law. What conclusions can be drawn from the language in investment treaties?

III. THE ABSENCE OF EXPLICIT REFERENCE TO HUMAN RIGHTS

A common feature of investment treaties is the absence of explicit reference to other branches of international law, including human rights. The closest connection is, at best, an abstract reference in the preamble to social welfare.⁸ This could be seen as a rather striking approach since investment disputes are likely to touch upon and possibly clash with different human rights. In fact, nowadays, it is becoming more and more difficult to look at the protection of property rights without addressing human rights. It is frequently asked why investment treaties do not make any reference to this inevitable interplay. It may be because there is no need to. The absence of a specific provision on human rights law in an investment treaty does not, on its own, establish the inapplicability of human rights. The potential relevance of human rights law or other branches of international law is implicit in investment treaties. As a creature of public international law, an investment treaty must be read and interpreted in the context of the entirety of applicable public international law rules.

An investment treaty may or not contain an applicable law clause but the source of the legal obligations will always be the treaty and rules of interna-

⁸ For example, the Preamble of the North American Free Trade Agreement (NAFTA).

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tional law, including international human rights law. Of course, the abstract reference to ‘rules of international law’ could be seen to be of little assistance to an investment treaty tribunal in determining whether human rights norms are relevant to the interpretation of an investment treaty to a particular dispute. However we can safely say that, in principle, international human rights law plays a role in applying and interpreting investment treaties. This is so even in a case where there is no rule of international law directly applicable.⁹

A second reason why investment treaties do not make reference to human rights is because it is not in the spirit of investment treaties nor were they designed to deal with the tensions between investment law and other branches of international law, or to regulate the relationship between foreign investors and host States. I will now address the intention of State parties with regards to human rights and other branches of law.

This question must be analysed first through the process of treaty interpretation.¹⁰ The intention of the parties to an investment treaty provides the starting point for resolving this question.

IV. THE INTENTION OF STATE PARTIES

What is the express intention of States with regards to human rights law? I have participated in various investment treaty negotiations, in none of which the term human rights was ever raised—let alone discussed. It should not come as a surprise to find that the term human rights rarely crosses the minds of treaty negotiators during the negotiations. Does that mean that negotiators intend to exclude or give a peripheral role to human rights norms? The answer is no. The lack of explicit reference to certain policy objectives or set of legal rules does not mean that such policies or rules are to be irrelevant to a particular case. Some sets of rules will be relevant to a particular case and irrelevant in a different case. This is not a particular feature of investment treaties. International law generally does not contain express rules decisive of particular cases.¹¹ As explained below, the set of applicable rules will largely depend on the characterisation of the dispute and the circumstances of each case.

There is a further issue that must be addressed with respect to the intention of State parties. States negotiate investment treaties with a clear understanding of what the treaty’s object and purpose is and States rarely go

⁹ H Lauterpacht, *The Function of the Law in the International Community* (OUP 2011) 119.

¹⁰ C McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 *ICLQ* 37.

¹¹ British-American Arbitral Tribunal in the *Eastern Extension, Australasia and China Telegraph Company, Ltd* (9 November 1923) 6 *RLAA* 112.

beyond that. The purpose of investment treaties is to ‘impose restraints and obligations on the host State’.¹² In other words, to control abusive conduct by the State against the property rights of foreign investors. By self-imposing mechanisms of control over such conduct by means of international adjudication, the level of business risk is reduced and thus attracts foreign capital to the host State. This is the State’s motivation for entering into investment treaties. It is not the purpose of the treaty to emphasize the State’s right to regulate in the public interest or remind investment treaty tribunals about the importance of human rights, the protection of the environment or labour rights. No doubt there is the temptation to incorporate such topics in a treaty.

As laudable as these efforts might be, incorporating such language in a treaty would not resolve the complex issue of the relationship between investment protection and other branches of law, and in any case, there is also no need for it. Such amendments would only be necessary if one agrees with the premise that the treaty standards of protection favour investors. In my view, this is an erroneous perception of investment treaties. Nowhere in the language of most investment treaties could one conclude that they create an absolute right to property. Treaty negotiators might not have had human rights norms in mind at the negotiating table, but they did expect tribunals to read and interpret treaty obligations consistently with general international law, including human rights law.

One must not lose sight of the fact that the negotiation of investment treaties generally forms part of a wider economic policy which should be presumed to be integrated with, and be subject to, other policies of the State, such as the protection of human rights, the environment and social development. It is for these reasons that States omit explicit references to other disciplines or policy objectives.

V. IS HUMAN RIGHTS LAW PART OF THE APPLICABLE LAW?

Oscar Wilde said that truth is ‘rarely pure and never simple’.¹³ The same could well be said of international investment law. The ambiguities of the language in investment treaties have created a variety of legal problems that have led to different views from different tribunals on whether human rights law could be used in the application and interpretation of investment treaties. For example, it could be said that the fair and equitable treatment (FET), full protection and security and expropriation clauses are expressed in vague terms. Very few would disagree. Why do States follow this practice of ambiguity in the law?

¹² R Dolzer and M Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995).

¹³ O Wilde, *The Importance of Being Earnest* (1895) Act 1.

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In most cases, the ambiguity of the language is intentional. The vagueness in the language is important in an investment treaty for two reasons. First, the content of the standards of protection derive from customary international law. By leaving gaps in the content of the substantive obligations, States introduce a dynamic component to the treaty provisions in which the principle will remain constant but the content can develop over time. As customary international law develops so should international investment law.

Second, investment treaties do not purport to establish an integrated and isolated set of legal rules; they must be read and interpreted together with public international law rules. As stated by the tribunal in *AAPL v Sri Lanka*:

[an investment treaty] is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.¹⁴

This approach reflects the so-called ‘principle of integration’ in which treaties should not be considered in isolation of general international law.¹⁵ Thus in principle, human rights law plays a role in international investment law. Yet, in a practical sense, it is never exactly clear how human rights and investment law are supposed to interact in the framework of an investment dispute. The answer is, it depends! In some cases, the issues in dispute will be exclusively of the investment treaty regime, in others they may be exclusively matters of human rights law, and yet in others they may be matters of both legal systems.

To illustrate this clash of legal rules, I will discuss the latest decision dealing with international human rights obligations and investment treaty protection. In the case of *Grand River Enterprises Six Nations v United States*, the claimants were members of a First Nations’ tribe and producers of two brands of cigarettes. They argued that a major settlement between big tobacco companies and US states affected their business in Indian communities in the United States. The claimants argued that the settlement was imposed on them without consultation. They further argued that the United States breached the FET provision of NAFTA. The claimants’ main argument was that the ‘minimum standard of treatment’ includes the rights of indigenous peoples under customary international law. The argument was rejected. The tribunal concluded that the minimum standard of treatment under the

¹⁴ *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) 21.

¹⁵ Sands (n 1) 95.

NAFTA investment chapter does not incorporate 'other legal protections' that may be provided to investors under 'other sources of law'. It stated:

The tribunal understands the obligation to 'take into account' other rules of international law to require it to respect the Vienna Convention's rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a licence to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretative processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA....The Tribunal is particularly mindful in this regard of the Free Trade Commission's directive that a violation of an obligation under another treaty does not give rise to a breach of Article 1105.¹⁶

On its face, this passage shows that the *Grand River* tribunal did not view human rights obligations as playing any role (operational or normative) in the interpretation and application of the NAFTA. One wonders about the relevance of Article 1131 of NAFTA which requires that the issues in dispute shall be decided not only in accordance with NAFTA but also with 'applicable rules of international law'. Perhaps if we start by framing the issue as a 'licence to import' then, yes, the tribunal in *Grand River* might be correct. However if the tribunal is established to decide the issues in dispute in accordance with the treaty and applicable rules of international law one cannot see how human rights obligations applicable to both Canada and the United States are not relevant to the dispute. Article 1131 (and the same is true for other investment treaties) is based on the assumption that investment tribunals shall apply various sets of international legal rules rather than 'one coherent set of legal rules'.¹⁷

To conclude that NAFTA imposes a prohibition on importing other legal sources, the *Grand River* tribunal heavily relied on Section 2.3 of the Free Trade Commission's note of interpretation, which says that: 'a determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)'. However, one should not read too much into what was really intended by the Free Trade Commission. Section 2.3 of the note of interpretation does not have any meaning other than to state the obvious: a mere breach of other international obligations does not *ipso facto* amount to

¹⁶ *Grand River Enterprises Six Nations Ltd. v United States of America*. NAFTA Award (12 January 2011) 72.

¹⁷ To understand the choice of law in investment arbitration, see Z Douglas *The International Law of Investment Disputes* (CUP 2009) 50.

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a breach of the minimum standard of treatment. This is not the same as saying that a breach of another international obligation is irrelevant in the assessment of whether an investment has been treated unfairly or in a discriminatory manner.

Moreover, although the *Grand River* tribunal acknowledged the pertinence of the Vienna Convention on the Law of Treaties (VCLT) in interpreting NAFTA, it did not consider Article 31(3)(c) VCLT which requires that, in interpreting a treaty, 'there shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties'. The approach taken by the *Grand River* tribunal will not come as much of a surprise as most international courts and tribunals are reluctant to rely upon Article 31(3)(c).¹⁸

This reluctance can be explained from at least two perspectives. First, by relying on other 'relevant rules of law of international law', tribunals might run the risk of deciding the 'issues in dispute' outside the jurisdictional limitations of its competence.¹⁹ In *Oil Platforms*, the International Court of Justice (ICJ) was heavily criticized for using Article 31(3)(c) VCLT as a 'peg on which to hang the whole corpus of international law on the use of force'.²⁰ As Judge Higgins put it, one may not 'invoke the concept of treaty interpretation to displace the applicable law'.²¹

Second, although it is obvious that under international law the reference to other rules of international law cannot override treaty provisions²² as was the case in *Grand River*, tribunals nevertheless are somewhat sceptical when disputing parties invoke international human rights norms because it is often seen as an excuse, for example, by a respondent State to avoid State responsibility.²³ It has also been characterized as 'a vehicle for generally litigating claims based on alleged infractions of domestic and international law, thereby unduly circumventing the limited reach'²⁴ of the FET or the expropriation clause. Both are real concerns that tribunals cannot ignore. Nevertheless, however inconvenient it is for arbitrators to refer to other legal sources, it

¹⁸ Sands (n 1) 95.

¹⁹ C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 (2) *ICLQ* 288.

²⁰ A Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2nd ed 2007) 243.

²¹ *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Separate Opinion of Judge Higgins) (2003) 42 *ILM* 1387, para 49.

²² C Brown, *A Common Law of International Adjudication* (OUP 2009) 50.

²³ The same concern that perhaps troubled some tribunals in the cases against Argentina were the 'right to water' and the general defence under customary international law doctrine of 'state of necessity' where raised by Argentina. *CMS Gas Transmission Co v Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005); *Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Award 14 (14 July 2006).

²⁴ *Grand River Enterprises v United States of America*, NAFTA Award (12 January 2011) 219. See also, *Methanex Corp v United States of America*, NAFTA Final Award (3 August 2005).

should not be an argument for playing down the importance of other branches of international law.

The question of whether or not, and to what extent, an investment treaty tribunal should take into consideration human rights law in a particular case will depend first on how the dispute is characterized. How the dispute is characterized is fundamental as it puts the dispute in its proper legal context. At this point, an investment treaty tribunal must differentiate between the causes of action and the applicable law in a treaty. The cause of action is set out in the applicable treaty. It follows that an investor cannot bring a cause of action under, for example, the Human Rights Act by presenting a human rights dispute (e.g. illegal imprisonment of the investor) as if it was an investment dispute. In other words, an investor does not acquire a right to bring an investment claim against the conduct of the State (for example an illegal arrest warrant) although such a measure violates human rights norms, merely by virtue of being an investor. A different question is whether the harassment or the carrying out of arbitrary criminal investigations against the investor, in connection with the investors' investment, violates the FET or full protection and security standard.

VI. APPLICATION OF HUMAN RIGHTS IN INVESTMENT TREATY ARBITRATION

Human rights bodies have developed a vast body of jurisprudence on customary norms which are equally applicable in investment treaty disputes. The content of customary norms derives from common standards of justice found in public international law. It is important to recognize that in the field of State Responsibility, both human rights and investment law focus on the existence of a wrong according to international law. The concept of wrong under international law has been developed under the doctrine of State Responsibility. This doctrine refers to principles of international law such as the international law concept of due process,²⁵ and the international standard of making reparation in case of a breach of an international obligation.²⁶ These principles, together with the equal treatment, fairness and expropriation concepts, are all part of the legal corpus of both human rights law and investment law. Human rights bodies such as the European Court on Human

²⁵ As the International Court of Justice stated in discussing arbitrariness and due process: 'Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law'. *Case concerning Elettronica Sicula, S.p.A. (ELSI) (United States of America v. Italy)*, Judgment ICJ. Rep 1989, 15.

²⁶ See *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 29.

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Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have shed light upon the content of such rules and principles.

My view is that human rights law can be relevant when interpreting investment treaty standards of protection. This becomes more apparent as investment treaty case law shows a divergence of views amongst investment tribunals with respect to the content of investment protection obligations. Instead of heavily relying on dictionaries to find the content of FET, perhaps it would be more useful to look into human rights law. Can an investment treaty tribunal rely on jurisprudence from human rights bodies though? The answer is yes. If investment treaty tribunals rely on doctrines of general international law and jurisprudence from the ICJ or other international bodies, there is no reason why they should not rely on human rights jurisprudence. The *Saluka v Czech Republic* tribunal, for example, applied the doctrine of police powers under customary international law:

The principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police power of States’ forms part of customary international law today.²⁷

Here the issue is whether certain human rights norms form part of customary international law which could be applied in investment treaty cases. As we have seen from the case law, several investment treaty tribunals do address human rights norms in their decisions,²⁸ and more significantly, they have relied on human rights case law. The *Tecmed v Mexico* tribunal, for example, cited the ECtHR and the IACtHR as indicative of the existence of indirect expropriation and the principle of proportionality.²⁹ The *Fireman's Fund v Mexico* tribunal also cited the jurisprudence of human rights bodies for the content of what constitutes an indirect expropriation under international law.³⁰ In *Mondev v United States*, the tribunal cited the jurisprudence of the ECtHR for the non-retroactivity of criminal legislation, the concept of

²⁷ *Saluka B.V. v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) 262.

²⁸ See for example *Biloune and Marine Drive Complex v Ghana*, Award on Jurisdiction (27 October 1989); *Mondev International Ltd v United States of America* ICSID Case No ARB(AF)/99/2, Award (11 October 2001); *Técnicas Medioambientales, TECMED S.A. (Tecmed) v Mexico*, ICSID Case No ARB(AF)/00/2, NAFTA Award (29 May 2003); *CMS v Argentina*, (n 23); *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006); *Azurix v Argentina*, (n 23); *Siemens v Argentina*, ICSID Case No ARB/02/8, Award (6 February 2007); *Sempra v Argentina*, (n 2); *Saipem v Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction (21 March 2007).

²⁹ *Tecmed v Mexico* (n 28) 116.

³⁰ *Fireman's Fund v Mexico*, ICSID Case No ARB(AF)/02/01, NAFTA Award (17 July 2006).

fair trial and State immunity.³¹ However, the idea of applying case law from separate legal systems raises the question of whether, for example, a NAFTA tribunal could rely on European human rights case law where none of the parties of the treaty are parties to the European Convention on Human Rights (ECHR). In principle, the question of applying of human rights law would have to be answered through the process of analogy. This was what was done in the *Mondev* case.

Once it has been established that, in principle, human rights law could play an important role in the interpretation of investment treaties, which elements of human rights law are directly relevant for investment arbitration? In my view, in at least two areas: the concept of expropriation and the content of FET.

A. Expropriation

The first point of departure in the protection of legal rights is the balancing of conflicting interests in a particular case.³² International human rights law provides guidance on this issue. Under international human rights, bodies have examined the interference by seeking a balance between the public interest and the private rights of ownership. In *James v United Kingdom*, the ECtHR stated: 'Clearly, compensation terms are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants'.³³

Under the ECHR, the recognition of the human right to property is found in Article 1 of Protocol No. 1. Such a right is also found in the Universal Declaration of Human Rights.³⁴ The Inter-American Convention on Human Rights and the African Charter of Human Rights also provide for the right to property. However, the right is not unlimited. In reconciling the right to property and the public interest, human rights bodies carry out an assessment of the proportionality between the interests of the State to safeguard the public interests and the rights of the individual. The practice of such bodies demonstrates that in some situations there is no presumption in favour of compensation.³⁵ In other cases in which compensation is required, the objectives of public interest may call for less than full compensation. For

³¹ *Mondev v United States* (n 28) 139–144 .

³² Lauterpacht (n 9) 130.

³³ *James and Others v the United Kingdom* Case No. 3/1984/75/119 (ECtHR, 21 February 1986) (1984) Series A no. 98, 48.

³⁴ Article 17 of the Universal Declaration states: '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'.

³⁵ D Anderson, 'Compensation for Interference with Property' (1999) *European Human Rights Law Review* 547.

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example, in *Lithgow v United Kingdom*, the ECtHR held that 'legitimate objectives of public interest, such as 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'.³⁶

Under human rights law compensation is just one of the factors that has to be taken into account when determining whether a fair balance has been struck between the public interest and the individual's right. In many cases the human rights courts have concluded that a fair balance has been struck between private and public interests notwithstanding a failure to compensate for a loss or damage in the value of the property affected. For example, the *Pinnacle Meat Processors v United Kingdom* case involved the business of removal and processing of meat. As a result of regulations in response to the BSE threat, the business became illegal and the UK government did not pay compensation. The European Commission of Human Rights concluded that the measure in question did not involve expropriation. It stated that the ECHR did not provide for an automatic right to compensation for the consequences of regulatory measures and that the lack of compensation to parts of the beef industry could not be said to be arbitrary and thus unjustified.³⁷

As indicated above, investment tribunals should seek guidelines from international human rights case law on the concept of expropriation.³⁸

B. Fair and Equitable Treatment

The content of the FET standard is a highly debated issue in investment treaty arbitration. There are at least two views on this issue. One view is that FET is an independent and autonomous standard.³⁹ The opposite view is that it is synonymous with the customary international law minimum standard of treatment of aliens.⁴⁰ Supporters of this view resist the formulation of a wide-ranging standard.

³⁶ *Lithgow and Others v The United Kingdom* (1986) Series A No 102 (1986) 8 EHRR 329 121.

³⁷ *Pinnacle Meat Processors v United Kingdom*, Application No 33298/96 (1999) 27 CD 217, Decision (21 October 1998).

³⁸ C McLachlan, *International Investment Arbitration* (OUP 2008) 8.64. As Professor McLachlan wrote:

the decisions of the European Court of Human Rights as well as the decisions of other regional human rights courts should also be taken into consideration when seeking to understand customary international law on expropriation as well as the investment treaty elaboration of customary international law.

³⁹ FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) *British Yearbook of International Law* 241.

⁴⁰ NAFTA Free Trade Commission, Notes of Interpretation of Certain NAFTA Chapter 11 Provisions (31 July 2001).

Others take a more moderate approach. Some say that the interpretation should not require a ‘black-and-white choice between complete discretion on the one hand, and the application of a conception of customary international law ‘frozen in time... in the past’.⁴¹ It is suggested that the particular language in the investment treaty in question can be reconciled with general international law.

This is an area in which investment law can borrow from international human rights law. International human rights case law has been giving content to the international law standards of treatment. The concept of equal treatment, for example, is heavily embedded in human rights law. In the human rights context, this principle implies a vision of a fair and just business environment in which all persons participate on an equal basis with others in economic life. The content of this right includes the right to equality before the law; the right to equal protection and benefit of the law; the right to be treated as all the others; and the right of access to justice. It also requires an appropriate balance between the community interests and the protection of the investor. As suggested by Professor McLachlan, ‘the standard [FET] shares these concerns with international human rights law. The addition of the concept of equity also requires due weight to be given to the proper public purposes of the host State-performing a similar function to that of proportionality in the application of human rights standards’.⁴² This is not only a human rights approach. It is a reflection of general international law. As noted in Oppenheim’s International Law, ‘The requirements of international law in this field ...represent an attempt at accommodation between the conflicting interests involved’.⁴³

VII. CONCLUSION

The deeper we delve into international investment law the more we uncover difficulties. Without a doubt this branch of international law is replete with intimidating complex questions. In trying to solve these complexities we feel the need to seek coherence and certainty in the law. Some have tried to compartmentalize international investment law; to create a unique set of legal rules with the expectation that time will settle the law through the process of precedents within the world of investment treaty arbitration. Others have attempted to codify the content of the obligations contained in the treaties and the legal relationship between investment law and other legal systems.

⁴¹ C McLachlan (n 10) 381.

⁴² Ibid 400.

⁴³ R Jennings and A Watts (eds), *Oppenheim’s International Law* (9th ed OUP 2008) 933.

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Perhaps it might be wise however to start by asking ourselves what we mean when we use the term 'international investment law' and what the submission of an investment claim entails. First, if we can accept the premise that this is a system which cannot be fully articulated without reference to general international law, the relevance of human rights law in investment arbitration will become evident. Second, as is the case for other legal systems, the international investment system contains rules and principles that clash or overlap with other areas of law to which they might apply, leaving space for disputing parties to characterize disputes which in turn entails the possibility of applying different rules to the same situation.⁴⁴ Faced with this reality, arbitral tribunals will choose the rules they believe are relevant to a particular case. The process of adjudication requires an equitable approach to conflicts between human rights, environment and investment law. It involves a process of decision-making by tribunals in which they should not decide a particular case without taking into account the broader context, including human rights.

With many centrifugal forces pulling in different directions, it will be all the more important for international lawyers to remind themselves and others of the process of adjudication in international law and the relevance of custom and general principles in the construction of investment treaties.

Questions will remain with regard to the problem outlined at the beginning of this chapter: In which cases does the public interest require the damage of an investor to remain uncompensated? The answer to that question, whether it is dealt with in a human rights context or in an investment treaty; will always depend on the circumstances of each case.

⁴⁴ V Lowe, 'Sustainable Development and Unsustainable Arguments' in A Boyle and D Freestone, *Past Achievements and Future Challenges* (OUP 1999).

