The State's Duty to Protect Human Rights

Investment and Human Rights

Ursula Kriebaum

1. Introduction

It is difficult to generalize the effects of foreign investment on the enjoyment of human rights by the population of the host State. Today, most developing countries seek investment as a means of promoting development.[1] For many countries foreign investment flows[2] are much larger than development aid by States and International Organizations. [3] As a UN report indicates, well-managed investment has the potential to promote and protect human rights.[4]

However, beside this potential to enhance the respect for human rights, a number of human rights abuses related to foreign investment have arisen[5] and are likely to arise in the future. From the perspective of human rights treaties the first addressee in this context is the State receiving the foreign investment (host State). Under international human rights treaties States

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[1] Report of the High Commissioner for Human Rights, Human rights, trade and investment, 2 July 2003, E/CN.4/Sub.2/2003/9, p. 2.

[2] According to UNCTAD, global foreign direct investment (FDI) inflows amounted to $1,25 trillion in 2012 and are expected to grow to $1.45 trillion in 2013 (http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf).

[3] OECD statistics for 2012: Final data from members of the Development Assistance Committee (DAC) show that total net official development assistance (ODA) was USD 125.6 billion in 2012. (http://www.oecd.org/dac/stats/aidtopoorcountriesslipsfurtherasgovernmentstightenbudgets.htm).

ODA: Flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent (using a fixed 10 percent rate of discount). By convention, ODA flows comprise contributions of donor government agencies, at all levels, to developing countries ("bilateral ODA") and to multilateral institutions. ODA receipts comprise disbursements by bilateral donors and multilateral institutions. (OECD, Glossary of Statistical Terms).

[4] *Ibid*., at 8.

[5] See e.g.: J. Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse, A/HRC/8/5/Add.2, 23 May 2008;

see further e.g.: *John Doe I* v. *Unocal*, Case No. CV 966959, US Court of Appeals for the Ninth Circuit, 18 September 2002, 2002 ILM 1374; *Wiwa* v. *Royal Dutch Petroleum* Co., 226F. 3d 88 (2d Cir. 2000); African Commission on Human and Peoples' Rights, 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, http://www.cohre.org/store/attachments/SERAC%20and%20CESR%20v.%20Nigeria.doc.

have an obligation to respect, protect and fulfil[6] human rights of the population in all contexts thus also with regard to foreign investments.

Although investors, so far, cannot directly violate human rights treaties because they are not the addressees of these treaties, their way of operation, if tolerated by the State, can amount to a human rights violation by the latter (such conduct of investors is often called 'human rights abuse').[7] For instance a State would be required to take action against an investment where cases of forced labour[8] or ill-treatment[9] occur.

Unfortunately, States are not always able or willing to fulfil these obligations in the context of foreign investments. That is why the Guiding Principles on Business and Human Rights, which contain a "Protect, Respect and Remedy" framework,[10] are of special importance in the field of foreign investment.

If we turn to Pillar One of these principles: among the general obligation of States to protect against human rights abuses by third parties, including business enterprises,[11] two points are specially related to foreign investments:

1. The obligation of States to adopt and enforce laws that require business enterprises to respect human rights and periodically to assess the adequacy of such laws and address any gaps.[12]

Concerning the first point, the better the regulatory framework and its enforcement in a host country, the less human rights and investment law problems and conflicts will arise.

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[6] See e.g., Committee on Economic Social and Cultural Rights, General Comment 12, 1999, E/C.12/1999/5, para. 15; Committee on Economic Social and Cultural Rights, General Comment 14, 2000, E/C.12/2000/4, para. 33; Committee on Economic Social and Cultural Rights, General Comment 15, 2002, E/C.12/2002/11, paras. 20, 23, 24; M. Nowak, Introduction to the International Human Rights Regime, 2003, 48 *et seq*.

[7] O. De Schutter, International Human Rights Law, 2010, 365 et seq; on the issue of non-state actors and human rights see: e.g. A. Clapham, Human Rights in the Private Sphere, 1993; P. Alston (ed.), Non-State Actors and Human Rights, 2005; A. Clapham, Human Rights Obligations of Non-State Actors, 2006.

[8] See mutatis mutandis, ECHR, *Siliadin* v. *France*, Judgment of 26 July 2005, ECHR 2005-VII.

[9] See mutatis mutandis, ECHR, *A.* v. *United Kingdom*, Judgment of 23 September 1998, *Reports* 1998-VI.

[10] Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, 21 March 2011.

[11] Guiding Principles on Business and Human Rights I.A.1.:
States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

[12] Guiding Principles on Business and Human Rights I.B.3(a).

2. The obligation of States to "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts".[13]

Investment protection to foreign investors is currently guaranteed in three main forms: investment protection treaties, investment contracts and national investment laws. This paper focuses on treaties for the protection of foreign investments.[14] It explores in what way human rights norms have to be considered when applying and interpreting these treaties as well as the opportunities offered by these treaties to take human rights concerns into consideration.

The majority of these treaties are bilateral investment treaties. Between 2500 and 3000 such treaties have been signed. However, there is no exact data on how many of them are in force. In addition Free Trade Agreements can contain an investment chapter. NAFTA or the FTA currently negotiated between the EU and Canada are examples for such treaties. Dispute settlement is provided for in such treaties on a State to State and an investor to State level.

[13] Guiding Principles on Business and Human Rights I.B.9.

[14] On human rights and investment protection see in general e.g.:

L.E. Peterson/ K.R. Gray, International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration (April 2003), http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf; U. Kriebaum, Privatizing Human Rights, The Interface between International Investment Protection and Human Rights, in: A. Reinisch/ U. Kriebaum (eds.), The Law of International Relations – Liber Amicorum Hanspeter Neuhold, 2007, 165-189; L. Liberti, Investissements et Droits de l'Homme in: P. Kahn / T. Wälde (Eds.), New Aspects of International Investment Law, 2007, 791-852; W. Ben Hamida, Investment Arbitration and Human Rights, in 4 Transnational Dispute Management 2007; P. M. Dupuy, F. Francioni and E. U. Petersmann (eds.), Human Rights in International Investment Law and Arbitration, 2009; U. Kriebaum, Human Rights of the Population of the Host State in International Investment Arbitration 10 JWIT 2009, 653-677; C. Reiner/C. Schreuer, Human Rights and International Investment Arbitration, in: P.-M. Dupuy /F. Francioni /E.-U. Petersmann (Eds.), Human Rights in International Investment Law and Arbitration, 2009, 82-96; B. Simma/T. Kill, Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology, in: C. Binder/U. Kriebaum/A. Reinisch/S. Wittich (Eds.), Investment law for the 21st Century, Essays in Honour of Christoph Schreuer, 2009, 678-707; U. Kriebaum, Corporate Social Responsibility & Human Rights. Assessing the Relevance of International Investment Law, in: C. Binder et al. (Eds.), Corporate Social Responsibility and Social Rights, 2010, 53-85; U. Kriebaum (ed.). TDM 1 (2013) – Aligning Human Rights and Investment Protection; U. Kriebaum, Foreign Investments and Human Rights: The Actors and Their Different Roles, in: N.J. Calamita/D. Earnest/M. Burgstaller (eds.), The Future of ICSID and the Place of Investment Law in International Law, 2013, 45-59; E.-U. Petersmann, Human Rights, Trade and Investment Law and Adjudication: The Judicial Task of Administering Justice, in: N.J. Calamita/D. Earnest/M. Burgstaller (eds.), The Future of ICSID and the Place of Investment Law in International Law, 2013, 3-27; L. G. García, The Role of Human Rights in International Investment Law, in: N.J. Calamita/D. Earnest/M. Burgstaller (eds.), The Future of ICSID and the Place of Investment Law in International Law, 2013,29-43.

For the issue of stabilization clauses (often contained in investment contracts) and human rights see: A Shemberger, Stabilization Clauses and Human Rights, 2008 <http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf.

2. Are Human Rights Norms Relevant in Investment Disputes?

Whether an investment tribunal can or even must apply human rights law depends on the jurisdictional clause and on the applicable law.

In investment arbitration the tribunal's jurisdiction is based on and limited by the consent of the parties. The formulation of the compromissory clause in the investment protection treaty or the investment contract is therefore decisive for the jurisdiction of the tribunal.

These clauses vary. In some cases jurisdiction is restricted to violations of the treaty (mostly a BIT) containing the jurisdiction clause. Sometimes, the clause even restricts the jurisdiction to claims by investors and excludes the possibility for the host State to sue the investor. Art 12 of the Canada/Uruguay BIT is such an example:

> „Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, …"[15]

By contrast, other treaties such the Norway/Lithuania BIT contain a wide clause covering

> [a]ny dispute which may arise between an Investor of one Contracting Party and the other Contracting Party in connection with an investment …[16]

The first type of clause is very narrow and allows only for arbitration concerning breaches of the particular BIT standards. The second type of clause would also cover disputes involving human rights violations, if and to the extent that they affect the investment.

Therefore, it must be decided on a case by case basis whether and how far a particular human rights problem can be looked at by the investment tribunal.

Typical choice-of-law clauses include international law, covering treaties and customary law as well as the national law of the host State.[17]/[18] This may be interpreted as including

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[15] Canada/Uruguay BIT: Article 12. Emphasis added.

[16] Norway/Lithuania BIT: Article IX. Emphasis added.

[17] See e.g.: Article 10 (7) Netherlands-Argentina BIT

(7) The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.

[18] T. Begic, Applicable Law in International Investment Disputes, 2005; C. Schreuer et al The ICSID Convention, A Commentary, 2nd ed. 2009, Article 42.

See eg. Article 10 (7) Netherlands-Argentina BIT: 'The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the

human rights. Human rights law can be part of the applicable law as part of international law.[19] This applies in particular to the human rights treaties in force between the home and the host State of the investor. Otherwise, it must be established that a particular human rights norm is customary international law. Human rights norms may also be applicable as part of the local law.[20]

It is of utmost importance for the system to view international law as a coherent system of norms and not as fragmented into various branches. Systemic integration of the various branches of international law instead of applying international investment law in clinical isolation offers a potential to solve many of the problems in the context of human rights and investment.[21] As part of international law human rights law will in most of the cases form part of the applicable law and has to be treated as such.

3. "In Accordance With Host State Law" Clauses

Many investment protection treaties contain "in accordance with host state law" clauses.[22] The purpose of such provisions, is "to prevent the Bilateral Treaty from protecting

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dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.'

[19] The Report of the Executive Directors on the ICSID Convention reads as follows in paragraph 40: '… The term 'international law' shall be understood in the sense given to it by Article 38 of the Statute of the International Court of Justice.' This reference to Article 38 of the Statute of the ICJ shows that ICSID tribunals are to apply the full range of sources of international law. C. Schreuer et al, The ICSID Convention, A Commentary, 2nd ed. 2009, Article 42 169-203; P. M. Dupuy, Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law, in: P. M. Dupuy, F. Francioni and E. U. Petersmann (eds.), Human Rights in International Investment Law and Arbitration, 2009, 56 et seq; E Gaillard, Y Banifatemi, 'The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in ICSID Choice of Law Process', [2003] 18 ICSID Review Foreign Investment Law Journal at 348, 397.

[20] P. M. Dupuy, ibid. 59 et seq.

[21] See Section 6 of this paper, p. 18 et seq; on the issue of fragmentation of international law see: *Report of the Study Group of the International Law Commission; Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006); *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law,* UN Official Records of the General Assembly, Fifty-fifth session, UN Doc. A/CN.4/L.702, 18 July 2006.

[22] See e.g.: Germany-Philippines BIT, Article 1 Definition of Investment

For the purpose of this Agreement:

1. the term "investment" shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State, … .

Article 1(1) Bulgaria-China BIT:

The term 'investments' means property values and rights made as investment in accordance with the laws and regulations of the Contracting State accepting the investment in its territory.

investments that should not be protected, particularly because they would be illegal*",* as was explained by the Tribunal in *Salini Costruttori S.p.A and Italstrade S.p.A v. Morocco*.[23]

These clauses offer the possibility to take human rights into consideration when deciding whether a violation of investment law has occurred. They can serve as a bridge between national law as well as international human rights law and the investment treaty. To the extent that human rights obligations are incorporated into the host State's domestic law they become part of the framework that determines the legality of investments.

Tribunals have found that where they had to apply a BIT that contained such a clause an investment that was made in violation of host State law did not enjoy the protection of the BIT.[24] But it appears that even without a treaty provision of this kind tribunals will refuse to afford protection to investments that are contrary to host State law.

Bangladesh-Italy BIT

Article 1(1)

The term "investment" shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party in the territory of the other in conformity with the laws and regulations of the latter.

Spain-Ecuador BIT

Article 2 Promotion and Admission

Each Contracting Party […] will admit Investment according to its legal provisions.

The present Article will also apply to investments made before its entry into force by investors of a Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter […]

Article 3 Protection

… Each Contracting Party shall protect in its territory the investments made, in accordance with its legislation […] (courtesy translation from Spanish).

Netherlands-Bolivia BIT

Article 2

Either Contracting Party shall, within the framework of its law and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

On these clauses see e.g.: A. Carlevaris, The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals, 9 The Journal of World Investment and Trade 2008, 35-49; C. Knahr, Investments "in Accordance with Host State Law", 4 TDM No.5; U. Kriebaum, Illegal Investments, in: Klausegger et al. Austrian Arbitration Yearbook 2010, 307-335; R. Moloo/A. Khachaturian, The Compliance with the Law Requirement in International Investment Law, 34 Fordham International Law Journal 2011, 1473-1501.

[23] *Salini Construttori S.P.A. and Italstrade S.P.A.* v. *Kingdom of Morocco*, Decision on Jurisdiction, 23 July 2001, 6 ICSID Reports 400, para. 46.

[24] See e.g.: *Fraport AG Frankfurt Airport Services Worldwide* v. *Philippines*, Award, 16 August 2007, para. 401; *Inceysa Vallisoletana S.L.* v. *Republic of El Salvador*, Award, 2 August 2006, para. 203-207, 239, 257, 339; *Alasdair Ross Anderson et al.* v. *Costa Rica*, Award, 19 May 2010, paras. 50, 53, 58, 59; *Hamester* v. *Ghana*, Award, 18 June 2010, paras. 123-126, 138; *Saba Fakes* v. *Turkey*, Award, July 14, 2010, para. 115;

The Tribunal in *Plama*[25] operated under the Energy Charter Treaty which does not contain an "in accordance with host state law" clause. The Tribunal decided, however, that the existence of such a clause is no prerequisite for a tribunal to be able to deny protection to an illegal investment. The Tribunal in *Plama* took note of the fact that

> "the ECT does not contain a provision requiring the conformity of the Investment with a particular law".[26]

But it stated:

> "This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law"[27]

The Tribunal in *Phoenix* referred to this approach with approval.[28] The Tribunals in *Hamester* v. *Ghana*[29] *and SAUR* v. *Argentina*[30] further confirmed this approach.

Tribunals that declined to protect an investment which was not in accordance with host state law have either denied jurisdiction[31] or found the case to be inadmissible.[32] Tribunals based their decisions on principles such as good faith, "nobody can benefit from his own wrong" and violations of international public policy. In *Phoenix Action* v. *Czech Republic*,[33] an ICISD Tribunal stated:

> To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments in pursuance of torture or genocide or in support of slavery or trafficking of human organs.[34]

In accordance with host State law clauses in BITs often state that the investments must be "accepted", "admitted", "invested", "established" and "made" in accordance with host State

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Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. *Bolivia*, Decision in Jurisdiction, 27 September 2012, paras. 255, 282.

[25] *Plama Consortium Limited* v. *Bulgaria*, Award, 27 August 2008.

[26] Ibid., para. 138.

[27] Ibid.

[28] *Phoenix Action, Ltd.* v. *Czech Republic*, Award, 15 April 2009, para. 101.

[29] *Hamester* v. *Ghana*, Award, 18 June 2010.

124. These are general principles that exist independently of specific language to this effect in the Treaty.

[30] *SAUR* v. *Argentina*, Award, 6 Juni 2012, para. 308.

[31] See e.g.: *Fraport AG Frankfurt Airport Services Worldwide* v. *Philippines*, Award, 16 August 2007; *Inceysa Vallisoletana S.L.* v. *Republic of El Salvador*, Award, 2 August 2006.

[32] See e.g.: *Plama Consortium Limited* v. *Bulgaria*, Award, 27 August 2008.

[33] *Phoenix Action, Ltd.* v. *Czech Republic*, Award, 15 April 2009.

[34] Ibid., para. 78.

law. This indicates that the pertinent rules of law must relate to the process of initiating the investment rather than its performance. This concerns not so much a temporal aspect of the legality requirement but rather the compliance with rules related to the making of the investment.

Other clauses explicitly mention that the investment has to respect host State law during its entire operation. Article 2(2) of the China-Malta BIT 2009 can serve as an example for such a clause:

> Investments of either Contracting Party shall be made, and shall, for their whole duration, continuously be in line with the respective domestic laws.

Therefore, an investor could lose its investment protection in cases of human rights abuses which are at the same time also in breach of host State law, where the State has intervened to prevent or stop the human rights abuses. To the extent that international law is part of the applicable law, international human rights commitments may be applied directly also vis à vis the investor. But a well-functioning national regulatory system would make it easier for tribunals to deny investment protection if the local law and not only international human rights provisions are violated.

Adding a reference to certain international standards including human rights to the "in accordance with host State law" clause could strengthen it. This would clearly make the observance of human rights a condition for the protection of the investment.

4. References to Human Rights in Investment Protection Treaties

It is exceptional for a bilateral or regional investment protection treaty to contain explicit human rights provisions. Some treaties have references to labour rights, protection of health and safety, the environment or sustainable development in their preamble.[35] A reference to human rights in the treaty's preamble strengthens the argument that the treaty is to be interpreted in light of human rights standards. Furthermore, one can find clauses in preambles that parties should not relax health, safety or environmental standards to attract investment.

Some investment protection treaties provide that States should not lower their labour protection standards in order to attract foreign investment. The BIT between Belgium and Tajikistan provides in this regard:

[35] See e.g.: US/Albania BIT, US/Argentina BIT, US/Armenia BIT, US/Azerbaijan BIT, US/Bolivia BIT, US/Ecuador BIT, US/El Salvador BIT, US/Estonia BIT, US/Kazakhstan BIT, US/Rwanda BIT.

> The Contracting Parties recognise that it is inappropriate to encourage investment by relaxing domestic labour legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.[36]

The addition of human rights standards could strengthen this provision.

The only text which contains explicit human rights clauses in its preamble is the abortive Norwegian Draft Model BIT.[37] The Preamble contains references to health, safety, the environment and labour rights. In addition it contains a broad commitment to human rights as set out in the UN Charter and the Universal Declaration of Human Rights.

The operative clauses of the Norwegian draft Model BIT do not contain explicit carve-outs for human rights. They, however, allow the State to regulate in certain specific areas such as health, safety and the environment.[38]

Furthermore some of the South African BITs have carve-outs from national treatment and most-favoured-nation treatment with regard to measures taken to overcome past discrimination.[39] This provision is evidently designed to remedy the after-effects of the human rights abuses by the pre-1993 apartheid system.

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[36] *Article 6(2) Belgium-Tajikistan BIT 2009.*

[37] http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtale2.doc; see discussion in Letter from Norwegian Centre for Human Rights to Business and Industry Department, 15 April 2008, available at http://www.humanrights.uio.no/nasjonalinstitusjon/overvakning/horinger/2008/investeringer.pdf.

[38] Article [12] Right to regulate

Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.

[39] See e.g.: South Africa/Mauritius BIT Article 3(4)c; South Africa/Czech Republic BIT, Article 3(3)c.

The South Africa / Mauritius BIT provides in its Article 3(4)c for example:

Article 3 - Treatment of Investments

1. Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.

2. Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State.

3. Each Contracting Party shall in its territory accord to investors of the other Contracting Party treatment not less favourable than that which it accords to its own investors or to investors of any third State. The provisions of paragraphs (2) and (3) shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from –

The February 2012 draft to the Canada EU Trade Agreement contains a clause on Corporate Social Responsibility (CSR) which urges home and host States of investors to encourage companies operating on their territory to apply CSR standards notably the OECD Guidelines for Multinational Enterprises.[40] The Canada Peru FTA similarly mentions that the State Parties should encourage companies operating under their jurisdiction to voluntarily incorporate internationally recognized CSR standards,[41] without mentioning specific standards. A further example of a treaty containing provisions calling upon investors to comply with CSR standards is the Austria-Kosovo BIT of 2010 which mentions the OECD Guidelines in its preamble.[42]

Therefore, we can see an increasing number of references to human rights related topics especially the preambles of these instruments. This is of importance for the interpretation of the substantive protection standards. It is likely that we will see more provisions whereby States encourage investors to apply the OECD Guidelines or similar standards in future investment treaties.

5. Increasing the Host States Regulatory Space

A further phenomenon that has occurred during recent years is a re-definition of some of the substantive protection standards in investment treaties with the aim, of guaranteeing a larger regulatory space for host States. This includes regulation to implement human rights obligations of host States.

…

(c) Any law or measure in pursuance of any law, the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.

[40] Article X.13: Corporate Social Responsibility

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties, notably the OECD Guidelines for Multinational Enterprises. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their practices and internal policies.

[41] "Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as the statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies." *Canada-Peru FTA 2008*

[42] "Expressing their belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries; (…)" Austria-Kosovo BIT 2010

a. The Changing Requirements for the Existence of an Indirect Expropriation

It is generally accepted, and also reflected in nearly all investment treaties that an expropriation in order to be legal must meet four requirements:

1. Public purpose
2. Non-discrimination
3. Due process
4. Compensation

The most important condition is compensation. It is common ground that expropriations can be direct or indirect. [43]

Tribunals have in a number of cases grappled with the distinction between regulatory expropriation as a form of indirect expropriation and legitimate regulation. It is generally accepted that one can speak of an expropriation only if there is a total or at least a substantial deprivation of an investment. [44] In many cases legitimate regulation will not lead to a

[43] On indirect expropriation see, e.g.: V. Lowe, Regulation or Expropriation? 55 Current Legal Problems, 2002, 447–466; R. Dolzer, Indirect Expropriations: New Developments? 11 NYU Environmental Law Journal, 2003, 64–93; W.M. Reisman and R.D. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, 74 British Year Book of International Law, 2003, 115–150; G.H. Sampliner, Arbitration of Expropriation Cases Under U.S. Investment Treaties – A Threat to Democracy or the Dog That Didn't Bark? 18 ICSID Review Foreign Investment Law Journal, 2003, 1–43; J. Paulsson and Z. Douglas, Indirect Expropriation in Investment Treaty Arbitration, in: N. Horn and S. Kröll, Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, 2004, 145–158; L.Y. Fortier and S.L. Drymer, Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor, 19 ICSID Review Foreign Investment Law Journal, 2004, 293–327; D. Clough, Regulatory Expropriations and Compensation under NAFTA, 6 Journal of World Investment and Trade, 2005, 553–584; A. Newcombe, The Boundaries of Regulatory Expropriation in International Law, 20 ICSID Review Foreign Investment Law Journal, 2005, 1–57; U. Kriebaum, Regulatory Takings: Balancing the Interests of the Investor and the State, 8 Journal of World Investment and Trade, 2007, 717–744; S. Ratner, Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law, 102 AJIL 2008, 475-528;M. Paparinskis, Regulatory Expropriation and Sustainable Development in: M.-C. Cordonier Segger/M.W. Gehring/A. Newcombe, Sustainable Development in World Investment Law, 2011, 299-327; U. Kriebaum, Expropriation, in M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds), International Investment Law, Forthcoming 2014 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295979).

[44] See e.g.: *Metalclad Corp.* v. *Mexico*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award, 30 August 2000, para. 103; *Pope & Talbot* v. *Canada*, UNCITRAL (NAFTA), Interim Award, 26 June 2000, para. 102; *CMS Gas Transmission Company* v. *Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 262; *Telenor Mobile Communications A.S.* v. *Hungary* ICSID Case No. ARB/04/15, Award, 13 September 2006, paras. 64-65; *Compañia de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentina (Vivendi II)*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 7.5.11, 7.5.17, 7.5.24-7.5.30; *Sempra Energy International* v. *Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 284; *Merrill & Ring Forestry L.P.* v. *Canada*, UNCITRAL, (NAFTA), Award, 31 March 2010, para. 145; *Suez, Sociedad General de Aguas de Barcelona S. A., and InterAgua Servicios Integrales del Agua S.A.* v. *Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 123; *Chemtura Corporation* v. *Canada*, UNCITRAL (NAFTA), Award, 2 August 2010, paras. 244-249; *AES Summit Generation Limited and AES-Tisza Erömü Kft.* v. *Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 14.3.1; *Alpha Projektholding GmbH.* v. *Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 408; *Total S.A.* v. *Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 195; *El Paso Energy International Company* v.

substantial deprivation of all or most of the benefits of the investment for a substantial period of time. In such cases tribunals deny the existence of an expropriation for lack of sufficient severity.[45] In only little more than a dozen cases tribunals have found an indirect expropriation.[46] None of them concerned general regulation by the host State.

Argentina, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 233, 244-256; *Spyridon Roussalis* v. *Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paras. 328, 354.

U. Kriebaum, *Eigentumsschutz im Völkerrecht, Eine vergleichende Untersuchung zum internationalen Investitionsrecht sowie zum Menschenrechtsschutz* (2008) 297-325.

[45] See e.g.: *Spyridon Roussalis* v. *Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paras. 354-359; *White Industries Australia* v. *India*, UNCITRAL, Award, 30 November 2011, para. 12.3.6; *El Paso* v. *Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 245-256, 299; *Paushok* v. *Mongolia*, UNCITRAL, Award, 28 April 2011, para. 331-336 ; *Total S.A.* v. *Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, paras. 195-199; *AES Summit Generation Limited and AES-Tisza Erömü Kft.* v. *Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, paras. 14.3.1-14.3.4; *Chemtura* v. *Canada*, UNCITRAL (NAFTA), Award, 2 August 2010, paras. 244-247, 259, 264, 265, 267; *Suez, Sociedad General de Aguas de Barcelona S. A., and InterAgua Servicios Integrales del Agua S.A.* v. *Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, paras. 123-129, 134; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina / AWD Group* v. *Argentina*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, paras. 134, 140, 145; *Merrill & Ring Forestry L.P.* v. *Canada*, UNCITRAL, (NAFTA), Award, 31 March 2010, paras. 145, 152; *Toto* v. *Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, paras. 183-186; *Glamis Gold Ltd* v. *United States*, UNCITRAL (NAFTA), Award, 8 June 2009, para. 536; *National Grid PLC* v. *Argentina*, UNCITRAL, Award, 3 November 2008, para. 154; *Metalpar S.A. and Buen Aire S.A.* v. *Argentina*, ICSID Case No. ARB/03/5, Award, 6 June 2008, paras. 173, 174; *Corn Products International, Inc.* v. *Mexico*, ICSID Case No. ARB (AF)/04/1 (NAFTA), Decision on Responsibility, 15 January 2008, paras. 82, 87, 91-94; *BG Group Plc* v. *Argentina*, UNCITRAL, Award, 24 December 2007, paras. 268-272; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *Mexico,* ICSID Case No. ARB (AF)/04/5 (NAFTA), Award, 21 November 2007, paras. 240, 244-252; *Sempra Energy International* v. *Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras. 285, 286; *Tokios Tokelės* v. *Ukraine*, Award, 26 July 2007, paras. 120-122; *Enron* v. *Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 245, 246; *Eastern Sugar* v. *Czech Republic,* SCC Case No. 088/2004, Award, 27 March 2007, para. 210; *PSEG* v. *Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras. 278-280; *LG&E Energy Corp, LG&E Capital Corp., LG&E International Inc.* v. *Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 189-191, 198-200; *Telenor* Mobile Communication S.A. v. *Hungary,* ICSID Case No. ARB/04/15, Award, 13 September 2006, paras. 79-80; *Azurix Corp.* v. *Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 322; *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC* v. *Moldova*, SCC, Award, 22 September 2005, 4.2.5; *CMS Gas Transmission Company* v. *Argentina,* ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 262, 263; *Occidental Exploration and Production Company* v. *Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, para. 89; *Nycomb Synergetics Technology Holding AB, Stockholm* v. *Latvia*, Arbitration Institute of the Stockholm Chamber of Commerce (ECT), Award, 16 December 2003, para. 4.3.1; *Pope & Talbot* v. *Canada*, UNCITRAL (NAFTA), Award, 26 June 2000, paras. 96, 102; *S. D. Myers, Inc*. v. *Canada*, Partial Award, 13 November 2000, para. 283.

[46] *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, 209, 210; *Southern Pacific Properties (Middle East) Ltd*. v. *Egypt*, Award, 20 May 1992, 3 ICSID Reports 189, para. 164; *Antoine Goetz* v. *Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, 6 ICSID Reports 5, para. 124; *Metalclad Corp.* v. *Mexico*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award, 30 August 2000, 5 ICSID Reports 226, para. 103; *Wena Hotels Ltd*. v. *Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, 6 ICSID Reports 68, para. 99; *Wena Hotels Ltd*. v. *Egypt*, ICSID Case No. ARB/98/4, Decision on Interpretation, 31 October 2005; para. 120; *CME* v. *Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, 9 ICSID Reports 121, para. 606; *Middle East Cement Shipping and Handling Co. S.A*. v. *Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, 7 ICSID Reports 178, para. 107; *Tecnicas Medioambientales Tecmed S.A.* v. *Mexico,* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, 43 ILM 133 (2004, para. 115 citing *Pope & Talbot*. Referred to with approval by *BG Group Plc* v. *Argentina*, UNCITRAL, Award, 24 December 2007, para. 268; *Compañiá de*

Nevertheless, the US and Canada[47] and a number of other states have chosen to redefine the scope of protection under the expropriation clause in investment treaties by limiting it along the lines of US takings law.

Aguas del Aconquija S.A. and Vivendi Universal v. *Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 7.5.29, 7.5.34; *Eureko B. V.* v. *Poland,* Ad Hoc Arbitration, Partial Award, 19 August 2005, paras. 241, 243; *ADC* v. *Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 423-444; *Siemens* v. *Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, paras. 264-266, 271, 272; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.5.34; *Biwater Gauff (Tanzania) Ltd. v. Tanzania,* Case No. ARB/02/18, Award, 24 July 2008, para. 814; *Rumeli* v. *Kazakhstan*, Award, 29 July 2008, para. 708; *Saipem S.p.A.* v. *Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, paras. 124-161, 128, 129; *Gemplus S.A., SLP S.A. Gemplus Industrial S.A. de C.V.* v. *Mexico*/ *Talsud S.A.* v. *Mexico*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, paras. 8-21 – 8-28; *Alpha Projectholding GmbH.* v. *Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 408.

[47] Annex B.13(1) Canada Model BIT 2004 http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf Expropriation reads in this regard:

The Parties confirm their shared understanding that:

a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;

b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and

iii) the character of the measure or series of measures;

c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

Annex B US Model BIT 2004 http://www.state.gov/documents/organization/117601.pdf reads in this regard:

Annex B Expropriation

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

Under these redefined provisions, measures adopted in the public interest that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation and will only exceptionally be considered indirect expropriations.[48]

Therefore, these provisions takes the compliance with three of the conditions for a legal expropriation as evidence for the absence of an expropriation and hence as obviating the fourth requirement: compensation. This is highly problematic from a doctrinal point of view. As a consequence, essentially only illegal regulatory takings will be considered expropriations. However, these provisions assure that regulatory measures for the implementation of human rights norms will generally not constitute expropriations.

b. Fair & Equitable Treatment

Fair and equitable treatment (FET) provisions have come under close scrutiny by critics of investment law. The latter alleged that because of such clauses and the law suits resulting from them, governments would be chilled from bringing their legal systems in line with their human rights obligations.

One of the most important features of fair and equitable treatment is the preservation of legal stability[49] and the protection of the investor's legitimate expectations.[50] Other guarantees

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(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

[48] Annex B.13(1) Canada Model BIT **Expropriation** reads in this regard:

> c) **Except in rare circumstances**, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in **good faith**, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, **such as** health, safety and the environment, do not constitute indirect expropriation.

[49] See e.g.: *CMS* v. *Argentina*, Award, 12 May 2005, paras 274-276; *CME* v. *Czech Republic*, Partial Award, 13 September 2001, para. 611; *Occidental* v. *Ecuador*, Award, 1 July 2004, paras. 183, 191; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, para. 231-232; *LG&E* v. *Argentina*, Decision on Liability, 3 October 2006, para. 131; *Enron* v. *Argentina,* Award, 22 May 2007, para. 260; *Sempra* v. *Argentina*, Award, 28 September 2007, paras. 303, 304; *National Grid* v. *Argentina*, Award, 3 November 2008, para. 179; *Alpha* v. *Ukraine*, Award, 8 November 2010, para. 420; *Lemire* v. *Ukraine*, Award, 28 March 2011, paras. 68-73.

[50] See e.g.: *Saluka* v. *Czech Republic*, Partial Award, 17 March 2006, para. 302; *LG&E* v. *Argentina*, Decision on Liability, 3 October 2006, para. 130; *Enron* v. *Argentina*, Award, 22 May 2007, paras. 292-310; *BG* v. *Argentina*, Final Award, 24 December 2007, para. 310; *Duke Energy* v. *Ecuador*, Award, 18 August 2008, paras, 340, 365; *National Grid* v. *Argentina*, Award, 3 November 2008, para. 173; *Jan de Nul* v. *Egypt*, Award, 6 November 2008, para. 265; *Bayindir* v. *Pakistan*, Award, 27 August 2009, paras. 178, 179; *EDF* v. *Romania*, Award, 8 October 2009, para. 216; *Frontier Petroleum* v. *Czech Republic*, Final Award, 12 November 2010, paras. 285, 286; *El Paso* v. *Argentina*, Award, 31 October 2011, para. 348.

typically required by tribunals are transparency, freedom from coercion and harassment, procedural propriety and due process as well as good faith.[51]

Similar requirements can also be found in human rights treaties where any interferences with human rights have to respect rule of law standards. For example, the European Court of Human Rights requires in the context of interferences with property rights that the interference has a basis in the domestic law of the interfering State.[52] In case of manifestly unreasonable or arbitrary domestic decisions the Court will find a violation of the right to the protection of property contained in Article 1 of the Optional Protocol to the European Convention on Human Rights.[53] The Court has consistently held that the "terms 'law' or 'lawful' in the Convention '[do] not merely refer back to domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law" ….[54] In practice, this means that the domestic legal basis must be adequately accessible, sufficiently precise and foreseeable.[55] This implies that a norm has to be formulated with sufficient precision to enable an investor or other person to adjust his conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[56]

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[51] R. Dolzer/ C. Schreuer, Principles of International Investment Law, 2nd ed., 2012, 145 et seq.

On FET see in general: M. Paparinskis, The International Minimum Standard and Fair and Equitable Treatment, 2013; R. Klager, Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness', 11 *Journal of World Investment & Trade*, 2010, 435; J.R. Picherack, 'The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone too Far?', 9(4) *Journal of World Investment & Trade*, 2008, 255; J. Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment, 2008; K. Yannaca-Small, Fair and Equitable Treatment Standard: Recent Developments, in: August Reinisch (ed.), Standards of Investment Protection, 2008, 111-130; S. W. Schill, Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law, IILJ Working Paper 2006/6 (Global Administrative Law Series), http://www.iilj.org; S. W. Schill, Fair and Equitable Treatment, the Rule of Law and Comparative Public Law, in S. W. Schill, *International Investment Law and Comparative Public,* 2010, 151-183; R. Dolzer, Fair and Equitable Treatment: A Key Standard in Investment Treaties, 39 International Law, 2005, 87; C. Schreuer, Fair and Equitable Treatment in Arbitral Practice, 6 The Journal of World Investment & Trade 357, 2005; C. Schreuer, Fair and Equitable Treatment in Arbitral Practice, 6 *Journal of World Investment & Trade*, 2005, 357; B Choudhury, Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law, 6 Journal of World Investment and Trade, 2005, 297–320; P. Dumberry, The Quest to Define 'Fair and Equitable Treatment' for Investors under International Law, The Case of the NAFTA Chapter 11 Pope & Talbot Awards, 3 Journal of World Investment and Trade, 2002, 657–691; UNCTAD (ed.) Fair and Equitable Treatment, UNCTAD series on issues in international investment agreements, 1999; Vascannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice, 70 BYIL 1999, 99.

[52] See e.g.: ECHR, *Vasilescu* v. *Romania*, Judgment, 22 May 1998, para. 50.

[53] See e.g.: ECHR, *Agro-B, Spol, S.R.O.* v. *Czech Republic*, Decision, 1 February 2011.

[54] Ibid., para. 67.

[55] See e.g.: ECHR, *Carbonara und Ventura v. Italy*, Judgment, 30 May 2000, ECHR 2000-VI; *Lithgow v. United Kingdom*, Judgment, 8 July 1986, para. 110; *Hentrich v. France*, Judgment, 22 September 1994, para. 42; *Agro-B, Spol, S.R.O.* v. *Czech Republic*, Decision, 1 February 2011.

[56] See e.g.: ECHR, *Sun v. Russia*, Judgment, 5 February 2009, para. 26.

Rules that are interpreted by national courts in a contradictory manner do not fulfil these requirements.[57] A fundamental change in the interpretation of domestic legal norms by the domestic courts can also lead to a violation of the right to the protection of property.[58] Furthermore, basic procedural safeguards are required by the rule of law.[59] This implies adversarial proceedings that comply with the principle of equality of arms and enable the claimant to present its argument on the issue.[60] Therefore, a certain transparency and stability in the interpretation of the domestic legal order are required by the European Court of Human Rights in a manner similar to investment tribunals. The same is true for due process guarantees in the context of the protection of property. Like investment tribunals, the European Court of Human Rights also protects against unreasonableness and arbitrariness in national decision making.

In recent years, arbitral tribunals have moved towards a more cautious approach concerning the fair and equitable treatment standard and the right to regulate. They have stressed the need for States to maintain a regulatory space.[61]

Some treaties have established a link between fair and equitable treatment and the customary law international minimum standard. This does not necessarily increase the regulatory space of governments. The customary law standard is at least as imprecise as the fair and equitable treatment standard. Moreover, tribunals have indicated that the practice of tribunals on fair and equitable treatment is currently shaping the customary international minimum standard.[62]

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[57] See e.g.: ECHR, *Belvedere Alberghiera SRL v. Italy*, Judgment, 30 May 2000, para. 58; *Carbonara and Ventura v. Italy*, Judgment, 30 May 2000, para. 65.

[58] See e.g.: ECHR, *Fener Rum Erkek Lisesi Vafki v. Turkey*, Judgment, 9 January 2007, para. 57; *OAO Neftyanaya Kompaniya Yukos v. Russia*, Judgment, 20 September 2011, paras. 559-575.

[59] See e.g.: ECHR, *Hentrich v. France*, Judgment, 22 September 1994, para. 42.

[60] Ibid.

[61] See e.g.: *Enron* v. *Argentina,* Award, 22 May 2007, para. 261; *Parkerings* v. *Lithuania*, Award, 11 September 2007, paras. 327-338; *BG Group* v. *Argentina*, Final Award, 24 December 2007, paras. 298; *Plama* v. *Bulgaria*, Award, 27 August 2008, paras. 177, 219; *Continental Casualty* v. *Argentina*, Award, 5 September 2008, paras. 258-261; *AES* v. *Hungary*, Award, 23 September 2010, paras. 9.3.27-9.3.29; *Impregilo* v. *Argentina*, Award, 21 June 2011, paras. 290-291; *El Paso* v. *Argentina*, Award, 31 October 2011, paras. 344-352, 365-374.

[62] *Pope & Talbot* v. *Canada*, Award on Merits, 10 April 2001, paras. 115-118; *Pope & Talbot* v. *Canada*, Award on Damages, 31 May 2002, paras 63-65; *Mondev* v. *United States*, Award, 11 October 2002, paras 116, 123, 125, 127; *GAMI* v. *Mexico*, Award, 15 November 2004, para. 95; *Thunderbird* v. *Mexico*, Award, 26 January 2006, para. 194; *Azurix* v. *Argentina*, Award, 14 July 2006, paras 365-368; *Vivendi* v. *Argentina*, Award, 20 August 2007, para. 7.4.7., note 325; *Chemtura* v. *Canada*, Award, 2 August 2010, paras. 121, 236; *Ulysseas* v. *Ecuador*, Final Award, 12 June 2012, para. 245.

Another approach is to adapt the text of the norm. A recent CETA draft contains a norm redefining the fair and equitable treatment standard.[63] It contains a list of measures that have typically been considered a breach of the fair and equitable treatment standard by tribunals such as denial of justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination etc. Tribunals may under specific circumstances take legitimate expectations of investors into account. But this draft does not include stability. Furthermore, the norm provides for a mechanism that allows the State parties to review the content of the obligation.

Therefore, the norm tries to circumscribe the content of fair and equitable treatment taking into account the current case law of tribunals as well as the negative reactions to a stability requirement identified by some tribunals. By removing the stability requirement, legislation designed to implement human rights will generally not trigger a violation of the norm. Furthermore, the proposed FET provision provides an explicit procedural mechanism for the States parties to react to the case law of future investment tribunals on the subject.[64]

[63] Article X.9: Treatment of Investors and of Covered Investments (Draft CETA Investment Text, 31 May 2013)

1. Each Party shall accord in its territory to investors and to covered investments of the other Party fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 7.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:

a. Denial of justice in criminal, civil or administrative proceedings;

b. Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.

c. Manifest arbitrariness;

d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

e. Abusive treatment of investors, such as coercion, duress and harassment; or

f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 4 of this Article.

3. In addition to paragraph 2, a breach of fair and equitable treatment may also arise from any other treatment of covered investments or investors which is contrary to the fair and equitable treatment obligation recognized in the general practice of States accepted as law.

4. In accordance with X *[exact reference to be determined regarding the procedure]*, the Parties shall every X years *[or regularly]*, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment.

5. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

…

For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.

…

[64] For a more detailed analysis of the CETA provisions on FET see: U. Kriebaum, FET & Expropriation in the (Invisible) EU Model, BIT, JWIT 2014 (in print).

6. Reconciling Human Rights and Investment Protection through Treaty Interpretation

It is important to underline that the principles of treaty interpretation as provided for in the Vienna Convention on the Law of Treaties offer a viable possibility to take human rights into consideration when interpreting investment treaties and deciding whether a violation of investment law has occurred without a need to redefine investment treaty provisions.[65]

Article 31(3)c VCLT requires that in the interpretation of a treaty

> "[t]here shall be taken into account, together with the context: … any relevant rules of international law applicable in the relations between the parties".[66]

To enter into the debate on unity or fragmentation of international law to answer the question whether human rights norms are relevant rules in the context of the interpretation of an investment protection treaty and are whether they applicable in the relations between the parties to the dispute would go to far here. There are authorities for a *lex specialis* approach as well as for an approach reconciling different fields of international law.[67] Human rights norms will be especially relevant for the interpretation if the preamble of the investment protection

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[65] See, eg.: U Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration' [2009] 10 JWIT 653-677; B Simma and T Kill, Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology, in: C Binder et al (eds.), *International Investment law for the 21st Century, Essays in Honour of Christoph Schreuer* (OUP 2009) 678-707, at 706.

[66] Article 31(3)c Vienna Convention on the Law of Treaties, (1969), 1155 UNTS 331.

[67] See e.g.: B. Simma/T. Kill, Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology, in: C. Binder/U. Kriebaum/A. Reinisch/S.Wittich, International Investment law for the 21st Century, Essays in Honour of Christoph Schreuer, 2009, 678-707; T. Waelde, Interpreting Investment Treaties: Experience and Examples, in: C. Binder/U. Kriebaum/A. Reinisch/ S. Wittich, International Investment Law for the 21st Century, Essays in Honour of Christoph Schreuer, 2009, 724-781, at 772-775; R. Gardiner, Treaty Interpretation, 2008, 260-275; C. McLachlan, Investment Treaties and General International Law, 57 ICLQ 2008, 361-401; Report of a study group of the UN International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006), paras 410–80; C. McLachlan, The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention, 54 ICLQ 2005, 279-320; 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 Bruno Simma, 2011, 1079-1096.

Oil Platforms case (*Iran* v. *United States of America)* (Merits) International Court of Justice, I.C.J. Reports 2003, para. 41: Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3(c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. But see also Separate Opinion of Judge Buergenthal, Oil Platforms (*Islamic Republic of Iran* v. *United States*),Judgment, ICJ Reports 2003, paras. 22-23; Separate Opinion of Judge Higgins, Oil Platforms (*Islamic Republic of Iran* v. *United States*), Judgment, ICJ Reports 2003, 225, paras. 45-46.

The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by … the 1955 Treaty.

treaty refers to such rules. Furthermore, if both State parties to a bilateral investment treaty conferring jurisdiction on the tribunal are also parties to a particular human rights treaty this requirement will also be fulfilled.[68] The situation is more problematic with regard to regional investment protection treaties. There, the question arises whether all the parties to the regional investment protection treaty have to be parties to the human rights treaty relied upon. There is no uniform answer to this question.[69]

If particular human rights norms are relevant and applicable in an investment case these norms may influence the meaning of the terms and provisions of the investment treaty. Human rights considerations can find their way into investment law via the interpretation of certain concepts prevalent in that area of the law like "legitimate expectations". This concept has a role in all of the protection standards. Legitimate expectations are of particular importance in the assessment whether the "fair and equitable treatment" standard has been breached or whether an indirect expropriation occurred.[70] There can be no legitimate expectations that are contrary to human rights law.

Concerning the weight to be accorded to human rights treaties for interpretative purposes the Tribunal in *S.D. Myers* v. *Canada* stated in case of environmental law obligations and international investment law, that in a case "where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade".[71] Transferred to the

[68] *ILC Report on Fragmentation*, supra note 67, para. 472.

Simma and Kill refer furthermore to the concept of erga omnes obligations. (B. Simma/T. Kill, Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology, in: C. Binder/U. Kriebaum/A. Reinisch/S. Wittich, International Investment law for the 21st Century, Essays in Honour of Christoph Schreuer, 2009, 678-707, at 701); B. Simma, From Bilateralism to Community Interest in International Law, 250 Recueil des cours VI, 1994, 216, 293-321.

[69] See *ILC Report on Fragmentation,* supra note 67, paras. 471, 472; J. Pauwelyn, Conflict of Norms in Public International Law, 2003, 257-263; C. McLachlan, The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention, 54 ICLQ 2005, 313-315; M.E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, 2009, 433, para. 25.

[70] Generally on the significance of legitimate expectations see: Schreuer, C., Fair and Equitable Treatment in Arbitral Practice, 6 The Journal of World Investment & Trade, 2005, 357, 374-380; E. Snodgrass, Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle, 21 ICSID Review – FILJ, 2006, 1; S. Fietta, The "Legitimate Expectations" Principle under Article 1105 NAFTA–I*nternational Thunderbird Gaming Corporation v. The United Mexican States*, 7 The Journal of World Investment & Trade, 2006, 423; A. v. Walter, The Investor's Expectations in International Investment Arbitration, in: A. Reinisch/Ch. Knahr (eds.) International Investment Law in Context, 2008, 173; C. Brown, The Protection of Legitimate Expectations as a 'General Principle of Law': Some Preliminary Thoughts, TDM, January 2008; I. Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment, 2008, 163; C. Schreuer/U. Kriebaum, At What Time Must Legitimate Expectations Exist?, in: J. Werner/ A. H. Ali, Liber Amicorum for Thomas Wälde, 2009, 265-276.

[71] *S.D. Myers* v. *Government of Canada*, First Partial Award, 13 November 2000, 8 ICSID Reports 18:

issue of human rights this would mean, that if a State has several possibilities to comply with its human rights obligations, it has to adopt the alternative that is most consistent with investment law. From a human rights perspective it would probably be the other way round and the approach that is least intrusive into human rights of individuals would have to be chosen. Neither of these approaches would lead to a conflict of the two systems as long as a particular option for implementation is compatible with both normative regimes.

Therefore, human rights norms will be relevant in the application and interpretation of investment protection treaties depending on the exact jurisdiction clause, the applicable law and direct or indirect references to human rights in these treaties. This is especially so where "legitimate expectations" of an investor have to be taken into consideration for the assessment of a violation of a protection standard.

7. Summary and Conclusion

Host States of foreign investments are under an obligation to respect, protect and fulfill human rights of their citizens as well as guarantee investors' rights. In many respects this can best be achieved by a well-designed foreseeable domestic regulatory framework which is properly enforced. In such a situation human rights violations as well as violations of investors' rights will be the exception rather than the rule.

The obligation to protect the national population against human rights abuses by third persons including foreign investors implies the need for the host State to maintain adequate space to amend the national regulatory framework if this should become necessary to protect against human rights abuses by foreign investors. This can be achieved by a number of different concepts currently used in the formulation, interpretation and application of investment protection treaties.

Investment law as it currently stands offers several tools to take human rights obligations of host States into consideration when interpreting bilateral investment treaties:

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220. The Preamble to the NAFTA, the NAAEC and the international agreements affirmed in the NAAEC suggest that specific provisions of the NAFTA should be interpreted in light of the following general principles:

- Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;
- Parties should avoid creating distortions to trade;
- environmental protection and economic development can and should be mutually supportive.

221. In the Tribunal's view, these principles are consistent with the express provisions of the Transboundary Agreement and the Base1 Convention. A logical corollary of them is that where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements.

1. To enable a tribunal to deal with human rights violation requires a wide jurisdictional clause in the treaty.

2. Human rights law will generally be part of the applicable law in case of an investment dispute arising under an investment protection treaty. A specific reference in the treaty to human rights law could remind tribunals as well as States of this fact.

3. The same is true for "in accordance with host State law clauses". They are a useful tool provided by many investment protection treaties. They will be effective to the extent that human rights are incorporated into the host State's domestic law. In the presence of such a clause, investment protection will be available only if the investment complies with human rights norms. However, a specific reference to human rights in connection with such a clause may lend them additional weight. In constitutional systems following a dualist approach concerning the incorporation of international law into the national legal system a reference to human rights in the "in accordance with host State law clause" might be vital since in such systems human rights treaties do not form part of the domestic legal system unless they have been specifically incorporated.

4. References to human rights norms as well as to corporate social responsibility in preambles of investment protection treaties may offer important guidance for those applying and interpreting these treaties.

With regard to the provisions on indirect expropriation and fair and equitable treatment one can observe a certain willingness of States to amend the respective treaty provisions to clarify the regulatory space of governments. This corresponds to the requirement in pillar one of the framework "protect, respect and remedy" of the Guiding Principles on Business and Human Rights. This goes hand in hand with an increasingly cautious approach of arbitral tribunals when applying the norms on indirect expropriation and fair and equitable treatment.

Human Rights norms as well as investment protection norms share a number of common requirements: the prohibition of discrimination in the enforcement of the law, the requirement of an independent adjudication of legal norms and the presence of basic due process guarantees, the accessibility of legal norms which are sufficiently precise and foreseeable as well as absence of arbitrariness. In both systems this can be seen as emanating from rule of

law requirements.[72] Much can be achieved for the population of the host State and investors at the same time if host States stick to these principles.

International law will only be capable of protecting against human rights abuses by investors, human rights violations by States and violations of investors' rights if it is perceived in an integrated fashion and not in terms of isolated branches of the law.

[72] For one of the definitions of the rule of law see: *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,* S/2004/616, 23 August 2004, para. 6:

The "rule of law" … refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

For the rule of law in investment law see in particular, Stephan W. Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law', IILJ Working Paper 2006/6 (Global Administrative Law Series), http://www.iilj.org; Stephan W. Schill, 'Fair and Equitable Treatment, the Rule of Law and Comparative Public Law', in Stephan W. Schill, *International Investment Law and Comparative Public*, 2010, 151-183.