

## Human Rights and International Investment Law: Investment Protection as Human Right?

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## Abstract

Legal research conceptualized the relationship between International Investment Law (IIL) and International Human Rights Law (IHRL) until recently rather as opposing fields of law with colliding policy interests as well as contradictory rules and regulations. However, lately a new approach is gaining increasing support in the academic community: Investment protection could be understood as being part of human rights law. Such a conclusion may be perceived as highly controversial, however, from a conceptual perspective IIL and IHRL share more common ground than differences. This article will argue, first, that certain material standards of IIL can be conceptualized to be human rights-like guarantees of a minimum standard of protection and second, that such an understanding does not lead to a neoliberal proliferation of economic rights but, to the contrary, may serve as an important conceptual tool to prevent overly extensive interpretations of investment treaties and to balance economic rights with other human rights in case of norm conflict. After all, IIL could prove to be not more, but also not less, than “One Out of a Crowd” of all other fundamental human rights.

## A. Introduction

Legal research conceptualized the relationship between International Investment Law (IIL) and International Human Rights Law (IHRL) until recently rather as opposing fields of law with colliding policy interests as well as contradictory rules and regulations. In a fragmented international legal order international legal obligations to protect foreign investment can potentially hinder States from fulfilling their obligations under human rights treaties. Although practical examples of norm collisions between the two fields of law have been the exception,<sup>1</sup> at least the regulatory chill that IIL may trigger for national legislation, particularly with respect to human rights law,<sup>2</sup> seems widely accepted.<sup>3</sup> However, lately a new approach is gaining

<sup>1</sup> J. D. Fry, ‘International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity’, 18 *Duke Journal of Comparative & International Law*. (2007-2008) 1, 77, 148 and 149.

<sup>2</sup> B. Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’, 6 *International and Comparative Law Quarterly* (2011) 3, 580.

increasing support in the academic community: Investment protection could be understood as being part of human rights law.<sup>4</sup> This understanding may seem farfetched at first, most prominently because investment protection is generally only awarded to foreign investors and as such at least *de lege lata* does not constitute a human right. From a conceptual perspective, however, IIL and IHRL share more common ground than differences.<sup>5</sup> Thus, it is not surprising that both fields share common roots within the customary rules of international law protecting the rights of aliens and that prior to the establishment of the relevant treaties, - International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) on the one hand, International Center for the Settlement of Investment Disputes (ICSID) and numerous Bilateral Investment Treaties (BITS) on the other hand - the protection of property was widely considered to be part of human rights protection.<sup>6</sup> As such it seems rather surprising that IIL and IHRL at some point in their respective developments took divergent paths.

In the following contribution, I will introduce two key arguments: First, that certain material standards of IIL can be conceptualized to be human rights-like guarantees of a minimum standard of protection and second, that such an understanding does not lead to a neoliberal proliferation of economic rights, but, to the contrary, may serve as an important conceptual tool to prevent overly extensive interpretations of investment treaties and to balance economic rights with other fundamental human rights in case of norm conflict. After all, IIL could prove to be not

<sup>3</sup> J. Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2010, paras 20 - 25; L. E. Peterson & K. R. Gray, 'International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration' (April 2003) available at: [http://www.iisd.org/pdf/2003/investment\\_int\\_human\\_rights\\_bits.pdf](http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf), 23, 24 (last visited 3 May 2012); for a different view with regard to State regulation to mitigate climate change see: S. W. Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change', 24 *Journal of International Arbitration* 5 (2007) 5, 469 477.

<sup>4</sup> F. Schorkopf, 'Das Verhältnis von Umwelt- und Menschenrechtsschutz zum Investitionsschutz', in D. Ehlers *et al.* (eds), *Rechtsfragen internationaler Investitionen* (2009), 137, 142.

<sup>5</sup> See T. G. Nelson, 'Human Rights Law and BIT Protection: Areas of Convergence', 12 *Journal of World Investment & Trade* (2011) 1, 27.

<sup>6</sup> See Art. 17 Universal Declaration of Human Rights, UNGA Res. 217 A (III) of 10 December 1948; UNYB (1948-49) 535.

more, but also not less, than “One Out of a Crowd” of all other fundamental human rights.<sup>7</sup>

## B. International Investment Law

The significance of foreign direct investment (FDI) in the global economy has grown considerably in modern times. FDI flows quadrupled between 1990 and 2000 on a worldwide scale<sup>8</sup> and despite the recent economic crisis FDI flows are predicted to reach pre-crisis levels in 2011.<sup>9</sup> This increase of FDI flows was complemented by a corresponding growth of international investment law, which over time developed its own distinct features within the broader realm of international economic law.<sup>10</sup> The term *international investment law* in this context can be understood as the set of legal principals governing the relationship between a foreign investor and the host State to the investment.

Generally, three different layers of protection can be distinguished: First, the customary rules of international law protecting the rights of aliens. These century old principles of the minimum standards of protection of aliens<sup>11</sup> still can be of relevance in current disputes concerning the protection of investment abroad. The *Diallo Case*, a case argued before the ICJ between the Republic of Guinea and the Democratic Republic of Congo in 2010, shows that international customary rules can still be ground for claims of diplomatic protection against host States to an international investment.<sup>12</sup>

Second, claims of investors against States can be grounded on individual Investor – State contracts or concessions. These contracts may provide advantages to a private investor *vis á vis* the host State. To do so, however, they require considerable bargaining power on account of the private party. As a consequence, small investors often lack the means to acquire protection through individual Investor- State contracts.

<sup>7</sup> See ICSID Report 2010 painting, EL Anatsui, ‘One Out of a Crowd’, 17.

<sup>8</sup> See UNCTAD, *World Investment Report* (2011), 3.

<sup>9</sup> *Id.*, xiii.

<sup>10</sup> R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2008), 2.

<sup>11</sup> See M. S. Mc Dougal *et al.*, ‘The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights’, 70 *American Journal of International Law* (1976) 3, 432; R. B. Lillich, *The human rights of aliens in contemporary international law* (1984), 1.

<sup>12</sup> *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010.

Third, international investment can be protected through international investment agreements (IIAs) in the form of traditional international treaties between States. Since the conclusion of the first bilateral investment treaty (BIT) between Germany and Pakistan in 1959, there has been a rapid growth in numbers of concluded BITs on a global scale. Today more than 6000 IIAs have been concluded between States creating a “web” of different standards of protection almost everywhere around the world.<sup>13</sup> Additionally, Free Trade Agreements (FTAs) may also contain investment protection standards.<sup>14</sup> Yet, until today all steps taken towards concluding a comprehensive multilateral investment agreement were unsuccessful.<sup>15</sup>

Perhaps the most striking innovation of the rapid development of IIL was, however, the inclusion of Investor–State dispute resolution procedures in IIAs. Through arbitration clauses in IIAs private parties are provided with the opportunity to bring claims against States through independent arbitral proceedings. The resulting arbitral awards gain a high level of enforceability, as through the 1958 New York Convention<sup>16</sup> these awards are enforceable within national jurisdictions throughout the world. A good example of the high level of enforceability is the recent seizure of the Boeing 737 of the Thai Crown Prince at Munich Airport in July 2011, following an arbitral award issued for an insolvent German construction corporation against the Kingdom of Thailand.<sup>17</sup>

Recent developments show that in practice IIAs are the most relevant legal basis for investment claims brought before arbitral tribunals.<sup>18</sup> In light of these developments, it is not surprising that the overall number of claims brought against States before arbitral tribunals has almost steadily been

<sup>13</sup> *Supra* note 8, xvi.

<sup>14</sup> Of practical relevance is foremost the North American Free Trade Agreement (NAFTA) which under its Chapter 11 includes a comprehensive investment protection regime.

<sup>15</sup> R. Dolzer & C. Schreuer, *supra* note 11, 26 and 27.

<sup>16</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, available at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf), (last visited 3 May 2012); at present 146 Signatory Parties.

<sup>17</sup> See Frankfurter Allgemeine Zeitung Online, *Thailändischer Prinz will Boeing selbst auslösen* (1 Aug 2011) available at <http://www.faz.net/artikel/C31325/gepfaendetes-flugzeug-thailaendischer-prinz-will-boeing-selbst-ausloesen-30477281.html> (last visited 3 May 2012).

<sup>18</sup> See International Centre for Settlement of Investment Disputes ‘The ICSID Caseload –Statistics (Issue 2011 - 2)’ (2011), 10, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionValue=CaseLoadStatistics> (last visited 3 May 2012).

increasing.<sup>19</sup> As a consequence, some States seem to be more and more reluctant to subject themselves to the jurisdiction of arbitral tribunals and in academia arbitral awards have at times been criticized for their one-sidedness in favor of the investor.<sup>20</sup>

### C. Approaches towards the Relationship between IIL and IHRL

Given the increasing number of publications on the relationship between IIL and IHRL,<sup>21</sup> I will attempt to categorize the ongoing discussions in this field of academic literature into three different approaches.<sup>22</sup> Although any categorization bears the threat of oversimplification, a grouping of approaches may bring along a better understanding of the ongoing debate and the differing lines of argumentation. While certainly not all publications can be classified as

<sup>19</sup> See International Centre for Settlement of Investment Disputes ‘The ICSID Caseload – Statistics (Issue 2011 - 2)’ (2011), 10, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>, 10 (last visited 3 May 2012).

<sup>20</sup> See prominently the joint statement of several law professors, G. van Hunten *et al.* ‘Public Statement on the International Investment Regime’ (31 August 2010) available at [http://www.osgoode.yorku.ca/public\\_statement](http://www.osgoode.yorku.ca/public_statement) (last visited 3 May 2012); with further reference: C. N. Browner & S. W. Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’, 9 *Chinese Journal of International Law* (2008-2009) 2, 474, 475.

<sup>21</sup> On the relationship of IIL with IHRL see: B. Simma, *supra* note 3, 580; J. D. Fry, *supra* note 2, 77; T. G. Nelson, *supra* note 6, 27; J. D. Taillant & J. Bonnitcha, ‘International Investment Law and Human Rights’, in: M.-C. Cordonier Segger *et al.* (eds.), *Sustainable Development in World Investment Law* (2011) 53, 79; P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009); B. Simma & T. Kill, ‘Harmonizing Investment Protection and Human Rights: First Steps towards a Methodology’, in: C. Binder *et al.* (eds.), *Essays in Honour of Christoph Schreuer: International Investment Law for the 21<sup>st</sup> Century* (2009) 678; M. Jacob, ‘International Investment Agreements and Human Rights’, *INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development* (2010); B. Letnes, ‘Foreign Direct Investment and Human Rights: An Ambiguous Relationship’, 29 *Forum for Development Studies* (2002) 1, 33, 52; J. Tobin & S. Rose-Ackerman, ‘Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties’ (2 May 2005) available at <http://ssrn.com/abstract=557121> (last visited 3 May 2012); L. E. Peterson & K. R. Gray, *supra* note 4, 23 and 24.

<sup>22</sup> See also F. Schorkopf, *supra* note 5, 137.

falling within the realm of one of these approaches in a strict sense, most, if not all, publications follow lines of argumentation which can be linked in one way or the other to one of the following categories.

### I. “Human Rights *against* IIL”

Traditionally, IHRL and IIL are seen as completely separated fields of international law which give rise to considerable potential for norm conflict. It is often stated that IIL may prevent States from tackling legitimate human rights issues because of the threat of being confronted with claims brought by private investors before arbitral tribunals.<sup>23</sup> This view is often expressed by authors who generally are skeptical of globalization and fear that neoliberal trade and investment regimes may unduly limit State sovereignty.<sup>24</sup> This line of argumentation is frequently connected with a challenge of the legitimacy of IIL in general and particularly its key procedural element: Investment arbitration. This approach could perhaps best be described as “IHRL *against* IIL”. Although varying degrees of criticism towards IIL exist, the overall understanding that IIL may itself be detrimental to State sovereignty and human rights protection is shared by many academics.<sup>25</sup>

### II. “Human Rights *through* IIL”

Other more “investment friendly” commentators, often practitioners in the field of IIL, try to highlight the positive side- and spillover effects of IIL. On the grounds of the positive effects of FDI on the overall economic development of societies, they seek to establish that IIL may indirectly serve the implementation of human rights.<sup>26</sup> Despite the difficulty to obtain empirical evidence, this is a key argument to justify substantial rights of

<sup>23</sup> J. Ruggie, *supra* note 4, 20 - 25; J. Weincymer, ‘Balancing Property Rights and Human Rights in Expropriation’, in: P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 275, 309; L. E. Peterson & K. R. Gray, *supra* note 4, 15 and 16.

<sup>24</sup> B. Mahnkopf, ‘Investition als Intervention: Wie interregionale und bilaterale Investitionsabkommen die Souveränität von Entwicklungsländern beschneiden’, 12 *Internationale Politik und Gesellschaft* (2005) 121, 138.

<sup>25</sup> G. van Hunten *et al.*, *supra* note 21.

<sup>26</sup> C. Schreuer & U. Kriebaum, ‘From Individual to Community Interest in International Investment Law’, in: U. Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, 1079, 1088.

foreigners, which may, at times, provide more rights to foreign investors than to the nationals of the concerned host State. It is the author's submission, however, that it is difficult to use indirect policy arguments to legitimize special legal rights of foreign investors. In any event, the positive development of the overall human rights situation in a certain State depends on many more factors than economic growth or the mere existence of investment protection for foreign investors. This is not to say that positive spillover effects do not exist - rather to the contrary. But indirect spillover effects should in any case not serve as sole legitimization for a different treatment of nationals *vis-à-vis* foreigners. Thus, the approach that could best be described as "Human Rights *through* IIL" is not necessarily mistaken when positive effects of IIL on human rights are highlighted. However, the feeling remains that positive side effects are often overstretched in order to defend the legitimacy of IIL and investment arbitration.

### III. "IIL *as* Human Right"

Lastly, a fairly new approach can be distinguished in academic writing. IIL could be understood as part of human rights protection.<sup>27</sup> Although surprising at first, this view is consistent with the experience of national legal systems in which the protection of property and related economic rights are usually linked to the protection of other human rights.<sup>28</sup> IIL and IHRL certainly have many distinct characteristics, yet, only a comparative study focusing on the historic roots of both fields of the law can establish to what extent IIL and IHRL are different, similar or even to a certain degree identical. It is the author's submission that after careful comparative considerations one may conclude that IIL in its essence is very much alike IHRL. Although both fields of the law on a procedural level developed almost reversed characteristics, certain material standards of IIL may already constitute human rights, while others may be considered to represent human rights in the making. As a legal consequence, international investment law in the future may not be interpreted isolated from human rights law but, to the contrary, arbitrators must pay due consideration to other human rights which may be relevant to solve the investment dispute before them. In the following, similarities and differences of IIL and IHRL

<sup>27</sup> F. Schorkopf, *supra* note 5, 137.; in this direction also T. G. Nelson, *supra* note 6, 27; J. D. Fry, *supra* note 2, 148 and 149.

<sup>28</sup> From a German perspective see Art. 12 and Art. 14 German Basic Law.



will be scrutinized. To begin with, the contribution will first take into account procedural aspects (I.), later it will focus on material similarities in protection standards (II.), before considering the legal consequences that the described concept of “IIL as Human Right” could potentially trigger for the practical application of international investment law in arbitral proceedings (E.).

## D. Similarities and Differences between IIL and IHRL

### I. Procedural Elements

When comparing the two fields of law, it becomes obvious that while there are certain differences, the two areas share some of their most important elements. BITs contain material rights of the investor against the host State, including the right to be compensated for expropriation, to be treated equitably and fairly, to be afforded physical security and in many cases not to be discriminated against on grounds of nationality.<sup>29</sup> Human rights, on the other hand, are similarly rights of individuals that protect individuals against infringements by States.

Although there may be some disagreement as to what extent BITs actually contain rights of individuals or whether States on a purely procedural level give the Investor the right to exercise State rights contained in the treaty,<sup>30</sup> this differentiation from a conceptual perspective seems purely formalistic. In any case, BITs contain individual procedural rights to the extent that private entities have the opportunity to bring claims against States before independent arbitral tribunals. As such, one can conclude that both fields protect individuals or corporate investors against infringements by public authority by providing them with direct standing before international fora.<sup>31</sup>

<sup>29</sup> T. G. Nelson, *supra* note 6, 27.

<sup>30</sup> *Archer Daniels Midland Co. v. Mexico*, No. ARB/AF/04/05, Award, ICSID Add. Facility Nov. 21 (2007) 169; see also Z. Douglas, ‘The Hybrid Foundation of Investment Treaty Arbitration’ 74 *British Yearbook of International Law* (2003) 162, 163; K. Parlett, ‘Diplomatic Protection and Investment Arbitration’, in: R. Hofmann & C. J. Tams (eds.), *International Investment Law and General International Law* (2011), 217.

<sup>31</sup> Direct standing in this context does not apply to all human rights protection mechanisms; U. Kriebaum & C. Schreuer, *supra* note 27, 1088.

Yet, at the same time there also exist differences. The most obvious one is the difference in the group of people enjoying the respective rights. While IHRL grants rights to all human beings IIL only awards rights to foreign investors, thus making nationality a key criterion in the establishment of jurisdiction of any arbitral tribunal.<sup>32</sup> On a procedural level, another important difference is the in IHRL prevailing rule of the exhaustion of local remedies. IIL generally does not require the exhaustion of local remedies, thus placing the investor on an equal footing with the State.<sup>33</sup> Moreover, the implementation and enforcement of awards and rulings differs dramatically. While arbitral awards, as described above, reach a high level of enforceability, mechanisms to protect human rights often are not binding upon States and are thus rendered futile. Taking this into account, one can conclude that in a procedural context investment law awards more rights to private parties than even the most progressive human rights protection mechanisms.<sup>34</sup>

According to many academics and practitioners, however, these are not the only differences. It is often stated that while IHRL is fundamental to protect human dignity, IIL is instrumental to stimulating foreign investment and thereby economic growth.<sup>35</sup> This contention has widely been uncontested. It is the author's submission, however, that the differing motivation of concluding human rights and investment treaties is in its structure a different question, and thus of no relevance to the material rights contained in the respective documents. While it is generally the case that investment treaties are concluded with express language supporting the overall intention of the treaty to promote foreign investment,<sup>36</sup> the material rights contained aim at protecting investors from undue State action. With the exception of the differing groups of right bearers, the same holds true for IHRL. Although human rights treaties do not contain express provisions supporting the overall aim of the treaties to promote economic prosperity, it is beyond doubt that economic considerations and sustainable development

<sup>32</sup> U. Kriebaum, 'Judicial 'Balancing' of Economic Law and Human Rights', in: P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 219, 220.

<sup>33</sup> C. Reiner & C. 'Schreuer, Human Rights and International Investment Arbitration', in: P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 82, 83.

<sup>34</sup> *Id.*, 94.

<sup>35</sup> B. Simma & T. Kill, *supra* note 22, 707.

<sup>36</sup> M. Sornarajah, *The International Law on Foreign Investment*, 3<sup>rd</sup> ed. (2010), 16.

play a key role in the ratification of both IIL and IHRL instruments.<sup>37</sup> The similarities of the two fields become even more striking when scrutinizing the common roots of the two areas in the customary rules of international law protecting the rights of aliens.<sup>38</sup> In the following, the differing material protection standards will thus be assessed with particular focus on their historic development.<sup>39</sup>

## II. Material Elements

### 1. Expropriation

The right of aliens not to be unlawfully expropriated without prompt, adequate and effective compensation is one of the most firmly established customary rules of international law protecting the rights of aliens.<sup>40</sup> Its roots go back to ancient times when travelling abroad was dangerous and there was a constant threat of being deprived of all possessions when crossing the next bridge on the territory of a foreign landlord.<sup>41</sup> The emergence of this rule is closely connected to an inherent problem of human nature that foreigners have historically been struggling with: Foreigners are and have always been particularly vulnerable to discrimination.<sup>42</sup> Not only are foreigners not capable of participating in the making of community decisions,<sup>43</sup> but it is usually easier to target foreigners with unjust measures than nationals, where a backlash of public opinion is much more likely to occur.

The protection of property of foreign investors from unlawful expropriation pursuant to the Hull formula is also a core element of most

<sup>37</sup> Highlighting the common objective of sustainable development: J. Krommendijk & J. Morijn, ‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration’, in: P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 422, 430.

<sup>38</sup> M. S. Mc Dougal *et al.* *supra* note 12, 432; R. B. Lillich, *supra* note 12, 1.

<sup>39</sup> See similarly just recently published: T. G. Nelson, *supra* note 6, 27.

<sup>40</sup> I. Brownlie, *Principles of Public International Law* (2003) 509.

<sup>41</sup> J. Jr. Goebel, ‘The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, insurrection and Civil Wars’, 8 *American Journal of International Law* (1914) 4, 802, 803.

<sup>42</sup> Myers S. Mc Dougal *et al.*, *supra* note 12, 433.

<sup>43</sup> *Id.*

IAs.<sup>44</sup> Surprisingly, however, the protection of property as such is not contained in the most prominent universal human rights treaties. While the nonbinding UDHR contains a provision for the protection of property,<sup>45</sup> neither of the UN Covenants on Human Rights include such provisions. Thus, many commentators conclude that a universal human right to the protection of property does not exist.

While ICCPR and ICESCR do not provide for the protection of property, regional human rights instruments include such provisions. The first optional protocol of the ECHR<sup>46</sup> provides for the protection of property just as well as the American Convention on Human Rights<sup>47</sup> and the Banjul Charter.<sup>48</sup> Yet, the protection of property in human rights treaties is not only limited to regional human rights treaties. Similar property rights are included in the Convention on the Elimination of all forms of Racial Discrimination (CERD),<sup>49</sup> the Convention on the Elimination of Discrimination against Women (CEDAW),<sup>50</sup> the Convention relating to the Status of Refugees<sup>51</sup> and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>52</sup> This short overview over the relevant human rights treaties already implies that the protection of property is included in all modern comprehensive human rights treaties. While it is certainly still correct to state that no international treaty expressly provides for a universal human right to the protection of property, modern developments of international law point towards a reconsideration of the possibility of a human right to property as either customary rule or as general principle of international law.<sup>53</sup>

<sup>44</sup> R. Dolzer & C. Schreuer, *supra* note 11, 89.

<sup>45</sup> Art. 17 of the Universal Declaration on Human Rights, UNGA Res. 217 A (III) of 10 December 1948; UNYB (1948-49) 535.

<sup>46</sup> Art.1 of the First Protocol to the European Convention on Human Rights, CETS No. 9.

<sup>47</sup> Art. 21 of the American Convention on Human Rights, OAS Treaty Series No. 36.

<sup>48</sup> Art. 14 of the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) 1520 UNTS 217.

<sup>49</sup> Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

<sup>50</sup> Art. 15 of the Convention on the Elimination of all Forms of Discrimination against Women, 2149 UNTS 13.

<sup>51</sup> Art. 8 of the Convention relating to the Status of Refugees, 189 UNTS 150.

<sup>52</sup> Art. 15 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3.

<sup>53</sup> Art. 38 (c) Statute of the International Court of Justice; on the possibility of human rights as general principles of international law see: B. Simma & P. Alston, 'The

While the inclusion of a right to property in the UN Covenants was highly controversial during the cold war era, the end of the cold war and the subsequent developments in the national legal orders of former communist States seems to hint into the direction that the right to property, as a minimum standard of treatment, exists in almost all countries.<sup>54</sup> Of course it can be argued that a right to property in the Covenants was left out intentionally on ideological grounds. In light of the developments since the 1990s, however, such argument sounds somewhat outdated. It rather seems as if the right to property was left out. Later, however, the need for a minimum standard for the protection of property became necessary and eventually the right to a minimum standard of protection of property, already included in the treaty law of IIL, became part of modern human rights law as general principle of law.

From this observation, one could derive a certain tendency in the development of international law: Rights that primarily are only meant and designed for foreigners may eventually become accepted as rights for all.

Such a conclusion may be perceived as highly controversial, particularly because the standard of protection of property under human rights regimes often differs from the approach taken by arbitral tribunals in IIL.<sup>55</sup> However, it is nevertheless argued that a minimum standard of the protection of property became a universal human right as general principal of international law. This level of protection is certainly not identical to the findings of arbitral tribunals in investment cases relying on particular BITs. These cases can, however, be of guidance when determining a minimum standard that is already part of international human rights law. While it cannot be said that existing IIL standards will be transferred into future human rights standards one-to-one, one should be mindful that, as a tendency under international law, rights of foreigners, as long as they constitute minimum standards, may eventually, ideally through democratic process, become accepted as rights for all.

When it comes to the protection from unlawful expropriation IIL and IHRL are thus not mutually exclusive, but can rather be understood as complementing each other. Although differences in the level of protection

Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1988) 82, 108.

<sup>54</sup> J. Waincymer, *supra* note 24, 277.

<sup>55</sup> U. Kriebaum & C Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, available at: [http://www.univie.ac.at/intlaw/concept\\_property.pdf](http://www.univie.ac.at/intlaw/concept_property.pdf) (last visited 3 May 2012) 1.

exist from a conceptual perspective both fields aim *inter alia* in the same direction: Protecting private parties from State interferences with regard to a minimum guarantee of property rights.

## 2. Fair and Equitable Treatment

The protection standard of Fair and Equitable Treatment (FET) is next to the protection from unlawful expropriation one of the most common protection standards of IIL.<sup>56</sup> The content of the FET standard is somewhat vague and thus open to different interpretations.<sup>57</sup> It has been particularly disputed whether FET merely reflects the international customary rules of a minimum standard of treatment, or whether it offers an autonomous standard in addition to general international law.<sup>58</sup> This dispute by itself already displays how closely the FET standard is connected to the international customary rules of treatment of aliens. As stated by the US – Mexico Claims Commission in its famous *Neer* case of 1926:

“[...]the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”<sup>59</sup>

Subsequent tribunals have distanced themselves from the high threshold formulated in the *Neer* case.<sup>60</sup> Yet, particularly in NAFTA cases by virtue of an affirmative interpretation by the NAFTA Free Trade Commission, it is well accepted that Article 1105(1) NAFTA reflects the customary rule of minimum standard and does not require treatment in addition to or beyond that which is required by customary international law.<sup>61</sup>

It becomes obvious, that the historical roots of the FET standard do not only lie, as often stated, in treaty law, perhaps most prominently

<sup>56</sup> R. Dolzer & C. Schreuer, *supra* note 11, 119.

<sup>57</sup> M. Sornarajah, *supra* note 37, 235 and 236.

<sup>58</sup> R. Dolzer & C. Schreuer, *supra* note 11, 124.

<sup>59</sup> *Neer v. Mexico*, Opinion, US - Mexico General Claims Commission, 15 October 1926, 21 *American Journal of International Law* (1927), 556.

<sup>60</sup> *Pope & Talbot v. Canada*, Award, 11 April 2001, 42 ILM, 2002, 352; *Mondev v. USA*, Award, 11 October 2002, 42 ILM, 2003, 85; *GAMI v. Mexico*, Award, 15 November 2004, 44 ILM, 2005, 545; see also with further reference R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2008), 129, 130.

<sup>61</sup> Free Trade Commission Note of Interpretation of 31 July 2001.

displayed by the practice of the US to conclude Treaties of Friendship Commerce and Navigation (FCNs).<sup>62</sup> But indeed also the roots of the FET standard lie in the customary rules of the protection of aliens. When tracking the exact roots of the FET standard, one is faced with the problem that out of necessity customary rules protecting the rights of aliens as minimum standards are left highly general in their empirical evidence.<sup>63</sup> Attempts of arbitral tribunals to offer a definition of the FET standard, however, further exemplify that the FET standard is rooted in customary international law and is also not unfamiliar to modern human rights treaties. In *MTD v. Chile* the tribunal concurred with a legal opinion of Judge Schwebel that fair and equitable treatment includes such fundamental standards as good faith, due process, non-discrimination, and proportionality.<sup>64</sup>

These principles are common to the customary rules of international law protecting the rights of aliens, IHRL and IIL. Particularly the applicability of the principle of proportionality, mostly understood as human rights concept, in the field of IIL has lately been at the center of academic attention.<sup>65</sup> The understanding of “IIL as Human Right” could give a satisfactory explanation as to why the principle of proportionality should also be applied in investment cases. Moreover, the understanding of IIL as a human rights-like guarantee of minimum standards of protection would strongly support the view taken by the NAFTA Free Trade Commission that in principle the FET standard is to be interpreted as not going beyond the level of protection of customary international law.

### 3. Full Protection and Security

Most investment treaties also include the protection standard of ‘full protection and security’.<sup>66</sup> Just like the FET standard the full protection and security standard is general in nature and open to different interpretations. Traditionally, full protection and security includes the right of the investor to be protected against various types of physical violence, including the

<sup>62</sup> See for instance Article I (1) of the 1954 FCN treaty between Germany and the US, Treaty of Friendship Commerce and Navigation, 20 October 1954, US-FRG, 273 UNTS 4.

<sup>63</sup> M. S. Mc Dougal *et al.*, *supra* note 12, 450.

<sup>64</sup> *MTD v Chile*, Award, 25 May 2004, 12 ICSID Reports 6; see also R. Dolzer & C. Schreuer, *supra* note 11, 131.

<sup>65</sup> J. Krommendijk & J. Morijn, *supra* note 38, 430.

<sup>66</sup> R. Dolzer & C. Schreuer, *supra* note 11, 149.

unlawful invasion of the premises of the investment. However, the contemporary understanding of full protection and security extends its original meaning to also provide guarantees against infringements of the investor's rights by laws and regulations of the host State.<sup>67</sup> The protection from physical or legal infringements, however, is far from absolute and host States are generally only responsible to exercise 'due diligence' and to take measures that are appropriate under the case specific circumstances.<sup>68</sup>

Just like it is the case with the FET standard, in some treaties, most prominently NAFTA, full protection and security again does not extend beyond the standards embodied in customary international law. In the *ELSI* case the ICJ suggested that the standard may extend further than general international law.<sup>69</sup> However, tribunals such as in the case of *Noble Ventures v. Romania* were doubtful of such conclusion.<sup>70</sup> Again, one can conclude that IIL includes protection standards similar to those included in IHRL. Protections from physical infringements in fact represent the cornerstones of international human rights protection. Although the case of *Biloune v. Ghana*<sup>71</sup> exemplifies that investment tribunals are often hesitant to exercise their jurisdiction in cases where human rights violations are at the center of dispute, this does, however, not mean that human rights violations exclude the jurisdiction of investment tribunals. In cases in which an infringement of the right of an investor to full protection and security occurs, it is often paralleled by a corresponding violation of a human right of the investor. Also in this regard IHRL and IIL can rather be understood as complementing each other, rather than being cause for norm conflict.

## E. Conception of IIL as Human Right: Constitutional Balancing between Economic Rights and other Human Rights?

IHRL and IIL claims are not mutually exclusive, they may exist in parallel. Although BITs may provide a foreign investor with more rights

<sup>67</sup> *Id.*

<sup>68</sup> R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (1995) 61; with further reference: R. Dolzer & C. Schreuer, *supra* note 11, 149.

<sup>69</sup> *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, ICJ Rep (1989) 15, para. 111.

<sup>70</sup> *Noble Ventures v Romania*, Award, 12 October 2005, para. 14.

<sup>71</sup> *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.



than everyone is entitled to under human rights law, both regimes in this context are not the source of norm conflict but they can rather be understood as mutually supportive and complementing each other. Problems only arise twofold: First, when material investment protection standards exceed guarantees which can be compared to minimum human rights standards and, second, when human rights other than the economic rights of the investor are of relevance in arbitral investment proceedings. Similar problems exist in IHRL when the ECtHR misinterprets ECHR provisions not as minimum standards and third parties interests in *multipolaren Grundrechtsverhältnissen* (“multipolar basic rights relationships”) are left out of the balancing process.

The conception of IIL as human right may bring important advantages. Understanding investment protection as one right among others that first needs to be understood as minimum standard and second, needs to be balanced with other human rights may serve investment tribunals in the future as conceptual tool to effectively balance investment protection with other human rights. If this understanding was taken seriously, the system of IIL could hardly be viewed as illegitimate and IIL would not represent a threat to international human rights protection but rather a useful supplement to IHRL, designed to promote economic growth, the protection of property and related economic rights. While it cannot be said that existing IIL standards will be transferred into future human rights standards one-to-one, one should be mindful that as a tendency under international law rights of foreigners, as long as they constitute minimum standards, may eventually become accepted as rights for all. In any event, there exists considerable potential for cross-fertilization between the two fields of law which are separated by a merely perceived legal boundary.