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Protection of Property under Human Rights and International Investment Law: A Case-Law Analysis

Eleni Gavriil

Department of History, Politics and International Studies, Neapolis University Pafos, Pafos 8042, Cyprus; e.gavriil.2@nup.ac.cy

Abstract: The article herein examines the case-law interplay between human rights and international investment law. An example of this interplay is the relation of property rights to protection from expropriation. In this study, a conceptual framework is developed, which represents the various ways of case-law interaction between the two disciplines regarding protection of property. This is achieved by using a cross-reference approach, where it is proven that the two legal fields overlap and share these common principles, albeit with their structural differences. This interplay has various dimensions, and this article aims at analysing them and ultimately illustrating that human rights and international investment law are not independent from each other.

Keywords: human rights; international investment law; European Convention on Human Rights; investor-state arbitration; the right to property; protection from expropriation; the proportionality principle

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1. Introduction

The protection of private property is a cornerstone in the development of a liberal economy and in building stable democratic political and legal systems (Pushkar 2012, p. 143). Human rights (HR) and international investment law (IIL) approach protection of property from different angles. However, that does not exclude the fact that they share similarities and that they influence one another. The most visible linkage between the two regimes is the cross-referencing in investment arbitration and the human rights courts (Steininger 2017, p. 3).

The case-law analysis presented herein demonstrates that the two fields interact with each other in various ways regarding property rights. The specific objective of this paper is to explore property protection, one of the common elements of HR and IIL. This is achieved by addressing the various ways of interplay between HR and IIL in the context of protection of property. Although this study recognises that HR and IIL have several analogous core principles, its focus is on protection of property to demonstrate the relationship between the two fields, as it can be incorporated under the institutions of both HR and IIL. By exploring the case-law interplay in the context of the protection of property, it is intended to reach general conclusions about the connection of the two disciplines and to examine the way in which HR and IIL deal with the same issue. The present study is aimed at analysing the nexus between the two legal regimes in the protection of property.

The case-law analysis that will follow will demonstrate how human rights are applied in investor–state dispute settlement (ISDS) in the context of expropriation. In fact, investment tribunals took inspiration from human rights courts to guide their decisions. Furthermore, foreign investors have submitted relevant claims in human rights courts. Through the concept of expropriation, it will be demonstrated that the two fields often collide. In some cases, tribunals were engaged with the conflict between the investment protection from expropriation and the host state's human rights obligation.

This article consists of seven sections and proceeds as follows: Section 2 will focus on the human right to property and protection from expropriation in international investment

law. It will analyse the key features of protection of property in HR and IIL. In the next section, emphasis will be given to the proportionality principle as applied in investment tribunals. The application of the proportionality test will illustrate how arbitral tribunals have benefitted from the European Court of Human Rights (ECtHR) case-law. The proportionality test can help resolve the tension between police powers and investment protection in a consistent manner and therefore can bridge the gap between the two regimes. The next section will explore the human rights arguments in investment arbitration cases of expropriation that have been invoked by foreign investors and host states and have been rejected. This part will demonstrate how human rights arguments have been invoked in investment arbitration and the reluctance of arbitrators to approve them. Section 5 will focus on ISDS cases of expropriation in which amicus curiae briefs were submitted and raised human rights concerns. Section 6 will explore cases where foreign investors applied to the ECtHR and claimed that their right to property had been violated. This case-law analysis will highlight the common ground between the two legal branches since foreign investors can submit their claims to human rights courts. After that, the conclusions are presented. Finally, four tables that summarise the case-law analysis that is conducted in Sections 3–6 are presented.

In the next paragraphs, an attempt is made to explain the interconnection of the various principles that will be mentioned in each part of the article.

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 (Klein 2012, p. 189). International investment agreements (IIAs) protect the right to property and guarantee that foreign investments will be respected and protected from measures that constitute expropriation. In a similar manner, the protection of property also exists in human rights law, even though the right to property is not contained in all human right treaties. Importantly, the European Convention on Human Rights (ECHR) protects the relevant right in Article 1 of the First Protocol (*Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms* 1952). The article states inter alia that a legal person is entitled to the right to property. This provision is of great significance, as it proves that foreign investors could allege human right-based claims for protection of their property from expropriation, an argument that is supported by the European Court of Human Rights jurisprudence and will be analysed in the sixth part. This article adopts the ECHR opinion that property rights are considered human rights and thus extended to a legal person.

Concerning the protection from unlawful expropriation, both bodies of international law protect the property against the adverse exercise of state sovereignty (Cotula 2017, p. 252). Thus, even though international investment law and human rights seem opposite and antagonistic, they share a common territory: the protection of private parties from state interferences, ensuring a minimum guarantee of property rights (Klein 2012, p. 192). Another shared territory between IIL and HR is the protection of life and of the physical integrity of investors, as well as of the personnel involved in the investment project. The full protection and security (FPS) clause established in IIAs guarantees protection from any physical violence towards the investor and the investment. When implementing the FPS, the state must act with due diligence to protect both the property and the investor against threats and attacks (Fanou and Tzevelekos 2018, pp. 117–88). In a similar manner, human rights courts have held that states have an obligation to protect human rights within their jurisdiction and used the term "due diligence". According to Mantilla Blanco, although this analogy could be useful, the usage of it depends on the circumstances of each case (Mantilla Blanco 2019, p. 446).

The two legal regimes, HR and IIL, overlap and complement each other in their approach to safeguarding property rights. Arguments from human rights treaties could be used to explain analogous investment protection rules in at least two ways: by being "relevant" rules in terms of the Vienna Convention on the Law of Treaties (VCLT) Article 31(3)(c) and by being used as comparative arguments (Paparinskis 2013, p. 228; *Vienna*

Convention on the Law of Treaties, Treaty Series Vol 1155 (VCLT) 1969). The right to property provides evidence that human rights are not only political and civil; they include economic rights, too. International investment law is not only founded in economic liberalisation but also in principles like the fair and equitable treatment standard, which is close to human rights (Paparinskis 2013, pp. 175–78). Hence, an arbitration tribunal could rely on human rights to reinforce the investors' rights and claims.

The present study additionally recognises that international law, including customary international law and general principles of international law, may be relevant to IIAs. This view is supported by a few investment arbitration awards such as *Urbaser v Argentina*. In this case, the tribunal highlighted that Article 31(3)(c) of the VCLT indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The BIT cannot be interpreted and applied in a vacuum" (*Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina ICSID Case No ARB/07/26 Award* 2016, para. 1200). Consequently, human rights, which are embedded in international law, have a place in investment arbitration (Karamanian 2013, pp. 425–26). This paper will examine the right to property under the ECHR and protection from expropriation under IIAs as analogous rights with significant case-law interaction between the two legal branches. The various types of case-law interaction serve as a demonstration of the general relationship between HR and IIL. This study will offer a systematic analysis of the case-law interactions between HR and IIL in the context of protection of property.

2. The Human Right to Property and Protection from Expropriation in International Investment Law

In a historical context, the right to property can be traced back to the early philosophical writings of the *Déclaration des droits de l' homme et du citoyen* and to the US Bill of Rights. The protection of foreign property was already crystallised at the beginning of the 20th century. However, the international human rights law protection of property emerged after the Second World War (Cotula 2015, p. 118). Since then, a number of universal and regional human rights treaties arose that include the right to property.

Classifying a right as a "human right" suggests that it is fundamental in nature and thus entitled to enhanced protection. Human rights can be divided into absolute and relative. Absolute rights are those that can never be breached by the states and must be guaranteed all the time, such as the right to life and the right not to be tortured. On the other hand, relative rights can be restricted by states based on the rule of law. The human right to property is a social-economic right and hence is relative in nature. As a result, it is subjected to regulations under domestic law (Sprankling 2014, pp. 205–6).

Notably, the classification of the right to property as a human right was not widely accepted and raised a debate among the legal community (Golay and Cismas 2012, p. 2). The con-side supports that property rights are not part of the human rights regime. This is derived from the idea that property rights are difficult to be recognised as rights inherent to human beings. Some legal scholars regard that they are not sufficiently fundamental, and additionally, they are a source of inequality. The pro-side considers property rights as human rights. It supports that property rights provide the means to protect an individual's autonomy, a basis for the participation in a democratic society (Ristik 2016, p. 148). Additionally, arguments of an economic basis support that property rights are essential for a minimum standard of living. Property rights are also viewed as the most significant means to alleviate world property. Notably, John Locke, one of the most influential thinkers of the Enlightement, was in favor of the opinion that property rights are themselves human rights, and he believed that a person is entitled to work and enjoy the fruits of their labor (Waincymer 2009, p. 284). In regard to this debate, Hawyard justifies that property rights are human rights initially because property rights are related to well-being and dignity and secondly because they reflect the principle of equality. On the other hand, he finds that property rights are distinct from other human rights. That is because they are not

"unconditional" and they can be altered or destroyed without violating the human rights of the holder (Hayward 2013, pp. 2660–61).

While the right to property historically emerged in connection with a liberal political tradition that emphasised land ownership, international jurisprudence has broadened the relevance of the right. Property rights apply individually and collectively and additionally protect not only land ownership but a wider range of rights (Cotula 2017, pp. 239–40).

In essence, property rights safeguard individuals against host states' actions. Regarding foreign investors, if the investor is an individual, undoubtedly, he/she enjoys human rights and hence the right to property. In regard to a legal person, the legal framework is less clear (Sprankling 2014, p. 207).

The globalisation of economic activity has contributed to the development of property law. This impact is mainly observed in the international investment regime where property transactions span national borders. Developing states liberalised their domestic policies to attract foreign investments. Simultaneously, capital-exporting states sought, among others, protection from expropriation. This led to the signing of numerous bilateral investment treaties (BITs) between developing states and capital-exporting states, as well as to the establishment of multilateral investment treaties (MITs). These treaties provide the broad protection of foreign investments against direct and indirect expropriation that supersedes domestic law (Barrera 2018, p. 2661).

The investment protection regime emerged to protect the interests of foreign investors. IIAs protect inter alia human rights and mainly property rights. Investment treaties protect not only investments but also individual investors, including shareholders. The investment-related doctrines for property protection apply only to aliens; a rule which does not exist in the protection of property in human rights law. From a comparative perspective, it is observed that investment treaties do not speak of property but of "investment", while human rights law refers to property (Kriebaum and Schreuer 2007, p. 2).

The right to property under the ECHR and protection from expropriation under IIAs are analogous rights, and parallels can be drawn between them. As a result, there is significant case-law interaction in the context of protection of property. This article's analysis will serve as a demonstration of the general relationship between HR and IIL.

Based on the case-law analysis that will follow, both human rights considerations and general international law have a place in investment arbitration. Since all international agreements, including international investment agreements, are interpreted in accordance with customary international law, human rights norms are relevant (Ho 2018, p. 543). The possible interaction between human rights and investment law in the case law can happen in the following ways: Firstly, investors may use human rights to strengthen their protection against a host state's misconduct, and secondly, investment protection standards can conflict with the state's international human rights obligations. In regard to expropriation cases, human rights play a role on both sides of the balance. Both states as obligation holders and investors as property rights holders could invoke human rights. Furthermore, areas where human rights interact with international investment law are cases of foreign investors in the European Court of Human Rights. Finally, the recent trend of amicus curiae submissions is also a way of invoking human rights concerns in investment arbitration.

3. The Proportionality Principle in ISDS Cases of Expropriation

The proportionality principle that has been established in human rights courts can be integrated in investment proceedings to balance the human rights and investment standards. The arbitral practice shows that, in cases of conflict between investment protection and human rights, tribunals have been using the proportionality principle to balance investment protection and human rights.[1]

[1] Table 1 summarises the case-law of arbitration tribunals concerning the application of the proportionality principle in cases of expropriation.

Table 1. The proportionality principle in ISDS cases of expropriation.

Case	Court/Tribunal	Summary
Tippets v Iran	Tribunal, Chamber 2	The sole effect doctrine was considered.
Santa Elena v Costa Rica	ICSID	The sole effect doctrine was considered.
Saluka v Czech Republic	ICSID	The police power doctrine was considered.
Philip Morris v Uruguay	ICSID	The police power doctrine was considered.
Burlington v Ecuador	ICSID	The police power doctrine was considered.
Tecmed v Mexico	ICSID	The principle of proportionality was adopted in determining indirect expropriation. Tribunal cited the ECtHR's jurisprudence.
LG&E v Argentina	ICSID	The proportionality test was used and *Tecmed* was approved.
El Paso v Argentina	ICSID	The proportionality test was used but the tribunal required a high threshold for lack of proportionality.
Continental Casualty v Argentina	ICSID	The proportionality test was used but the tribunal required a high threshold for lack of proportionality.
Occidental v Ecuador	ICSID	The proportionality test was used to determine indirect expropriation. The suitability stage was not mentioned.
Metalclad v Mexico	ICSID	The proportionality test was used. The suitability and legitimacy of the measures were taken into account.
Total v Argentina	ICSID	A balancing approach was followed, and the investors' legitimate expectations were taken into account.
Azurix v Argentina	ICSID	The proportionality test was used to determine indirect expropriation. The tribunal referred to *Tecmed*.
Bernhard von Pezold v Zimbabwe	ICSID	The host state invoked the proportionality principle. The tribunal rejected the proportionality argument.

The proportionality principle can be deployed as a yardstick for appraising whether the state has overstepped the bounds of its discretion (Schlink 2012, p. 2). It is a principle which deals with the balancing of the relationship between end and means (Han 2007, p. 636). Several scholars and practitioners perceive it as a neutral, clear, and objective framework of analysis that can restrain the exercise of public authority, shape judicial review, and manage private actor's expectations (Vadi 2018, p. 62).

In IIL, this methodology facilitates the balance between the interests of foreign investors and conflicting public interests (Kingsbury and Schill 2010, p. 78). Indeed, an analysis of a potential expropriation, considering factors that include the effects, context, proportionality, and investor's legitimate expectations, is in the interest of maintaining a balanced approach from the perspectives of both the foreign investor and the host state (Olynyk 2012, p. 279). Sornarajah states that at a time when states have rediscovered customary principles and have introduced regulatory rights into the new balanced treaties, the introduction of the proportionality principle gives a new lease of life to investment arbitration; a perspective which can ensure the viability of the investment treaty arbitration (Sornarajah 2015, p. 367). Even though arbitral tribunals have not relied extensively on proportionality analysis, they have increasingly made use of this concept to define the standards of protection in the past decade (Vadi 2018, pp. 88–89).

As developed in the jurisprudence of various domestic and international courts, the three sub-elements that compose the proportionality principle are:

- Suitability: the means must be suitable or helpful to achieve its objective. Additionally, the end itself should possess legality and justification.
- Necessity: the means must be necessary to achieve the end. If there are any other means less restrictive to applicants' interests and capable of producing the same result, then less restrictive means should be adopted.

- Proportionality stricto sensu: the means do not have excessive restrictive effect on the applicants' interest compared to the interest pursued by it (Han 2007, pp. 636–37).

The notion of proportionality can be conceived as a "general principle" (Schlink 2012, p. 2). It is applied in the decisions of the International Court of Justice (ICJ), the Court of Justice of the European Union (CJEU), regional human rights courts such as the ECtHR, and domestic courts. Proportionality was an established principle of the German constitutional law when the ECtHR applied it for the first time in the *Belgian Linguistics* case in 1968. The principle of proportionality is a general principle of European Union Law used in the jurisprudence of the CJEU)and found in Article 36 of the Treaty on the Functioning of the European Union. In the context of international law, the principle is recognised as a general principle of law recognised by civilised nations under Article 38(1)(c) of the ICJ Statute (Bucheler 2015, p. 29).

Notably, proportionality analysis has a significant role in the jurisprudence of the ECtHR while resolving conflicts between individuals and member states. The proportionality doctrine which the court developed openly favors non-nationals who "will generally have played no part in the election or designation of the [measures] authors nor have been consulted in its adoption". It follows that "there may well be a legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals" (*James et al. v United Kingdom ECtHR* 1986, para. 64; Hoffman 2008, p. 163).

General international law is relevant in interpreting investment agreements and therefore in investor-state arbitrations disputes. Arbitrators can refer to the proportionality principle as a general principle of international law and thus as part of the applicable law. Proportionality will be either part of the applicable law, under Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other State (ICSID Convention) or a rule of international law applicable under Article 31(3)(c) of the VCLT (Vadi 2018, p. 121).

One of the main criticisms of international investment law is the imbalance between the investment protection and the host state's police power. This criticism focuses on the broad interpretation of the tribunals regarding indirect expropriation. The first step of the tribunal when assessing indirect expropriation is to examine the effect of the state's measures on foreign investment and the investor's rights. This is the reason why the "*sole effect doctrine*" was established (Lorfing and Burghetto 2017, p. 100). The specific doctrine focuses on the impact of the governmental measures on the affected property and not on the purpose of the measures. Contrarily, the "*police power doctrine*" was developed by taking into consideration the state's right to regulate in fields where there was significant public interest such as tax law, public health safety, and the environment. States will not pay compensation for adopting non-discriminatory bona fide measures that have a public policy objective (Malakotipour 2020, p. 239).

When examining the *sole effect* doctrine, tribunals examine the economic impact and the degree of interreference of the state measure (Salacuse 2015, p. 335). They only rely on the effects of a measure and disregard the regulatory purpose (Kriebaum 2018, p. 447). The state measure must have a destructive and long-lasting effect on the economic value of the investment, which must be equivalent to its effect indirect expropriation (UNCTAD 2012, p. 63). The *sole effect* criterion has been applied in numerous arbitration awards but with a variety of applications. The *Tippets v Iran* case is a typical relevant example. As stated in the award: "the government's intention is less important than the effects of the measures on the owner of the assets and the form of the measures of control or interference is less important than the reality of their impact" (*Tippets, Abbett McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran No 141-7-2 Award* 1984, para. 225–26, see Table 1). The *sole effect* doctrine was adopted in *Santa Elena v Costa Rica*. Arbitrators noted that despite how beneficial environmental measures are for society, the state must still pay compensation. According to the tribunal's reasoning, the purpose of protecting the environment does not affect the payment of compensation: "where property is expropriated, even for environmental purposes . . ., the state's obligation to pay compensation remains" (*Santa Elena v Costa*

Rica Compañía del Desarrollo de Santa Elena, S.A. v The Republic of Costa Rica, ICSID Case No ARB/96/1 Final Award 2000, para. 71–72, see Table 1).

The opposite approach is the *police power* doctrine. It has been applied by arbitrators who have taken into consideration the impact of the state measure on the foreign investor's right, the right of the state to regulate, and the purpose of the state measure (Lorfing and Burghetto 2017, p. 115). Based on this doctrine, tribunals use the criteria of public interest, non-discrimination, and due process to decide whether an expropriation has occurred (Kriebaum 2018, p. 447).

In *Saluka v Chezh Republic*, the tribunal held that states are not liable to pay compensation when "in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare". The tribunal further highlighted that international law has not defined precisely what regulations fall within the police powers of states (*Saluka Investments BV v Czech Republic UNCITRAL Partial Award* 2006, para. 255, 263, see Table 1).

Based on the doctrine of *police powers*, certain acts of the state cannot be considered indirect expropriation, and thus, they are not subject to full compensation. The state will not be liable for indirect expropriation if the relevant measures fall into the state's police powers. For instance, in the case of *Philip Morris v Uruguay*, the tribunal decided that the measures taken by the state were a valid exercise of its police power for the protection of public health and cannot constitute an expropriation. Accordingly, "in order for a States' action in exercise of regulatory powers not to constitute indirect expropriation, the action . . . must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate" (*Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay ICSID Case No ARB/10/7 Award* 2016, para. 305, see Table 1). In *Burlington v Ecuador*, the tribunal found that the expropriatory measures were not justified under the police power doctrine (*Burlington Resources Inc v Ecuador ICSID Case No. ARB/08/5 Decision on Liability* 2017, para. 472–73, 529, see Table 1). Tribunals were applying the *sole effect* test and, thus, their role was limited to considering whether a regulatory measure has caused serious damage to a foreign investment without any concern about the regulatory power of the host state. This tension makes the application of the principle of proportionality essential in investment arbitration, as it can balance the competing interests in the dispute.

The concept of proportionality has been considered in several cases dealing with the *police power* doctrine. This doctrine has been used to justify regulatory measures of general application taken within the power of the state to regulate for the public interest despite adverse impacts on the economic interests of foreign investors (Bertrand 2019, p. 58). Krommendijk and Morijn point out that the concept of police powers seems to be a good entry point for human rights arguments in investor-state arbitration (Krommendijk and Morijn 2009, p. 433).

Host states are obliged to not violate international investment agreements. At the same time, they need to implement social and economic policies and respect the human rights of the local population. A reason for criticism around international investment law concerns the priority that is given to foreign investment over the host state's police powers. Because of that, investment tribunals, as mentioned above, have given a broad interpretation of the concept of indirect expropriation. The proportionality principle is considered as the most complete and widely accepted method to balance investment protection and human rights obligations of the host state (Scheu 2017, p. 491). It is used as a tool to evaluate justifications for interference with rights and obligations and to bridge the gap between legitimate governmental regulation and protection of investments. Notably, critics of the application of the proportionality principle in investment arbitration support that a strict proportionality analysis may place too much discretion in the hands of arbitrators (Henckels 2012, p. 238).

In the context of the general relationship between HR and IIL, the use of the proportionality principle has two dimensions. Firstly, it can harmonize the conflicting norms of investors' rights and host states' obligations to human rights. Secondly, the fact that invest-

ment arbitration borrowed the principle from human rights law illustrates the overlap and the connection of the two disciplines. It must be noted that the standard of protection from expropriation is not absolute and that it must be evaluated with the promotion of public interest. An analysis of arbitral tribunals that have adopted the proportionality principle in the context of expropriation will follow.

Tribunals have gradually adopted the proportionality principle while deciding claims of indirect expropriation. However, arbitration tribunals have not used the three steps of the proportionality test of the ECtHR, but in contrast, they have adopted only the third step, proportionality stricto sensu (Vadi 2018, pp. 96–97). Malakotipour notes that another difference between the ECtHR and investment arbitration cases is that the first applies this analysis to decide on the amount of compensation (Malakotipour 2020, p. 249).

In regard to property rights, the ECtHR must assess whether the state's interference with property rights strikes a fair equilibrium between the demands of the general interests of the community and the requirements of the protection of the complainant's property rights (Kriebaum 2007, p. 730). The use of the principle by other fora like the ECtHR may be instructive in the international investment law regime. In fact, the ECtHR and investment tribunals share similarities regarding the concept of indirect expropriation. As demonstrated in the first part of this chapter, the ECtHR has developed a sophisticated jurisprudence while deciding on conflicts between the regulatory powers of the state and interferences with property rights. To this regard, the ISDS may be influenced by the ECtHR's case-law concerning the proportionality principle in cases of expropriation. Furthermore, the approach of the Strasbourg Court regarding interference with property could help to resolve the contradictions between the application of police power and the sole effect doctrines (Bertrand 2019, p. 75).

The importation of the ECtHR proportionality principle in the context of the right to property in investment arbitration concerning cases of expropriation is evident of the similarities between the two legal regimes. This study recognises the differences between the two fields. Nevertheless, it demonstrates that despite their differences, fundamental principles can pe applied in a similar way. In addition, the proportionality principle is a useful tool to balance host states' international human rights obligation and the interests of investors.

Tecmed v Mexico is the leading case where the principle of proportionality was used in determining indirect expropriation in investor-state arbitration (*Técnicas Medioambientales, TECMED S.A.(Tecmed) v Mexico ICSID Case No ARB(AF)/00/2 NAFTA Award* 2003). Tecmed purchased a waste landfill and obtained the necessary permit to operate a landfill. The company claimed that the host state's measure not to renew the permit was arbitrary and non-substantiated and therefore amounted to indirect expropriation. It also alleged violations of the fair and equitable treatment and the full protection and security rules of the BIT. The host state argued that the decision was made in conformity with its general policy for environmental protection and public health. The tribunal declared the *"sole effect"* doctrine. It decided that the state's measure was legitimate under domestic law, but it stripped Tecmed of the value of its investment, which was not justified by public interest concerns. Therefore, it violated the BIT and constituted an indirect expropriation. The tribunal stated that it would determine "whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation" (*Técnicas Medioambientales, TECMED S.A.(Tecmed) v Mexico ICSID Case No ARB(AF)/00/2 NAFTA Award* 2003, para. 122, see Table 1). It also claimed that "there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realised by any expropriatory measure" (*Técnicas Medioambientales, TECMED S.A.(Tecmed) v Mexico ICSID Case No ARB(AF)/00/2 NAFTA Award* 2003, para. 122).

By establishing the balancing approach through the proportionality test, *Tecmed* has brought a radical change. Notwithstanding, Mengie argues that because the tribunal did not apply all the elements of the proportionality test, it has not shown full commitment to

the principle (Mengie 2016, pp. 85–86). In an analysis of the case, Xiuli points out that the application of the balancing test indicates that the principle can be used to balance interests if the case involves conflicts between public interest and private interest and discretion of government (Han 2007, p. 644). To support its use of a human rights methodology, the tribunal relied on cases from the European Court of Human Rights. More specifically, it quoted the ECtHR case of *James v United Kingdom* to determine whether there was an expropriation in the first place ((*Técnicas Medioambientales, TECMED S.A.(Tecmed) v Mexico ICSID Case No ARB(AF)/00/2 NAFTA Award* 2003, para. 122)). It can be said that the tribunal in *Tecmed* benefited from the intellectual legacy of the ECtHR. In that sense, the jurisprudence of the ECtHR on the protection of property rights has been particularly relevant to investment arbitration (Balcerzak 2017, p. 53).

Based on the above, the *Tecmed* tribunal used the proportionality test to determine whether an expropriation had occurred. The essential difference from the ECtHR is that the latter used the proportionality test to decide whether an expropriation that has occurred is justified (Leonhardsen 2012, p. 124). Overall, the tribunal used the proportionality principle to guide its evaluation whether an indirect expropriation took place. However, it proceeded directly to assess a measure's strict proportionality without considering the steps of suitability and necessity.

While deciding on cases of indirect expropriation, tribunals have generally approved *Tecmed*; however, none of the following cases have analysed the proportionality principle like *Tecmed* (Henckels 2012, p. 234). In *LG&E v Argentina,* the tribunal referred to the proportionality principle and cited the *Tecmed* case. It stated that the "Tribunal must balance two competing interests: the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies" (*LG&E v Argentina ICSID Case No ARB/02/1 Decision on Liability* 2006, para. 189, see Table 1). Unlike the *Tecmed* tribunal, the *LG&E* tribunal appeared to set a high threshold for finding the lack of proportionality and ultimately denied the indirect expropriation claim (Kingsbury and Schill 2010, p. 95). The *El Paso v Argentina* and *Continental Casualty v Argentina* tribunals similarly required a high threshold for lack of proportionality. In the award, there was no mention of the steps of suitability and necessity. Additionally, there is not a clear way of showing how the tribunal applied the strict proportionality review to determine indirect expropriation (*El Paso v Argentina ICSID Case No ARB/03/15 Award* 2011, para. 244–8, see Table 1; Ranjan 2014, p. 866). In *Occidental v Ecuador*, the tribunal, while undertaking the proportionality test, did not mention the suitability stage and found that the measure taken by Ecuador was not proportionate (*Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador ICSID Case No ARB/06/11 Award* 2012, para. 428–36, see Table 1). The tribunal in *Metalclad Corporation v Mexico* based its finding on the observation that the measure lacked suitability to promote a legitimate purpose ((*Metalclad v Mexico ICSID Case No ARB(AF)/97/1 Award* 2000, para. 90–98); Scheu 2017, p. 493, see Table 1).

This approach did not find full support in investment arbitration. Not all tribunals proceeded to a proportionality analysis but rather introduced a balancing approach to determine whether the relevant measures where a breach of the BIT. In a similar vein to the ECtHR, tribunals have questioned whether foreign investors had legitimate expectations. If the answer was positive and the investors did have legitimate expectations, then a balancing approach was necessary. (*Total SA v Argentina ICSID Case No ARB/04/01 Award* 2013, para. 113–23, see Table 1).

The applicability of the above proportionality test was confirmed in *Azurix v Argentina*. The tribunal referred to *Tecmed* and applied the proportionality principle to assess whether an expropriation had occurred. Nonetheless, it found that the impact of the governmental measures on the foreign investment did not amount to expropriation (*Azurix Corp v Argentina ICSID Case No ARB/01/12 Award* 2006, para. 322, see Table 1). The tribunal expressed the relevance of the principle of proportionality and stated that "these elements provided useful guidance for the purpose of determining whether regulatory action would

be expropriatory and give rise to compensation" (*Azurix Corp v Argentina ICSID Case No ARB/01/12 Award* 2006, para. 312).

Based on the above case-law analysis, some investment tribunals have adopted the proportionality principle, while the majority did not. Notably, tribunals have not developed a common proportionality test, and their criteria varied. For example, in *Bernhard von Pezold v Zimbabwe*, the respondent invoked the principle of proportionality in connection with the state's legitimate exercise of its police powers (*Bernhard von Pezold and Others v Zimbabwe ICSID Case No ARB/10/15 Award* 2015, para. 454, see Table 1). The tribunal dismissed the state's proportionality argument and found that the state action amounted inter alia to unlawful expropriation (*Bernhard von Pezold and Others v Zimbabwe ICSID Case No ARB/10/15 Award* 2015, para. 463, 492).

4. Rejection of Human Rights Arguments in ISDS Cases of Expropriation

Both investors and host states could invoke human right arguments in the process of investment arbitration cases that concern expropriation. Foreign investors have relied on human rights to strengthen the protection of their property rights. On the other hand, human rights considerations have been invoked by host states to justify the expropriation of foreign investments and thus the breach of IIAs. Host states have invoked human rights in order to justify breaches of their investment obligations as part of their police power of defense. Moreover, host states have may present counterclaims against foreign investors in opposition to the foreign investor's initial claim in the same legal proceeding.

In practice, tribunals have been reluctant to adopt human rights considerations, and in several cases, these arguments have been rejected. In the cases discussed below, human rights were invoked by the parties of the dispute in the context of expropriation. Accordingly, tribunals were reluctant to consider the human rights arguments in all the above-mentioned cases. Nevertheless, human rights are not a priori outside the jurisdictional scope of tribunals. If the tribunals had engaged more with human rights considerations, this could have contributed to a more balanced relationship between investors' rights and human rights.[2]

Table 2. Rejection of human rights arguments in ISDS cases of expropriation.

Case	Court/Tribunal	Summary	Human Rights Arguments	Court/Tribunal Decision
Channel tunnel v France and the United Kingdom	PCA	Foreign investors used human rights to support their augments.	ECHR Article 1 of Protocol No. 1.	Rejection of the human rights argument of foreign investors due to the limited jurisdictional scope of the BIT.
Roussalis v Romania	ICSID	Foreign investors used human rights arguments to support their arguments.	ECHR Article 1 of Protocol No. 1.	Rejection of the human rights argument of foreign investors due to the BIT's stronger protection.
Siemens v Argentina	ICSID	The host state used human rights as a defense against the investor based on the financial crisis.	ECHR Article 1 of Protocol No. 1 *ECtHR case James v UK.*	Rejection of the human rights argument since the ECtHR case-law concerned a different subject-matter.
Sempra v Argentina	ICSID	The host state used human rights as a defense against the investor based on the financial crisis.	Inter-American Convention on Human Right's obligations.	Rejection of the human rights arguments despite the financial crisis.
Pezold v Zimbabwe	ICSID	The host state relied on human rights to support its position as a defense against the investor.	ECtHR case-law on the margin of appreciation doctrine in cases of expropriation ECtHR case -aw on the proportionality principle.	Rejection of the human rights arguments due to the lack of support in investment law.

[2] Table 2 summarises the case-law of arbitration tribunals that rejected human rights arguments invoked either by host states or foreign investors in cases of expropriation.

In *Channel tunnel v France and the United Kingdom*, the claimants referred inter alia to Article 1 of the First Protocol of the European Convention on Human Rights and the protection of property. The tribunal rejected the argument and stated that "the Concession Agreement does not contain any contractual commitment by the States Parties that they will comply with their own or with European law" (*Channel Tunnel Group v France and the United Kingdom PCA Case No 2003-06 Partial Arbitral Award* 2007, para. 148, see Table 2). In this case, the foreign investors sought to support their claim based on the ECHR to strengthen their protection. Accordingly, the tribunal did not engage in the human rights argument based on the limited jurisdictional scope of the BIT.

Tribunals followed a similar approach when they had to deal with human rights arguments in cases of expropriation. The tribunal in *Roussalis v Romania* rejected the ECHR argument and recognised that the BIT offered more specific and stronger protection to the foreign investor (*Spyridon Roussalis v Romania ICSID Case No ARB/06/1 Award* 2011, para. 310, see Table 2). Similarly, the investor based its claim on the right to property of Article 1 of the First Protocol in addition to BIT breaches (*Spyridon Roussalis v Romania ICSID Case No ARB/06/1 Award* 2011, para. 157–60). Roussalis argued that property protection under the ECHR provides for a better treatment than the applicable investment treaty on expropriation (*Spyridon Roussalis v Romania ICSID Case No ARB/06/1 Award* 2011, para. 114–5).

Apart from the investors' human rights arguments, host states also relied on human rights to support their claims. Host states have used human rights as a defense against the investors' claims that their rights have been violated. Argentina is one of these host states that used human rights arguments in several cases. During the financial crisis, Argentina undertook regulatory measures against foreign investors and invoked human rights as a defense. As an illustration, Argentina cited the ECtHR case *James v United Kingdom* and supported that when an expropriation is found, the compensation must not always reflect the fair market value due to the financial crisis of the state (*Siemens AG v Argentina ICSID Case No ARB/02/08 Award* 2007, para. 346, see Table 2). The tribunal rejected Argentina's argument and stated that the case-law on which Argentina based its argument (*James v UK* and *Tecmed* cases) concerned the determination of whether an expropriation had occurred, and it was not a part of the assessment of the level of compensation (*Siemens AG v Argentina ICSID Case No ARB/02/08 Award* 2007, para. 346). In a similar case *Sempra v Argentina*, Argentina argued that its responsibility against the alleged expropriation was excluded based on international law rules on state responsibility pertaining to the state of necessity (*Sempra Energy International v Argentina ICSID Case No ARB/02/16 Award* 2005, para. 98, see Table 2). It argued that the measures undertaken were necessitated by the Inter American Convention on Human Rights (*Sempra Energy International v Argentina ICSID Case No ARB/02/16 Award* 2005, para. 331). Nevertheless, the tribunal rejected the arguments and concluded that there were least-restrictive measures that Argentina could have adopted (*Sempra Energy International v Argentina ICSID Case No ARB/02/16 Award* 2005, para. 332). The tribunal acknowledged the financial instability of the host state but once more rejected the human rights arguments.

The host state has relied on human rights when faced with allegations of expropriation in *Pezold v Zimbabwe*. The tribunal again rejected the human rights arguments. Zimbabwe based its arguments extensively on the case-law of the European Court of Human Rights to support its position. It argued that the tribunal should assess the legality of the expropriations on the basis of the wide margin of appreciation doctrine and the proportionality principle as developed in the ECtHR's jurisdiction (*Bernhard von Pezold and Others v Zimbabwe ICSID Case No ARB/10/15 Award* 2015, para. 453–4, see Table 2). The tribunal dismissed the arguments and stated that "balancing competing human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the tribunal is not aware that the concept has found much support in international investment law" (*Bernhard von Pezold and Others v Zimbabwe ICSID Case No ARB/10/15 Award* 2015, para. 465–6).

5. Amicus Curiae Submissions in ISDS Cases of Expropriation

Amicus curiae submissions are another avenue for considering human rights in investment arbitration. Amicus briefs are widely accepted by many international adjudicatory bodies such as the European Court of Human Rights. Even though they have been widely accepted by various adjudicatory bodies for many years, in investment arbitration, they were first seen in 2001 in the *Methanex v US* case (N. Butler 2019, p. 145; *Methanex v The United States of America UNCITRAL Final Award* 2005). Amici appear with differences in the various courts, but they are generally used to address additional legal claims, to provide certain types of information, and to present arguments made by the parties in an alternative way (Farber 2019, p. 3).[3]

Table 3. Amicus curiae submissions in ISDS cases of expropriation.

Case	Court/Tribunal	Summary	Court/Tribunal Decision
Aguas del Tunari v Bolivia	ICSID	The case concerned the privatisation of the water service in Cochabamba that led to public demonstrations.	The amicus curiae were submitted by NGOS and individuals but was rejected due to the lack of parties' consent.
Biwater v Tanzania	ICSID	The case dealt with water privatisation and involved matters of public interests including human rights considerations.	Amicus curiae were permitted to be filed in for transparency reasons. Tribunal rejected the request to access the case documentation and to attend the oral hearing.
Apotex v USA	ICSID	Foreign investors claimed that several IIAs clauses were breached.	The amicus curiae was rejected. Tribunal found that the amicus did not satisfy the following criteria: the possible assistance to the tribunal, the scope of the dispute and the public interest in the case.
Vivendi v Argentina	ICSID	The case concerned a project in water distribution. Foreign investors claimed that their property was expropriated.	The amicus curiae was accepted because of the human rights considerations that were raised in the case.
Von Pezold v Tanzania	ICSID	The case concerned the expropriation of investors' agricultural estates.	The amicus curiae was rejected because the human rights arguments were considered as irrelevant to the case.
Pac Rim v El Salvador	ICSID	The case concerned a claim for indirect expropriation because the host state did not issue a license due to environmental concerns.	The amicus curiae was rejected because the human rights arguments were considered unnecessary.
Merrill and Ring Forestry v Canada	ICSID	The case concerned a claim for indirect expropriation.	The tribunal rejected the investors' claim and did not mention the amicus curiae.
Bear Creek v Peru	ICSID	The case concerned the revocation of a mining license because of strong opposition by local communities due to environmental concerns.	1st amicus curiae: filled by the investors' home state—accepted. 2nd amicus curiae: filled by a Peruvian NGO and a lawyer and contained human rights arguments—accepted. 3rd amicus curiae: filled by the Columbia Centre on Sustainable Investment (CCSI)—rejected because the CCSI did not sufficiently shown its contribution to the case

Since the beginning of 21st century, third parties have been able to make submissions to arbitral tribunals depending on the applicable rules. Third parties are mainly non-governmental organisations (NGOs), affected local groups, indigenous communities, and environmental groups. In regard to the relationship between human rights and international investment law, amicus briefs provide an option to civil societies to raise their voice and to protect human rights. There are various requirements for the submission of amicus curiae, but in general, the petitioners must have a significant interest in the dispute and must be able to assist the tribunal to decide on a legal or factual issue (Cotula 2017, p. 273).

[3] Table 3 summarises the case-law of arbitration tribunals where amicus curiae briefs were submitted and raised human rights considerations in cases of expropriation.

The acceptance of amicus briefs can increase the transparency of the field and help the field deal with human rights issues that are outside the arbitrators' expertise (De Brabandere 2011, p. 107). According to a document published by the UNCITRAL Working Group III, amicus curiae can provide relevant information on points of fact or law. However, the system is not designed to grant effective voice or protection to those whose rights are being affected by foreign investment. Third parties do not have the right to intervene in a significant way in the proceedings, and they can only assist the arbitrators in their decision (CCSI et al. 2019, p. 6).

Some IIAs explicitly allow for the acceptance and consideration of amicus curiae briefs. However, amicus briefs were not addressed by either the investment agreements or by the ICSID Arbitration Rules and the UNCITRAL Rules. More recently, these instruments have been amended to allow amici to participate in investment treaty arbitration.

Based on the ICSID Rule 37(2)(1), tribunals take into consideration the following factors to grant the request: (a) whether the non-disputing party has the ability to assist the tribunal in the determination of a factual or legal issue by bringing a perspective, particular knowledge or insight; (b) whether the non-disputing party addressees a matter within the scope of the dispute; and (c) whether the non-disputing party has a significant interest in the proceedings. Arbitrators have the discretion to permit amicus under specific requirements (Born and Forrest 2019, p. 6). In cases where the relevant applicable treaty is silent, some tribunals have required the consent of the parties to permit amicus participation (*Aguas del Tunari SA v Bolivia ICSID Case No ARB/02/3 Letter from the Tribunal to NGO on Petition to Participate as Amici Curiae* 2003, see Table 3). In *Biwater v Tanzania*, the tribunal considered the lack of transparency as a reason for accepting third party involvement. The tribunal particularly highlighted that the case involved matters of public interests, including human rights considerations (*Biwater Gauff Ltd. v Tanzania ICSID Case No ARB/05/22 Award* 2008, para. 358–9, see Table 3). Amici can also provide their expertise in human rights issues and thus make a useful contribution to the issues under dispute. Nevertheless, the tribunal can still deny their submission to intervene in the case (*Apotex Inv v The United States of America ICSID Case No UNCT/10/2 Procedural Order No 2* 2011, para. 22, see Table 3).

The first ICSID tribunal to accept an amicus submission was the *Vivendi v Argentina* case (*Suez, Sociedad Gerreral de Aguas de Barcelona S.A and Vivendi Universal SA v Argentina ICSID Case No ARB/03/17 Award* 2015). The foreign investors alleged, amongst others, the indirect expropriation of their assets. The tribunal did not find that the host state expropriated foreign investments but, on the contrary, did award damages due to a breach of the Fair and Equitable Treatment obligation (N. Butler 2019, p. 164). The tribunal explicitly responded to the human rights argumentation by Argentina and the amici. However, it stated no incompatibility was seen between the right to water and the BIT obligations. To permit the submission of the amicus, the tribunal considered the public interest in the subject matter of the case. Arbitrators noted that the water distribution systems affect millions of people and thus human rights considerations are raised. (*Suez, Sociedad Gerreral de Aguas de Barcelona S.A and Vivendi Universal SA v Argentina ICSID Case No ARB/03/17 Order in response to a petition for transparency and participation as amicus curiae* 2005, para. 19–23, see Table 3).

The case *Biwater v Tanzania* dealt with water privatisation. The dispute concerned the termination of the contract between the investor and the host state and the seizure of the investor's assets. The tribunal did not find that expropriation took place and dismissed the investor's claim for compensation (*Biwater Gauff Ltd. v Tanzania ICSID Case No ARB/05/22 Award* 2008, para. 392). An amicus curiae submission was filed by a collective of national and international NGOs. The third parties, specialised in a range of human rights issues, stated their human rights and sustainable development concerns (*Biwater Gauff Ltd. v Tanzania ICSID Case No ARB/05/22 Petition for Amicus Curiae Status* 2006, para. 7, see Table 3). The tribunal gave permission to file the amicus curiae but rejected their request to access the case documentation and to attend the oral hearing. The tribunal analysed the arguments of the amici regarding the human right of access to clean and safe water and stated that human

rights considerations are equally applicable to their case (*Biwater Gauff Ltd. v Tanzania ICSID Case No ARB/05/22 Petition for Amicus Curiae Status* 2006, para. 52).

In *Von Pezold v Zimbabwe*, the arbitral tribunal deemed the human rights arguments developed by amicus curiae petitioners as not relevant to the investment dispute (*Bernhard von Pezold and Others v Zimbabwe ICSID Case No ARB/10/15 Award* 2015, para. 57–60). Similarly, in *Pac Rim Cayman LLC v El Salvador*, the claimant alleged a breach of the indirect expropriation standard after the host state refused to issue a gold mining license due to environmental concerns. In this case, the tribunal found unnecessary and thus rejected the human rights arguments developed in amicus curiae submissions (*Pac Rim Cayman LLC v El Salvador ICSID Case No ARB/09/12 Award* 2016, para. 30, see Table 3).

In the case *Merrill and Ring Forestry v Canada*, the foreign investor alleged that the Canadian government had breached, among others, the NAFTA obligation for protection against expropriation. An amicus brief was submitted and accepted (*Merrill and Ring Forestry LP v Canada ICSID Case No UNCT/07/1 Award* 2010, para. 22, see Table 3). Overall, the tribunal rejected the investor's claims. However, when the tribunal decided in favor of the host state, it did not mention the amicus brief in its decision (N. Butler 2019, p. 167).

The case *Bear Creek Mining v Peru* revolved around a dispute over the revocation of a mining concession. The mining project was strongly opposed by local communities, which protested against it, arguing that the project would pollute the environment (*Bear Creek Mining v Peru ICSID Case No ARB/14/21 Award* 2017, see Table 3). After a governmental measure prohibited mining in the area, the investor filed a claim for indirect expropriation. The tribunal considered the following factors to determine indirect expropriation: the "economic impact" of the expropriation", the reasonable expectations of the investor, and the character of the measure (*Bear Creek Mining v Peru ICSID Case No ARB/14/21 Award* 2017, para. 416). Peru responded that the reason for revoking the mining license was the social unrest in the local community. Peru argued that, based on the police power doctrine, a state is not liable for takings that may result from legitimate exercises of a state's inherent power to regulate for the protection of safety and public order (*Bear Creek Mining v Peru ICSID Case No ARB/14/21 Award* 2017, para. 460). Ultimately, the tribunal held that the revocation of the license indeed constituted indirect expropriation (*Bear Creek Mining v Peru ICSID Case No ARB/14/21 Award* 2017, para. 414).

Concerning the award of damages, Peru claimed that the investor had contributed to the social unrest, and therefore, damages must be reduced. In his dissenting opinion, Professor Sands agreed with Peru and appealed to the International Labour Organization's Indigenous and Tribal Peoples Convention. He noted that the Convention imposes an obligation on investors not to engage in actions that can affect the indigenous peoples' human rights (*Bear Creek Mining Corp v Peru ICSID Case No ARB/14/2 Partial Dissenting Opinion of Professor Philippe Sands* 2017, para. 4–10).

During the dispute, two amici briefs were accepted, and one was rejected. The first accepted amicus was filed by Canada, the investor's home state. The second was filed by a Peruvian NGO and a lawyer and contained human right arguments. Its basis was the factual and legal relationship between indigenous people and the investor and was accepted by the tribunal. The rejected amicus was from the Columbia Centre on Sustainable Investment (CCSI). The CCSI argued that its submission is broader and would bring a particular expertise in the analysis of public policy implications of such investment that are beyond the commercial sphere (*Bear Creek Mining Corp v Peru ICSID Case No ARB/14/2 Procedural Order No.6* 2016, para. 12). The tribunal found that the CCSI had not sufficiently shown that it would be able to contribute any further information or arguments that would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties (*Bear Creek Mining Corp v Peru ICSID Case No ARB/14/2 Procedural Order No.6* 2016, para. 38).

Amicus curiae submissions aim to protect important public interests such as human rights and bring them to the attention of arbitrators. One of their advantages is that they

can offer knowledge and expertise in issues that the tribunal might lack (Gomez 2012, pp. 543–44). On the other hand, some scholars criticize them for not providing added value and because they increase the cost of and delay the arbitration process (Gomez 2012, pp. 550, 552).

The analysis of the amici in the context of expropriation demonstrates the general issue of amicus curiae in investment arbitration. Even though they can influence the reasoning of the awards, tribunals often do not pay enough or even any attention to them. In fact, based on the case-law analysis, it is illustrated that the tribunals have not given adequate or even any consideration to the human rights issues that they raise. This article agrees with the view that the acceptance of amici briefs raising human rights issues can contribute to the harmonisation of international law (Harrison 2009, p. 421). Indeed, amicus curiae can be a useful tool for arbitrators to balance investment protection and human rights and to consider issues that are beyond their expertise. This tool can bring more transparency in the field since entities such as organisations and associations can access the proceedings of ISDS.

6. ECtHR Cases Concerning Foreign Investors and the Right to Property

The ECHR, in Article 1 of the First Protocol (1P-1), safeguards the right to property for everyone. More specifically, it protects claims arising out of contractual rights and hence affords guarantees to foreign investors. Therefore, foreign investors are also protected by the Convention and have a right to apply to the Strasbourg Court when their property rights are violated. In this section, an overview of ECtHR cases concerning foreign investments and the right to property is given.[4]

Table 4. ECtHR cases concerning foreign investors and the right to property.

Case	Court/Tribunal	Summary	Court/Tribunal Decision
Zlinsat v Bulgaria	ECtHR	Foreign investors alleged a violation of their right to property protected under the ECHR.	The Court found a violation of the right to property based on ECHR 1P-1.
Gasus Dosier v Netherlands	ECtHR	The investors lost their property because of measures taken by the Dutch tax authority.	The Court denied a violation of the right to property based on ECHR 1P-1.
Bosphorus Hava Uollari Turizm v Ireland	ECtHR	The company alleged a violation of the right to property protected under the ECHR.	The Court did not find a violation of the right to property.
Bimer v Moldova	ECtHR	The company claimed that the sudden repeal of the license to run a duty-free shop and bar violated the right to property under the ECHR.	The Court found that the repeal was unlawful based on ECHR 1P-1.
Yukos v Russia	ECtHR	Yukos initiated parallel proceedings before the ECtHR and an arbitration tribunal (PCA). Before the ECtHR, they claimed inter alia for violations of ECHR 1-P1 and Article 6.	The ECtHR found a violation of 1P-1. The ECtHR found a violation of the right to a fair trial established in Article 6.
Yukos v Russia	PCA	Yukos claimed that the protection from indirect expropriation standard was violated.	The PCA found a violation of the indirect expropriation standard.

In *Zlinsat v Bulgaria*, foreign investors claimed a violation of their right to property rights under the ECHR. In this case, the state suspended the hotel contract between itself and the Czech company based on an alleged breach of the national privatisation act. The Court decided that the act constituted an unlawful interference with the applicant's

[4] Table 4 summarises the ECtHR's case-law where foreign investors claimed that their right to property established in the ECHR has been violated.

property rights on the basis of 1P-1 (*Zlinsat v Bulgaria App No 57785/00 ECtHR* 2006, para. 96, see Table 4).

Furthermore, in the *Gasus Dosier v Netherlands* case, a German undertaking lost its property as a consequence of constraint measures taken by Dutch tax authorities. In this case, the Court denied the infringement of the right under Article 1 of the First Protocol and stated that to furnish commercial goods to someone who is not able to settle his account immediately constitutes an inherently risky transaction (*Gasus Dosier v Netherlands App No 15375/89 ECtHR* 1995, p. 79, see Table 4).

Another case which concerns foreign investors seeking property protection in the Strasbourg Court is *Boshporus Hava Yollari Turizm v Ireland*. In this case, the company alleged that Ireland's seizure of an airplane violated Article 1 of Protocol 1 of the ECHR. The seizure of the investment was based on a regulation of the European Community (EC) that imposed sanctions against the former Federal Republic of Yugoslavia (*Boshporus Hava Yollari Turizm v Ireland App No 45036/98 ECtHR* 2005, para. 14, see Table 4). The Court ruled in favor of Ireland and found that relevant law protected fundamental rights (*Boshporus Hava Yollari Turizm v Ireland App No 45036/98 ECtHR* 2005, para. 165–67).

In the case of *Bimer v Moldova*, the company was owned by Moldovan, American, and Bahamian investors. The license of the company to run a duty-free shop and a duty-free bar was suddenly repealed after three years of operating. The national courts of Moldova found that the repeal of the license was unlawful under domestic law based on Moldova's Law on Foreign Investment. The ECtHR found that the repeal was unlawful based on Article 1 of the First Protocol after characterising the license as a property (*Bimer SA v Moldova App No 15084/03 ECtHR* 2007, para. 49–51, see Table 4).

An interesting case of the ECtHR indicating the overlap between human rights and international investment law is *Yukos v Russia* (*OAO Neftyanaya Kompaniua Yukos v Russia App No 14902/04 ECtHR* 2014). Not only investors invoked their rights under the Convention, but additionally, there was a parallel proceeding before the Pemanent Court of Arbitration (PCA). Notably, the ECtHR proceeding preceded the investment arbitration (De Brabandere 2015, pp. 2, 4). The investor does not necessarily have to choose between investment arbitration and the ECtHR. Although some IIAs require investors to choose a single avenue of relief, arbitral tribunals usually do not prevent investors from making use of two remedies if the state's behavior violated both an IIA and the ECHR (Taton and Croisant 2018, p. 112). Before the ECtHR, the investor claimed that the enforced governmental measures constituted inter alia a violation of Article 1 of Protocol 1. In this regard, the ECtHR did not make a finding on illegal expropriation and, rather, held that Russia was liable for unlawful and disproportionate interference of the human right to property (Aceris Law LLC 2017). More particularly, the Court found that the assessment of penalties was unlawful (*OAO Neftyanaya Kompaniua Yukos v Russia App No 14902/04 ECtHR* 2014, para 575, see Table 4).

Investors also claimed that Russia breached the right to a fair trial under ECHR Article 6. The Strasbourg Court decided that the domestic trial of the investor did not comply with the procedural requirements of Article 6, and thus, the right to a fair trial was restricted. The Court based its decision on the fact that the investors did not have sufficient time to prepare their defense before the domestic courts. ECtHR found that the overall effect of these difficulties, taken as a whole, restricted the rights of the defense, and thus, the principle of a fair trial, as set out in Article 6, was violated (*OAO Neftyanaya Kompaniua Yukos v Russia App No 14902/04 ECtHR* 2014, para. 551, 538).

On the other hand, the PCA found that such governmental measures had an effect "equivalent to nationalization or expropriation" (*Yukos Universal Limited v Russia PCA Case No AA 227 Award* 2009, see Table 4). While deciding on fair trial issues, the PCA did not separate them from property issues. The PCA stated that the expropriation of the investor's property was not carried out under due process of law (*Yukos Universal Limited v Russia PCA Case No AA 227 Award* 2009, para. 1583–85).

Dederer observes that the *Yukos* cases are quite illustrative regarding investment protection through the different sectors of public international law. Both fields of law may be applicable to the same issues, but at the same time, they may conclude different results (Dederer 2015). In the *Yukos* case, the investors used the ECHR to support their arguments before the PCA. At the same time, the arbitration tribunal cited the ECtHR judgment and noted that "...the Tribunal agrees with the Claimants, and with the ECtHR, that the retroactive application of Resolution 9–P violated a fundamental principle of legality..." (*Yukos Universal Limited v Russia PCA Case No AA 227 Award* 2009, para. 700, 718). This cross-referencing shows the possible dialectic relationship between HR and IIL, despite their differences. Foreign investors increasingly file claims against developed states. Moreover, many developed states are members of human rights regimes such as the ECHR. Therefore, parallel cases like the *Yukos* may become an often phenomenon in modern investment law (Dederer 2015). In the context of this article, the parallel proceedings show that HR and IIL indeed share common grounds.

Kriebaum overall acknowledges that the ECtHR was not originally designed as a body for the settlement of investment disputes and thus has several disadvantages in comparison to international investment protection. Nevertheless, in cases where the investment protection treaty only provides for jurisdiction for expropriation, the ECtHR can be a meaningful alternative, if under an investment treaty, no expropriation has occurred (Kriebaum 2009, pp. 244–45).

7. Conclusions

This article explored the interplay between HR and IIL regarding the protection of property in the case-law. Protection from property interference was chosen due to the fact that it is one of the areas that HR and IIL share a common territory. Notably, the right of property is the most significant right of foreign investors (P. Butler 2017, p. 351). Foreign investments are protected based on Article 1 of the First Protocol of the Convention, and the ECtHR has dealt with several cases concerning foreign investors and their property rights. The protection of property in IIL has been established as protection against expropriation. To identify indirect expropriation, tribunals have used the "sole effect" and the "police power" doctrines. While examining the police power doctrine, tribunals used the proportionality principle and cited the ECtHR jurisprudence.

The overlap between the two legal regimes was demonstrated in the case-law analysis presented in this article. As a general conclusion based on this analysis, arbitration tribunals are reluctant to accept human rights-based arguments and have not developed a coherent methodology for evaluating expropriation issues. This reluctance is observed both when foreign investors and host states have invoked human rights. Nevertheless, tribunals are at least addressing human rights, and this study's view is that as investment law grows, arbitrators will continue to face the raising of human rights issues in ISDS. Amicus curiae submissions constitute a way of raising human rights issues in the context of expropriation, even though it appeared that they had little influence on the relevant awards in the case studies presented herein.

In this this article, it was additionally demonstrated that the proportionality principle is a way of balancing the investor's rights with the state's right to make public policy decisions. Proportionality analysis is increasingly applied by investment tribunals in ways that have some resemblances to the ECtHR. This cross-referencing is strong evidence in favor of the unity of IIL and HR and against the self-isolation of the regimes. Kingsbury and Schill argue that the principle of proportionality has the potential to help structure both the relationships between states and foreign investors and the relationship between international investment law and other sub-areas of international law (Kingsbury and Schill 2010, p. 104).

To conclude, this case-law analysis showed that international investment law is not isolated from other international law regimes. The application of the proportionality test in investment arbitration proves that human rights principles may fill the gaps in the

international investment regime. The tool of proportionality can contribute to the balancing of police power and investors rights and the resolving of conflicts between HR and IIL.

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