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The 'Human Nature' of International Investment Law

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1. Introduction

In the context of the 'fragmentation' narrative, international law regimes are often perceived as homogeneous, both in terms of the objective they pursue and the people who compose them.[1] Such is the case of international investment law (IIL) that is usually depicted as an investor-oriented setting and whose adjudicators are at times portrayed as constituting a homogeneous college. Therefore, it comes as no surprise that the relationships between IIL and human rights are addressed by mainstream literature as a matter of interaction between two different legal and social settings.[2]

In this article, I propose a different way of approaching and analyzing these relationships. Instead of conceiving of IIL and human rights as two different settings and focusing on how human rights can be incorporated within the IIL regime, it examines indeed the human rights dimension of IIL. By doing so, my objective is twofold. First, I aim at unraveling the human rights components this regime is made of. Second, I intend to demonstrate that the human

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[1] On 'fragmentation' and its counterpart, *i.e.*, 'unity', *see* International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification of International Law', Doc A/CN.4/L.682. Among an abundant literature, *see in particular* M. Craven, 'Unity, Diversity and the Fragmentation of International Law', 14 *Finnish Yearbook of International Law* (2003) 36; P.-M. Dupuy, *L'unité de l'ordre juridique international*, 'General Course of Public International Law', 297 *RCADI* (2002) 9; M. Koskenniemi, P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553; M. Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation', 17 *Finnish Yearbook of International Law* (2006) 1; B. Simma, D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *European Journal of International Law* (2006) 483; S. Singh, 'The Potential of International Law: Fragmentation and Ethics', 24 *Leiden Journal of International Law* (2011) 23.

[2] On the relation between IIL and human rights in general, *see in particular* P.-M. Dupuy, E.U. Petersmann, F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP, 2009); P.-M. Dupuy, J. Vinuales, 'Human Rights and Investment Disciplines: Integration in Progress', *in* M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds), *International Investment Law* (Baden Baden: Nomos, 2012); 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* (The Hague: Eleven International Publishing, 2007) 165; M. Jacob, 'International Investments Agreements and Human Rights' (2010) 1; L. Liberti, 'Investissements et droits de l'homme', *in* P. Kahn, T. Wälde (eds), *New Aspects of International Investment Law* (2007) 791; L.E. Peterson, 'Human Rights and Bilateral Investment Treaties – Mapping the Role of Human Rights Law Within Investor State Arbitration' (2009) 1; 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), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer* (Oxford: OUP, 2009) 678; B. Simma, 'Foreign Investment Arbitration: a Place for Human Rights?', 60 *International and Comparative Law Quarterly* (2011) 573.

rights dimension of the IIL regime has yet the potential to gain more importance because of the recent evolutions known by IIL.

To reach this objective and thereby reveal the 'human nature' of IIL, I analyze this regime through two lenses: normative and arbitral. As for the normative lens, it is my objective to shed light on the human rights dimension of the norms provided in international investment agreements (IIAs). In the context of this discussion, I claim for a double paradigmatic shift in the discourse of international (investment) lawyers. The first one relates to the 'conflict' discourse that has been capturing international legal scholarship for more than a decade.[3] Indeed, I argue that the conflicting situations that arbitration tribunals are faced with are better conceived of in terms of a conflict of interests than in terms of a conflict of norms. In relation to this, the second paradigmatic shift concerns the way the law-application process is conceptualized. I put forth the idea that this process should be regarded as an argumentative process, more than as an interpretative one (Section 2). To illustrate the practical dimension of this double paradigmatic shift, I analyze various scenarios raising the question of the violation of the norms on indirect expropriation and the fair and equitable treatment (FET) by a human rights state measure. I then proceed with the analysis of the 'human nature' of IIL by focusing on investment arbitration. In light of the study of the evolution of the regime, I highlight the impact of this evolution on the profile of arbitrators and features of arbitration proceedings and analyze how these evolutions reinforce the 'human nature' of IIL (Section 3).

2. The 'human nature' of international investment norms

One of the main consequences of the 'fragmentation' narrative and of the homogeneous perception of international law regimes is to reduce their *ethos* and *telos*. In this context, IIL and its norms are very often regarded as 'pro-investor'. Of course, IIAs provide only investors with right and only states with obligations. However, this regime is much more complex, animated as it is by different interests, especially human rights ones. To demonstrate the 'human nature' of IIL norms, *i.e.*, indirect expropriation and the FET, I analyze them in three ways. First, I examine their normative features, in particular their indeterminacy, and discuss what this tells us with respect to the 'conflict' discourse between IIL and human rights

[3] *See in particular* G. Guillaume, 'The Proliferation of International Judicial Bodies: the Outlook for the International Legal Order', Address before the General Assembly of the United Nations (2000).

(Section 2.1).[4] Against this background, I then explain the limits of interpretation to understand the law-application process and propose to conceive of the former as an argumentative process. In particular, I stress the argumentative role played by balancing methods to unveil the 'human nature' of IIL (Section 2.2). Ultimately, I illustrate the functioning of these methods with fictitious scenarios where a non-discriminatory human rights state measure is claimed to be in breach of the FET (Section 2.3) and the provision on indirect expropriation (Section 2.4).

2.1. The shift in the 'conflict' discourse: from conflicts of norms to conflicts of interests

As is well-known, investment disputes, where the legality of state measures aiming at the protection/promotion of human rights was at stake, have so far scarcely resulted in the use of international human rights law by states. When it was used, arbitration tribunals often did not elaborate on this argument. Irrespective of the reasons put forth by tribunals[5] and the other potential reasons[6] that can explain this situation, it is worth noticing that when discussing the issue of the alleged violation of the provisions on indirect expropriation and the FET, mainstream literature analyzes this situation as raising a normative conflict between IIL and international human rights law. I argue that such situations cannot be regarded *ipso facto* as a conflict between these IIAs norms and international human rights norms. Two intertwined motives support this claim: the first one relates to the features of IIL provisions, the second to the nature of legal norms in general.

At first, one should emphasize that indirect expropriation and the FET do not confer an absolute protection to investors. Investors may well claim that each state measure that affects their investment is in breach of the above-mentioned provisions, this does not mean that such is the case. From the host state's point of view, the measures they enact to protect/promote human rights in particular, or more generally other public interests, cannot be regarded as being in violation of the indirect expropriation and FET provisions only because they have a negative impact on a foreign investment. These statements are obvious for all the lawyers

[4] The 'human nature' of IIAs provisions formulated in the preamble or in the body that expressly refer to human rights is not analyzed in this article.

[5] In the *Azurix* and *Siemens* cases for instance, the tribunals argued a lack of elaboration by the parties on the arguments concerning human rights instruments, *see Azurix Corp v. Argentine Republic*, Award, 14 July 2006, ICSID Case No. ARB/01/12, para. 261; *Siemens v. Argentine Republic*, Award, 17 February 2007, ICSID Case No. ARB/02/8, para. 79. For a detailed discussion of the arguments provided by the arbitration tribunals that had to deal with the international human rights law argument, *see* M. Hirsch, 'Investment Tribunals and Human Rights: Divergent Path', *in* P.-M. Dupuy, E.U. Petersmann, F. Francioni (eds), *supra* note 2, 97, at 99-106.

[6] *See infra* section 3.1.

familiar with investment treaty arbitration. But investment lawyers should go one step further and they should not consider that the state measures here at stake raise a normative conflict situation between IIL and international human rights law.
Indeed, to reach the conclusion that such a conflict exists, one would need to be faced with a situation where the host state is unable to comply with two obligations in a given situation. But at the outset, on the face of the drafting of most of the provisions on indirect expropriation and the FET and the vagueness they mirror,[7] it proves to be impossible to demonstrate that these norms provide for conducts that clash with the conducts required from host states by the norms of international human rights law they are bound by. Indeed, what is the normative substance of the reference to 'fairness' and 'equity' that would allow one to argue *a priori* that it is in conflict with international human rights norms, for instance the right to water? In the same vein, what is the normative substance of the reference to 'measures having an effect equivalent or tantamount to expropriation' that would enable one to reach this conclusion? Given their terseness, similar questions can be asked when focusing on international human rights norms and investigating their relationships with IIAs norms.[8] In other words, I argue that, *a priori*, there is no normative conflict between IIAs and international human rights norms. Such a conflict can only be said to exist *a posteriori* at the end of the law-application process. On the other hand, I defend the idea that the real conflict arbitration tribunals are faced with in this situation is a conflict of interests: a conflict between the interests of the host state to the protection/promotion of human rights and the interests of the investor.[9] IIAs provisions and their normative vagueness are only constitutive of the normative space where this conflict rages.

In order to highlight the debate on this conflict between the host states' and investors' interests, it is useful at this stage to formulate some theoretical remarks on the nature of legal norms in general. Furthermore, these remarks will inform the discussion of the IIAs provisions application process conducted in the following sections.

[7] A few provisions are more detailed, *see in particular* Article 6 ('Expropriation and compensation') and Annex B ('Expropriation') of the 2012 US Model Bilateral Investment Treaty.
[8] Because of the vagueness that characterizes economic, social and cultural rights, the UN Committee on Economic, Social and Cultural rights issued comments, especially on the substantive implication of the right to water and some of the state measures necessary to ensure its fulfillment, *see* Committee on Economic, Social and Cultural Rights, the Right to Water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), General Comment No. 15 (2002).
[9] This approach applies to all the conflicting situations, for instance with the interests of workers or environmental interests.

Many legal theorists, in particular Hart, have theorized the vagueness that is inherent to legal norms.[10] In a nutshell, Hart conceives of norms as being made of an 'open-texture' that is revealed when it is faced with a situation not foreseen by the law-maker. For Hart, the open-texture of legal norms appears in hard cases where the intention of the law-maker is unclear, opposed to easy cases where such an intention seems obvious. This opposition between hard-cases and easy-cases has been extensively discussed in the literature.[11] As I have argued elsewhere,[12] the situations of law-application cannot be classified into two well-defined boxes, but can be better understood in terms of a sliding scale along which the intention of the law-maker appears more and more/less and less obvious. Beyond the question of the relevance of this distinction, what is crucial is the ascertainment of the interests whose promotion/protection is enshrined in legal norms. Indeed, when making norms, law-makers do nothing else than to arbitrate between various societal interests. In the frame of this conceptual understanding, legal norms are the normative outcome of a legislative balancing process. For instance, if we take the example of the prohibition for cars to circulate on beaches, this norm strikes a balance between the interests of holiday-makers in security and quiet and the interests of drivers who would otherwise save time or enjoy the landscape, to the benefit of the former. However, if this norm proves to enshrine a clear balance as for drivers aiming to have a good time in dunes, it appears quite vague regarding the situation where a car enters a beach to evacuate a sick person. Does this norm prohibit such an entry? In case such a prohibition is argued before a tribunal by a holiday-maker, this tribunal is first required to assess whether or not holiday-makers' interests (should) prevail in this situation in order to rule on the alleged violation of the norm. In such a situation, assisted by previous decisions, the law-applying authority is required to strike a balance between the interests at stake in order to assess the conformity of the conduct with the legal norm. In this context of indeterminacy, the balancing provides at the time both the concretization of the norm and the solution to the dispute. In other words, the dispute settlement and the law-making roles of the tribunal are contemporaneously intertwined.[13]

This brings us back to IIAs provisions. Indirect expropriation and the FET are the normative outcome of a balancing legislative process aiming at the protection of foreign investors

[10] *See* H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 1997).
[11] *See in particular* N. McCormick, *Legal Reasoning and Legal Theory* (Oxford: OUP, 1996), at 273.
[12] *See* Y. Radi, *La standardisation et le droit international – Contours d'une théorie dialectique de la formation du droit* (Bruxelles : Bruylant, 2012), at 91.
[13] For a detailed analysis of normative vagueness, *see ibid.*, at 83-99.

against discriminatory and arbitrary state conducts.[14] In the normative frameworks these provisions constitute, arbitration tribunals are called to strike casuistic balances to give substance to the norms and thereby assess their alleged violation. Irrespective of the question of the role of precedent in investment arbitration,[15] they can rely on the case-law that I have elsewhere conceptualized as a systemic balancing of interests.[16] In this article, I intend to focus on the casuistic balancing of interests that can help arbitrators in assessing the legality of human rights states measures with respect to the provisions on indirect expropriation and the FET. To do so, I first start with the discussion of the law-application process where balancing methods are used.

2.2. The shift in the law-application discourse: from interpretation to argumentation

The law-application process is generally conceived of as a process requiring interpretation. This is evidenced by the frequent reference to Article 31 of the Vienna Convention on the Law of Treaty (VCLT) in the decisions of international tribunals.[17] I argue that the methods of interpretation provided in this provision tend to be ineffective as for the assessment of the violation of indirect expropriation and the FET, in particular in relation to states measures aiming at the protection/promotion of human rights.

Starting with the exegetic interpretation, such a statement seems to be beyond any discussion. Indeed, the terseness of words such as 'fair', 'equitable' or 'amount/equivalent to an expropriation' makes this literal interpretation fruitless. Because of this vagueness, arbitrators often resort to the teleological method of interpretation. In light of the preamble of the applicable IIA, they base their interpretation on the object and purpose of the agreement. I defend the opinion that this method is made ineffective because of the duality of interests pursued by IIAs. Indeed, contrary to the mainstream belief, IIAs do not aim only at protecting

[14] As I have argued elsewhere, IIAs can be regarded historically as forming part of a 'systemic package deal' in which investors' protection was conventionally granted against the delivery of guarantees by Western states to their investors, *see ibid.*, at 343-346.

[15] On this issue, *see in particular* E. De Brabandere, 'Judicial and Arbitral Decisions as a Source of Rights and Obligations', *in* T. Gazzini, E. De Brabandere (eds), *International Investment Law. The Sources of Rights and Obligations* (Leiden/Boston: Martinus Nijhoff Publishers, 2012); J.P. Commission, 'Precedents in Investment Treaty Arbitration: a Citation Analysis of a Developing Jurisprudence', 24 *Journal of International Arbitration* (2007) 129; G. Kauffman-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse', 23 *Arbitration International* (2007) 357; C. Schreuer, M. Weiniger, 'Conversation Across Cases: Is there a Doctrine of Precedent in Investment Arbitration', *in* P. Muchlinski, F. Ortino, C. Schreuer (eds), *Oxford Handbook on International Investment Law* (Oxford: OUP, 2008) 1188; Y. Radi, 'The Coherence of International Law – An Illustration by International Investment Law', 2 *The Hague Yearbook of International Investment Law* (2012) 415.

[16] *See* Y. Radi, 'The Coherence of International Law – An Illustration by International Investment Law', *ibid.*, at 436-441.

[17] *See* Article 31 of the Vienna Convention on the Law of Treaties (VCLT), 23 May 1969.

investors. More precisely and as its genesis teaches us, this objective is only an instrumental one[18] inasmuch as it aims at realizing the main objective of the investment law regime, *i.e.*, the economic development of the host state.[19] In particular in light of the humanization of the concept of development,[20] this main objective should support a (teleological) interpretation favouring state's interest. That being said, it remains that investor's interests also have to be taken into account under the teleological interpretation. As it appears here, this method of interpretation brings in two competing interests in the settlement of the dispute without providing any solution as to how to deal with them.[21] This outcome is similar to the one reached through Article 31 (3) (c) VCLT enshrining the principle of systemic integration.[22] Beyond the analysis conducted above,[23] this is further evidenced by the fact that the use of

[18] In that sense, the *Joseph Lemire* Tribunal stated that: 'The object and purpose of the BIT - the third interpretive criterion - is defined in its Preamble: the parties 'desir[e] to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party' and recognize that the BIT 'will stimulate the flow of private capital and the economic development of the Parties'. The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital. But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, *the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy* [emphasis added].', *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, 21 January 2010, ICSID Case No. ARB/06/18, paras. 271-273. *See* also *Amco Asia Corp. and others and the Republic of Indonesia,* Award on Jurisdiction, 25 September 1985, ICSID Case No. ARB/81/01, para. 23.

[19] *See in particular* the Preamble of the ICSID Convention as well as Para. 9 of the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

[20] The right to development is nowadays regarded as a human right. *See in particular* Article 1.1 of the General Assembly UN Declaration on the Right to Development: '[T]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.', Declaration on the Right to Development, GA Res.41/128, 4 December 1986.

[21] *See* N. Matz-Lück, 'Harmonization, Systemic Integration, and 'Mutual Supportiveness' as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation', 37 *Finnish Yearbook of International Law* (2006) 37, at 50 ; B. McGrady, 'Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: *EC—Biotech Products* and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of the Treaties', 42 *Journal of World Trade* (2008) 589, at 607; V. Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case-law of the ECtHR: an Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration', 31 *Michigan Journal of International Law* (2010) 621, at 686

[22] Article 31 (3) (c) VCLT: 'There shall be taken into account, together with the context: … any relevant rules of international law applicable in the relations between the parties.' The International Law Commission (thereafter ILC) argues that: 'The article [Article 31 (3) (c)] gives expression to the objective of "systemic integration" according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.', International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (2006), para. 17. In the literature, *see in particular* D. Kalderimis, C. Tripp, 'Systemic Integration and International Investment Law – Some Practical Reflexions', Published by the International Society of International Economic Law (2012); C. McLachlan, 'Investment Treaties and General International Law', 57 *International and Comparative Law Quarterly* (2008) 361.

[23] *See supra* section 2.1.

Article 31 (3) (c) whose only virtue is to open the doors of regimes,[24] is very often followed by a test of proportionality in the reasoning of international judges.[25] But what is balanced in such a test are not the norms themselves, but their underlying interests which are thereby unearthed. In relation to this, one should emphasize that such a balancing between colliding interests can be realized by arbitration tribunals without any preexisting recourse to systemic integration. This is so because, as explained when discussing the teleological interpretation, the IIL regime is a heterogeneous one made of the interests of investors and states, in particular human rights. Thereby, interests protected by international human rights norms are already protected within the investment law system itself under the 'general interest' label and arbitration tribunals (only) have to balance them with investor's interests. As it appears here, the concept of 'interpretation' does not reflect the essence of the law-application process conducted by investment tribunals. Given the terseness of IIAs provisions and the need to arbitrate between conflicting interests, their reasoning is in fact characterized by an argumentative rationale.

This brings us to the analysis of the balancing methods used by arbitration tribunals, *i.e.*, the legitimate expectations and proportionality. Before examining them from a technical point of view in light of the case-law, one should first explain their role and status in the written decisions.

To start with, it should be emphasized that these written decisions constitute a reconstruction of the legal reasoning of arbitrators. To understand this, one can usefully refer to the drafting-style of decisions in continental Europe, for instance, in France. The case-law of the French *Conseil d'Etat* or *Cour de Cassation* shows that French decisions are very short, not very well argued, 'as if' there was no need to reason. And precisely, French tribunals are not supposed to show that they have to reason when applying law and settling a dispute, because *la loi* has traditionally been conceived of in France as 'omniscient' and 'omnipotent'. But as in any other jurisdiction, law is there characterized by a vagueness that requires a legal reasoning. While it traditionally does not appear in continental Europe court's decisions, it does in

[24] Article 31 (3) (c) VCLT was qualified of the 'master key to the house of international law' by Ms. Xue Hanqin, member of the ILC at the time the diversification and the expansion of international law was discussed at the International law commission.

[25] As argued by A. Stone Sweet and J. Mathews, proportionality provides judges with the most appropriate analytical procedure currently available for adjudicating disputes involving conflicts between two interests that possess the same rank in a normative hierarchy, *see* A. Stone Sweet, J. Mathews, 'Proportionality Balancing and Global Constitutionalism', 47 *Columbia Journal of Transnational Law* (2008) 73.

Common Law decisions that reconstruct the argumentative process led individually by each member of the tribunal and the entire tribunal in its collegiality.[26]

This is precisely this Common Law approach that is adopted by arbitration tribunals along the publicization of investment arbitration.[27] Given the above-mentioned normative vagueness, the argumentative style of legal reasoning allows arbitration tribunals to explain and justify their final decision. In a context where their legitimacy of origin is challenged, this is a practice that legitimizes the exercise of their mandate.[28] Against this backdrop, the methods of balancing used by arbitration tribunals in their written decisions, *i.e.*, the legitimate expectations and proportionality, can be regarded as tools that participate to the explanation and legitimization of arbitrators' decisions.[29] The inconsistencies that yet characterize their use by arbitration tribunal tend to undermine this role. This leads us to the analysis of the way these methods of balancing are used in investment arbitration and the potential they have to strike a balance between investors' interests and human rights' interests.

2.3. The legitimate expectations test and the FET

The normative vagueness of the FET promotes flexibility in the investment process and allows for the taking into account of the specificities of each case. As stated by the *Mondev* tribunal 'a judgement of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case'.[30] It remains that facts 'on their own' cannot guide the assessment of the violation of the FET. In this sense, arbitration tribunals increasingly

[26] On the lack of differences between civil law and common law legal reasoning, *see in particular* N. McCormick, « Judgements in the Common Law », in Ch. Perelman, P. Foriers (eds), *La motivation des décisions de justice* (Bruxelles: Bruylant, 1978) 167, at 170.

[27] Indeed the commercial arbitration style of drafting tends to focus on facts instead of law. In this sense, *see in particular* S. W. Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator', 23 *Leiden Journal of International Law* (2010) 401, at 425. For an example, *see Eastern Sugar B.V. v. The Czech Republic*, Partial Award, 27 March 2007, Case SCC No. 88/2004, paras. 222-343. On the reasoning of arbitration tribunals, *see* O. K. Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis', 19 *European Journal of International Law* (2008) 301.

[28] On the distinction between the 'legitimacy of origin' and the 'legitimacy of exercise', *see* J. d'Aspremont, E. de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise', 34 *Fordham. Law Review* (2010) 101. On the legitimacy of arbitration tribunals, *see in particular* Ch. Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter', 36 *Vanderbilt Journal of Transnational Law* (2003) 73.

[29] The publicization of the community of arbitrators and the increasing involvement of public (international) law professors accustomed to these techniques also explain why one has witnessed in the last years an increased recourse to such methods in written awards. On the publicization of the community of arbitrators, *see infra* section 3.1.

[30] *Mondev International Ltd. v. United States of America*, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2, para. 118.

refer to the legitimate expectations of investors.[31] This is well illustrated by this *obiter dictum* in the *Tecmed* case:

> 'The foreign investors expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives and requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.'[32]

As it appears here almost all the categories of the FET are encompassed by legitimate expectations, to the extent that one can consider that 'the breadth of these expectations could imply that the test is being used as a catch-all phrase to refer to the majority of the fact situations subsumed under fair and equitable treatment'.[33] In this sense, the legitimate expectations should not be viewed as a sub-category of the FET as mentioned by the late T. Wälde but as a category replacing the FET.

I argue that legitimate expectations so well suit the FET because they constitute a method of balancing more than one of its normative subcategory. This 'methodological' dimension can be traced back to the way legitimate expectations are used in domestic and European administrative law. In this area of law, they aim at balancing the normative power of the state and the protection of private entities. As formulated by R. Thomas:

[31] This increasing arbitration practice triggers an inflation in the academic literature about legitimate expectations in international investment law, *see in particular* C. Brown, 'The Protection of Legitimate Expectations as a "General Principle of Law": Some Preliminary Thoughts', 6 *Transnational Dispute Management* (2009) 1; S. Fietta, 'Expropriation and the "Fair and Equitable Standard" – The Developing Role of Investors' "Expectations" in International Investment Arbitration', 23 *Journal of International Arbitration* (2006) 375; E. Snodgrass, 'Protecting Investor's Legitimate Expectations: Recognizing and Delimiting a General Principle', 21 *ICSID Review – Foreign Investment Law Journal* (2006) 1; F. Orrego Vicuna, 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society', 5 *International Law Forum du droit international* (2003) 188; M. Potesta, 'The Doctrine of Legitimate Expectations in Investment Treaty Law', Published by the International Society of International Economic Law (2012); A. von Walter, 'The Investor's Expectations in International Investment Arbitration', 6 *Transnational Dispute Management* (2009) 1.

[32] *Tecnicas Medioambientales Tecmed, S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 154.

[33] C. F. Dugan, Jr. D. Wallace, N. D. Rubins, B. Sabahi, *Investor-State Arbitration* (Oxford: OUP, 2008), at 513.

> 'This principle of legitimate expectations concerns the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority. The principle therefore concerns the degree to which an individual's expectations may be safeguarded in the face of a change of policy which tends to undermine them.'[34]

This balancing is made of two steps. First, administrative tribunals investigate whether the private entity has legitimate expectations. Such an assessment is generally based on a specific commitment of the state toward that entity or a limited group of entities. To do so, they take into account all the circumstances, in particular the foreseeability of the reconsideration of the commitment as well as the diligence that could have been expected from its beneficiary. If administrative tribunals conclude that there exist legitimate expectations, they then recourse to a proportionality test to assess whether the state was allowed to frustrate these expectations. This domestic background allows us to better understand the way investment arbitration tribunals refer to legitimate expectations so as to proceed to the balancing of the private interest of the investor and the public interest of the state.

Starting with the type of state measure that can constitute the basis of legitimate expectations, one witnesses two trends in the investment arbitration practice. One can deduce from the first one illustrated by the above-mentioned extract from the *Tecmed* award that the entire normative framework can ground the legitimate expectations of the investor. Such an approach is protective of the investor to the detriment of the normative freedom of the host state. On the opposite, the second trend teaches us in conformity with the practice of administrative tribunals that only a specific commitment can constitute the basis of a legitimate expectation. This trend is exemplified by the *EDF* award:

> 'The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.'[35]

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[34] R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law,* (Oxford: Hart Publishers, 2000), at 41.

[35] *EDF (Services) Limited v. Romania,* Award, 8 October 2009, ICSID Case No. ARB/05/13, para. 217. In the same way, the CMS Tribunal stated: 'It is not a question of whether the legal framework might need to be frozen as it can always evolved and be adapted to changing circumstances, but neither is it a question whether the framework can be dispensed with altogether when the specific commitments to the contrary have been made.

Turning to the taking into account of circumstances, one can also notice a divergence regarding the diligence expected from states and investors. Some arbitration tribunals consider in line with domestic practice that the investor bears an obligation of due diligence in case there are any ambiguity concerning the existence of a specific commitment or in situation of normative instability, be it of a structural or sectorial nature. Illustrating this trend, the *Parkering* tribunal put forth:

> 'In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate. By deciding to invest notwithstanding this possible instability, the Claimant took the *business risk* to be faced with changes of laws possibly or even likely to be detrimental to its investment. The Claimant could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement a stabilisation clause or some other provision protecting it against unexpected and unwelcome changes.'[36]

On the opposite, a second trend relies on the alleged weakness of the investor to argue that the obligation of due diligence is born by the state. In this sense, T. Wälde argued:

> '[I]nternational investment law is aimed at promoting foreign investment by providing effective protection to foreign investors exposed to the political and regulatory risk of a foreign country in a situation of relative weakness. The main principles underlying the NAFTA (preamble, Art. 102) as developed in the most recent and authoritative jurisprudence by arbitral tribunals require that in case of doubt, the risk of ambiguity of a governmental assurance is allocated rather to the government than to a foreign investor and that the government is held to high standards of transparency and responsibility for the clarity and consistency in its interaction with foreign investors. If official communications cause, visibly and clearly, confusion or misunderstanding with the foreign investor, then the government is responsible for pro-actively clarifying its position [...] As mentioned, the essential difference for the application of the "legitimate expectation" concept under Art. 1105 of the NAFTA and comparable investment treaties from commercial contract law as applied in international commercial arbitration is that the two parties in investment disputes are not in an equal position. If the parties are in an equal position, a much higher degree of due diligence is justified, as for example in inter-state relations under conventional international law, in WTO law or in transnational commercial relations, as usually

The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.', *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8, para. 277.

[36] *Parkerings-Companiet AS v. Lithuania*, Award, 11 September 2007, ICSID Case No. ARB/05/08, paras. 335-336. In the same way, the *Olguin* Tribunal stated that: 'Th[e] Tribunal d[id] not accept Mr. Olguín's contention that he was induced to make his investment by the bulletins issued by the Central Bank of Paraguay. To the contrary, the Tribunal fe[lt] that prudence would have prompted a foreigner arriving in a country that had suffered severe economic problems to be much more conservative in his investments.', *Olguin v. Paraguay*, Award, 26 July 2001, ICSID Case No. ARB/98/5, para. 75.

> adjudicated in international commercial arbitration. Strong parties in an equal position can be expected to deploy more expertise and due diligence to minimise ambiguity in their dealings with each other. Nor can the same requirements as in national judicial review of administrative actions be applied as the foreign investor is in a much more vulnerable, exposed position than a national citizen confronting his administration before national courts.'[37]

Beyond this divergence, when tribunals reach the conclusion that the investor had legitimate expectations then frustrated by the host state, she may pretend to benefit from the protection granted by the FET in relation for instance to transparency or non-discrimination. In conformity with domestic case-law, some tribunals reach this conclusion only after having tested whether the frustration of legitimate expectations could be regarded as legitimate under a test of proportionality. In this sense, the *Saluka* tribunal stated:

> 'The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other. A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.'[38]

In light of domestic case-law and despite the need to refine and harmonize its use in investment arbitration, it appears that legitimate expectations constitute a precious tool to balance the public and the private and thereby to complete the normative substance of the FET provision in light of the circumstances of any given case as well as to assess its violation. In particular, the legitimate expectations can allow arbitration tribunals to strike a balance between human rights' interests and investors' interests. Given the absence of case-law with this respect, I rely here on fictitious scenarios concerning the question of the legality of a non-discriminatory state measure enacted pursuant to a human rights objective. More precisely, I address the question as to whether the investor can regard such a measure as being in breach of the FET.[39]

[37] *Thunderbird Gaming Corporation v. The United Mexican States*, Separate opinion of Thomas Wälde, 26 January 2006, paras. 5-33.
[38] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Award, 17 March 200, para. 306.
[39] These analyses being based on fictitious and basic scenarios, I draw here general conclusions whose modalities will vary depending on the specificities of each case.

For the purpose of the analysis, it is useful to distinguish between two possible normative scenarios.[40] First, the breach of the FET provision is to be tested against a normative framework which regulates an entire sector of economic activity –and not specifically the activities of one particular investor. The second scenario refers to domestic norms aiming to regulate the activities of a particular foreign investor, in terms for instance, of granting an authorization, a licence, or a permit. The aim under both scenarios is to determine under which conditions the modification of the normative framework to protect/promote human rights breaches the FET.

Starting then with the first scenario, it is well known that states enjoy a normative freedom. In that context, they may in principle freely regulate a sector of activity, the regulation being applicable to all the investors that are active in that sector. An investor cannot expect the new regulation not to apply to her. The general normative framework that regulates her activity is not frozen for her at the time she made her investment. Such a freeze can only occur if the state specifically committed itself *vis-a-vis* her ensuring that new regulations will not be applicable to her. Such a specific commitment would create the legitimate expectation that the normative framework regulating her activity is not modified. As far as the second scenario is concerned, *i.e.* the norms regulating the activities of a particular foreign investor, they constitute the basis of the legitimate expectations of the investor concerned. More specifically, it constitutes the basis of two different legitimate expectations, the expectation to exercise the activity she was authorized to develop, and the expectation to do so under the conditions decided by the state or agreed on between that latter and the investor herself.

As a guide to determine whether the FET provision has been breached, arbitrators have first to identify whether legitimate expectations for the investor were created by the state. However, in accordance with what has already been explained, an arbitration tribunal cannot conclude definitely that the modification of the normative framework that breaches the legitimate expectations equally violates the FET provision, unless it first applies the test of proportionality. The assessment of the infringement of the legitimate expectations of the investor constitutes only the first step of the reasoning. In the frame of proportionality, arbitrators have to balance the legitimate expectations of the investor against the human rights objective pursued by the state measure in question. To do so, arbitrators have to assess whether the measure was necessary, in light of the circumstances of the case, as well as

[40] These two normative frameworks may nevertheless overlap.

whether alternative means for reaching the same public interest goal were available to the host state.

As far as the 'circumstances of the case' are concerned, although reality is often difficult to conceptualize, two general categories may be envisaged. The first one is connected to the future planned human rights policies of the state; the second is linked to an unforeseeable situation, calling for state's reaction. Concerning the former -under the reservation of the particularity of each case- what may generally be argued is that long-term promotion of human rights will only rarely justify the infringement of the legitimate expectations of the investor. This is so because of the fact that the promotion of human rights is an on-going process towards a middle/long-term objective. States are free to plan the way they choose to promote human rights. However, the absence of urgent necessity leaves both room and time to adapt domestic policy to the expectations of investors. When a state creates legitimate expectations with regard to the regulatory framework, it knows -or at least it is expected to know- what the consequences of that specific economic/investment policy are with regard to human rights. Quite the contrary, when a state enacts measures for protecting human rights from a situation threatening their enjoyment by local societies in an unpredictable context, the circumstances are totally different. The state acts under urgency. It is in principle unable to foresee the necessity to enact special measures for safeguarding human rights. If, for instance, after having granted a licence for the production of a medicine, proof comes from the science revealing that this product is a threat to health, then, there is no alternative way for that state than to ban the production of the medicine. In the same vein, if scientific research concludes that a chemical product is dangerous for the environment, what else can the state do other than to ban its production? In these cases, the circumstances surrounding the conflict between the interests of the investor and the state and the absence of any other available means for protecting human rights justify in principle the infringement of the legitimate expectations of investors and turn legal the relevant state practice, which is deemed to be necessary for the protection of public interest and therefore to pass the test of proportionality. As it appears here in light of the analysis of these scenarios, the FET as applied through the legitimate expectations test has a 'human nature'. A similar conclusion can be reached with respect to indirect expropriation and the test of proportionality.

2.4. The proportionality test and indirect expropriation

The provision on indirect expropriation protects investors against state measures having an effect tantamount or equivalent to (direct) expropriation. The vagueness of this provision stands precisely in the criteria of this equivalence. In any case, it is through these criteria that arbitrators strike the balance between public and private interests that allows for the completion of the normative substance of this provision and the settlement of the dispute as to its alleged violation.

In the past mainly, arbitration practice seemed to be 'Manichean' inasmuch as it appeared to focus either on the effect of state measures ('sole effect doctrine'), favouring thereby investor's interests or on their purpose ('police power doctrine'), favouring, on the opposite, state's interests. However, beyond the *dogma* of the 'sole effect'[41] and 'police power'[42] doctrines as asserted in *obiter docta* and the divergences among tribunals as to the exact weight to be given to the various circumstances, I argue that, whatever the starting point of tribunals' reasoning, most of the tribunals increasingly rely on this test: a state measure pursuing the public interest amounts to an expropriation only in extreme situations, consisting in the loss of control or in the complete destruction of the value of the investment.[43] This test can be conceptualized as a technique which strikes a balance between public interest and the interest of the investor. In practice, the investor has to bear the brunt of the satisfaction of the public interest to the point where this annihilates her investment. At that point, it is up to the society to accept the consequences of such satisfaction.[44] While being at the core of the case-law, this balancing test is made explicit in the test of proportionality that has been used by some arbitration tribunals. A detailed description of this test can be found in the *Tecmed* case:

> 'After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to

[41] For a radical expression of this doctrine, *see in particular Metalclad Corporation v. Mexico,* Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1, para. 103

[42] For a radical expression of this doctrine, *see in particular Methanex* v. *The United States,* Final award, 3 August 2005, para. 7.

[43] Compare for instance on the one hand, the *Feldman* and *Tecmed* cases and on the other hand, the *Encana* case. *See Feldman* v. *Mexico,* Award on Merits 16 December 2002, ICSID Case No. ARB(AF)/99/1, para. 152; *Tecnicas Medioambientales Tecmed, S.A.* v. *United Mexican States,* Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 115; *EnCana Corporation* v. *Republic of Ecuador,* 3 February 2006, LCIA Case No. UN3481, para. 169.

[44] Following this approach, the distinction between regulation and expropriation can be discussed. As asked by Judge Higgins: 'Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss?' In fact, the author shares the view expressed by Judge Higgins, arguing that the difference between expropriation and regulation based on public purpose is hardly viable intellectually. In this regard, the conclusions reached by Judge Higgins in the context of international law, are equally pertinent also for investment law: 'A regulation that amounted (by virtue of its scope and effect) to a taking, would need to be 'for a public purpose' (in the sense of in general, rather than for a private, interest). And just compensation would be due. At the same time interferences with property for economic and financial regulatory purposes are tolerated to a significant extent.', R. Higgins, 'The Taking of Property by the State: Recent Developments in International Law', 259 *RCADI* (1982) 267, at 331.

> be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal ... from examining the actions of the State ... to determine whether such measures are with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the action of the state and whether such deprivation was compensated or not ... it should be also considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it.'[45]

Under the proportionality test, arbitrators take into account the objectives pursued by the measure, its effect as well as the legitimate expectations of the investor. In that sense, it traces back the arbitrators' reasoning to the 'distinct investment-backed expectations' mentioned in the US practice[46] in reference to the test created by the US Supreme Court to rule on the alleged violation of the Fifth Amendment of the US Constitution protecting the right to property. In the 1978 *Penn Central Transportation Co.* case, the Supreme Court stated:

> '[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case'. ... In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations ... So, too, is the character of the governmental action.'[47]

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[45] *Tecnicas Medioambientales Tecmed, S.A.* v. *United Mexican States*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para 122. *See* also *Total S.A. v. République d'Argentine*, Award, 27 December 2010, ICSID Case No. ARB/04/01, para. 232.

[46] Annex B (Expropriation) 4. (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. (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.', Treaty Between the Government of the United States of America and the Government of [Country] concerning the encouragement and reciprocal protection of investment'(2012).

[47] *See Penn Central Transportation Co.* v. *New York City* (*Penn Central* case), 438 US 104 (SC1978). For a detailed overview and analysis of the case law, *see in particular* J. David Bremer and R.S. Radford, 'Great Expectations: Will *Palazzolo* v. *Rhode Island* Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law', 9 *New York University Environmental Law Journal* (2001) 449; J. David Bremer and R.S. Radford, 'The (Less?) Murky Doctrine of Investment-Backed Expectations after *Palazzolo*, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo* Muck', 34 *Southwestern University Law Review* (2005) 351; David L. Callies, 'Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From *Penn Central* to *Dolan*, and What State and Federal Courts Are Doing

Given the analogies between the proportionality test and the 'distinct investment-backed expectations' as well as the need to refine the former in investment arbitration,[48] one can usefully rely on the US Courts' case-law to investigate how to balance between human rights' and investors' interests with respect to indirect expropriation. The US case-law regarding expropriation is quite complex, in particular because of the divergences between the US Supreme Court and lower courts. There is no room here to investigate in an in-depth manner this case-law.[49] It suffices to mention two rules that are of relevance concerning the expectations owners may have in the United States: the 'notice rule' and the 'US background principles of the State's law of property and nuisance'.

The 'notice rule' is one of the component of the 'distinct investment-backed expectations' test, together with non-discrimination, *i.e.*, the use of their property by owners being in a similar situation to an owner, and the specific considerations connected to the overall circumstances of the case. The basic rationale of this rule stands in the fact that the reasonableness of owners' expectations should be assessed against the backdrop of the state of the regulatory affair in force at the time the person entered into her property. This reasonableness depends on the extent to which state law fostered and protected the expectations at the time they were forged. From this angle, a specific law or even a 'normative environment', especially in highly regulated sectors,[50] may be considered as giving notice to the owner that a state measure may, in a hypothetical future, affect her property. In such a situation, the owner may not be endorsed with a distinct investment-backed expectation. By the same token, no state law can ground an owner's expectation that

About It', 28 *Stetson Law Review* (1999) 523; John A. Kupiec, 'Returning to Principles of 'Fairness and Justice': the Role of Investment-Backed Expectations in Total Regulatory Taking Claims', 43 *Boston College Law Review* (2008) 865.

[48] In this sense, *see* also A. Sweet Stone, 'Investor-State Arbitration: Proportionality's New Frontier', 4 *Law and Ethics of Human Rights* (2010) 47, at 68.

[49] For such an in-depth analysis, *see* Y. Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox', 37 *North Carolina Journal of International Law and Commercial Regulation* (2012) 1108, at 1051-1160.

[50] 'Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end', *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993) quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958). As it may be inferred from the case-law of Federal Claims which has repeatedly noted that this line of reasoning is most compelling when there is no 'preexisting right of use under common law', this solution might reasonably apply when the property interest at issue is one created by the statutory scheme itself, *Maritrans Inc. v. United States*, 40 Fed. Cl. 790 (1998), references quoted *in* J.D. Bremer and R.S. Radford, 'The (Less?) Murky Doctrine of Investment-Backed Expectations after *Palazzolo*, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo* Muck', *see supra* note 47, at 396.

she will be authorized to make a harmful use of her ownership without any intervention from the state.[51]

When envisaging the question of the legality of a non-discriminatory human rights state measure that fully deprives an investor of her property, the 'notice rule' is decisive.[52] Given that human rights norms have been in force since the aftermath of World War II and that very often investors develop an activity in highly regulated sector, it can be considered in particular in the former that this 'human rights normative environment' gives them notice that a state measure may be enacted which affects their investment. This result may however be affected by the existence of a specific commitment or representation that is made relevant by the third element of the 'distinct-investment-backed expectations', *i.e.*, the specific considerations connected to the overall circumstances of the case. In fact, what comes into play here is the question of the legitimate expectations that have been created for the investor by a special commitment of the state, promising to not modify the regulatory framework that concerns the activity of the investor. But, as was already explained above, neither the existence of legitimate expectations nor the mere fact that these have been violated, suffices for establishing the liability of the host state. Under the principle of the 'legitimate expectations', such an infringement has –at the second step of the test- to be balanced against the purpose pursued by the measure in question, that is to say that its legality is judged on the basis of the necessity of the public interest protected. According to the argument that was developed concerning the FET, the application of proportionality will lead to the conclusion that the infringement of the legitimate expectations of the investor is not justified for measures aiming at the long-term promotion of human rights. So, if a specific commitment was given by the host state to the investor and the state measure in question is found to pursue a long term human rights objective, the expropriation will have to be compensated in order to be legal. On

[51] *See* for instance, *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962); *Miller v. Schoene* 276 U.S. 272(1928). As highlighted by case-law and literature, at issue there is the distinction to be drawn between 'harm preventing' measures and 'benefit conferring' measures. At the core of the matter, there is the fact that as argued by the Restatement 'practically all human activities unless carried on in a wilderness interfere to some extend with others or involve some risk of interference', Restatement (Second) of Torts § 822, Comment 9, at 112 (1979), quoted in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). By the same token, J.L. Sax suggested that 'the problem is not one of noxiousness of harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses'. From this angle, defining 'property as the 'end result of a process of competition among inconsistent and contending economic values', he proposed the following rule: [w]hen economic loss is incurred as a result of government enhancement of its resource position in an enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.', J.L. Sax 'Takings and the Police Power', 74 *The Yale Law Journal* (1964) 36, at 49, 61, 63.

[52] These analyses being based on fictitious and basic scenarios, I draw here principled conclusions whose modalities will vary depending on the specificities of each case.

the other hand, in principle, the protective measures regarding an unforeseeable situation will pass the 'balancing test', especially in the cases where it is due to the (illegal) conduct of the investor that the enactment of a human rights measure became necessary. Thus, the balancing process that is inherent to the principle of 'legitimate expectations' reduces further the already narrowly defined situations, where a state measure that has been enacted pursuant to human rights objectives will be found to breach the indirect expropriation provision.

Turning now to the 'US background principles of the State's law of property and nuisance', it suffices to mention that they intervene 'upstream', *i.e.*, in order to deny the existence of a property right, which, consequently, cannot be affected by any type of measure. As Justice Scalia contended in the *Lucas* case, a 'background principle' cannot be based on law that is 'newly legislated or decreed'.[53] It must predate the entry into property. According to the view expressed by the Supreme Court in the *Palazzolo* case, these 'background principles '[are] explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. ... A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed'.[54]

Hence, if one relies on this US case-law,[55] one can conclude that a state measure that was enacted to pursue a human rights objective cannot constitute a 'background principle' *per se*. However, I argue that the 'national and international human rights law background' does so. Hence, relying on human rights law, the assessment of whether the state measure in question has the power to legally limit all economic use of investment without a compensation being due, should turn mainly on one objective factor: the nuisance generated by the investment. An investor cannot expect to cause nuisances with regard to human rights, without triggering any reaction from the state. It is so whatever the exact responsibility of the investor in the nuisance. Obviously, it is so with regard to an investor which consciously causes such a nuisance, because of the illegal nature of her activity or the violation of the rules regulating a lawful business. But it is so as well with regard to 'innocent' investors whose investment

[53] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
[54] *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).
[55] These analyses being based on fictitious and basic scenarios, I draw here principled conclusions whose modalities will vary depending on the specificities of each case.

turns out to be harmful. Regarding these 'innocent investors', they generally develop an investment in sensitive sectors of activity, about which scientific discoveries may reveal their risk for health, the environment... Therefore, investors have to be conscious of the fact that they evolve in a sector of activity whose regulation may be called to change in order to answer potential nuisances.[56] In these situations of nuisance caused by investments, a state measure enacted to protect human rights which fully deprives an investor from her investment should not be considered as violating the provision on indirect expropriation, even if it is not compensated.[57] As it appears here in light of the analysis of these fictitious scenarios, the indirect expropriation has a 'human nature' that is evidenced by its application through the proportionality and 'distinct-investment-backed expectations' tests. This human nature having been evidenced with respect to the norms of international investment law, one can now proceed with the analysis of the 'human nature' of international investment arbitration.

3. The 'human nature' of international investment arbitration

The international investment arbitration setting is often perceived as homogeneous and 'pro-investor'. Such a portray overlooks the heterogeneity of the community of the people currently involved in investment arbitration. Although this community has always been heterogeneous, one witnesses an increasing heterogeneization of this community, due to the recent evolution of the IIL regime. It is true with respect to the profile of arbitrators, but also with the recent arrival of 'new comers', *i.e.*, non-disputing parties. This process results in the greater humanization of the investment arbitration setting, another manifestation of the 'human right' nature of IIL. To highlight this phenomenon, I first explain the above-mentioned evolution that has led to the publicization of investment disputes (Section 3.1). I then examine this publicization with respect to the evolution of the profile of arbitrators as well as the arbitration procedural features and I analyze how this contributes to the further humanization of the investment arbitration setting (Section 3.2).

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[56] Furthermore, it has to be remembered that the 'risk' is part of the definition of 'investment'.

[57] This conclusion would not be affected by the existence of a state specific commitment not to modify the normative framework. As for the 'guilty investor', either in case she was granted with a license or a permit or she operates in a freezing normative framework on the basis of a specific commitment, the legitimate expectations thus created are obviously annihilated by their unlawful behaviour. They were indeed not granted with the legitimate expectation to cause nuisance in relation to human rights. Regarding innocent investors, it has been analyzed in relation with the FET provision, that the application of the 'legitimate expectations' principle led to the conclusion that a state measure aiming to protect human rights in an unpredictable and emergency context will pass the balancing test.

3.1. The publicization of investment disputes

For a long time, the possibility to recourse to arbitration had to be provided in state contracts concluded by the host state and the investor.[58] The investment dispute was at that time of a contractual nature and mainly concerned the alleged violation of the state contract by the host state. From the 1960's onwards, states have started to conclude IIAs, most of them providing a dispute settlement mechanism. For the first time in investment arbitration,[59] a tribunal accepted in 1990 that an investor sued a host state by using the conventional dispute settlement provision, without having previously concluded any contract with it and thereby without being able to rely on a contractual dispute settlement provision.[60] Having being extensively discussed at the outset,[61] this 'unilateral arbitration' is nowadays beyond discussion.[62] However this evolution as to the basis of arbitration has had a broader impact. It has resulted indeed in a move away from a contractual dispute to a conventional dispute except as to 'contract claims'.[63] But mainly, this 'treatification' of the object of the dispute has brought about the publicization of the dispute as to two dimensions.

First of all, in relation to the debate having surrounded states contracts,[64] investment disputes can definitely be regarded as public international law disputes. This is reinforced by the fact that arbitrators refer to the public international law rules of interpretation as codified by Article 31 VCLT to interpret IIAs. As above-mentioned, this includes systemic interpretation that opens the door[65] of the dispute to 'the rules of public international applicable in the

[58] For a discussion of the legal status of states contracts, *see in particular* P. Mayer, 'Le mythe de l'ordre juridique de base (ou *Grundlegung*)', *in Le droit des relations économiques internationales – Etudes offertes à Berthold Goldman* (Paris: Litec, 1982) 199; P. Weil, *Problèmes relatifs aux contrats passés entre un Etat et un particulier*, 128 *RCADI* (1969) 94.

[59] In the *SPP* case, the Tribunal decided that the state's consent to arbitration could be derived from domestic law, *SPP v. Egypte*, Second decision on jurisdiction, 14 April 1988, ICSID case No. ARB/84/3.

[60] *Asian Agricultural Products Ltd. v. Sri Lanka*, Final Award, 27 June 1990, ICSID Case No. ARB/87/3.

[61] *See* G. Burdeau, 'Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les Etats', 1 *Revue de l'Arbitrage* (1995) 3, at 13; P. Reuter, 'Réflexion sur la compétence du Centre créé par la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats', *in Investissements étrangers et arbitrage entre Etats et personnes privées. La Convention BIRD du 18 mars 1965*, (Paris: Pedone, 1969), at 14; B. Stern, 'Le consentement à l'arbitrage CIRDI en matière d'investissement international : que disent les travaux préparatoires ?', *in Mélanges en l'honneur de Philippe Kahn. - Souveraineté étatique et marchés internationaux à la fin du 20e siècle,* (Paris: LGDJ, 2000) 223, at 227.

[62] *See* W. Ben Hamida, *L'arbitrage transnational unilatéral. Réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique,* PhD doctorate, Paris II Panthéon Assas, (2003) ; J. Paulsson, 'Arbitration Without Privity', 10 *ICSID Review – Foreign Investment Law Journal* (1995) 232.

[63] Among the disputes registered by the ICSID in 2010, IIAs amounted to 73% of the instruments constituting the basis of consent to arbitration, while contracts and domestic legislation amounted respectively to 22% and 5%, *see* ICSID cases – Statistics, No. 2010-2 at 20.

[64] *See supra* note 58.

[65] *See supra* note 24.

relations between the parties'.[66] In the same vein, public international law is also often made applicable to the settlement of the dispute.[67] As analyzed below, this aspect of the publicization of the dispute has resulted in the publicization of the community of arbitrators, who by legal education and culture tend to have a stronger knowledge and 'sensitivity' to human rights in the context of investment disputes.

The second consequence of the 'treatification' of investment disputes concerns the increased impact of investment arbitration on public interest and public policies. At the time of state contracts, they equated to a few contractual disputes whose settlement was of interest at best for a limited number of analogous situations. On the contrary, in the contemporary context of 'treaty claims', one witnesses a tremendous increase in disputes which are of interest for the worldwide community of states and investors. This increase mainly due to the 'unilateralization' of arbitration and the broad definition of investment in IIAs means that the scope of the state measures that are and can be reviewed by arbitration tribunals is expanding. Beyond the fact that this tends to transform these tribunals into *-mutatis mutandis-* administrative tribunals, this entails that all the aspects of domestic public interest and policy choices can now be scrutinized by arbitration tribunals.[68] In addition to this, one should realize that investment arbitration does not only impact public interest on the domestic scene of the host state involved in proceedings, but that it has worldwide consequences. Indeed, it is of interest for policy choices and public interest of all the states parties to IIAs.[69] As briefly explained here, the treatification of investment dispute that has taken place has put public interest at the core of investment arbitration. This had the effect of triggering the publicization of arbitration proceedings and its opening to non-disputing parties, often originating from the human-rights setting. Having retraced and explain the evolution of the IIL that has led to the opening of investment treaty arbitration and the publicization of the profile of arbitrators, I can now analyze these two phenomena.

[66] For an analysis of the limits of interpretation and in particular of Article 31 (3) (c) VCLT, *see supra* section 2.1.

[67] In the frame of the ICSID, it is so either by way of the applicable law clause of IIAs as illustrated by Art. 1131.1 of the NAFTA which provides that 'a tribunal established under this section shall decide the disputes in issue in accordance with this Agreement and applicable rules of international law', or in case there is no provision on the applicable law in the IAA by way of Art. 42.1 of the Washington convention that provides that '[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.', ICSID Convention.

[68] *See in particular* G. van Harten, M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 *European Journal of International Law* (2006) 121, at 122; R. Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law', 37 *New York University Journal of International Law and Politics* (2005) 953, at 956.

[69] On the systemization of investment arbitration, *see* Y. Radi, *La standardisation et le droit international – Contours d'une théorie dialectique de la formation du droit*, *supra* note 12, at 359-370.

3.2. The publicization of arbitration features

As above-mentioned, the evolution of investment arbitration has enshrined investment disputes as public international law disputes. From an organic point of view, this has resulted in the increase number of public law and public international lawyers in the community of arbitrators previously dominated by private and commercial lawyers.[70] Even though this community is still a hybrid one made of different epistemic communities,[71] one cannot deny that it is nowadays characterized by its publicization. This evolution is not without consequence on the status of public interest in general and human rights in particular in investment arbitration. Indeed, from the viewpoint of their legal culture, (public) international lawyers tend to grant the public interest and in particular human rights with a privilege status. In terms of legal knowledge, they have a better command of international human rights law as they have of other fields of public international law such as environmental law. This can result in a better taking into account of human rights interests in the settlement of investment disputes. *Last but not least*, public international lawyers are familiar with the above-mentioned methods of balancing that reveal the taking into account of the public interest in the law-application process. As it appears here, the publicization of the profile of arbitrators reinforces the 'human nature' of investment arbitration. This also comes from the procedural opening of the dispute to non-disputing parties and to the civil society.

As is well-known, investment arbitration was originally modeled on commercial arbitration. The confidentiality that characterized this model made sense at a time when public interest was not as central as it is now in investment arbitration. But the above-mentioned mutation of investment arbitration and the consequent impact of arbitrators on public interest called for and prompted evolutions of investment dispute settlement, in particular in terms of a greater openness and transparency of arbitration proceedings. This evolution was initiated by the practice of North-American states, in particular in the NAFTA as well as the US and Canadian conventional practices. Among other features, it consisted in the publication of all the documents except those confidential and mainly in the possibility offered to non-disputing

70 This had a similar impact on the profile of the scholars interested in IIL.

71 On 'epistemic communities' in international investment law, *see* M. Hirsch, 'The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective' *in* T. Broude, Y. Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011) 115; M. Hirsch, 'The Sociology of International Economic Law', 29 *European Journal of International Law* (2008) 277; S. Schill, 'W(h)ither Fragmentation? On the literature and Sociology of International Investment Law', 22 *European Journal of International Law* (2011) 875.

parties to submit *amicus curiae* briefs as well as to attend hearings.[72] Even though they are less progressive, the evolutions realized by the 2006 revision of the ICSID rules of procedure for arbitration proceedings (ICSID arbitration rules) make ICSID proceedings more open and more transparent, promoting thereby the legitimacy of exercise of ICSID arbitration tribunals.[73] Central in this revision is the possibility for non-disputing parties to submit *amicus curiae*[74] if they are authorized by the tribunal to do so after it has consulted the parties and checked whether the conditions of legality and appropriateness are respected.[75] Among these conditions, the non-disputing parties are required to bring 'a perspective, particular knowledge or insight that is different from that of the disputing parties'.[76] This appears to be highly relevant in respect with human rights when we remember that states have so far generally failed to put forth valuable human rights defenses.[77] Non-disputing parties and in particular human-rights NGOs are thereby given the opportunity to bring their expertise and to contribute to the further humanization of investment arbitration. Beyond the institutional dimension of this humanization of investment arbitration, non-disputing parties are thereby given a role in the settlement of the dispute and the making of international investment law. When exercising this role, they can shed light on the human rights aspects of the dispute at stake and on the 'human nature' of the rules of IIL, as (public) international lawyers acting as arbitrators can do. As it appears here, the 'human nature' of investment arbitration impacts on the 'human nature' of the norms of IIL.

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[72] For an analysis of the relevant provisions *see* OECD, *Transparency and third party participation in investment-state dispute settlement procedures* (2005), at 6-9.

[73] In addition to the submission of *amicus curiae*, one can mention the possibility for non-disputing parties to attend the hearing, unless one party disagrees and after the tribunal has consulted with the Secretary General, Rule 32, para. 2 of the ICSID Rules of Procedures for Arbitration Proceedings (ICSID arbitration rules).

[74] *See* Rule 37 of the ICSID arbitration rules. In the ICSID context, NGOs got for the first time access to proceedings when the *Suez/Vivendi* Tribunal recognized the authority of arbitrators to receive *amicus curiae* briefs, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentine Republic*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, ICSID Case No. ARB/03/19. In the NAFTA context and in application of Article 15 of the UNCITRAL arbitration rules of procedure, the *Methanex* Tribunal was the first one to accept such briefs, *Methanex* v. *United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001. This decision was later confirmed by the NAFTA Free Trade Commission, *see* Statement of the Free Trade Commission on Non-Disputing Party Participation, 31 July 2001.

[75] *See in particular* E. de Brabandere, 'NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes', 12 *Chicago Journal of International Law* (2011) 95; S. Ménetrey, *L'amicus curiae, vers un principe commun de droit procédural*, (Paris: Dalloz, 2010), at 156-180.

[76] *See* Rule 37, para. 2 of the ICSID arbitration rules.

[77] *See supra* note 5.

4. Conclusion

In this article, I have intended to unravel and analyze the 'human nature' of IIL with regard to both its substantive norms and the features of investment arbitration. To put this effort in perspective, I would like to formulate two concluding remarks. First, as it has appeared in many respects, the 'human nature' of IIL is part of the 'public nature' of the regime. As explained in this article, this 'public nature' has gained an undeniable importance over the last two decades because of the evolution of the IIL regime. It remains that it cohabits with a 'private nature' that makes IIL schizophrenic. This brings me to the second concluding remark. Although both the norms and arbitration's features mirror the 'human nature' of IIL, this human nature is not yet that obvious on the face of the arbitration practice. This absence is generally explained by the 'pro-investor' profile of the arbitrators' community. As I have attempted to demonstrate here, their profile is not homogeneous. It proves to be much more complex and diverse. However, it remains that some arbitrators are indeed less inclined than others to give voice to the 'human nature' of IIL. But beyond this, the perception that the 'human nature' of IIL is muted mainly comes from the fact that arbitrators tend to take stock of it without showing and wording it. In this respect, they should not forget that 'not only must Justice be done; it must also be seen to be done'.[78]

[78] *See R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233).