
The Concept of Property in Human Rights Law and International Investment Law

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The protection of privately owned property has developed independently in human rights law and in international investment law. Both areas of international law have yielded numerous decisions; however, there appears to be relatively little interaction between the two fields. Even the concept of the property to be protected is by no means uniform.

I. Terminology and Definitions

The differences start with terminology. Art. 1 of the First Additional Protocol to the European Convention on Human Rights (Art. 1, 1st Protocol) speaks of “possessions” and of “property”,¹ but it does not contain a definition of these terms.

¹ “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general

The European Court of Human Rights (ECHR) has refrained from offering a general definition, but it has generally adopted a broad concept of property in its case law on this provision. By contrast, the Inter-American Court of Human Rights (IACHR) has adopted a definition of the term “property” as contained in Art. 21 of the Inter-American Convention.²

International investment law does not normally speak of property but of “investments”. The existence of an investment is relevant not only as an object of protection but also as a jurisdictional requirement for international investment arbitration. Art. 25(1) of the ICSID Convention³ states that the jurisdiction of tribunals established within its framework is limited to disputes “arising directly out of an investment”. No definition is given for the term “investment” but tribunals have adopted a list of descriptors that they find typical for investments. These descriptors include a substantial contribution, certain duration, an element of risk and significance for the host State’s development.⁴

Where the jurisdiction of a tribunal is based on a bilateral investment treaty (BIT) the definition of the term “investment” contained in the treaty is also relevant. Most BITs contain broad definitions of “investment”. Typical of these comprehensive definitions is the one contained in the BIT between Argentina and the United States:

“investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

interest or to secure the payment of taxes or other contributions or penalties”.

The French text speaks of *biens* and of *propriété*. The ECHR has made it clear that it treats these terms as synonyms: *Marckx v. Belgium* (App no 6833/74) (1979) Series A no 31, para. 63.

² *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Judgment)* Inter-American Court of Human Rights, Series C no. 79 (31 August 2001), para. 144: “Property can be defined as those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movables and immovables, corporal and incorporeal elements and any other intangible object capable of having value”.

³ Convention on the Settlement of Investment Disputes between States and Nationals of other States, (1966) 575 U.N.T.S. 159; (1965) 4 I.L.M. 532.

⁴ *Fedax N.V. v. Venezuela*, Decision on Jurisdiction, 11 June 1997, (1998) 37 I.L.M. 1378 para. 43; *Salini Costruttori SpA et Italstrade SpA v. Morocco*, Decision on Jurisdiction, 23 July 2001, J de Droit Intl 196 (2002), (2003) 42 I.L.M. 609, para. 53 [hereinafter *Salini Costruttori v. Morocco*]; *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406, para. 133 footnote 113; *Joy Mining Machinery Ltd. v. Egypt*, Award on Jurisdiction, 6 August 2004, paras. 53, 57, 62 [hereinafter *Joy Mining (Jurisdiction)*]; *AES Corporation v. Argentina*, Decision on Jurisdiction, 26 April 2005, para. 88; *Bayindir Insaat Turizm Ticaret Ve Sanayi A. S. v. Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 130-138 [hereinafter *Bayindir (Jurisdiction)*]. Decisions of investment tribunals that have not yet appeared in print are available at <http://ita.law.uvic.ca/>.

- (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
- (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having economic value and directly related to an investment;
- (iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and
- (v) any right conferred by law or contract, and any licenses and permits pursuant to law;

Similarly broad definitions of “investment” are contained in regional multilateral treaties such as the Energy Charter Treaty (ECT)⁵ and the North American Free Trade Agreement (NAFTA).⁶

II. The Significance of National Law

The ECHR has adopted an autonomous interpretation of the term “possessions” which is independent of domestic law. In *Beyeler v. Italy* it said:

[P]ossessions in the first part of Article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law ...⁷

The IACHR has proceeded similarly.⁸

On the other hand, the ECHR has given significance to the treatment under domestic law of the property in question before the interference. For instance in *Former King of Greece v. Greece* the Court said:

65. ... the Greek State itself repeatedly treated it as private property and had not produced a general set of rules governing its status. [This fact] prevents the Court from

⁵ Final Act of the European Energy Charter Conference, Annex 1 (1994), Art. 1.

⁶ North American Free Trade Agreement, Art. 1139.

⁷ *Beyeler v. Italy* (App no 33202/96) ECHR (GC) 2000-I para. 100. See also *Matos e Silva Lda. v. Portugal* (App no 15777/89) ECHR 1996-IV para. 75; *Former King of Greece v. Greece* (App no 25701/94) ECHR 2000-XII para. 60; *Tsirikakis v. Greece* (App no 46355/99) ECHR 17 January 2002, para. 53; *Forrer-Niedenthal v. Germany* (App no 47316/99) ECHR 20 February 2003, para. 32; *Bronionski v. Poland* (App no 31443/96) ECHR (GC) 2004-V para. 129; *Öneriyıldız v. Turkey* (App no 48939/99) ECHR (GC) 2004-XII para. 124 [hereinafter *Öneriyıldız* 2004].

⁸ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* (note 2) at paras. 146-153.

concluding that it had a *sui generis* and quasi-public character to the effect that it never belonged to the former royal family.⁹

Another area where domestic law has turned out to be relevant in the practice of the ECHR is the restitution of property taken before the entry into force of the European Convention for the State concerned. There is no general right to restitution. But where domestic law provides for it, the right to restitution is protected by Art. 1, 1st Protocol to the extent so provided. This means that the right to restitution is contingent upon the conditions contained in domestic law.¹⁰

In the area of investment law, BITs sometimes include the formula “in accordance with host State law” in their definitions of the term “investment”. Host States have argued that this meant that the concept of “investment”, and hence the reach of the protection under the treaty, had to be determined by reference to their own domestic law. Tribunals have rejected this approach. They have held that the reference to the host State’s domestic law concerned not the definition of the term “investment” but solely the legality of the investment. The Tribunal in *Salini v. Morocco* said in this respect:

This provision [the required compliance with the laws and regulations of the host state] refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected because they would be illegal.¹¹

This means that the object of protection remains determined, in principle, by international standards as determined by international law, especially the applicable treaties. At the same time, the existence of an investment will often be conditioned by the validity of an act, especially a contract, governed by the local law. For instance, if the investment consists in the acquisition of shares in a company, the

⁹ *Former King of Greece*, *supra* (note 7). See also *Matos e Silva Lda*, *supra* (note 7) at para. 75; *Ceskomoravská myslivecká jednota v. Czech Republic* (App no 33091/96) ECHR 23 March 1999 (Decision on Admissibility); *Beyeler*, *supra* (note 7) at paras. 104, 105; *Papastavrou et al v. Greece* (App no 46372/99) ECHR 2003-IV 257, paras. 34, 35; *Katsoulis et al v. Greece* (App no 66742/01) ECHR 8 July 2004, paras. 31, 32; *Öneryıldız* 2004, *supra* (note 7) at paras. 124, 129.

¹⁰ *Gospodinova v. Bulgaria* (App no 37912/97) ECommHR 16 April 1998 (Decision on Admissibility); *Jantner v. Slovakia* (App no 39050/97) ECHR 4 March 2003, para. 34; *Kopecký v. Slovakia* (App no 44912/98) ECHR (GC) 2004-IX, para. 35; *von Maltzan et al v. Germany* (App nos 71916/01, 71917/01, 10260/02) ECHR (GC) 2 March 2005 (Decision on Admissibility) para. 74; *Bronionski*, *supra* (note 7) at paras. 125, 132; *Malbous v. Czech Republic* (App no 33071/96) ECHR (GC) 2000-XII (Decision on Admissibility).

¹¹ *Salini Costruttori v. Morocco*, *supra* (note 4) at para. 46. See also *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004, at paras. 83 *et seq.*; *Bayindir* (Jurisdiction), *supra* (note 4) at paras. 105-110; *Saluka Investments BV v. Czech Republic*, Partial Award, 17 March 2006, paras. 203, 204, 217.

investment will only exist if the purchase of the shares is valid. The validity of the purchase is governed by the applicable domestic law.

EnCana Corp. v. Ecuador concerned a refusal to refund value added tax. The relevant BIT contained a choice of law clause that referred only to the BIT itself and to applicable rules of international law. The Tribunal said:

Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.¹²

Some BITs go even further and state after their definition of “investments” that “[t]he meaning and scope of the assets above mentioned shall be determined by the laws and regulations of the Party in whose territory the investment was made”.¹³ The Tribunal in *Gas Natural* found that this provision merely concerned the modalities of the exercise of rights and not the basic question whether the assets in question were part of the “investments” protected by the BIT. It said:

The rights appertaining to shareholders under the law pursuant to which the corporation is organized are, as the second paragraph of Article I(2) states, subject to the law of Argentina. That law would determine, for example, how shareholders’ meetings are convened, how directors are elected, what accounts must be maintained, etc. But the shares themselves, when held by a national of a party to the Treaty, clearly constitute an “investment” as defined in the Treaty.¹⁴

III. Types of Property

1. Immovable and other Tangible Property

It is beyond doubt that ownership of immovable property and of tangible assets is protected by both systems. Practice under Art. 1, 1st Protocol shows a number of instances in which these two types of possessions were the objects of proceedings.¹⁵

¹² *EnCana Corporation v. Ecuador*, Award, 3 February 2006, para. 184.

¹³ Art. I(2) of the Argentine-Spain BIT.

¹⁴ *Gas Natural SDG, S.A. v. Argentina*, Decision on Jurisdiction, 17 June 2005, para. 34 [hereinafter *Gas Natural v. Argentina*].

¹⁵ *Wiggins v. United Kingdom* (1978) 13 DR 40 at p. 46 (Decision on Admissibility of 8 February 1978), (“The Commission furthermore does not accept the view of the Government that the term ‘possessions’ within the meaning of that provision should be limited to moveable property only”); *Sporrong and Lönnroth v. Sweden* (App nos 7151/75 and 7152/75) (1982) Series A no 52;

Investment law also shows instances of takings of land and buildings thereon as well as of moveable property.¹⁶ However, direct expropriation of immovable and other tangible property has become exceptional. Most of the more recent cases concern indirect expropriations which typically affect incorporeal and intangible property.

2. Claims and Rights to Performance

Judicial practice both in the field of human rights and of investment law is unanimous in extending the concept of the protected property to rights arising from contracts and other types of claims.

The ECHR has developed a uniform practice whereby a legitimate expectation of a property right is sufficient for purposes of Art. 1, 1st Protocol. In *Slivenko v. Latvia* it said:

“[p]ossessions” can be “existing possessions” or assets, including claims by virtue of which the applicant can argue that he or she has at least a “legitimate expectation” of acquiring effective enjoyment of a property right.¹⁷

Legitimate expectations and hence protection under Art. 1, 1st Protocol will exist where the applicant has obtained an enforceable arbitral award or judgment.¹⁸

James v. United Kingdom (App no 8793/79) (1986) Series A no 98; *Poiss v. Austria* (App no 9816/82) (1987) Series A no 117; *Erkner and Hofauer v. Austria* (App no 9616/81) (1987) Series A no 117; *Wiesinger v. Austria* (App no 11796/85) (1991) Series A no 213; *Prötsch v. Austria* (App no 15508/89) ECHR 1996-V; *Håkansson and Sturesson v. Sweden* (App no 11855/85) (1990) Series A no 171-A; *Piron v. France* (App no 36436/97) ECHR 14 November 2000; *Wüttek v. Germany* (App no 37290/97) ECHR 2002-X, at paras. 43 et seq.; *Öneryıldız v. Turkey* (App no 48939/99) ECHR 18 June 2002, at paras. 141-142; *Öneryıldız* 2004, *supra* (note 7) at para. 124.

¹⁶ *Amco v. Indonesia*, Award, 31 May 1990, 1 ICSID Reports 569; *Biloune v. Ghana*, Award, 27 October 1989, 95 I.L.R. 183; *Compañía del Desarrollo de Santa Elena, S.A v. Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153; *Middle East Cement v. Egypt*, Award, 12 April 2002, 7 ICSID Reports 178, paras. 131-151; *Generation Ukraine v. Ukraine*, Award, 16 September 2003; *GAMI Investments, Inc. v. Mexico*, Award, 15 November 2004 [hereinafter *GAMI v. Mexico*].

¹⁷ *Slivenko and Others v. Latvia* (App no. 48321/99) (GC) ECHR 2002-II, para. 121; see also *Van der Musselle v. Belgium* (App no 8919/80) (1983) Series A no 70, para. 48; *Pine Valley Developments Ltd. and Others v. Ireland* (App no 12742/87) (1991) Series A no 222, para. 51; *Pressos Compania Naviera S.A. u.a. v. Belgium* (App no 17849/91) (1995) Series A no 332, para. 31; *Gospodinova, supra* (note 10); *Malhous, supra* (note 10); *Bugarski and von Vuchetich v. Slovenia* (App no 44142/98) ECHR 3 July 2001; *Prince Hans-Adam II of Liechtenstein v. Germany* (App no 42527/98) (GC) ECHR 2001-VIII, para. 83; *Onzounis and Others v. Greece* (App no 49144/99) ECHR 18 April 2002, para. 24; *Polacek and Polackova v. Czech Republic* (App no 38645/97) ECHR 10 July 2002, para. 62; *Jantner, supra* (note 10) para. 27; *Des Fours Waldrode v. Czech Republic* (App no 40057/98) ECHR 4 March 2003; *Harrach v. Czech Republic* (App no 77532/01) ECHR 27 May 2003; *Kopecký, supra* (note 10) at para. 35.

Similarly, rights to restitution under national law are protected.¹⁹ However, no legitimate expectation and, therefore, no protection exist where the restitution is subject to a condition which has not been fulfilled. In *Malhous v. Czech Republic* the ECHR said:

[The r]ight to restitution was subject to the condition that the property in question was still in the possession of the State or of a legal person at the time of the entry into force of that Act – a condition which was not met in the applicant’s case. The Court concludes that Mr Malhous could not have had any “legitimate expectation” of realising his claim to restitution of his father’s property.²⁰

Difficult borderline cases arise where the existence of the right is disputed but the applicant has an arguable claim. Under the practice of the ECHR an arguable claim is not sufficient to establish a legitimate expectation. In *Kopecký*, a restitution case, the Court, after discussing its previous practice²¹ in some detail, reached the conclusion that the decisive criterion was whether the conditions for the restitution were objectively established. It said:

... the Court notes that the applicant’s restitution claim was a conditional one from the outset and that the question whether or not he complied with the statutory requirements was to be determined in the ensuing judicial proceedings. The courts ultimately found that that was not the case. The Court is therefore not satisfied that, when filing

¹⁸ *Stran Greek Refineries and Stratis Andreadis v. Greece* (App no 13427/87) (1994) Series A no 301-B, para. 59; *Brumarescu v. Romania* (App no 28342/95) ECHR 1999-VII, para. 70; *O.N. v. Bulgaria* (App no 35221/97) ECHR 6 April 2000 (Decision on Admissibility); *Sciortino v. Italy* (App no 30127/96) ECHR 18 October 2001; *Burdov v. Russia* (App no 59498/00) ECHR 2002-III, paras. 9, 40; *Ryabykh v. Russia* (App no 52854/99) ECHR 2003-IX, para. 61; *Bocancea et al v. Moldova* (App no 18872/02) ECHR 6 July 2004, para. 36; *Jasiuniene v. Lithuania* (App no 41510/98) ECHR 6 March 2003, para. 44; *Timofeyev v. Russia* (App no 58263/00) ECHR 23 October 2003, paras. 45, 46; *Sabin Popescu v. Romania* (App no 48102/99) ECHR 2 March 2004, para. 79; *Prodan v. Moldova* (App no 49806/99) ECHR 18 May 2004, para. 59; *Bronionski, supra* (note 7) at paras. 130-133; *Piven v. Ukraine* (App no 56849/00) ECHR 29 June 2004, para. 46; *Croitriu v. Romania* (App no 54400/00) ECHR 9 November 2004, para. 34.

¹⁹ *Gospodinova, supra* (note 10); *Jantner, supra* (note 10) at para. 34; *Kopecký, supra* (note 10) at para. 35; *von Maltzan, supra* (note 10) at para. 74; *Bronionski, supra* (note 7) at paras. 125, 132.

²⁰ *Malhous, supra* (note 10). See also *Lindner and Hammermayer v. Romania* (App no 35671/97) ECHR 3 December 2002; *Brezny & Brezny v. Slovakia* (App no 23131/93) (1996) 85 DR 65, at p. 80 (ECommHR); *Gratzinger and Gratzingerova v. Czech Republic* (App no 39794/98) (GC) ECHR 2002-VII, at para. 69; *Bugarski, supra* (note 17); *Prince Hans-Adam II of Liechtenstein, supra* (note 17); *Polacek and Polackova, supra* (note 17).

²¹ *Pine Valley Developments Ltd., supra* (note 17) at para. 51; *Stretch v. United Kingdom* (App no. 44277/98) ECHR 24 June 2003, para. 35; *Pressos Compania Naviera S.A., supra* (note 17) at para. 31; *Smokovitis v. Greece* (App no 46356/99) ECHR 11 April 2002, para. 32.

his restitution claim, it can be said to have been sufficiently established to qualify as an “asset” attracting the protection of Article 1 of Protocol No. 1.²²

It follows that under the practice of the ECHR, claims will be protected if they are enforceable or based on a justified expectation concerning the existence of a property right. An arguable claim will not suffice for this purpose.

In international investment law it is long established that contractual rights are protected.²³ The definitions of “investment” in BITs are in line with this tradition. They typically include rights conferred by contract, often referring to concessions or licenses.

The judicial authority for the proposition that rights arising under contracts are protected against expropriation goes back for over a century.²⁴ It is reinforced by the case law of the Iran-US Claims Tribunal²⁵ and is reflected in recent decisions of investment tribunals.²⁶

²² *Kopecký*, *supra* (note 10) at para. 58. See also *Jantner*, *supra* (note 10); *von Maltzan et al*, *supra* (note 10) at paras. 97 *et seq.*

²³ See G. C. CHRISTIE, What Constitutes a Taking of Property under International Law?, 38 *British Year Book Intl Law* 305 at p. 311 (1962); B. H. WESTON, ‘Constructive Takings’ under International Law: A Modest Foray into the Problem of ‘Creeping Expropriation’, 16 *Virginia J Intl Law* 103 at pp. 112-13 (1975); R. HIGGINS, The Taking of Property by the State: Recent Developments in International Law, 176 *Collected Courses* 263 at p. 271 (1982-III); G. SACERDOTI, Bilateral Treaties and Multilateral Instruments on Investment Protection, 269 *Collected Courses* 251 at p. 381 (1997); Taking of Property, UNCTAD Series on issues in international investment agreements, New York/Geneva, United Nations, 2000, p. 36; T. WAELDE/A. KOLO, Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law, 50 *Intl and Comparative Law Quarterly* 811 at p. 835 (2001); 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 J* 1 at p. 14 (2003); J. PAULSSON/Z. DOUGLAS, Indirect Expropriation in Investment Treaty Arbitrations, in: N. Horn, P. Kröll (eds.), *Arbitrating Foreign Investment Disputes*, 2004, p. 145, at p. 152; S. ALEXANDROV, Breaches of Contract and Breaches of Treaty, The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*, 5 *The J of World Investment & Trade* 555 at p. 559 (2004).

²⁴ *Rudloff Case*, Interlocutory Decision, 1903, 9 *Rep Intl Arbitral Awards* 244, 250 (1959); *Norwegian Shipowners’ Claims (Norway v. United States)*, Award, 13 October 1922, 1 *Rep Intl Arbitral Awards* 307, 318, 325; *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ Series A No 7 (1927) at p. 44.

²⁵ *Starrett Housing Corp. v. Iran*, 19 December 1983, 4 *Iran-US CTR* 122, 156; *Amoco International Finance Corp. v. Iran*, 14 July 1987, 15 *Iran-US CTR* 189 at para. 108; *Phillips Petroleum Co. v. Iran*, 29 June 1989, 21 *Iran-US CTR* 79 at para. 76. See also G. H. ALDRICH, What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal, 88 *American J Intl Law* 585 at p. 598 (1994).

²⁶ *Eureko B. V. v. Poland*, Partial Award, 19 August 2005, para. 241.

The ICSID Tribunal in *SPP v. Egypt*²⁷ examined whether the measures by Egypt affecting rights under a contract to build hotels may amount to an expropriation. The Tribunal said:

164. Nor can the Tribunal accept the argument that the term “expropriation” applies only to *jus in rem*. The Respondent’s cancellation of the project had the effect of taking certain important rights and interests of the Claimants. ... Clearly, those rights and interests were of a contractual rather than *in rem* nature. However, there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefor.

165. Moreover, it has long been recognized that contractual rights may be indirectly expropriated. In the judgment of the Permanent Court of International Justice concerning *Certain German Interests in Polish Upper Silesia*, the Court ruled that, by taking possession of a factory, Poland had also “expropriated the contractual rights” of the operating company. (PCIJ, Series A, No. 7, 1926, at p. 44).²⁸

In *Tokios Tokelės v. Ukraine*²⁹ the Respondent had argued that the dispute did not “arise directly out of an investment” because the allegedly wrongful acts by Ukrainian governmental authorities (including unwarranted and unreasonable investigations of the Claimant’s business, unfounded judicial actions to invalidate the Claimant’s contracts, and false, public accusations of illegal conduct by the Claimant) were not directed against the physical assets owned by the Claimant, *i.e.*, its facilities and equipment.³⁰ The Tribunal rejected this argument and said:

... the Respondent’s obligations with respect to “investment” relate not only to the physical property of Lithuanian investors but also to the business operations associated with that physical property.³¹

*Bayindir v. Pakistan*³² concerns a contract between a foreign investor and the Pakistan National Highway Authority (NHA) about the construction of a motorway. While construction was underway NHA terminated the contract and subsequently entrusted the completion of the project to a local contractor. With respect to expropriation, the Tribunal said in its decision on Jurisdiction:

²⁷ *SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Reports 189.

²⁸ *Ibid.* at pp. 228-229. See also *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Reports 89, para. 98.

²⁹ *Tokios Tokelės v. Ukraine*, *supra* (note 11).

³⁰ *Ibid.* at para. 90.

³¹ *Ibid.* at para. 92.

³² *Bayindir* (Jurisdiction), *supra* (note 4). See also *Impregilo S. p. A. v. Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 274.

It is not disputed that expropriation is not limited to *in rem* rights and may extend to contractual rights.³³

Investment tribunals have accepted a wide variety of claims arising from contracts as constituting an investment and as enjoying protection from expropriation and other interferences. These claims arose from loans and other financial instruments,³⁴ civil engineering and construction contracts,³⁵ licenses to operate waste disposal,³⁶ pre-shipment inspections³⁷ and rights under energy purchase contracts.³⁸

3. Shareholding

The protection of shareholders' rights raises a number of issues. The most basic one is whether shareholding qualifies as a protected right at all. The second one concerns the position of shareholders in relation to the company. In particular, does a minority shareholder have the right to pursue a claim independently of the company? Finally, are shareholders entitled to pursue a claim only in respect of their ownership of the shares or also for diminution of the value of the company?

It is well established that ownership of shares is protected, in principle, by Art. 1, 1st Protocol. *Bramelid & Malmström v. Sweden*³⁹ concerned the forced sale of shares to the majority owner. The Commission said:

A company share is a complex thing: certifying that the holder possesses a share in the company, together with the corresponding rights (especially voting rights), it also constitutes, as it were, an indirect claim on company assets. In the present case, there is no doubt that the NK shares had an economic value. The Commission is therefore of the

³³ *Bayindir* (Jurisdiction) *ibid.* at para. 255.

³⁴ *Fedax N. V. v. The Republic of Venezuela*, Award, 9 March 1998, (1998) 37 I.L.M. 1391; *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 335; *CDC v. Seychelles*, Award, 17 December 2003. But see *Joy Mining* (Jurisdiction), *supra* (note 4) at paras. 41 et seq.

³⁵ *Salini Costruttori v. Morocco*, *supra* (note 4) at paras. 45-58; *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, 29 November 2004, (2005) 44 I.L.M. 573 para. 67; *Impregilo v. Pakistan*, *supra* (note 32), paras. 13 et seq.; *Bayindir* (Jurisdiction), *supra* (note 4) at paras. 111-121, 127-129.

³⁶ *Metalclad v. Mexico*, Award, 30 August 2000, 5 ICSID Reports 209; *Tecmed v. Mexico*, Award, 29 May 2003, (2004) 43 I.L.M. 133; *Waste Management v. Mexico*, Award, 30 April 2004, (2004) 43 I.L.M. 967.

³⁷ *SGS v. Pakistan*, *supra* (note 4) at paras. 75-78, 123-129, 133-140; *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 515, paras. 99-112.

³⁸ *Nycomb v. Latvia*, Award, 16 December 2003, para. 4.3.3 d); *Petrobart v. Kyrgyz Republic*, Award, 29 March 2005, pp. 69-72.

³⁹ *Bramelid & Malmström v. Sweden* (App nos 8588/79, 8589/79) (1982) 29 DR 64 (ECommHR Decision on Admissibility).

opinion that, with respect to Art. 1 of the First Protocol, the NK shares held by the applicants were indeed “possessions” giving rise to a right of ownership.⁴⁰

The ECHR has confirmed this position in a number of cases.⁴¹ It has pointed out that the share certifies that the holder possesses a portion in the company together with the corresponding rights. This was not just an indirect claim on the company’s assets but covered also other rights like voting rights and the right to influence the company. The shares undoubtedly had an economic value and constituted “possessions” within the meaning of Art. 1, 1st Protocol.⁴²

At the same time, the ECHR and the Commission have adopted a restrictive attitude towards shareholders who acted independently of the company in pursuit of claims arising from acts that adversely affected the company. In some cases, claims by majority shareholders were admitted on the ground that the claimants had carried out their own business through the medium of the companies and were hence directly affected. The fact that it was not their shareholding as such that was affected, but rights of the company which in turn led to a loss in the value of the shares, did not affect the standing of these shareholders.⁴³

In contrast, claims by minority shareholders were declared inadmissible even though the value of their shares had been affected.⁴⁴

But majority shareholding in itself will not be decisive for an independent standing of shareholders. In *Agrotexim Hellas S.A. et al v. Greece* none of the Applicants held a majority of the shares but jointly they owned 51.35%. The Commission said:

... the question whether a shareholder may claim to be victim of measures affecting a company cannot be determined on the sole criterion of whether the shareholder holds the majority of the company shares. This element is an objective and important indication but other elements may also be relevant. ... [I]t [the Commission] has previously taken into account the fact that an applicant shareholder was carrying out its own business through the medium of the company and that he had a personal interest in the subject matter of the complaint ... It has also considered whether it was open to

⁴⁰ *Ibid.* at p. 81.

⁴¹ See e.g. *Lithgow et al v. United Kingdom* (App nos 9006/80, 9261/81, 9263/81) (1986) Series A no 102.

⁴² *Sovtransavto Holding v. Ukraine* (App no 48553/99) ECHR 2002-VII, at paras. 91, 92.

⁴³ *X v. Austria* (App no 1706/62) (1966) 9 Yearbook 130 (ECommHR Decision); *Kaplan v. United Kingdom* (App no 7598/76) (1980) 21 DR 5 at p. 23 (ECommHR, Report adopted on 17 July 1980 pursuant to Art. 31).

⁴⁴ *Yarrow P.L.C. et al v. United Kingdom* (App no 9266/81) (1983) 30 DR 155 at p. 185 (ECommHR Decision on Admissibility).

the company itself, being the direct victim, to lodge an application with the Commission.⁴⁵

The ECHR agreed that the decisive criterion was the impossibility of an application by the company itself. The Court said:

... the piercing of the “corporate veil” or the disregarding of a company’s legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or - in the event of liquidation - through its liquidators. ... This principle has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice (Barcelona Traction, Light and Power Company Limited, judgment of 5 February 1970, Reports of judgments, advisory opinions and orders 1970, pp. 39 and 41, paras. 56-58 and 66).⁴⁶

It follows from the above practice that under the European system an independent right of shareholders under Art. 1, 1st Protocol is subsidiary to the right of the company itself and will be recognized only in exceptional cases. This would be the case, in particular, where the company itself did not have the possibility to pursue the claim.

The starting point under the American Convention on Human Rights is different. Unlike Art. 1, 1st Protocol of the European Convention, Art. 21 of the American Convention does not refer to the property of juridical persons. Under the established practice of the Inter-American Commission on Human Rights there is no jurisdiction for applications alleging violations of property rights of juridical persons.

This has led the Inter-American Commission to deny standing even where the application had been made not by the company but by its controlling shareholder. This followed from the close connexion between the individual and the company, from the fact that the impugned acts had been directed against the company rather than against the individual and from the exhaustion of local remedies by the company rather than by the individual.⁴⁷

On the other hand, the Inter-American Court has recognized the principle that shares are property in the sense of the Convention. In *Ivcher Bronstein v. Peru*⁴⁸ the applicant was deprived of his nationality, in order to remove him from the editorial control of the TV channel whose shares he owned. The Court said:

⁴⁵ *Agrotexim Hellas S.A. and Others v. Greece*, (App no 14807/89) 72 DR 148, at pp. 155 and 156 (ECommHR Decision on Admissibility).

⁴⁶ *Agrotexim and Others v. Greece* (1) (App no 14807/89) (1995) Series A no 330-A, para. 66.

⁴⁷ *Bendeck-COHDINSA v. Honduras*, Inter-America Commission on Human Rights Report N° 106/99 (27 September 1999) at paras. 17-30.

⁴⁸ *Ivcher Bronstein v. Peru (Judgment)*, Inter-American Court of Human Rights Series C No 74 (6 February 2001).

“Property” may be defined as those material objects that may be appropriated, and also only rights that may form part of a person’s patrimony; this concept includes all movable and immovable property; corporal and incorporeal elements, and any other intangible object of any value. ... [I]t may be concluded that ... he owned shares in the Company and that, in 1986, they represented 53,95%, and he was therefore the Company’s majority shareholder. Obviously, this participation in the share capital could be evaluated and formed part of its owner’s patrimony from the moment of its acquisition; as such, that participation constituted a property over which Mr. Ivcher had the right to use and enjoyment.⁴⁹

Developments in international investment law have been far more generous towards shareholders than in human rights law.⁵⁰

Investments often take place through the acquisition of shares in a company that has a nationality different from that of the investor. In investment law, unlike human rights law, the claimant’s nationality is essential. In particular, only foreign investments are protected.

The classical position was represented by the *Barcelona Traction* case:⁵¹ under its basic principle only corporate rights would be protected and the corporation had to have the right nationality.⁵²

Under a doctrine that emphasizes corporate personality, only the corporation’s – but not the shareholder’s – nationality would matter. The issue is particularly acute where, as is often the case, investments are made through companies incorporated in the host State. Many States require a locally incorporated company as a precondition for the investment. The local company would not as such qualify as a foreign investor and would hence be excluded from resorting to international arbitration.⁵³ This would have deprived a large proportion of foreign investment of international protection.

Contemporary treaty law offers a solution that gives independent standing to shareholders: most BITs include shareholding or participation in a company in their definitions of “investment”. In this way, the participation in the locally in-

⁴⁹ *Ibid.* at paras. 122, 123.

⁵⁰ For detailed treatment see S. A. ALEXANDROV, The ‘Baby Boom’ of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as ‘Investors’ and Jurisdiction *Ratione Temporis*, 4 Law and Practice Intl Courts and Tribunals 19 (2005); C. SCHREUER, Shareholder Protection in International Investment Law, in: P.-M. Dupuy/B. Fassbender/M.N. Shaw et al. (eds.) *Völkerrecht als Wertordnung, Festschrift für Christian Tomuschat*, pp. 601-619 (2006).

⁵¹ *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)* (Judgment) ICJ Reports (1970), p. 4.

⁵² The ICJ recognized that this might be different under treaties: at paras. 89-90. The ICJ also recognized that the exclusion of shareholders’ rights might not apply if the company was registered in the State inflicting the damage: *ibid.* at para. 92.

⁵³ Art. 25(2)(b) of the ICSID Convention foresees the possibility of an agreement between the investor and the host State to treat a locally incorporated company as a foreign investor because of foreign control.

corporated company becomes the investment. Even though the local company is unable to pursue the claim internationally, the foreign shareholder in the local company may pursue the claim in his own name. Put differently, the local company is not endowed with investor status but the participation therein is seen as the investment. The shareholder may then pursue claims for adverse action by the host State against the local company that affects its value and profitability. Arbitral practice on this point is extensive and uniform.⁵⁴

In *Alex Genin v. Estonia*,⁵⁵ the Claimants, United States nationals, were the principal shareholders of EIB, a financial institution incorporated under the law of Estonia. The Tribunal rejected the Respondent's argument that the claim did not relate to an "investment" as understood in the BIT. It said:

The term "investment" as defined in Art. I (a)(ii) of the BIT clearly embraces the investment of Claimants in EIB. The transaction at issue in the present case, namely the Claimants' ownership interest in EIB, is an investment in "shares of stock or other interests in a company" that was "owned or controlled, directly or indirectly" by Claimants.⁵⁶

Minority shareholders too have been accepted as claimants and have been granted protection under the respective treaties.⁵⁷ In *CMS v. Argentina*,⁵⁸ jurisdic-

⁵⁴ See e.g.: *Antoine Goetz and others v. Republic of Burundi*, Decision of 2 September 1998, 6 ICSID Reports 5; *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396; *Compañía de Aguas del Aconquija, P.A. & Compagnie Générale des Eaux v. Argentine Republic* (the *Vivendi* case), Decision on Annulment, 3 July 2002, 6 ICSID Reports 340 [hereinafter *Vivendi*]; *Azurix Corp. v. Argentine Republic*, Decision on Jurisdiction, 8 December 2003, (2004) 43 I.L.M. 259; *LG&E Energy Corp. v. Argentine Republic*, Decision on Jurisdiction, 30 April 2004; *AMT v. Zaïre*, Award, 21 February 1997, (1997) 36 I.L.M. 1531, 5 ICSID Reports 11; *Alex Genin, Eastern Credit Limited, Inc. and A.P. Baltoil v. The Republic of Estonia*, Award, 25 June 2001, 6 ICSID Reports 241 [hereinafter *Alex Genin v. Estonia*]; *CME Czech Republic B. V. (The Netherlands) v. The Czech Republic*, Partial Award, 13 September 2001; *Camuzzi v. Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 12, 78-82, 140-142; *Gas Natural v. Argentina*, *supra* (note 14) at paras. 32-35, 50-51; *AES Corporation v. Argentina*, *supra* (note 4) at paras. 85-89; *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal S.A. v. Argentina (Vivendi II)*, Decision on Jurisdiction, 14 November 2005, paras. 88-94; *Continental Casualty v. Argentina*, Decision on Jurisdiction, 22 February 2006, paras. 51-54, 76-89.

⁵⁵ *Alex Genin v. Estonia*, *ibid.*

⁵⁶ *Ibid.* at para. 324.

⁵⁷ See e.g.: *AAPL v. Sri Lanka*, Award, 27 June 1990, 4 ICSID Reports 246; *LANCO v. Argentina*, Decision on Jurisdiction, 8 December 1998, 5 ICSID Reports 367; *Vivendi*, *supra* (note 54); *CMS Gas Transmission Company v. Republic of Argentina*, Decision on Jurisdiction, 17 July 2003, (2003) 42 I.L.M. 788; *Champion Trading Co. and Ameritrade International Inc. v. Arab Republic of Egypt*, Decision on Jurisdiction, 21 October 2003; *GAMI v. Mexico*, *supra* (note 16); *LG&E Energy v. Argentina*, *supra* (note 54) at paras. 50-63; *Sempra Energy v. Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 92-94; *El Paso Energy v. Argentina*, Decision on Jurisdiction, 27 April 2006, para. 138.

⁵⁸ *CMS Gas Transmission v. Argentina*, *ibid.*

tion was based on the BIT between Argentina and the United States. The claimant owned 29.42% of TGN, a company incorporated in Argentina. Argentina argued that CMS, as a minority shareholder in TGN, could not claim for any indirect damage resulting from its participation in the Argentinean company.⁵⁹ The Tribunal rejected this argument.⁶⁰ It said:

The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.⁶¹

Furthermore, it held that

[t]here is indeed no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of its shares.⁶²

This practice has also been extended to indirect shareholding through an intermediate company.⁶³ The same technique has been employed where the affected company was incorporated not in the host State but in a third State.⁶⁴

This shareholder protection extends not only to ownership in the shares but also to the assets of the company. Adverse action by the host State in violation of treaty guarantees affecting the company's economic position gives rise to rights by the shareholders.⁶⁵ In *GAMI v. Mexico*,⁶⁶ the claimant, a U.S. registered corporation, held a 14.18% equity interest in GAM, a Mexican registered corporation. Mexico had expropriated a number of mills belonging to GAM. The Tribunal said:

⁵⁹ *Ibid.* at paras. 36, 37.

⁶⁰ *Ibid.* at paras. 47-65.

⁶¹ *Ibid.* at para. 48.

⁶² *Ibid.* at para. 51. To the same effect see *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, Decision on Jurisdiction, 14 January 2004, paras. 39, 44, 49 [hereinafter *Enron v. Argentina* (Jurisdiction)] and Decision on Jurisdiction (Ancillary Claim), 2 August 2004, paras. 21, 22, 29, 39 [hereinafter *Enron v. Argentina* (Ancillary)].

⁶³ See e.g.: *Siemens A.G. v. Argentine Republic*, Decision on Jurisdiction, 3 August 2004, (2005) 44 I.L.M. 138; *Enron v. Argentina* (Jurisdiction), *supra* (note 62); *Camuzzi v. Argentina*, *supra* (note 54) at para. 9; *Gas Natural v. Argentina*, *supra* (note 14) at paras. 9, 10, 32-35.

⁶⁴ *Ronald P. Lauder v. The Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66; *Waste Management v. Mexico*, *supra* (note 36).

⁶⁵ *CMS Gas Transmission v. Argentina*, *supra* (note 57) at paras. 59, 66-69; *Azurix v. Argentina*, *supra* (note 54) at paras. 69, 73; *Enron v. Argentina* (Jurisdiction), *supra* (note 62) at paras. 35, 43-49, 58-60 and *Enron v. Argentina* (Ancillary), *supra* (note 62) at paras. 17, 34-35; *Siemens v. Argentina*, *supra* (note 63) at paras. 125, 136-150; *GAMI v. Mexico*, *supra* (note 16) at paras. 26-33; *Camuzzi v. Argentina*, *supra* (note 54) at paras. 45-67; *Sempra Energy v. Argentina*, *supra* (note 57) at paras. 73-79; *Continental Casualty v. Argentina*, *supra* (note 54) at para. 79; *Bogdanov v. Moldova*, Award, 22 September 2005, para. 5.1.

⁶⁶ *GAMI v. Mexico*, *supra* (note 16).

The fact that a host State does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment.⁶⁷

...

GAMI's shareholding was never expropriated as such. GAMI contends that Mexico's conduct impaired the value of its shareholding to such an extent that it must be deemed tantamount to expropriation.⁶⁸

This generous extension of procedural rights to shareholders is likely to lead to some interesting situations. Practical problems may arise where claims are pursued in parallel, especially by different shareholders or groups of shareholders. In addition, the affected company itself may pursue certain remedies while a group of its shareholders may pursue different ones. The situation becomes even more complex where indirect shareholding through intermediaries is combined with minority shareholding. In such a case shareholders and companies at different levels may pursue conflicting or competing litigation strategies that may be difficult to reconcile and coordinate.

IV. Property as a Combination of Rights

The ownership of an economic enterprise may be compared to a bundle of sticks. Each stick represents a distinct and separate right. The European Court of Human Rights was confronted with this phenomenon in two respects:

First: cases where someone owns only one or several but not all sticks of the bundle. The question arose, whether this specific stick (right) enjoys property protection standing on its own. The Court answered this question in the affirmative.

In *Iatridis v. Greece*⁶⁹ the Court accepted the good will of a cinema as a "possession" within the meaning of Art. 1, 1st Protocol. The case concerned the eviction of the operator of a cinema who owned the cinema equipment but had only leased the cinema site. The Court said in this respect:

[B]efore the applicant was evicted, he had operated the cinema for eleven years under a formally valid lease without any interference by the authorities, as a result of which he had built up a clientele that constituted an asset.⁷⁰

Second: someone owns real estate or an enterprise, *i.e.* the whole bundle of sticks and is deprived only of one or several of them but not of all of them. Is the

⁶⁷ *Ibid.* at para. 33.

⁶⁸ *Ibid.* at para. 35.

⁶⁹ *Iatridis v. Greece* (App no 31107/96) ECHR 1999-II.

⁷⁰ *Ibid.* at para. 54. Reference omitted.

deprivation of one of the sticks to be considered an expropriation of this single right or only a limitation of the whole bundle? In the first case, the second sentence of paragraph 1 of Art. 1, 1st Protocol (deprivation of possession) would be applicable, whereas in the second case, paragraph 2 of Art. 1, 1st Protocol (control of the use of property) would govern the situation. As will be illustrated, the Court did not look at single rights in isolation.

*Tre Traktörer v. Sweden*⁷¹ concerned the revocation of a licence to serve alcoholic beverages. The Court accepted the economic interest in the running of the restaurant as a “possession” within the meaning of Art. 1, 1st Protocol. It said:

[T]he Court takes the view that the economic interests connected with the running of Le Cardinal were “possessions” for the purposes of Art. 1 of the Protocol. Indeed, the Court has already found that the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company’s business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant.⁷²

Nevertheless the Court did not regard the interference in *Tre Traktörer v. Sweden* as expropriation as the measure did not take away all the rights of the bundle, but it instead considered the case under the second paragraph of Art. 1 of the Protocol (control of the use of property). The Court said in this respect:

Severe though it may have been, the interference at issue did not fall within the ambit of the second sentence of the first paragraph. The applicant company, although it could no longer operate Le Cardinal as a restaurant business, kept some economic interests represented by the leasing of the premises and the property assets contained therein, which it finally sold in June 1984. There was accordingly no deprivation of property in terms of Art. 1 of the Protocol.⁷³

The case *Fredin v. Sweden*⁷⁴ concerned the revocation of the applicant’s permit to extract gravel. When assessing whether the measure amounted to a *de facto* expropriation the Court took into account the effects of the revocation on the surrounding properties also owned by the applicant. It said:

Nothing indicates, however, that the revocation directly affected these other properties. Viewing the question from this perspective, the Court does not find it established that the revocation took away all meaningful use of the properties in question.⁷⁵

This finding was one relevant element for regarding the interference as control of the use of property under the second paragraph of Art. 1, 1st Protocol.

Thus the Court is prepared to accord property protection to single rights out of a bundle. But for a deprivation in the sense of the second sentence of para-

⁷¹ *Tre Traktörer v. Sweden* (App no 10873/84) (1989) Series A no 159.

⁷² *Ibid.* at para. 53. Reference omitted.

⁷³ *Ibid.* at para. 55. Reference omitted.

⁷⁴ *Fredin v. Sweden (No. 1)* (App no 12033/86) (1991) Series A no 192.

⁷⁵ *Ibid.* at para 45. Reference omitted.

graph 1 to occur there must be a deprivation of the whole bundle of rights. If only some of the rights are taken, the Court will examine the case either under the second paragraph (control of the use of property) or under the first sentence of the first paragraph of Art. 1 (peaceful enjoyment of possessions).

When determining the existence of an “investment”, tribunals have emphasized repeatedly that what mattered was not so much ownership of specific assets but rather the combination of rights that were necessary for the economic activity at issue. The Tribunal in *CSOB v. Slovakia* said of the concept of an investment in the context of jurisdiction under the ICSID Convention:

An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.⁷⁶

In a similar vein, an ICSID Tribunal in *Enron v. Argentina*⁷⁷ said in this respect:

... an investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty. This particular aspect was explained by an ICSID tribunal as “the general unity of an investment operation” and by one other tribunal considering an investment based on several instruments as constituting “an indivisible whole”.⁷⁸

Under this theory it should not be permissible to focus on a particular aspect of an investment operation in isolation and to examine whether it constitutes an investment by itself. A claim which forms part of a larger series of transactions would not on its own qualify as an investment.

Tribunals have not always been faithful to the theory of investments as a combination of interrelated rights and transactions. In *Joy Mining v. Egypt*⁷⁹, the claimant had delivered and installed mining equipment. The transaction was secured by a bank guarantee. The claim before the Tribunal was for the return of the guarantee. The Tribunal paid lip service to the theory of totality of rights, saying that “a

⁷⁶ *CSOB v. Slovakia*, *supra* (note 34) at para. 72.

⁷⁷ *Enron v. Argentina* (Jurisdiction), *supra* (note 62).

⁷⁸ *Ibid.* at para. 70. Footnotes omitted. The case references are to *Holiday Inns v. Morocco* and to *Klöckner v. Cameroon*. See *Holiday Inns v. Morocco*, Decision on Jurisdiction, 1 July 1973. The decision in that case is unpublished. A detailed description is offered by P. LALIVE, The First “World Bank” Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems, 51 *British Year Book Intl Law* 123 (1980). *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 13 *et seq.*; Decision on Annulment, 3 May 1985, 2 ICSID Reports 95, 97-117.

⁷⁹ *Joy Mining* (Jurisdiction) *supra* (note 4).

given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole”.⁸⁰ Yet elsewhere the Tribunal denied the existence of an investment “as a bank guarantee is simply a contingent liability”.⁸¹ In other words, the Tribunal, rather than examining the entire transaction, looked at the bank guarantee, which was but one aspect of the operation, and examined whether it was an investment.⁸²

*Eureko B.V. v. Poland*⁸³ also appears to be at variance with the theory of the general unity of the investment operation. The case concerned a share purchase agreement between the investor and the Polish State under which the investor acquired a minority participation in a Polish company. A related agreement guaranteed the investor the right to acquire further shares that would have given it control over the company. Subsequently, Poland changed its privatization strategy and withdrew its consent to the acquisition of further shares by the investor. The Tribunal, in analyzing the existence of an investment, looked not so much at the overall transaction but at the specific rights of which the investor had been deprived. Of these, the investor’s corporate governance rights were particularly important since they had an independent economic value.⁸⁴ The Tribunal said:

The Tribunal has a measure of hesitation in finding that Eureko’s corporate governance rights under the SPA [Share Purchase Agreement], standing alone, qualify as an investment under the Treaty. On balance, however, it finds that those rights, critical as they were to the conclusion of the SPA and hence to the making of Eureko’s very large investment, do so qualify.⁸⁵

In other words, a particular right arising from the overall operation was equated with the investment as such.

V. Conclusion

This short comparison of the concept of property protected in human rights law and in international investment law shows remarkable differences. Similar issues are treated quite differently. In part this is evidently due to the fact that the questions that have arisen in one field are unlike those that have arisen in the other.

⁸⁰ *Ibid.* at para. 54.

⁸¹ *Ibid.* at para. 44.

⁸² The Tribunal also found that the overall transaction was an ordinary sales contract rather than an investment.

⁸³ *Eureko B. V. v. Poland*, *supra* (note 26).

⁸⁴ *Ibid.* at para. 145.

⁸⁵ *Ibid.* at para. 144.

Also, the treaties governing the two fields are differently worded. The diverse functions of human rights law and investment law may also have contributed to the diversity of outcomes. The restrictive attitude towards the nationality of claimants in investment law, which is absent from human rights law, has also contributed to the different approaches.

But these practical explanations are only part of a larger picture. Perhaps the most important reason for this divergence in legal development is the isolation in which the two fields of specialization operate. Notwithstanding evident similarities, there is little interaction and cross citation between decision makers and scholars in the two fields.⁸⁶ This in turn is part of a broader phenomenon of fragmentation in international law. Increasing specialization has led to epistemic sub-communities with their own specialized terminologies which barely communicate with each other. Ideas and concepts from one field of international law are virtually unknown in another. Well-tested solutions adopted in one field are absent from another.

Initiatives to bridge the gaps between these areas of specialization are entirely feasible. They would have to start with advanced legal education, for instance courses co-taught by specialists in different yet related fields. Other possibilities are seminars for practitioners that straddle different fields and go beyond a description by specialists of their own areas of specialization. Finally, research projects that bring together the best parts of the experience of different fields may help to close the growing abyss between different fiefdoms within international law.

⁸⁶ See *e.g.* *Biloune v. Ghana*, *supra* (note 16) at p. 203 where the Tribunal explicitly declines to deal with human rights issues.