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PROPERTY RIGHTS AS HUMAN RIGHTS IN INTERNATIONAL INVESTMENT ARBITRATION: A CRITICAL APPROACH

ENRIQUE BOONE BARRERA*

Abstract: The treaty-based regime of investment protection is said to protect the property rights of foreign investors. Arbitral tribunals are usually tasked with settling investment disputes using principles of international law, some of which refer to the doctrine of protection of aliens. These features have led some commentators to compare the protection of foreign investment with the protection of property rights by human rights instruments and courts. This Essay provides a critical perspective on the relationship between these two systems. The Essay re-examines the widespread assumptions that underlie efforts to find parallels between human rights and foreign investment protection. The analysis reveals that even when investment tribunals protect property rights, they do so within the narrow confines of a monetary dispute. Substantive treaty provisions, as interpreted by arbitral tribunals, cannot be placed in the tradition of the protection of aliens, but rather in the efforts of developed countries to entrench the Hull formula. Furthermore, after examining the distinct approaches to the protection of property rights by arbitral tribunals and human rights courts, this Essay concludes that the narrow goals of international investment agreements are fundamentally different from those pursued by human rights instruments.

INTRODUCTION

In April of 2018, the European Court of Human Rights (“ECtHR”) dismissed an investor claim because the claimant and the subject matter were the same as those of a case that an arbitral tribunal had already settled.¹ Is the fact, however, that similar claims can be submitted to two different dispute settlement institutions—one specialized in the protection of

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¹ *Le Bridge Corp. Ltd. S.R.L. v. Republic of Moldova*, App. No. 48027/10, ¶ 33 (Eur. Ct. H.R., Apr. 19, 2018) (finding that the claim brought before the court was the same in substance and brought by the same complainant as a prior proceeding in an arbitral tribunal, even though in the first proceeding the claim was brought on behalf of the complainant’s company and the second claim was brought on his own behalf as an investor).

foreign investment and the other a human rights court—sufficient to conclude that both regimes are also similar? The two systems evolved from very distinct historical circumstances, and yet there is enough overlap in terminology to merit a closer examination of their relationship. In particular, international investment tribunals have borrowed terminology that historically has been used in the context of protecting aliens and, later, in human rights discourse. The protection of property rights is considered to be the bedrock of international investment protection. In his well-known exchanges with his Mexican counterpart, Secretary of State Cordell Hull claimed that “no government is entitled to expropriate private property, *for whatever purpose*, without provision for prompt, adequate, and effective payment therefor.”² It was probably difficult for Hull to realize how culturally dependent his reverence for private property was.³ The idea that there was a universally accepted principle that reflected such a stance was more of an aspiration than a reality. There is not now, and there never has been, such a principle.⁴ In fact, few propositions in law are more contested, and yet more widespread, than the absolute precedence of private property rights, even in the United States.⁵ In spite of this fact, the Mexican and American govern-

² See ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 478–79 (2d ed. 2008) (emphasis added) (providing an excerpt from a letter from Secretary Hull to the Mexican Ambassador to the United States dated August 22, 1938).

³ In Mexico, private property rights are subject to limitations imposed by the constitution. *Id.* at 472. Some cultures, however, have even more idiosyncratic approaches to property. See Carol M. Rose, *Invasions, Innovation, Environment*, in HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY 21, 31–33 (D. Benjamin Barros ed., 2010) (describing the “complex mixtures” of traditional approaches of property and modernist understandings of property). Furthermore, in some societies, property rights are associated with political, social, and even spiritual norms. LORENZO COTULA, *HUMAN RIGHTS, NATURAL RESOURCE AND INVESTMENT LAW IN A GLOBALISED WORLD: SHADES OF GREY IN THE SHADOW OF THE LAW* 11 (2012).

⁴ LOWENFELD, *supra* note 2, at 481. Although Andrew Newcombe and Lluís Pardell argue that, by the 1900s, American and European international lawyers agreed that a minimum standard of justice in the treatment foreigners existed, it should be noted that it was still nascent, and lacked the rather exacting features that Hull accorded to his principle of unconditional and prompt compensation. Andrew Newcombe & Lluís Paradell, *Historical Development of Investment Treaty Law*, in *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 1, 11 (Kluwer Law Int’l eds., 2009). The most memorable description of this agreement between all “civilized nations” is by Nobel Prize winner Elihu Root in 1910, who described a “very simple, very fundamental” standard of justice that all domestic legislation must meet. Jan Wouters, Sanderijn Duquet & Nicolas Hachez, *International Investment Law: The Perpetual Search for Consensus*, in *FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS* 25, 27–28 (Oliver De Schutter, Johan Swinnen & Jan Wouters eds., 2013).

⁵ For a communitarian critique of private property rights, see Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, in *LAW AND THE ORDER OF CULTURE* 162, 182 (Robert Post ed., 1991); see also Jeremy Waldron, *Property, Justification and Need*, 6 *CAN. J.L. & JURIS.* 185, 185 (1993). John Rawls argued that the precise content of private property rights could vary from

ments reached an agreement in 1938 on the settlement of agrarian and oil claims, but they did not reach an agreement regarding what constituted the law.⁶ This is not just a historical anecdote, but rather is symptomatic of the different perspectives on the nature and reach of investment protection measures to this day.

If proven that international investment law (“IIL”) ultimately advances human rights, it would be one of the strongest arguments for the beleaguered regime of investment protection. Since the neo-liberal craze of the 1990s that helped spread international investment agreements (“IIAs”) throughout the world faded, there have been renewed efforts to justify the current system of investment protection.⁷ Justifications for the IIL regime have varied through time. Initially, the justification was the protection of a basic principle of international law that required “prompt, adequate, effective” compensation for foreign investors.⁸ The exact meaning and extent of such a principle, however, has always been contested, making it an odd foundation for a regime of international law that imposes penalties.⁹ The justification then shifted to the minimum standard of treatment of aliens (“MST”), which was supposed to root IIL in customary international law. The relationship between the MST and IIL, however, has been uneasy, particularly when used to determine when and how much compensation should be paid after expropriation. That was never the purpose of the MST as established in *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* and *B.E. Chattin (United States) v. United Mexican States*.¹⁰ Although there seems to be agreement that the standard set in those cases has evolved, there is no agreement regarding the new meaning of the MST.¹¹ At the same time, proponents of IIL have relied on more utilitarian justifications, arguing that

society to society. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 114–15 (Erin Kelly ed., 2003).

⁶ LOWENFELD, *supra* note 2 at 476, 479–81; Wouters et al., *supra* note 4 at 29.

⁷ JOSÉ A. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* 132–33 (2011).

⁸ *Id.* at 98.

⁹ See LOWENFELD, *supra* note 2, at 481–82 (describing the increasing skepticism among Western scholars regarding the extent of the principle’s application).

¹⁰ *B.E. Chattin (U.S.) v. United Mexican States*, 4 R.I.A.A. 282, 295 (U.S.-Mex. Gen. Cl. Comm’n 1927) (finding that Mexican proceedings against an American did not sufficiently meet international standards); *L.F.H. Neer and Pauline Neer (U.S.) v. United Mexican States*, 4 R.I.A.A. 60, 62 (U.S.-Mex. Gen. Cl. Comm’n 1926) (denying an American claim for compensation following the death of an American, and stating that the Commission was not prepared to find that the Mexican authorities showed any “lack of diligence” in their investigation to warrant liability for Mexico).

¹¹ Enrique Boone Barrera, *The Case for Removing the Fair and Equitable Treatment Standard from NAFTA* 7 (CIGI Papers No. 128, Apr. 2007), https://www.cigionline.org/sites/default/files/documents/Paper%20no.128web_2.pdf [<https://perma.cc/S4YL-T2KJ>].

IAs attract foreign investment.¹² This too is controversial as an unqualified statement. Linking human rights to IIL could be the last justification to entrench an international system of protection for foreign investment.

The objective of this Essay is to re-examine the arguments that underpin the notion that IIL and human rights are similar systems. In order to accomplish this, Part I will revisit the historical account of IIL as a holistic system designed to facilitate the progress of all nations.¹³ Part II has two objectives: first, analyze the three main approaches to property rights as human rights in IIL and, second, analyze the concept of property in IIL and in human rights instruments.¹⁴ Cases from both regimes are also contrasted to flesh out their main differences.

I. PATH DEPENDENCE AND INTERNATIONAL INVESTMENT LAW

The most controversial aspect of IIL is the system of investor-state arbitration (“ISA”). As a response to critics, some scholars have pointed out that it is precisely states themselves that, exercising their sovereign powers, have chosen to subject themselves to ISA.¹⁵ This is, of course, technically true, but it ignores how the regime of international investment protection evolved in a context of decolonization efforts by developing countries and of power imbalances during treaty negotiations.¹⁶ The fact that economic

¹² JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, *THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME* 166 (2017) [hereinafter BONNITCHA ET AL., *POLITICAL ECONOMY*] (concluding that there is a large and growing literature suggesting that IIAs have some impact on investment decisions in some circumstances); Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in *YEARBOOK ON INTERNATIONAL LAW & POLICY 2009–2010*, at 539, 546 (Karl P. Sauvant ed., 2010) (discussing the difficulty to ascertain the exact effects of Bilateral Investment Treaties).

¹³ See *infra* notes 15–49 and accompanying text.

¹⁴ See *infra* notes 50–157 and accompanying text.

¹⁵ See Charles N. Brower & Stephen W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 *CHI. J. INT’L L.* 471, 490 (2009); see also ALVAREZ, *supra* note 7, at 368–69 (noting that states are asserting sovereignty as opposed to rejecting it by participating in ISAs); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1591 (2005) (arguing that because states chose to enter investment treaties, these treaties “do not trespass unnecessarily on sovereignty”).

¹⁶ See Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 *AM. J. INT’L L.* 475, 476 (2008) (stating that “[l]arge-scale nationalizations often stemmed [from developing countries’] decolonization”); see also Isabel Feichtner, *International (Investment) Law and Distribution Conflicts Over Natural Resources*, in *BRIDGING THE GAP* 256, 260 (Stephan W. Schill, Christian J. Tams & Rainer Hoffman eds., 2015) [hereinafter *BRIDGING THE GAP*] (discussing how decolonization has led to conflicting positions between industrialized and developing countries, particularly surrounding permanent sovereignty over national resources); Markus Wagner, *Regulatory Space in International Trade Law and In-*

channels now flow in many directions and all countries are exposed to ISA has triggered a strong reaction from developed countries.¹⁷ This speaks volumes about whether a genuine exercise of state sovereignty would have produced the same sort of treaties that were effected well into the 1990s.¹⁸ This is not an earth-shattering revelation, and yet the gradual omission of this history has allowed alternative narratives to take hold about the emergence of the regime of investment protection.

The notion that international investment protection is a guarantor of human rights is based on a particular narrative about how and why IIL emerged in the first place. José Alvarez, for instance, argued that Bilateral Investment Treaties (“BITs”) “were . . . designed to support the national and international rule of law”¹⁹ Furthermore, he went on to say that “[t]o the extent investor-state decisions elaborate on concepts such as ‘fair and equitable treatment’, they may be engaging *in the same enterprise* as international courts engaged in interpreting human rights.”²⁰ Indeed, the fair and equitable treatment standard (“FET”) is related to the MST, which in turn is associated with protecting a foreigner’s most basic of human rights. Of course, the international investment regime protects only one type of human right, namely, property rights. Alvarez pointed out, however, that “protecting the rights of investors may sometimes be hard to distinguish from protecting their human rights.”²¹ As a result, IIAs may, in some instances, improve the rule of law, due process, freedom of expression, as well as protect

ternational Investment Law, 36 U. PA. J. INT’L L. 1, 22–23 (2014) (arguing that IIAs were structurally skewed in favor of capital-exporter countries). I use the term “regime” in the same way that Steven Ratner defines it: “[A] self-identified field of international law comprising norms to regulate a certain type of conduct and institutions to make decisions within it.” Ratner, *supra*, at 485. Some commentators argue that it is important to identify the different regimes of international investment with the “investment *treaty* regime.” BONNITCHA ET AL., POLITICAL ECONOMY, *supra* note 12, at 2–3 (emphasis added).

¹⁷ Ratner, *supra* note 16, at 514 (arguing that, in the NAFTA context, even though the U.S. and Canada believed that Mexico would be the target of investment provisions, claims against those two countries have given them a strong interest in lessening the asymmetry of IIAs); Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT’L L. 1147, 1155–56 (2014) (noting that their data shows that investors from developing countries hardly ever file arbitration claims against developed countries); Wagner, *supra* note 16, at 23–24 (stating that developed states must defend their actions before arbitral tribunals with more frequency now that capital flows are not unidirectional).

¹⁸ In fact, the use of international arbitration in the early days was accompanied by fears of military intervention. James T. Gathii, *War’s Legacy in International Investment Law*, 11 INT’L COMMUNITY L. REV. 353, 358 (2009).

¹⁹ ALVAREZ, *supra* note 7, at 378.

²⁰ *Id.* at 379 (emphasis added).

²¹ *Id.* at 381.

against government violence.²² The same has been said about foreign direct investment and human rights in general.²³

As described in the introduction, history supports the idea that IIAs were designed to protect the economic interests of investors in developing countries, not that they were fashioned to advance the rule of law. Furthermore, the line connecting economic development, human rights, and the current system of ISA is far from straight—if it exists at all. The system of international investment protection that developed countries advanced as reflective of fundamental principles of justice, was anything but. To state the obvious, merely invoking a principle of international law does not make any measure just. The French, for instance, argued that they were defending “principles of universal justice” when they attacked Argentina from 1838 to 1840 to obtain privileges for their citizens.²⁴ Great Britain, for its part, “intervened in Latin American at least forty times from 1820 to 1840.”²⁵

More importantly, Ha-Joon Chang has observed that even if the United States and European Union states have been proposing investment liberalization as the path to prosperity, “during their early stages of development, now-developed countries systematically discriminated between domestic and foreign investors in their industrial policy.”²⁶ Chang argued that developed countries themselves did not believe, particularly in the early stages of development, that it was a good idea to surrender large parts of the economy to foreign interests.²⁷ The effects of ISA on policymaking are not entirely understood, but they could be significant.²⁸ Although some scholars have argued that international investment tribunals do not ask states to repeal measures found in violation of an IIA, as the World Trade Organization (WTO) does, asking states, particularly developing countries, to compensate foreign investors could have the same effect.²⁹

²² *Id.* at 378–82.

²³ Julian Scheu, *Trust Building, Balancing, and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration*, 48 *GEO. J. INT’L L.* 449, 454–55 (2017).

²⁴ Alexis Mourre, *Perspectives of International Arbitration in Latin America*, 17 *AM. REV. INT’L ARB.* 597, 597 (2006).

²⁵ Newcombe & Paradell, *supra* note 4, at 9.

²⁶ Ha-Joon Chang, *Regulation of Foreign Investment in Historical Perspective*, 16 *EUR. J. DEV. RES.* 687, 688 (2004). This Essay will not dwell on the problematic nature of the notion of discrimination based on comparing foreign investors with “the most-favored domestic investors.” For information on this issue, see JÜRGEN KURTZ, *THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS* 79–135 (2016).

²⁷ Chang, *supra* note 26, at 693 (citing the United States as an example).

²⁸ BONNITCHA ET AL., *POLITICAL ECONOMY*, *supra* note 12, at 168–71.

²⁹ See ALVAREZ, *supra* note 7, at 55 (describing the policy consideration of “vindication” rendered by ISAs).

It may be true, as Alvarez argued, that some of the claims of individual investors might be similar to human rights cases.³⁰ But that may be the extent to which the two systems resemble. How an arbitral tribunal processes such a claim and the way that principles of international law are applied is strikingly different for each system. According to Steven Ratner, this may be because the institutional inertias of each regime are different and “institutions continually make decisions oriented toward advancing the goals of the regime, not the goals of other regimes.”³¹ The regime of international investment protection did not emerge to protect human rights, but rather to shield the economic interests of foreign investors from developed countries by curtailing the ability of host states to interfere with them.³² Again, this commentary notes nothing extraordinary, but this history still needs emphasizing.

The disconnect between rhetoric and reality does not mean that the regime of international investment protection always had the narrow objectives that it has now. In fact, an examination of the evolution of the American codification of investment protection measures shows a balanced approach in which the well-being of the host country was an important consideration for the long-term sustainability of American exports.³³ The first Friendship, Commerce and Navigation treaties (“FCNs”) recognized that the success of an investment depended on the prosperity of the host country.³⁴ Some scholars considered these initial FCNs to be a more holistic and a more suitable way of protecting investments than narrower approaches.³⁵

³⁰ Alvarez did recognize some differences between the two systems, which he mostly identified as procedural. *Id.* at 66–67. In terms of property rights, however, he acknowledged that there were differences regarding how it may be interpreted under human rights and investment treaties. He concluded, however, saying that: “[I]nvestors’ rights to legitimate expectations in their property may be the most effectively protected ‘human’ right that there is . . .” *Id.* at 74.

³¹ Ratner, *supra* note 16, at 485.

³² See Melaku Geboye Desta, *Sovereignty Over Natural Resources and International Investment Law: The Elusive Search for Equilibrium*, in BRIDGING THE GAP, *supra* note 16, at 223, 227 (stating that the use of international arbitration insulates the investment from local law and domestic courts); see also Moshe Hirsch, *Investment Tribunal and Human Rights Treaties: A Sociological Perspective*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 85, 93 (Freya Baetens ed., 2013) (explaining that investment lawyers usually emphasize market economy ideology while human rights lawyers emphasize the primacy of human rights over all other international legal rules) [hereinafter INTEGRATIONIST PERSPECTIVES].

³³ KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 37–38 (2017).

³⁴ *Id.* at 196.

³⁵ See *id.* (noting that the United States favored the FCN because it “addressed matters other than investment, such as trade or the personal rights of individuals”).

In the 1980s, however, the American business community had grown unhappy with FCNs.³⁶ Ronald Reagan decided to move from the FCN to the BIT model and, by 1982, the United States had signed its first BIT with Egypt.³⁷ According to Wolfgang Alschner, American BITs integrated some of the elements of the FCN model, but again, they were only investment related and mostly aimed at increasing the scope of investment protection.³⁸ Gone with the FCNs was an approach to investment protection that strived for a balance between certainty for investors and the responsibility of states to regulate in sensitive areas.³⁹ Developing countries mostly felt the effects of such a shift.⁴⁰ This was no surprise; commentators at the time understood the different nature of the BITs and never considered the possibility that these treaties could possibly be used against a developed nation.⁴¹ The disparity in power between capital exporting countries and host countries heavily influenced the evolution IIL.

From this brief historical recounting, we can conclude two things: (1) that the regime of international investment protection did not emerge to protect human rights, but rather to protect the economic interests of developed countries, and (2) that the features of ISA are not a sign of “immaturity” of the regime of international investment protection, but its *raison d’être*.⁴² The entire purpose of ISA tribunals was to insulate the investor

³⁶ See Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties in Modern Investment Treaty Law*, 5 GOETTINGEN J. INT’L L. 455, 463 (2013) (noting that in the 1970s and 1980s the differences between FCN and BIT became clear, and that the U.S. business community began to favor BIT); see also BONNITCHA ET AL., *POLITICAL ECONOMY*, *supra* note 12, at 190 (explaining that in response to the “halt” of the FCN, business groups set up BIT).

³⁷ Alschner, *supra* note 36, at 464.

³⁸ *Id.* at 468–74.

³⁹ *Id.* at 465.

⁴⁰ Given that FCNs required reciprocity, any attempt to curtail the ability of a state to regulate would have had an effect on all parties. But once all other considerations were stripped from the treaties, with only the protection of capital standing, the effects of BITs became one-sided and mostly affected capital importing countries. *Id.*

⁴¹ *Id.* at 466.

⁴² Anthea Roberts, for instance, explained the trajectory of the regime of international investment protection in three stages: infancy, adolescence, and the forthcoming adulthood. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 75 (2013). In its infancy, IIL was a system dominated by the developed countries’ interests that led arbitrators to emphasize its roots in commercial arbitration and a narrow human rights approach. This narrow human rights approach led tribunals to favor the investors’ interests and conceive the protection of economic interests on a par of human rights. In the second stage that Roberts described, the “teenage years” so to speak, states are recalibrating investment protection and the public interest. See *id.* at 75–93 (describing the course of an investment treaty system, and equating it to a life cycle).

from the laws and courts of the host country.⁴³ This history also explains why it has been so difficult for arbitral tribunals to consider principles of human rights; that was never the purpose of IIL.⁴⁴ An argument could be made that this section reflects the past, but that it has become irrelevant with the recent reform efforts aimed at making the regime more responsive to public concerns.

The history of the regime of international investment protection still influences its development today. The frequent reliance of tribunals on precedent makes its progress highly path dependent.⁴⁵ As explained above, a regime is designed to advance its own objectives over others.⁴⁶ In ISA, the objective is to protect foreign investors above all else.⁴⁷ This narrow focus, in part, explains why ISA has become more isolated and controversial than the WTO dispute resolution mechanism. Jürgen Kurtz credited the stability of the WTO process to the fact that “the commitment to trade liberalization was always counter-balanced by mechanisms to ensure domestic stability and the pursuit by members of core public values.”⁴⁸ This, he continued, is in stark contrast to what happens in ISA.⁴⁹

⁴³ Desta, *supra* note 32.

⁴⁴ See Hirsch, *supra* note 32, at 92 (explaining that the sociocultural distances between particular international legal branches can affect the inclination or disinclination of decision-makers to incorporate or reject legal rules developed in other branches of international law, and that the inclination or disinclination of investment tribunals to incorporate human rights is influenced by the sociocultural distance between the two branches).

⁴⁵ According to Oona Hathaway the concept of path dependence, when applied to law, refers to three main points: (1) the reproduction of similar patterns; (2) the self-reinforcing processes of an institution; and (3) the importance of early events in determining further events; that is, that early events “lock-in” a system in particular pattern. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 628–631 (2001). Even though this analysis was about common law in general, it also applies to ISA given what Moshe Hirsch has called the “formal rejection and de facto acceptance of precedent.” Moshe Hirsch, *The Sociology of International Investment Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 143, 158 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014) [hereinafter BRINGING THEORY INTO PRACTICE].

⁴⁶ Ratner, *supra* note 16, at 485.

⁴⁷ BONNITCHA ET AL., POLITICAL ECONOMY, *supra* note 12, at 11 (stating that rapid spread of IIAs was mainly due to the desire to attract foreign investment, rather than strengthening international institutions or the protection of property rights).

⁴⁸ KURTZ, *supra* note 26, at 171.

⁴⁹ *Id.*

II. HUMAN RIGHTS AND PROPERTY RIGHTS IN INTERNATIONAL INVESTMENT AGREEMENTS

We can say with a great degree of certainty that IIL did not develop to support the international rule of law nor to protect human rights. If anything, history shows a systematic attempt to remove broader public concerns from IIAs.⁵⁰ Furthermore, IIL creates legal anomalies by providing foreign investors with substantive and procedural legal advantages over domestic investors in similar circumstances.⁵¹ Hardly the definition of rule of law. On the other hand, what about the protection of property rights? IIL protects the rights of investors *in relation* to their property. This does not mean that IIAs only deal with strict violations of property rights. As Alvarez points out, other forms of interference with the investors' rights are also addressed.⁵² Crucially, though, an IIA is breached only to the extent that such violations also affect an investment. For instance, when it comes to the FET clause in the North American Free Trade Agreement (NAFTA), Article 1105 extends this protection to the "investments of investors," and not to the investors themselves.⁵³ In this sense, investment law protects the economic interests of investors. Human rights law, on the other hand, protects basic rights that are necessary for human dignity and prosperity. Section A will cover the three main arguments made by other scholars to argue that the approach to property rights under the international investment regime is similar to the human rights approach.⁵⁴ Section B will analyze human rights case law and compare it to cases from arbitral tribunals.⁵⁵

A. Three Approaches to the Protection of Property Rights as Human Rights in Investor-State Arbitration

Even if history does not support the notion that the regime of treaty-based protection of foreign investment emerged to protect human rights, it

⁵⁰ See generally David Schneiderman, *The Global Regime of Investor Rights: Return to the Standards of Civilized Justice?*, 5 TRANSNAT'L LEGAL THEORY 60 (2014) (explaining that early formulations of diplomatic protection of aliens, and contemporary ILL, is based on a single standard of civilized justice).

⁵¹ As Lorenzo Cotula puts it: "A fundamental pillar of human rights law is the principle of equality in the enjoyment of human rights, which is embodied in all major human rights treaties." Lorenzo Cotula, *International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa*, 33 S. AFR. Y.B. INT'L L. 62, 95 (2008).

⁵² ALVAREZ, *supra* note 7, at 378–82.

⁵³ North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289, 639 (1993) [hereinafter NAFTA].

⁵⁴ See *infra* notes 56–96 and accompanying text.

⁵⁵ See *infra* notes 97–157 and accompanying text.

could be argued that it does nonetheless. This section analyzes the three main approaches that have been used to justify such account. These approaches follow an analysis of the practice of arbitral tribunals, which interpret and apply IIAs. It is in this context that some commentators have found parallels between the two regimes.

1. The Minimum Standard of Treatment of Aliens as the Origin of International Investment Law

The argument that the MST is the origin of IIL is similar to the historical justification of IIL as an expression of human rights; the main difference is that it goes to the substantive basis for the claim. The standards contained in IIAs have a pedigree that, in some cases, go back for centuries, which makes them part of customary international law. This view was expressed by Hull and, even before him, by Elihu Root.⁵⁶ There are several scholars who have looked into the relationship between customary international law and the standards contained in IIAs and, in particular, regarding the MST.⁵⁷ The main goal of this section, however, is to demonstrate that even if it were the case that such relationship existed, the main analysis should concentrate on whether they are actually being applied as such by arbitral tribunals, and whether they are suitable for ISA proceedings.

Several commentators have observed that the protection of foreign investment is related to the MST. According to Francisco Francioni, “[d]enial of justice lies at the heart of the development of international law on the treatment of aliens and of foreign investment.”⁵⁸ In the same vein, Pierre-Marie Dupuy argues that:

[I]n terms of historical origins if not precise date of birth, the international protection of foreign investments clearly *preceded* the recognition at the international level of fundamental rights. This is merely due to the fact that customary international law relating

⁵⁶ Wouters et al., *supra* note 4, at 27–28.

⁵⁷ See, e.g., PATRICK DUMBERRY, *THE FORMATION AND IDENTIFICATION OF RULES OF CUSTOMARY INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW* 61–67 (2016) (describing the origin of MST); José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17 (2009) (discussing the relationship between BITs and custom, and noting the minimum guarantees in BITs); Campbell McLachlan, *Is There an Evolving Customary International Law on Investment?*, 31 ICSID REV.—FOREIGN INV. L. REV. 257 (2016), <https://doi.org/10.1093/icsidreview/siw015> [<https://perma.cc/LZ4M-P9GK>] (observing the relationship between investment treaties and custom, and specifically noting the function of the MST).

⁵⁸ Francesco Francioni, *Access to Justice, Denial of Justice, and International Investment Law*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 63, 63 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009) [hereinafter *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW*].

to the protection of citizens abroad or the parallel establishment of international customary obligations incumbent on the territorial state to protect alien property had already crystallized at the turn of the twentieth century, if not even a little earlier.⁵⁹

Other authors have made similar observations.⁶⁰ It is important to go over this argument carefully as there are several ways of interpreting it depending on how it is phrased. There are three main claims related to the MST and IIL that are important to unpack: (1) there are historical antecedents of protection of foreign investment that were prior to the development of human rights; (2) these historical antecedents gave rise to the MST; and (3) the MST is at the heart of IIL.

a. There Are Historical Antecedents of Protection of Foreign Investment Which Were Prior to the Development of Human Rights

The claim that there were instances of protection of foreign investment prior to human rights is fairly uncontroversial, although it should be noted that this says nothing about the relationship between the two concepts.⁶¹ There were many unrelated legal developments prior to the development of human rights. Furthermore, the fact that there were historical instances of protection of foreign investment, and that today we have a system of treaty-based protection of foreign investment, is insufficient to draw a direct link between the two developments.⁶²

⁵⁹ Pierre-Marie Dupuy, *Unification Rather Than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 58, at 45, 47.

⁶⁰ See ALVAREZ, *supra* note 7, at 63 (observing the historical relationship between human rights and investment rights); BONNITCHA ET AL., POLITICAL ECONOMY, *supra* note 12, at 11 (stating that “the notion that international law should guarantee foreign investors international minimum standards of treatment has a long history”); LOWENFELD, *supra* note 2, at 469–94 (explaining the evolution of what responsibility host states have to foreign investors under customary international law).

⁶¹ Pierre-Marie Dupuy argued that “there is, from a conceptual point of view, a significant difference between the sets of rules governing respectively the protection of aliens and human rights.” Dupuy, *supra* note 59, at 47. Nevertheless, Dupuy argued that “the rights of aliens, including their economic rights linked to property, can to a large extent be perceived as the precursors of human rights . . .” *Id.* at 49.

⁶² See LOWENFELD, *supra* note 2, at 469–70 (describing the initial understanding that the expropriation of foreign property required compensation). Andreas Lowenfeld himself was not clear about where this notion came from. *See id.* (noting that “it was not clear whether this understanding was derived from a general principle of law . . . or was unique to international law”). Even the articulation of the “international standard of civilized nations” by Elihu Root has been deemed problematic because of its vagueness and contradictions. MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 40 (2013).

b. These Historical Antecedents Gave Rise to the MST

The idea that historical antecedents gave rise to the MST is a controversial claim that, although repeated many times, has not been proven. There are historical accounts of protection of foreign investment that date back to the seventeenth century, or even as far back as the late Middle Ages.⁶³ Regardless of the point of departure, they are both mythical as the basis of the MST as is understood in arbitral tribunals. The goal here is not to refute these historical accounts, but instead to question their relevance in regards to how present-day arbitrators interpret the MST.

The MST is usually tied to the seminal *Neer* case, which involved a criminal matter between private parties and not the protection of property.⁶⁴ Indeed, as Martins Paparinskis noted: “[s]ince the scope of a State’s obligation to preclude and punish mistreatment by non-State actors may plausibly be different from the obligation not to mistreat aliens itself, a generalization about the content of standard for a State’s conduct, including the protection of foreign investment, from such an atypical rule may be inaccurate.”⁶⁵

As a result, it is true, as Francioni argues, “access to justice is inseparable from the ‘minimum standard of treatment of aliens.’”⁶⁶ The main problem is that the doctrinal basis for the MST, as a reflection of customary international law, is of very little relevance for arbitral tribunals applying IIAs to protect foreign investment. There is no direct link between the protection of foreign property and the MST as customary international law. This is not to dispute that there may have been coincidences from a functionalist perspective; however, no straight line linking the protection of foreign investment in the Middle Ages to the *Neer* case (which defines the MST as understood by arbitral tribunals) has been demonstrated. Furthermore, the MST itself has never been an adequate reference to support the expanded protections to foreign investors in IIAs.

c. The MST Is at the Heart of IIL

To the extent that the point of entry of the MST in ISA is the FET, it is not entirely clear that there is a direct link between the customary definition of the MST and the FET. The relationship between the FET and the MST is

⁶³ BONNITCHA ET AL., *POLITICAL ECONOMY*, *supra* note 12, at 11; Francioni, *supra* note 58, at 63.

⁶⁴ *Neer*, 4 R.I.A.A. at 62.

⁶⁵ PAPANINSKIS, *supra* note 62, at 51.

⁶⁶ Francioni, *supra* note 58, at 64.

controversial, and neither term is particularly self-explanatory.⁶⁷ Some have argued that the FET itself is customary international law; however, few tribunals have taken that position and there are no sufficient reasons to consider it to be the case.⁶⁸ Newer treaties have responded to these concerns by codifying what the FET may mean, explicitly incorporating elements of the denial of justice doctrine, and collapsing any remaining distinction between the FET and the MST.⁶⁹ Nevertheless, the threshold to determine a violation of the MST in ISA is still a matter of controversy.⁷⁰

Finally, the idea that denial of justice is at the heart of IIL is also controversial. As explained at the beginning of this Essay, what seemed to have propelled the current system of treaty-based protection of foreign investment was a notion among developed countries that foreign investors were entitled to a particular set of compensation rules.⁷¹ It was not, technically speaking, a matter of denial of justice that prompted the spread of IIAs. The real force behind the spread of IIAs was the entrenchment of the Hull formula as a standard of international law, through mostly bilateral agreements, after developed countries failed to do so at multilateral gatherings.⁷²

For the purposes of this Essay, we can conclude that yes, the MST is related to the protection of fundamental rights and that yes, these preceded human rights. However, the customary nature of this standard is not directly

⁶⁷ See Boone Barrera, *supra* note 11, at 3 (noting the debate surrounding the relationship between MST and the FET).

⁶⁸ See PATRICK DUMBERRY, *FAIR AND EQUITABLE TREATMENT: ITS INTERACTION WITH THE MINIMUM STANDARD AND ITS CUSTOMARY STATUS* 57–76 (2017) [hereinafter DUMBERRY, *FAIR AND EQUITABLE TREATMENT*] (concluding that the FET standard is not customary international law, but rather a treaty-based standard of protection); Ioana Knoll-Tudor, *The Fair and Equitable Treatment Standard and Human Rights Norms*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW*, *supra* note 58, at 310, 318 (stating that Judge Schewebel supports the existence of customary FET).

⁶⁹ See Boone Barrera, *supra* note 11, at 8 (referencing the Trans-Pacific Partnership (TPP) as an example of a treaty that incorporated these additional restrictions, and noting that the TPP failed).

⁷⁰ For instance, the concept of legitimate expectations expands the scope of protection under the MST. See *id.* (noting that the concept of legitimate expectations lacks fundamental “criteria” and as such has to potential to erode “the boundaries of the FET”).

⁷¹ See *supra* notes 15–49 and accompanying text. This belief was not unanimous, however. Even in the United States there was skepticism about the primacy of the property rights of foreign investors. Writing in 1928, Frederick Sherwood Dunn noted that: “[t]o extend the rule of the inviolability of the property rights of aliens to cover all cases of expropriation without concurrent indemnity, regardless of whether such act is deemed to be a necessary step in the improvement of conditions of the native population, would seem to place a powerful obstacle in the way of social reform.” Frederick Sherwood Dunn, *International Law and Private Property Rights*, 28 COLUM. L. REV. 166, 178 (1928).

⁷² See BONNITCHA ET AL., *POLITICAL ECONOMY*, *supra* note 12, at 122 (explaining that one of the functions of IIAs was to settle the rules of expropriation in favor of the Hull formula).

related to IIAs, and it does not inform the reasoning of arbitral tribunals.⁷³ The MST did not emerge to settle investment disputes, and tribunals have to resort to stretching the MST beyond recognition to justify awards relying on it.⁷⁴ The current use of the MST clause by arbitral tribunals has not been successfully traced back to the early historical instances of the protection of foreign investment.

2. Treaty-Based Protection of Foreign Investment as Functionally Similar to Protection of Human Rights

IIAs can be seen as protecting human rights even if not considered a human rights instrument per se. This is because, as mentioned in the introduction, IIAs claim to protect property rights, usually by upholding other principles such as access to justice and due process. John Sprankling, for instance, considered that IIAs codified “the traditional requirement of adequate compensation,” thus internationally coordinating an alleged principle of customary law which had come under threat by various countries, mostly in the developing world.⁷⁵ Thus, if IIL protects a customary international principle related to a human right—i.e. property rights—then it can be seen as functionally similar to a human rights instrument.

The most typical articulation of this argument, however, involves taking certain elements of both regimes and comparing them. There is no express intention to say that both regimes are the same; the implication is that they are so similar that it is only superficial features that separate them.⁷⁶ So, for example, it has been argued that IIL is just one of the “investment disciplines,” along with human rights and diplomatic protection.⁷⁷ Indeed, in this case, human rights courts are presented as a court of last resort while

⁷³ See DUMBERRY, FAIR AND EQUITABLE TREATMENT, *supra* note 68, at 62 (stating that arbitral tribunals have generally failed to prove the existence of customary rules).

⁷⁴ Boone Barrera, *supra* note 11, at 6–7 (referencing *Bilcon of Del. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 346–351 (Mar. 17, 2015) as an example of a tribunal expanding the MST); DUMBERRY, FAIR AND EQUITABLE TREATMENT, *supra* note 68, at 46 (noting that state conduct that would not have constituted a breach of the MST in the past, may in fact be a breach today).

⁷⁵ John G. Sprankling, *The Emergence of International Property Law*, 90 N.C. L. REV. 461, 481 (2012).

⁷⁶ See, e.g., August Reinisch, *The Rule of Law in International Investment Arbitration*, in RECONCEPTUALIZING THE RULE OF LAW IN GLOBAL GOVERNANCE, RESOURCES, INVESTMENT AND TRADE 291, 297 (Photini Pazartzis et al. eds., 2016) (analyzing what he considered to be the functional equivalence between human rights instruments and some arbitration rules).

⁷⁷ Ursula Kriebaum, *The Nature of Investment Disciplines*, in BRINGING THEORY INTO PRACTICE, *supra* note 45, at 45.

ISA is the most effective way of protecting property rights.⁷⁸ No distinction is made regarding whether all property rights violations can be equally considered human rights claims, or if arbitral tribunals could be considered as functionally similar to human rights courts. It has even been suggested that indigenous communities have protected their traditional rights invoking “the right to property, as used by foreign investors in FTAs and BITs.”⁷⁹

The crux of this argument is that the protections offered in IIAs *may* already be human rights, or that they “represent human rights in the making.”⁸⁰ That is, even if treaty-based investment protections are not technically human rights as of now, they are “human right-ish” enough that they function as such. As mentioned above, this was precisely the intention of IIAs: they were meant to entrench a particular notion of protection of foreign investment by force of repetition.⁸¹ In Section B, I address these assertions against relevant human rights and arbitral cases.⁸²

3. International Investment Agreements as Instruments to Promote “Good Governance” and Development

The third argument, that IIAs contain basic notions of due process and the rule of law so that their implementation and awareness promote good governance and development, is the weakest connection to human rights of the three.⁸³ This argument was first made in relation to the perceived lack of

⁷⁸ See ALVAREZ, *supra* note 7, at 74 (noting that investment property rights have greater international protection); Kriebaum, *supra* note 77, at 48 (noting that ILL contrast with human rights by seeking to protect “foreigners’ rights”).

⁷⁹ Manuel Monteagudo, *The Right to Property in Human Rights and Investment Law: A Latin American Perspective of an Unavoidable Connection* 12 (SECO / WTI Academic Cooperation Project, Working Paper Series, 2013), <https://ssrn.com/abstract=2613890> [<https://perma.cc/Z2KL-M26R>]. But see Christina Binder, *Investment, Development and Indigenous Populations*, in BRIDGING THE GAP, *supra* note 16, at 423, 426 (“Indigenous rights that are most at risk in an investment-related context are thus land and resource rights as well as their right to cultural identity (and cultural heritage).”); Judith Levine, *The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples*, in INTEGRATIONIST PERSPECTIVES, *supra* note, 32 at 106, 121 (stating that “(i)vestment-treaty arbitration is not the most common forum for the airing of complaints on behalf of indigenous peoples about their treatment under standards of international law”).

⁸⁰ Nicolas Klein, *Human Rights and International Investment Law: Investment Protection as Human Right?*, 4 GOETTINGEN J. INT’L L. 199, 206 (2012).

⁸¹ M. Sornarajah argued that the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, a written text adopted by the International Law Commission that attempts to codify rules of state responsibility, could have also been used to further the expansion of investment protection in conjunction with arbitral awards. M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 92–93 (2015).

⁸² See *infra* notes 97–157 and accompanying text.

⁸³ See ALVAREZ, *supra* note 7, at 59, 378–79 (noting the similarities between IIAs and human rights, and outlining the argument that the protection of investor’s rights means the protection of

adequate legal institutions of the host state—usually a developing country.⁸⁴ The argument later morphed to include developed countries themselves. IIAs were then seen as providing protection that foreign investors inherently lacked for no other reason than that they were foreign.⁸⁵ The first iteration of this argument coincided with the lack of ISA cases against developed countries.⁸⁶ The argument evolved, however, to accommodate the fact that ISA was being used against countries that saw themselves as already having a strong rule of law that needed no bypassing.⁸⁷

The connection to human rights in these arguments is tenuous, but it is still there. If investment arbitration promotes good governance domestically, then it could be said that it indirectly promotes human rights values such as due process. It is true that these protections are related just to the treatment of the foreign investor regarding property rights, however, as Alvarez put it: “the social goal of those who conclude investment treaties—securing sustainable economic development—is itself important precisely because it enables human beings to flourish.”⁸⁸ This author agrees with that sentiment, but still questions whether IIAs really pursue “human flourishing” using

human rights); Monteagudo, *supra* note 79, at 15 (arguing that there are distinct differences between investment rights and human rights).

⁸⁴ David P. Fidler, *The Return of the Standard of Civilization*, 2 CHI. J. INT’L L. 137, 140–41 (2001) (stating that the standard of civilization was a way of expanding Western civilization and protecting, among other things, the property of Western people); Schneiderman, *supra* note 50, at 62 (arguing that a single vision of civilization informed early formulations of diplomatic protection of aliens and, later, contemporary IIL); Schultz & Dupont, *supra* note 17, at 1161 (explaining an account of investment arbitration that describes it as substituting for the rule of law of the host state).

⁸⁵ See, e.g., ALVAREZ, *supra* note 7, at 118–19 (articulating a version of the obsolescing bargaining model and arguing that this was the reason why developed countries pushed for IIAs); Armand de Mestral & Robin Morgan, *Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter 11 Arbitration?*, in SECOND THOUGHTS: INVESTOR STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES 155 (Armand de Mestral ed., 2017) [hereinafter INVESTOR STATE ARBITRATION] (arguing that most Chapter 11 cases would not have a remedy under Canadian law); Charles N. Brower & Lee A. Steven, *Who Then Should Judge? Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT’L L. 193, 200 (2001) (arguing that the same rules that apply to Mexico under Chapter 11 should apply to Canada and the U.S.).

⁸⁶ See Schultz & Dupont, *supra* note 17, at 1162 (noting how in the mid-1990s more cases were filed against developed countries).

⁸⁷ Armand de Mestral, *Investor-State Arbitration between Developed Countries*, in INVESTOR STATE ARBITRATION, *supra* note 85, at 29–30. The proposed *United States-Mexico-Canada Agreement* (USMCA) moves away from the idea that ISA is necessary between developed countries. The USMCA, which is meant to supersede NAFTA, proposes to remove ISA between Canada and the United States. Even though ISA was left in place between the United States and Mexico, the scope is more limited than in NAFTA’s Chapter 11. OFFICE OF THE U.S TRADE REPRESENTATIVE, UNITED STATES-MEXICO-CANADA AGREEMENT TEXT, ANNEX 14-D, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/14%20Investment.pdf> [<https://perma.cc/6BR4-TT4H>].

⁸⁸ ALVAREZ, *supra* note 7, at 62.

economic development as a means to an end, or if the protection of wealth has always been *the end*, in and of itself. As mentioned in Part I, history does not seem to support this lofty idea that IIAs emerged to promote human rights, rather than as a well-calculated attempt to create customary international law regarding the protection of foreign investment.⁸⁹

Some have argued that ISA cannot be stacked against developing countries because investors do not have an overwhelming rate of success with their claims, and the fact that there are more developed versus developed country cases than developed versus developing country cases.⁹⁰ To be sure, this argument does not necessarily deny the historical account described at the beginning of this Essay, but instead asserts that the system has evolved in a different path.⁹¹ This claim can easily be addressed. First, as some commentators have observed, the win/lose record says nothing about the fairness of ISA.⁹² Second, the parameters used to assert that investors often do not win have been challenged.⁹³ Third, it may be true that there are more ISA cases between developed countries; however, it is still very much the case that ISA is an instrument for investors from developed countries.⁹⁴ Finally, it is not much to say that in a system where only investors can initiate claims they do not always win.

It is important to emphasize that the remedy in ISA is monetary compensation, not the removal of the offending measure.⁹⁵ This is an odd mechanism to ensure the flourishing of all humanity. Furthermore, as Hull indicated in his exchange with his Mexican counterpart, the treatment of locals was far from being in line with the concerns of the alleged international standard that he was advocating for.⁹⁶ IIAs main concern are to deter the host state from interfering with foreign investors regardless of the cause,

⁸⁹ BONNITCHA ET AL., *POLITICAL ECONOMY*, *supra* note 12, at 200.

⁹⁰ Susan D. Franck, *International Investment Arbitration: Winning, Losing and Why*, 7 WASH. & LEE L. REV. 1, 3 (2009); Schultz & Dupont, *supra* note 17, at 1151, 1156.

⁹¹ Schultz & Dupont, *supra* note 17, at 1156.

⁹² ALVAREZ, *supra* note 7, at 390; BONNITCHA ET AL., *POLITICAL ECONOMY*, *supra* note 12, at 26.

⁹³ Howard Mann, *ISDS: Who Wins More, Investors or States?*, INT'L INST. FOR SUSTAINABLE DEV., INV. TREATY NEWS (June 2015), <http://www.iisd.org/itn/wp-content/uploads/2015/06/itm-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf> [<https://perma.cc/8J8Z-FXXW>].

⁹⁴ Schultz & Dupont, *supra* note 17, at 1157.

⁹⁵ BONNITCHA ET AL., *POLITICAL ECONOMY*, *supra* note 12, at 75.

⁹⁶ See LOWENFELD, *supra* note 2, at 476 (providing an excerpt from Secretary Hull's letter to the Mexican Ambassador to the United States dated July 21, 1938). Indeed, Hull indicated that: "We cannot question the right of a foreign government to treat its own national in this fashion if it so desires. This is a matter of domestic concern." See *id.* (meaning foreign governments can expropriate without following Hull's standard).

which is far from a holistic approach to human development. The next Section expands on this notion.

B. Property Rights in International Investment Agreements and Arbitral Awards

There are two main issues to discuss regarding property rights in IIAs. The first refers to the notion of “property” itself, which, in these agreements, is understood to be “investments.” The second is related to the substantive provisions of protection. These distinctions are significant because if parallels between ISA tribunals and human rights courts are to survive, there must be sufficient overlap in the approaches in these two areas. In this Section, I compare and contrast the concept of “investment” in some IIAs with that of property in human rights documents.⁹⁷ I then analyze the protection offered in IIAs, and compare that with the sort of protection that human rights instruments offer.⁹⁸

1. Investment-Backed Expectations as Property

The definition of “investment” is important because it is the damage to an investment that creates potential grounds for a claim. Of course, it is not the only parameter, but without an investment covered under the IIA there is not much that an arbitral tribunal can do, even if there are other types of harms. There are two main approaches to the definition of investment in IIAs: enterprise-based and asset-based. The enterprise-based approach is the most aligned with the traditional notion of foreign direct investment.⁹⁹ The asset-based approach, however, is used more often in IIAs, and is the most open-ended.¹⁰⁰ As explained below, however, these definitions are more theoretical than categorical. NAFTA’s Chapter 11 definition of investment is mostly enterprise-based, but it also encompasses other economic interests.¹⁰¹

⁹⁷ See *infra* notes 99–112 and accompanying text.

⁹⁸ See *infra* notes 113–157 and accompanying text.

⁹⁹ See United Nations Conference on Trade and Development, *Scope and Definition: UNCTAD Series on Issues in International Investment Agreements II*, at 22–23 (2011), http://unctad.org/en/Docs/diaeia20102_en.pdf [<https://perma.cc/84T2-4SLC>] [hereinafter *UNCTAD Series*] (explaining the origins of the enterprise-based approach and noting that it limits investment to direct investment).

¹⁰⁰ Engela C. Schlemmer, *Investment, Investors, Nationality, and Shareholders*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 55–56 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2013); *UNCTAD Series*, *supra* note 99, at 21.

¹⁰¹ For instance, acquired property used or expected to be used for “economic benefit or other business purposes.” See, e.g., NAFTA, *supra* note 53, at 646 (stating in Article 1139, subsection (g), that the term investment includes “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes”).

Generally, then, most economic interests, backed by an infuse of money, can be considered an investment. For instance, in the recent cases *Bilcon of Delaware v. Government of Canada* (“*Bilcon Award*”) and *Bear Creek Mining Corp. v. Republic of Perú* (“*Bear Creek Award*”), the mere expenses to secure the rights to operate were considered investments by arbitral tribunals.¹⁰² Both cases involved the extracting industry, and in neither case did the enterprise actually operate, but instead there was an expectation that it would, and that the money spent towards that goal was considered an investment.¹⁰³ A good rule of thumb is that most expenditures by a foreign investor—with the goal of receiving some sort of return—can be considered an investment.¹⁰⁴ ISA tribunals protect this expectation of outcomes regarding the investment by invoking the concept of “legitimate expectations.”¹⁰⁵ It is this feature of the treaty-based protection of investments that distinguishes it from property rights as human rights.

This development has been considered an “investment-as-value” approach, as opposed to tribunals considering an “investment-as-property” approach.¹⁰⁶ The main distinction is that in the investment-as-value approach a breach of an investment-backed expectation could be expropriated, whereas in an investment-as-property approach it could only constitute a breach of the FET.¹⁰⁷ The case of *Pope & Talbot Inc. v. Government of Canada* can be considered an example of the investment-as-value approach because it considered access to the market as a “property interest.”¹⁰⁸ The

¹⁰² *Bear Creek Mining Corp. v. Republic of Perú*, ICSID Case No. ARB/14/21, Award, ¶¶ 284–285 (Nov. 30, 2017) [hereinafter *Bear Creek Award*]; *Bilcon of Del. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 346–351 (Mar. 17, 2015) [hereinafter *Bilcon Award*].

¹⁰³ See *Bear Creek Award*, *supra* note 102, ¶¶ 284–285 (concluding that the Claimant was an investor and made investments); *Bilcon Award*, *supra* note 102, at 346–51 (questioning whether William Ralph Clayton had control over the investment, but reserving judgment for a later time).

¹⁰⁴ Zachary Douglas phrased it this way: “The economic materialization of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of commercial return.” ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 189 (2009).

¹⁰⁵ See Ratner, *supra* note 16, at 511 (listing “legitimate expectations” as one of the elements considered by NAFTA tribunals to determine a regulatory taking); Trevor Zeyl, *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, 49 ALBERTA L. REV. 203, 207 (2011) (arguing that “[t]he doctrine of legitimate expectations has made its way to the forefront of investment treaty jurisprudence”); see also Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, in BRINGING THEORY INTO PRACTICE, *supra* note 45, at 363, 376–77 (stating that investment contracts made relying on specific representations by state officials can be the object of an claim under international investment law).

¹⁰⁶ Douglas, *supra* note 105, at 377.

¹⁰⁷ *Id.*

¹⁰⁸ *Pope & Talbot Inc. v. Gov’t of Canada*, UNCITRAL, Interim Award, ¶¶ 81–86 (June 26, 2000); Douglas, *supra* note 105, at 376–77.

Bear Creek Award is a more recent example where the tribunal considered that “an economic impact” on “investment-backed expectations” can be considered an indirect expropriation, and thus, potentially also “property.”¹⁰⁹ Both NAFTA and the Free Trade Agreement between Canada and the Republic of Peru have enterprise-based definitions of investment, which were supposed to be more restrictive in defining what would qualify as an investment.¹¹⁰ These cases show how these conceptual distinctions are not always helpful.

As explained previously, those who see the treaty-based regime of investment protection as having human rights qualities—or as a proto-human rights regime—see a straight line from the MST to present day IIAs. ISA claims, however, now rarely deal with expropriations of assets in the traditional sense.¹¹¹ Modern claims mostly deal with the protection of investment-backed expectations damaged by regulations or other domestic ordinances.¹¹² These developments have pushed the protection of “property” to uncharted territory, which is a long way from the customary norms of protection of aliens.

2. Property and Expectations in Human Rights Courts

The concept of legitimate expectations is not foreign in human rights courts. Furthermore, economic interests can be human rights to the extent that they are considered property as well. We know, however, that there is no single approach to protecting property rights. Some countries offer more protections than others do.¹¹³ International human rights treaties, when they do consider property rights as human rights, also come with limitations.¹¹⁴ There is still no consensus regarding whether customary international law

¹⁰⁹ *Bear Creek Award*, *supra* note 102, ¶ 415.

¹¹⁰ Free Trade Agreement between Canada and the Republic of Peru, Can.–Peru, art. 847, May 29, 2008; NAFTA, *supra* note 53, at 1139.

¹¹¹ BONNITCHA ET AL., *POLITICAL ECONOMY*, *supra* note 12, at 3. According to the United Nations Conference on Trade and Development (UNCTAD), of the known sixty-five ISA cases in 2017, only five were related to takeovers, seizures or nationalizations of investments. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT 2018: INVESTMENT AND NEW INDUSTRIAL POLICIES* 92–93, http://unctad.org/en/PublicationsLibrary/wir2018_en.pdf [<https://perma.cc/CN2F-BCVF>].

¹¹² For instance, from 1987 to July 2017 claimants argued a breach of the FET clause in 80% of the known cases, followed by indirect expropriation in 75% of known cases. Direct expropriation was the least alleged breach. UNCTAD, *Special Update on Investor-State Dispute Settlement: Facts and Figures*, IIA Issues Note No. 3, 5–6 (Nov. 2017), http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf [<https://perma.cc/8U9E-FB3H>].

¹¹³ Jeff Waincymer, *Balancing Property Rights in Expropriation*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW*, *supra* note 58, at 275, 277–78.

¹¹⁴ *Id.* at 279.

protects property rights.¹¹⁵ This Section, thus, only analyzes the strength of the parallelisms between the concept of property as used in some human rights and ISA cases.

Article 17 of the Universal Declaration of Human Rights covers “the right to own property” and the arbitrary deprivation of property.¹¹⁶ Most human rights courts, however, tend to be regional and apply their own respective treaties. Article 1 of the Protocol to the Convention for the Protection of Human Rights and Freedoms, for instance, protects “the peaceful enjoyment” of possessions, and also contains a prohibition against deprivation of possessions “except in the public interest and subject to the conditions provided by law and general principles of international law.”¹¹⁷ The Article goes on to emphasize that such protection should not be interpreted as restricting the state’s right to issue laws “to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”¹¹⁸ Article 21 of the American Convention on Human Rights (“ACHR”) also protects the enjoyment of property and contemplates compensation according to “the forms established by law.”¹¹⁹

One author has argued that most case law on property rights has come from the ECtHR, which influences how this topic is approached in ISA tribunals.¹²⁰ In a study made for the Council of Europe, Laurent Sermet argued that the ECtHR recognizes four levels of protection afforded by Article 1 of Protocol No. 1: peaceful enjoyment of property, conditions for the deprivation of property, the prerogative of states to use property in the public interest, and interference with property rights to obtain certain types of payment.¹²¹ These are protections offered to both the state and the individual. Crucially, the ECtHR also recognizes legitimate expectations as property in certain circumstances. The ECtHR interprets legitimate expectations ac-

¹¹⁵ Valentina Sara Vadi, *Through the Looking-Glass: International Investment Law through the Lens of a Property Theory*, 8 MANCHESTER J. INT’L ECON. L. 22, 26–27 (2011).

¹¹⁶ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III) (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/> [<https://perma.cc/4UHD-CP44>].

¹¹⁷ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

¹¹⁸ *Id.*

¹¹⁹ American Convention on Human Rights “Pact of San Jose, Costa Rica,” art. 21, Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter ACHR].

¹²⁰ Kriebaum, *supra* note 77, at 47 (stating that most of the cases regarding individual protection of property have come from regional conventions, such as Article 1 of the First Protocol to the European Convention on Human Rights, and noting that case law from the European Court of Human Rights is usually used for comparison in human rights law and investment law).

¹²¹ LAURENT SERMET, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND PROPERTY RIGHTS 8 (1992), [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-11\(1998\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-11(1998).pdf) [<https://perma.cc/5RR4-Q76V>].

ording to the domestic legal framework involved. Where domestic rules do not find legitimate expectations, the ECtHR usually does not either.¹²² Additionally, legitimate expectations as property refers to frustrated future gains resulting from government interference, and not just any expectation of treatment.¹²³ Many arbitral tribunals, in contrast, see legitimate expectations as a general rule of international law which can potentially cover any type of regulation or action by a government's administrative body.¹²⁴

The ECtHR approach has been criticized for not being in line with the values of the European Convention on Human Rights ("ECHR") given its emphasis on the economic aspects of property rights.¹²⁵ Furthermore, not every region protects property rights equally, and there is no universal approach to human rights.¹²⁶ For instance, although there are similarities between the ECHR, the American Convention on Human Rights "Pact of San Jose, Costa Rica" ("ACHR"), and the African Charter on Human and People's Rights ("ACHPR"), the latter does not require compensation after expropriation.¹²⁷ Even within the ACHR, Argentina introduced the following reservation to Article 21:

The Argentine Government establishes that questions relating to the Government's economic policy shall not be subject to review by an international tribunal. Neither shall it consider reviewable anything the national courts may determine to be matters of 'public utility' and 'social interest', nor anything they may understand to be 'fair compensation'.¹²⁸

Although the ECtHR has determined that the Protocol recognizes the right of property "in substance," it is also true that it has not enshrined an unqualified right to acquire property.¹²⁹ When it comes to the enjoyment of proper-

¹²² The court has found legitimate expectations to constitute property when it derives from the concept of possessions. *Id.* at 17.

¹²³ *Id.* at 13–17.

¹²⁴ Zeyl, *supra* note 105, at 208.

¹²⁵ Anat Scolnicov, *Human Rights and Derivative Rights: The European Convention on Human Rights and the Rights of Corporations*, in BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS: HUMAN RIGHTS, PRIVATE ACTORS, AND POSITIVE OBLIGATIONS 194, 213 (Tsvi Kahana & Anat Scolnicov eds., 2016).

¹²⁶ Vadi, *supra* note 115, at 28.

¹²⁷ Cotula, *supra* note 51, at 70.

¹²⁸ Argentina Reservations to the American Convention on Human Rights "Pact of San Jose, Costa Rica," Nov. 22, 1969, 1434 U.N.T.S. 311, https://treaties.un.org/doc/Publication/UNTS/Volume%201434/volume-1434-A-17955-English_French.pdf [<https://perma.cc/CU6Q-KN3Z>].

¹²⁹ *Marckx v. Belgium*, App. No. 6833/74, 31 Eur. Ct. H.R. (ser. A), ¶ 63 (June 13, 1979), <http://www.refworld.org/cases,ECHR,3ae6b7014.html> [<https://perma.cc/2Q99-QBHY>]; WILLIAM A. SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY* 969, 971 (2015) (stating there "there is no right to become the owner of property").

ty, the ECtHR has interpreted Article 1 as requiring a “fair balance” approach to the protection of property rights in which the court takes into account the aims pursued by the government.¹³⁰ Importantly, when it comes to interference with property rights, the ECtHR shows a great deal of deference to what the government considers to be in the best interest of their citizens unless the measure is clearly divorced from its aims.¹³¹ This is in contrast to what happens in ISA, where the fact that there could have been other alternatives to the measures taken potentially breaches the IIA.¹³²

As mentioned previously, the ACHR also recognizes the right to property with limitations very similar to those discussed in the ECHR. The ACHR, similar to the ECHR, uses the phrase “the right to the use and enjoyment of his property,” rather than a right to acquire property per se.¹³³ The ACHPR, for its part, is the most direct treaty in clearly stating that “[t]he right to property shall be guaranteed.”¹³⁴ A crucial difference, however, is that it does not guarantee compensation and refers the issue back to domestic legislation.¹³⁵ Lorenzo Cotula argues that this means that the ACHPR offers significantly lower protection than the ACHR and the ECHR.¹³⁶ It is, however, not entirely clear that the problem is the wording in the ACHPR. The African Commission on Human and Peoples’ Rights has determined that the right to property “includes a right to have access to property of one’s own and the right not for one’s property to be removed.”¹³⁷ Furthermore, the ACHR, which does explicitly mention compensation after expropriation, does so by clarifying that it should be done “in the cases and according to the forms established by law.”¹³⁸ It is true,

¹³⁰ SCHABAS, *supra* note 129, at 972.

¹³¹ *Id.* at 975.

¹³² *See, e.g.,* Sempra Energy Int’l v. Argentina, ICSID Case No. ARB/02/16, Award, ¶¶ 348–350 (Sept. 18, 2007) (noting that in the determination as to whether Argentina could use the state of necessity defense, the Tribunal second-guessed the Argentinean government’s assessment of the severity of the economic crisis and questioned whether the government actions were the only options available).

¹³³ ACHR, *supra* note 119, art. 21

¹³⁴ African Charter on Human and Peoples’ Rights “the Banjul Charter,” art. 14, June 27, 1981, 21 I.L.M. 58.

¹³⁵ *See id.* (noting that the right to property may only be “encroached upon” for public interest and “in accordance with provision of the appropriate laws”).

¹³⁶ Cotula, *supra* note 51, at 70.

¹³⁷ Media Rights Agenda and Others v. Nigeria, Nos. 105/93, 128/94, 130/94, 152/96, Decision, African Court on Human and Peoples’ Rights [Afr. Ct. H. P.R.], ¶ 77 (Oct. 1998), <http://case.law.ihrda.org/doc/105.93-128.94-130.94-152.96/> [<https://perma.cc/3RK2-5CWS>].

¹³⁸ ACHR, *supra* note 119, art. 21(2).

though, that there is not enough human rights case law that clearly establishes the contours of property rights in Africa.¹³⁹

In contrast, a case from Inter-American Court of Human Rights (“IACHR”) did identify what was encompassed by the concept of property. In the *Ivcher-Bronstein v. Peru* case, the court determined that property: “may be defined as those material objects that may be appropriated, and also any right that may form part of a person’s patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value.”¹⁴⁰ IACHR cases are mostly related to the property rights of indigenous populations. In the *Ituango Massacres v. Colombia*, the IACHR established that the Colombian army was complicit with a paramilitary group that attacked the community of El Aro in the municipality of Ituango.¹⁴¹ The paramilitary group murdered several members of the community, destroyed houses, and stole livestock, some of which, according to the IACHR, was acquired by members of the military.¹⁴² In its judgment, the IACHR noted the importance of the stolen livestock for the existence of the community itself.¹⁴³ Furthermore, the IACHR recognized that the destruction of houses also related to other rights, such as the right to privacy, and was an important site for human dignity.¹⁴⁴

The IACHR is unequivocal in its position that the right to property is a fundamental human right that interlinks several other rights.¹⁴⁵ The *Ituango Massacres* case is just one of several cases in which the IACHR interpreted the right to property as essential for the well-being and dignity of distinct communities, and in particular for indigenous populations.¹⁴⁶ In *Saramaka People v. Suriname*, the IACHR equally considered land as more than just property, but also as a “safeguard [to] their physical and cultural survival.”¹⁴⁷ There was a similar consideration in previous cases such as *Mayagna*

¹³⁹ Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in the African Charter*, in THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS 55, 63 (Manisuli Ssenyonjo ed., 2012); Cotula, *supra* note 51, at 71.

¹⁴⁰ *Ivcher Bronstein v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶122 (Feb. 6, 2001).

¹⁴¹ *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶¶ 176–177 (July 1, 2006).

¹⁴² *Id.*

¹⁴³ *Id.* ¶ 178.

¹⁴⁴ *Id.* ¶¶ 193–197.

¹⁴⁵ *Id.* ¶ 181.

¹⁴⁶ *Id.* ¶¶ 193–197.

¹⁴⁷ In this case the court recognized the Saramaka as “tribal,” but not indigenous to the region since they were brought as slaves during the seventeenth century. The Court also recognized,

(*Sumo*) *Awas Tingi Community v. Nicaragua*, *Sawhoyamaxa Indigenous Community v. Paraguay*, and, more recently, in the *Xákmok Kásek Indigenous Community v. Paraguay*, in which the court found that the effects on cultural identity by the lack of access of the members of the Xákmok Kásek to their territory was a violation of the right to property contemplated in Article 21.¹⁴⁸

This is not to say that the IACHR only protects indigenous land when it comes to the right to property. For instance, in the *Barrios Family v. Venezuela* case the court found that police agents stealing several personal items during a search, and setting fire to part of the residence of the victim, constituted violations to the right to property.¹⁴⁹ Contrast this and the above cases to the *Bilcon* Award where the Tribunal found that the procedure followed by a technical committee in charge of evaluating the environmental impact of a quarry was in breach of the MST, because it did not follow the expectations of the foreign investor.¹⁵⁰ In human rights courts, even the incorporation of legitimate expectations as property protects the conditions necessary for the effective use of property.¹⁵¹ It is in this context where legitimate expectations are part of human rights, they were never supposed to protect against any disappointment.¹⁵²

The purpose of this Essay is not to define what should properly be considered property, but rather to consider whether property rights should always be considered human rights. In this regard, Tim Hayward's distinctions are important to keep in mind. Hayward has described two justifications to consider property rights as human rights: (1) property rights as relating to well-being and dignity, and (2) property rights as reflective of

however, that they had "similar characteristics with indigenous peoples." *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶¶ 79–80, 85 (Nov. 28, 2007).

¹⁴⁸ *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 182 (Aug. 24, 2010); *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006); *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

¹⁴⁹ *Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶¶ 149–150 (Nov. 24, 2011).

¹⁵⁰ *Bilcon* Award, *supra* note 102, ¶ 594.

¹⁵¹ Rimantas Daujotas & Ramūnas Audzevičius, *The Concept of Legitimate Expectation in Investor-State Arbitration and the European Court of Human Rights*, 6 ВЕСТНИК МЕЖДУНАРОДНОГО КОММЕРЧЕСКОГО АРБИТРАЖА [BULLETIN OF THE INTERNATIONAL COMMERCIAL ARBITRATION] 8–9 (2012), <https://ssrn.com/abstract=2197157> [<https://perma.cc/NP2M-88M5>] (explaining that retroactive legislation that interferes with the enjoyment of *pre-existing* assets could interfere with "the right to peaceful enjoyment of possessions on the other").

¹⁵² See *Bilcon of Del. v. Gov't of Canada*, UNCITRAL, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶41 (Mar. 10, 2015) (noting that the claimant's "disappointment is not a basis for finding a violation of Article 1105").

equality.¹⁵³ That is, property rights are human rights to the extent that a person is entitled to the same rights as everyone else. Outside of these two justifications, Hayward finds that property rights are quite distinct from human rights. First, they are not “unconditional”, by which he meant that property rights are highly contextual.¹⁵⁴ Second, property rights are not imprescriptible, although human rights are.¹⁵⁵ This means that property rights can be altered or destroyed without violating the human rights of the holder.¹⁵⁶

The distinction between the different systems of property rights becomes clearer in domestic legal frameworks. Property rights are always contextual and responsive to the historical circumstances that each country goes through, whereas the treaty-based regime of foreign investment was designed to do the opposite: to de-contextualize property rights under the guise of applying universal principles of international law that have never really fit the regime. Even the *Factory at Chorzów Case (Ger. v. Pol.)*—often invoked to justify certain requirements for compensation—was issued in such particular circumstances that cannot be easily transplanted to ISA awards.¹⁵⁷ But once this narrative took hold, it was not surprising to start seeing comparisons between the work done by arbitral tribunals with that of human rights courts. Comparing the two systems, however, leads to the odd conclusion that cases of extreme violence and arbitrariness in the deprivation of property are the same—or at least similar—to cases where there is a disagreement regarding the decision of a technical committee. Both could certainly be wrong, but comparing them diminishes the relevance of human rights.

¹⁵³ Tim Hayward, *Human Rights vs Property Rights* 10–11 (Just World Inst., Working Paper No. 2013/04, 2013), http://www.sps.ed.ac.uk/jwi/research/working_papers/tim_hayward_human_rights_vs_property_rights [<https://perma.cc/Q585-YALD>].

¹⁵⁴ *Id.* at 12.

¹⁵⁵ *Id.* at 13.

¹⁵⁶ *Id.*

¹⁵⁷ *Factory at Chorzów Case (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13); see Ronald E.M. Goodman & Yuri Parkhomenko, *Does the Chorzów Factory Standard Apply in Investment Arbitration? A Contextual Reappraisal*, 32 ICSID REV.—FOREIGN INV. L. REV., 304, 322–23 (2017) (stating that the *Chorzów Factory* case did not deal with a case of unlawful expropriation under customary international law, but instead involved the seizure of property that “could not be taken even against compensation”); Joshua Karton, *Choice of Law and Interpretive Authority in Investor-State Arbitration*, 3 CAN. J. COMP. & CONTEMP. L. 217, 263 (2017); Francis J. Nicholson, S.J., *The Protection of Foreign Property Under Customary International Law*, 6 B.C. L. REV. 391, 394 (1965) (stating that the PCIJ found “the taking of alien property in contravention of a treaty was ‘unlawful’ and ‘illegal’” and that the Court noted that such violation created a duty to make reparations).

CONCLUSION

These findings may explain why arbitral tribunals approach the issue of human rights with much more trepidation than commentators. The mandate in IIAs has traditionally been a narrow one: resolve a dispute before the parties where the main issue is a monetary dispute—sometimes regarding an expropriation, but not necessarily. Principles of international law have fit awkwardly within this framework. Some of these principles were never really accepted by developing countries, some were too vague, and some emerged and were applied in situations radically different from investment disputes. Arbitral tribunals were tasked with resolving all these conflicts in addition to the dispute before them. It is not surprising that these efforts quickly became controversial. Regarding whether property rights are human rights, the main concern has always been to empower every person to own and enjoy their property in equal standing with the rest of the population. A regime of exception could not be further from this goal.