



WHERE REGIMES MEET: Human Rights and International Investment Law at the Point of Expropriation

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ABSTRACT

Contemporary international law increasingly rejects the notion of autonomous legal regimes, favoring a pluralist order grounded in normative interaction. Within this framework, international investment law (IIL) emerges, not as an autonomous, but as a specialized regime embedded in public international law and operating in normative interaction with other regimes, particularly international human rights law (IHRL). The doctrine of expropriation constitutes the central interface between these regimes, where the protection of foreign investors' property intersects with states' sovereign regulatory authority in pursuit of public welfare and human rights obligations.

This article examines expropriation through the distinction between *a priori* rights, grounded in human dignity and justice, and *posteriori* treaty-based protection emanating from state consent. It argues that prevailing arbitral jurisprudence has predominantly privileged proprietary interests through compensation-centered reasoning, often marginalizing broader public-law values embedded in IHRL. The result is a legitimacy deficit, especially in expropriation cases involving states' regulatory measures.

This article contends that existing analyses remain incomplete because they focus predominantly on legality rather than legitimacy. In response, it advances a legitimacy-oriented framework grounded in proportionality and systemic integration. This methodology seeks to balance investors' economic interests with states' regulatory powers in furtherance of development and public welfare objectives. Recognizing *a priori* normative status of human rights does not undermine investor protection; rather, it requires recalibrating such protection within a coherent public international law framework. Ultimately, the legitimacy of expropriation adjudication lies not in hierarchical regime prioritization, but in public law methodology capable of reconciling property protection with human-rights-based state regulation.

INTRODUCTION

In contemporary international legal discourse, globalization is no longer conceived as antithetical to plurality, but rather as the arena of its coexistence. The international legal order is shaped by diverse states, cultures, regulatory priorities, and institutional actors, resulting in the proliferation of norms and legal instruments, which has led to the emergence of multiple specialized or subordinated legal regimes within the overarching architecture of public international law.¹ This development has displaced the once-hegemonic conception of international law as constituted of autonomous and self-contained regimes, and has paved the way for

understanding the international legal order as a functionally interdependent, structurally interconnected, and normatively overlapping order. In this context, individual legal regimes resemble a neighborhood within a shared legal city of international law; with relative borders, distinct identity, and different functional purposes, yet inevitably neighboring, dialoguing with, and being influenced by other neighborhoods, in such a way that none of them operate in isolation or in a normative vacuum. This evolution gives rise to a foundational question: If international legal regimes are not *per se* independent, how should their interaction and normative coordination be conceptualized?

International investment law exemplifies this structural shift. While it functions as an autonomous specialized regime, it operates as a subsystem within the overarching frame-

1 Mouyal, L. W. (2016). *International investment law and the right to regulate: A human rights perspective*. Routledge, 96.

work of public international law, and increasingly interacts with other normative systems, most notably international human rights law. This interaction becomes particularly consequential where state interference with property is assessed, and nowhere is it more visible than in the doctrine of expropriation.

Expropriation occupies a central position in IIL, simultaneously protecting investors and serving as the principal arena in which private economic interests confront sovereign regulatory authority. Over time, arbitral jurisprudence has developed an elaborate *legality* framework distinguishing lawful from unlawful takings, relying on criteria such as public purpose, non-discrimination, due process, indirect expropriation, legitimate expectations, and compensation in accordance with the Hull formula.

While this legality-based structure is among the most settled areas of IIL, it risks obscuring a deeper normative question of whether satisfaction of formal criteria alone suffices to render state interference with property *legitimate*.

In practice, compensation has become the principal corrective mechanism for resolving regulatory conflicts, leading tribunals to prioritize legality and economic valuation over justification and legitimacy. This approach exacerbates a persistent legal and conceptual gap between international investment law and international human rights law, contributing significantly to the system's legitimacy deficit.² Furthermore, as the boundaries of international economic law expand, the necessity of integrating human rights considerations is becoming an unavoidable legal imperative even within the sphere of international commercial arbitration.³ Investor-state disputes are largely framed in economic terms, with tribunals

demonstrating considerable sophistication in calculating market value while devoting comparatively limited attention to the normative foundations that should constrain state interference or meaningfully integrate human rights considerations. Although human rights concepts such as due process, proportionality, and the right to property are increasingly appearing in arbitral reasoning, they are often invoked without methodological coherence. Balancing explains how interests are weighed, but not why particular interests should prevail or on what normative basis limits ought to be imposed, thereby blurring the boundary between *legality* and *legitimacy*.

Building upon prior scholarship addressing balancing and expropriation,⁴ this article argues that the persistent incoherence of expropriation jurisprudence stems not merely from doctrinal indeterminacy, but from an unexamined assumption of equivalence between investor property under IIL and property protected as a human right under IHRL. This presumed equivalence masks profound conceptual differences. In IIL, property is a treaty-based economic entitlement aimed at promoting capital mobility and investment security. In IHRL, property is a qualified right embedded within a broader normative structure grounded in human dignity and social justice, and collective interests.

By treating these conceptions as normatively interchangeable, tribunals render adjudication technically precise yet normatively shallow, assessing regulatory measures, such as those protecting public interest, environment, health, and social welfare, primarily through their economic impact, rather than through structured justification.

This article, therefore, reconceptualizes ex-

2 Yacoub, A. R. (2023). Bridging the gap between international investment law and human rights. *Hofstra L. Rev.*, 52, 65.

3 Racine, J. B. (2023). Human rights and international commercial arbitration. *Int'l Bus. L. J.*, 407.

4 Waincymer, J. (2009). Balancing property rights and human rights in expropriation. In Dupuy, P.-M., Francioni, F., Petersmann, E.-U. (eds.). *Human rights in international investment law and arbitration* (pp. 275–308). Oxford University Press; Mouyal, L. W. (2016). *International investment law and the right to regulate: A human rights perspective*. Routledge.

propriation less as a question of *legality* and more as a matter of *legitimacy* within an interdependent international legal order. It advances a legitimacy-oriented framework grounded in proportionality, systemic integration, and context-sensitive compensation, contributing to debates on ISDS reform and the philosophical foundations of property rights.

METHODOLOGY

Employing a descriptive, analytic, and comparative methodology, this article examines investment treaty provisions and investment arbitration jurisprudence to elucidate how tribunals currently balance investor property rights against public interest regulation and how they conceptually frame legality and legitimacy. By juxtaposing the economic asset model of property in international investment law with the social function model developed in human rights jurisprudence, the study develops a legitimacy-oriented analytical framework grounded in proportionality and systemic integration under international law. Ultimately, this framework is applied to reassess prevailing expropriation case law and to evaluate whether investment adjudication can reconcile *a priori* human rights norms with *a posteriori*, treaty-based property protection in a coherent public law structure.

FINDINGS AND DISCUSSION

1. CONCEPTUALIZING PROPERTY ACROSS LEGAL REGIMES

There exists a central yet insufficiently examined premise underlying expropriation jurisprudence: that “property” holds the same meaning and legal status across IIL and IHRL. This premise is rarely articulated in arbitral decisions, yet it casts a shadow over arbitral reasoning, obscuring the fact that property serves fundamentally different

normative functions in each regime, creating persistent insatiability in the background of arbitral reasoning. Failure to acknowledge this divergence has significant consequences for the interpretation, adjudication, and justification of expropriation, ultimately affecting its legitimacy. When tribunals treat these distinct concepts of property as if they were normatively equivalent, they obscure their true foundations and make coherent balancing practically impossible.

A. Property in International Investment Law: Economic Asset and Treaty Construct

In international investment law, property is primarily conceived as an economic asset whose protection promotes foreign investment by facilitating capital flows and investors’ security. The concept of “investment” is broadly defined in bilateral investment treaties and free trade agreements, encompassing shares, contractual rights, concessions, intellectual property, and legitimate expectations associated with regulatory stability.⁵ This breadth reflects the regime’s functional objectives: to maximize the protection of capital-based interests and enhance predictability for investors.

Property rights in this context are consent-based and treaty-derived, grounded not in human dignity or societal involvement, but in the host state’s international obligations. Their scope is determined by treaty text, arbitral interpretation, and applicable domestic law, rendering investor entitlements contingent upon both the existence of treaty protection and its adjudicative construction. However, balancing this asymmetry requires looking beyond state obligations alone; there is a growing necessity to “redesign corporate social responsibility clauses” to reflect binding investor human rights and environmental obligations.⁶ This structural shift is essential

5 UNCTAD. (2015). Investment Policy Framework for Sustainable Development (ch. II). United Nations.

6 Bueno, N., Vastardis, A. Y., Djeuga, I. N. (2023). Investor human rights and environmental obligations: The

to navigate the “tightrope of ethics, power, and responsibility” that increasingly characterizes modern investment arbitration.⁷

This instrumental conception of property is closely tied to the structure of investor-state dispute settlement. ISDS allows investors to bypass domestic legal systems, turning regulatory disputes into claims of an economic nature assessed through valuation methods like fair market value or discounted cash flow.⁸

The emphasis on valuation reflects a deeper normative orientation in which interference with property rights is primarily treated as an economic harm warranting financial compensation, rather than as a normative question about the legitimacy of state interference with those rights. Once compensation is deemed adequate, the legitimacy of the interference is often treated as resolved. This orientation helps explain why investment tribunals allocate significant effort to quantification of damages, while devoting comparatively little attention to the moral or social justification of state regulatory measures.

B. Property in International Human Rights Law: Qualified Right and Social Function

International human rights law approaches property from an entirely different normative starting point. Under IHRL, property is viewed as one of several rights necessary for individual autonomy, human dignity, security, and social participation. It is not treated as an absolute right; instead, its protection is conditioned by the requirements of public interest, proportionality, and respect for the rights of others.⁹ This understanding is particularly evident in

need to redesign corporate social responsibility clauses. *The Journal of World Investment & Trade*, 24(2), 179-216.

7 Vargiu, P. (2025). *Investment arbitration's tightrope: Ethics, Power and Responsibility*. Anthem Press.

8 Van Harten, G., Loughlin, M. (2006). Investment treaty arbitration as a species of global administrative law. *European Journal of International Law*, 17(1), 121-150, 122-123; UNCTAD. (2003). *Dispute settlement: Investor-State* (UNCTAD/ITE/IIT/30), 33.

9 Mouyal. (2016). 42.

the jurisprudence of regional human rights courts, notably the European Court of Human Rights, which has consistently highlighted the social function of property and grants states a wide margin of appreciation in regulating it to achieve legitimate public objectives.¹⁰ Property interference is assessed not merely in terms of compensation, but through a proportionality test that examines the relationship between the measures taken and their objectives, the availability of less restrictive alternatives, and the overall fairness of the burden placed on the individual.¹¹

Importantly, in human rights law, compensation is neither automatic nor always equal to full market value. While it is an important consideration in assessing proportionality, its absence does not automatically make an interference unlawful, nor does its presence legitimize state action.¹² The central concern is whether a “fair balance” has been struck between the demands of the public interest and the protection of individual rights.¹³

Property is protected to the extent that it supports individual autonomy and social participation, yet it remains secondary to broader societal objectives such as public health, environmental protection, and social justice.¹⁴ In this sense, property is situated within a normative order that prioritizes people over assets.

C. The False Assumption of Normative Equivalence

10 ECtHR. (1986). *James v. United Kingdom*, para. 46; ECtHR. (1982). *Sporrong and Lönnroth v. Sweden*, paras. 69-74; Mouyal. (2016). 106-114.

11 ECtHR. (1994). *Holy Monasteries v. Greece*, para. 71; Council of Europe. (1952). Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1. <https://www.echr.coe.int/documents/convention_eng.pdf>; Kriebaum, U. *Expropriation*. (2009). In Dupuy et al. (eds.). *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 219-244.

12 ECtHR. (1994). *Holy Monasteries v. Greece*, para. 71.

13 ECHR. Protocol No. 1, Article 1.

14 De Schutter, O. (2019). *International human rights law*. Cambridge University Press, 323-330.

Despite these profound differences, there exists a false assumption in investment tribunals' jurisprudence that on the functional and normative equivalence between investor property protected under IIL and property protected as a human right under IHRL. This assumption manifests in uncritical invocation of the right to property as a shared foundation across regimes; the use of proportionality language without proper human-rights methodology, and the tendency to resolve conflicts through compensation rather than justification.¹⁵

Tribunals find the assumption of equivalence appealing as it offers an illusion of coherence across fragmented legal regimes such as IIL and IHRL in the context of expropriation. Balancing of interests and rights appears straightforward, and conflicts seem manageable, if the notion of property is considered as the same right in both contexts. This apparent coherence, however, is misleading. Investor property is protected to promote economic activity and maintain investment confidence, whereas property protected under IHRL serves to safeguard individual dignity and social participation. These distinctions reflect not simply different priorities, but rather different normative logics.

By collapsing these distinct normative logics, tribunals sidestep the question of why investor property should enjoy the same level of protection as property held by individuals in their capacity as human beings. The result is a jurisprudence that implicitly elevates economic interests to quasi-fundamental status without articulating the normative justification.¹⁶ This prioritization becomes problematic in disputes involving public interest regulation, where the social costs of investment protection fall not on the investor but on the affected communities.

While expropriation disputes require balancing competing interests, such balancing presumes their normative commensurability. Absent a clear account of their foundations, adjudication risks degenerating into intuitive trade-offs rather than principled reasoning, producing a structural legitimacy deficit that doctrinal refinement alone cannot cure.

D. Implications for Expropriation Analysis

Recognizing the divergence between property conception across legal regimes requires abandoning the assumption of equivalence rather than subordinating investment protection to human rights. While investor property merits protection against arbitrary or discriminatory measures, it carries a different normative weight than human-rights-based property, which in turn demands distinct justificatory standards.

This insight carries direct consequences for expropriation analysis. It indicates that compensation cannot function as a universal solvent for legitimacy concerns, and that proportionality must be treated as a substantive standard rather than a merely rhetorical device. Above all, it underscores the necessity of an analytical framework that assesses not only the economic impact of state measures, but also their normative justification in relation to competing social interests.

2. HUMAN RIGHTS AS PRIORI RIGHTS AND PROPERTY RIGHTS AS POSTERIORI RIGHTS

The instability of expropriation jurisprudence cannot be fully understood without addressing a deeper normative distinction that often remains implicit in international adjudication: the difference between human rights as *a priori*, pre-positive rights grounded independently of positive law and property rights as *posteriori* entitlements created through legal instruments. This distinction

15 Hirsch, A. (2009). Investment tribunals and human rights. *American Journal of International Law*, 97, 99-123.

16 *Ibid.*, 97-99.

is not simply philosophical; it structures the way rights are generated, justified, and limited across legal regimes. Its absence within investment jurisprudence directly contributes to the legitimacy deficit previously identified.

A. Human Rights as *Priori* Rights: Dignity, Universality, and Pre-Positivity

In contemporary international law, human rights are commonly described as universal, inalienable, and inherent. Although codified in treaties such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights, their normative justification is not reducible to state consent.¹⁷ Rather, human rights instruments explicitly invoke the “inherent dignity” of the human person as the source of rights, indicating that legal recognition declares pre-existing rights rather than creates them.¹⁸

This pre-positive character of human rights is deeply rooted in natural law traditions, from Hugo Grotius’ account of rights that would endure even “if God did not exist”,¹⁹ to modern human rights law, which no longer requires adherence to classical natural law metaphysics yet retains the view that certain interests such as life, dignity, physical integrity, and basic autonomy, are normatively prior to political authority.²⁰

Within this framework, the right to property is not conceived as an absolute entitlement to exclusion or economic exploitation, but as a qualified right that serves human flourishing and social participation. Human rights jurisprudence consistently subjects property to limitations justified by public interest, the rights of others, and broader social needs, assessing state interference through

proportionality rather than automatic compensation.²¹

Human rights thus operate independently of reciprocal consent and require public justification for their limitation, an approach that contrasts sharply with the logic underpinning investor property protection.

B. Property Rights as *Posteriori* Rights: Consent, Constructed Expectations, and Economic Function

Investor property rights under IIL are paradigmatically *a posteriori*. They come into existence only through positive legal acts, including the conclusion of an investment treaty, the making of a qualifying investment, and the host state’s consent to arbitral jurisdiction. Unlike human rights, they are not attributed to investors by virtue of their humanity, but by virtue of their economic activity within treaty-based legal frameworks.

This constructed character of investor property is reflected in the expansive asset-based definitions of “investment” found in bilateral investment treaties. Such definitions deliberately detach property from traditional notions of ownership and instead ground it in economic value and exposure to risk.²² As a result, legitimate expectations, contractual rights, and even regulatory stability are treated as protected property interests, despite lacking recognition within domestic constitutional property regimes.²³

The protection of investor property is primarily aimed at promoting foreign direct investment by reducing political risk and ensuring predictability. Property rights function as incentives, rather than expressions of inherent dignity.²⁴ These rights are contingent,

17 Mouyal. (2016). 114-116.

18 United Nations. (1948). Universal Declaration of Human Rights; United Nations. (1966). International Covenant on Civil and Political Rights.

19 Grotius, H. (2005). The Rights of War and Peace (Tuck, R. (Ed.). Morrice, J. (Trans). Liberty Fund, Vol. I, Prolegomena §11, 89-90.

20 Donnelly, J. (2013). Universal human rights in theory and practice (3rd ed.). Cornell University Press, ch. 1.

21 ECtHR. (1986). James v. United Kingdom, 8793/79, para. 46.

22 United Nations Conference on Trade and Development. (2011). Scope and definition. <<https://unctad.org/webflyer/scope-and-definition>>.

23 Schreuer, C. (2009). The ICSID Convention: A Commentary (2nd ed.). Cambridge University Press, 653-661, 128-132.

24 Sornarajah, M. (2021). The international law on for-

and context-dependent, subject to state regulatory powers unless explicitly waived. Nevertheless, arbitral tribunals often treat such rights as quasi-absolute, evaluating regulatory measures primarily through the lens of economic impact rather than normative justification. The *a posteriori* and retrospective nature of these rights is thereby concealed, and their contingent, derivative status flattened into an assumed equivalence with fundamental rights.

C. The Normative Asymmetry and Its Implications on Expropriation

A central challenge in expropriation adjudication arises from the failure to distinguish between *a priori* rights protected under IHRL and the *a posteriori* character of investor property protection under IIL. When tribunals balance investor interests against public-interest regulation without first clarifying the normative status of the interests being balanced, they implicitly tend to assume equivalence between conceptually dissimilar forms of property. Yet balancing presupposes a shared metric of value and justification. Where that metric is not articulated, adjudication risks becoming intuitive: the tribunal may appear to weigh competing interests while, in reality, defaulting to valuation, expectations, and loss allocation as proxies for legitimacy.

This normative asymmetry becomes most evident in compensation practice. In IIL, compensation often functions as the decisive legitimizing mechanism for state interference. Once payment is ordered (or deemed payable), the underlying justification for regulation is treated as largely resolved. In IHRL reasoning, by contrast, it is merely one element within a broader proportionality analysis, and it cannot alone justify measures that impose excessive, discriminatory, or unjustifi-

able burdens. Recognizing the *a priori/posteriori* distinction does not require subordinating investment protection to human rights. Rather, it clarifies why investor property cannot automatically claim the same normative weight as rights grounded in human dignity and collective welfare. It also explains why a legality-and-compensation-centered approach may satisfy formal treaty logic while remaining vulnerable to a legitimacy deficit when regulatory measures implement public-health, environmental, or social-justice commitments. This legitimacy deficit underscores the broader necessity of robust public interest justifications in regulatory actions. As modern administrative and economic frameworks demand clearer articulation of the public interest to legitimize state interventions, whether in privatization contexts or general administrative law, investment arbitration must also increasingly accommodate the intrinsic value of these public interest justifications without reflexively triggering compensation mechanisms.²⁵

D. Jurisprudential Trajectories: From Expansive Regulatory Takings to Police Powers and Proportionality

The case law illustrates these dynamics. Early NAFTA-era awards fueled the concern that regulatory measures, especially environmental ones, could be reframed as compensable takings.²⁶

In contemporary treaty evolution, such concerns have driven efforts to explicitly carve out and protect the state's right to regulate, ensuring that urgent public policy goals, most notably climate change mitigation and environmental actions, are shielded from being interpreted as indirect expro-

foreign investment. 5th ed., Cambridge University Press, ch.2, 69-75, 77-80; Dolzer, R., Schreuer, C. (2012). Principles of International Investment Law, 2nd ed, Oxford University Press, 20-25, 145-150.

25 Papadopoulos, T. (2022). Privatizations of state-owned companies and justifications for restrictions on EU fundamental freedoms: past, present and future perspectives. Regulation of state-controlled enterprises: an interdisciplinary and comparative examination, 223-270.

26 Waincymer, 294-305.

priations.²⁷ In *Metalclad v. Mexico*,²⁸ Mexico's refusal of permits and the establishment of an ecological zone were treated as treaty breaches, with expropriation defined broadly to include "covert or incidental interference" that deprives an investor of significant expected economic benefit. The subsequent set-aside proceedings in the arbitral seat partially constrained the award on fair and equitable treatment while leaving intact key aspects of the expropriation outcome.²⁹ In *SD Myers v. Canada*,³⁰ an export ban adopted under asserted environmental rationales produced liability amid evidence suggestive of protectionist intent, and the tribunal's posture was read as demanding justification from the state. These early awards became focal points in the critique that indirect expropriation and expectations-based reasoning might generate regulatory chill, especially for developing states that cannot easily absorb compensation liabilities.³¹ Empirical and doctrinal analyses increasingly substantiate this "regulatory chill" hypothesis, particularly demonstrating how the threat of arbitration deters urgent environmental protection measures.³² Consequently, developing nations are increasingly forced to explore preventative legal strategies and policy mechanisms to mitigate these chilling effects on their sovereign

right to govern in the public interest.³³ However, even within NAFTA practice, subsequent awards reflected doctrinal retrenchment and a concern to preserve regulatory space. This conceptual shift resonates with the broader crystallization of the "right to regulate" paradigm, which posits those public authorities, spanning both national and provincial levels, must retain foundational autonomy to enact financial, administrative, and protective measures. Accordingly, modern international investment agreements increasingly institutionalize this right to prevent the undue restriction of sovereign governance.³⁴ In *Azinian v. Mexico*,³⁵ the tribunal rejected an attempt to internationalize contractual disappointment already adjudicated domestically, emphasizing that NAFTA was not designed to provide blanket insurance against adverse administrative and judicial outcomes and cautioning against converting ordinary governance into compensable international wrongs. Similarly, *Pope & Talbot v. Canada*³⁶ rejected the expropriation claim on the facts while refusing a categorical "police powers" exclusion, warning that blanket exemptions would create a loophole for creeping expropriation and instead anchoring the inquiry in the degree of interference, effective control, and operational profitability. These cases reflect an emerging judicial awareness that the credibility of expropriation doctrine depends on maintaining a principled boundary between regulation and taking, without immunizing the state, but also without treating every regulatory harm as a compensable deprivation. At its core, this jurisprudential balancing act reflects the systemic tension surrounding the host state's

27 Szostak, A. (2025). Towards right to regulate for climate actions: A closer look at the modernized Energy Charter Treaty. *The Journal of World Investment & Trade*, 26(5), 896-924.

28 *Metalclad Corp v Mexico*. (2000). ICSID Case No ARB (AF)/97/1, Final Award (30 August 2000), 40 ILM 36.

29 *Mexico v Metalclad Corp*. (2001). 2001 BCSC 664.

30 *SD Myers v Canada*. (n.d.). Final Award on the Merits, 40 ILM 1408, para 266.

31 Jones, E. (2007). Signing away the future: How trade and investment agreements between rich and poor countries undermine development. Oxfam Briefing Paper; Peterson, L. E., Gray, K. (2003). International human rights in bilateral investment treaties and in investment treaty arbitration. *International Institute for Sustainable Development*; Lawrence, J. (2006). Chicken Little revisited: NAFTA regulatory expropriations after *Methanex*. *Georgia Law Review*, 41, 261, 280.

32 Menghini, F. (2023). An analysis of the regulatory chill hypothesis: Environmental protection in international investment law.

33 Simbolon, P. G. M., Yenny, O. (2025). The chilling effect of international investment law and Indonesia's preventative steps to overcome it. *Jurnal Kajian Pembangunan Hukum*, 5, 91.

34 Gleason, T., Titi, C. (2022). The right to regulate. In *Academic Forum on ISDS Concept Paper* (Vol. 2).

35 *Robert Azinian and Ors (DESONA de CV) v Mexico*, Award, 1 November 1999, (2000) 39 ILM 537, at para 83; and *SD Myers*, n 63 above, at para 266.

36 *Pope & Talbot, Inc v Canada*. (2000). Interim Award (26 June 2000), (2002) 122 ILR 316, paras. 99, 102.

“right to regulate”.³⁷ Despite emerging judicial awareness, a profound structural imbalance often persists between robust investment protection and necessary sovereign regulatory space, revealing the limits of current piecemeal reform efforts in international investment law.³⁸

The decisive consolidation of a police-powers-oriented approach in the provided text is attributed to *Methanex v. US*,³⁹ which treated non-discriminatory regulation for a public purpose, adopted with due process, as non-compensable in principle unless the state had given specific commitments to refrain from regulation. Scholarly efforts have increasingly focused on drawing precise boundaries for this police powers doctrine, conceptualizing it as a vital sovereign defense against claims of indirect expropriation and advocating for a more balanced framework between investor protections and state regulatory authority.⁴⁰

In legitimacy terms, *Methanex* can be read as an implicit correction to the over-extension of indirect takings doctrine: it seeks to prevent the conversion of general welfare regulation into compensable expropriation absent a clear undertaking that stabilizes expectations. This line of authority is complemented by broader public-law reasoning

found in other fora. The *Iran–US Claims Tribunal* in *Sedco v. Iran*⁴¹ recognized a police powers exception, stating that no liability arises for economic injury resulting from bona fide regulation within accepted police powers. Parallel language appears in *Tecmed v. Mexico*,⁴² which described as “undisputable” the principle that states may cause economic harm through police powers without compensation. Critically for the present article’s legitimacy thesis, *Tecmed* also gestures toward proportionality by requiring tribunals to evaluate whether regulatory measures are proportional to the public interest pursued and the investment protection granted, and it frames legitimacy as dependent on factors including expectations, the importance of the protected interest, and distributive impact.⁴³ Yet *Tecmed* simultaneously illustrates the normative asymmetry problem: although it invites proportionality language, it does not clearly specify why investor expectations, derivative and treaty-mediated, should carry decisive normative weight against public health or environmental objectives grounded in collective welfare. This structural asymmetry exposes deeper systemic tensions within the liberal international order, where the interplay between domestic investment laws and international economic frameworks often sidelines urgent global imperatives, such as equitable resource governance and the pursuit of supply chain justice.⁴⁴

Post-Methanex jurisprudence in the text

- 37 Titi, C. (2022). The right to regulate in international investment law (revisited). International and Comparative Law Research Center.
- 38 Angin, B. (2025). The right to regulate vs investment protection: Unveiling the causes of imbalance and the limits of current reform efforts in international investment law. *ICSID Review – Foreign Investment Law Journal*, 40(1), 11-41.
- 39 *Methanex v. US*. (n.d.). ICSID Case No ARB/98/3, Pt IV, ch. D, 7; Dougherty, K. (2007). *Methanex v. United States: The realignment of NAFTA Chapter 11 with environmental regulation*. *Northwestern Journal of International Law and Business*, 27, 735, 746.
- 40 Bulut, O. E. (2022). Drawing boundaries of police powers doctrine: A balanced framework for investors and states. *Journal of International Dispute Settlement*, 13(4), 583-607; Wigati, A., Amalia, P. (2022). The police powers doctrine as a state’s protection against the claim of indirect expropriation under the international investment arbitration. *South East Asia Journal of Contemporary Business, Economics and Law*, 28(1).

- 41 *Sedco, Inc v Iran*. (n.d.). 9 Iran–US Claims Tribunal Reports 248, para 275.
- 42 *Técnicas Medioambientales Tecmed SA v Mexico*. (2003). ICSID Case No ARB(AF)/00/2, Award (29 May 2003), (2004) 43 ILM 133, para. 119.
- 43 Schill, S. (2007). Do investment treaties chill unilateral state regulation to mitigate climate change? *Journal of International Arbitration*, 24(5), 469, 473.
- 44 Chaisse, J., Dimitropoulos, G. (2023). Domestic investment laws and international economic law in the liberal international order. *World Trade Review*, 22(1), 1-17; Hailes, O. (2022). Lithium in international law: Trade, investment, and the pursuit of supply chain justice. *Journal of International Economic Law*, 25(1), 148-170.

shows both consolidation and continuing divergence. *Vivendi v. Argentina*⁴⁵ emphasized effect over intent in assessing regulatory interference, while *Parkerings v. Lithuania*⁴⁶ offered a definition of indirect expropriation as deprivation of enjoyment without formal transfer, and it endorsed the broad *Metalclad* formulation even though the dispute was contract-centered. At the same time, annulment reasoning in *MTD v Chile*⁴⁷ criticized Tecmed's apparent reliance on investor expectations as a source of state obligations, reasserting that obligations derive from treaty terms rather than expectations alone—though the text notes that expectations can still matter insofar as the treaty system itself makes them relevant to defining the limits of indirect expropriation. *Siemens v. Argentina*⁴⁸ further illustrates doctrinal consolidation around the irrelevance of governmental intent and the possibility of “creeping” expropriation through aggregated measures. *Saluka v. Czech Republic*⁴⁹ then restated a general deference principle: states do not expropriate when adopting general regulations commonly accepted within policy powers, reinforcing the *Sedco v. Iran*⁵⁰ police-powers logic. Finally, fiscal-regulation disputes underscore the evidentiary instability of expectations: *Feldman v. Mexico*⁵¹ treated tax laws as generally changeable, while Goetz found in favor of the

investor where specific confirmations were sought, illustrating how “expectations” can drift toward an unstable and over-inclusive constraint on governance.

These lines of authority map directly onto the normative asymmetry thesis. Where tribunals treat investor property as functionally equivalent to human-rights property and accept compensation as the primary legitimizing device, public-interest regulation risks being framed as a compensable deviation from investor expectations rather than as a presumptively legitimate exercise of democratic governance. Where tribunals adopt police powers and proportionality reasoning, they move closer to legitimacy-sensitive adjudication, but the jurisprudence remains vulnerable when it fails to articulate the normative hierarchy and justificatory framework that distinguishes treaty-based economic entitlements from dignity-based rights and collective interests. This is precisely why later disputes, often outside the excerpted NAFTA cluster, are analytically instructive for your article's framework. For example, *Azurix v. Argentina*⁵² is frequently discussed as recognizing a regulatory space in water/public utilities while still centering investor loss and compensation logic; *Philip Morris v. Uruguay*⁵³ is often read as unusually deferential to public-health regulation despite economic impact, yet without a fully theorized normative hierarchy. These decisions (along with the Iran–US Claims Tribunal's contextual approach in cases like *Sedco*) collectively support the proposition that legitimacy in expropriation disputes cannot be reduced to compensability, and that doctrinal stability requires explicit engagement with proportionality, systemic integration, and the a priori/a posteriori distinction.

45 *Compania de Aguas de Aconquija SA and Vivendi Universal v Argentina*. (2007). ICSID Case No ARB/97/3-20, Award (20 August 2007).

46 *Parkerings-Compagniet AS v Lithuania*. (2007). ICSID Case No ARB/05/8, Award (11 September 2007), para. 437.

47 *MTD Equity Sdn Bhd & MTD Chile SA v Chile*. (2007). ICSID Case No ARB/01/7, Decision on Annulment of the ad hoc committee (21 March 2007), para. 67.

48 *Siemens AG v Argentina*. (2007). ICSID Case No ARB/02/08, Award (6 February 2007), para. 270.

49 *Saluka Investments BV v Czech Republic (Saluka case)*. (2006). PCA, UNCITRAL, Partial Award (17 March 2006), paras. 284, 302.

50 *Sedco, Inc v Iran*. (n.d.). 9 Iran–US Claims Tribunal Reports 248, para. 275.

51 *Feldman v Mexico*. (2002). ICSID Case No ARB(AF)/99/1, Award (16 December 2002), 7 ICSID Reports 341.

52 *Azurix Corp. v. Argentine Republic*. (2006). ICSID Case No. ARB/01/12, Award (14 July 2006).

53 *Philip Morris Brands Sàrl, Philip Morris Products S.A., & Abal Hermanos S.A. v. Oriental Republic of Uruguay*. (2016). ICSID Case No. ARB/10/7, Award (8 July 2016).

E. Toward a Legitimacy-Sensitive Framework

The distinction between *a priori* and *a posteriori* rights established a conceptual foundation for reconceptualizing expropriation analysis. It elucidates why compensation, as a remedial mechanism, is insufficient to resolve legitimacy concerns and why proportionality review must be anchored in human-rights-based reasoning rather than confined to economic balancing. By acknowledging the derivative and consent-based nature of investor property, adjudicatory bodies are better positioned to articulate the limits of protection in a manner that preserves systemic coherence, foreseeability, and legal stability.

3. A LEGITIMACY-ORIENTED FRAMEWORK: PROPORTIONALITY AND SYSTEMIC INTEGRATION

To move expropriation jurisprudence beyond the narrow focus on legality and compensation, a framework is needed that engages directly with questions of legitimacy. This approach rests on two mutually reinforcing principles of general international law: proportionality and systemic integration. Together, they offer a structured methodology for reconciling investment protection with human rights obligations, ensuring that one regime does not override the other.

A. Proportionality as a Legitimacy Test

Proportionality provides a structured and principled alternative to ad hoc or intuitive balancing in expropriation analysis. Unlike approaches that rely on discretionary weighing of interests, it follows a clear sequence: suitability, necessity, and proportionality, which requires tribunals to articulate reasons for limiting rights. In practice, this legitimacy-oriented expropriation analysis ensures that states justify their measures by demonstrating a legitimate public objective and a rational connection between the measures tak-

en and that objective, while also constraining excessive interference through consideration of less restrictive alternatives.

Proportionality goes beyond simply keeping state power in check; it helps ensure a fair allocation of burdens is struck by assessing whether the impact on affected individuals is excessively relative to the public interest achieved. Unlike compensation-centered approaches, which treat compensation as a shortcut to legitimacy, proportionality focuses first on whether the state measure itself is substantially justified, with compensation considered only after legitimacy has been established.

By prioritizing reasoned justification rather than solely economic assessment, proportionality provides a strong framework for reconciling investment protection with wider public interests and human rights obligations.

B. Systemic Integration and Compensation in a Legitimacy-Oriented Framework

Proportionality alone is insufficient without a mechanism for integrating human rights norms into investment adjudication. Systemic integration, as articulated in Article 31(3) (c) VCLT, ensures that investment treaties are interpreted in light of all relevant rules of international law applicable between the parties.⁵⁴ Systemic integration does not expand tribunal jurisdiction or impose external obligations, but it informs interpretation by embedding investment obligations within a wider normative context, giving human rights, environmental, and constitutional norms interpretive relevance where they intersect with the investment standard. Importantly, systemic integration does not assume the automatic hierarchy of human rights over investment protection. Instead, it facilitates coherence by recognizing that states operate within an interconnected normative legal framework.

Within this legitimacy-oriented model, compensation is repositioned as a remedial

⁵⁴ VCLT, 1969, Art 31(3)(c)

measure contingent on the outcome of the proportionality analysis, rather than a primary source of legitimacy. When a state measure in expropriation is disproportionate or unjustified, compensation cannot cure the underlying illegitimacy, whereas proportionate and legitimate measures may involve context-sensitive adjustments to compensation instead of rigid adherence to market value.

Institutionally and doctrinally, adopting a legitimacy-oriented framework would not require radical institutional reform of investor-state arbitration, but it would require a recalibration of reasoning. Tribunals would be expected to articulate the public interest pursued, apply structured proportionality analysis, interpret obligations through systemic integration, and treat compensation as derivative rather than determinative. By combining proportionality with systemic integration and a principled approach to compensation, this framework enhances transparency, predictability, and normative credibility, aligning investment law more closely with constitutional and human rights jurisprudence.

4. IMPLICATIONS FOR INVESTMENT ARBITRATION AND REFORM

A legitimacy-oriented framework grounded in proportionality and systemic integration has implications that extend beyond doctrinal refinement to the broader reform debates surrounding investor-state dispute settlement (ISDS). Contemporary reform discussions, particularly within UNCITRAL Working Group III, tend to focus on procedural and institutional adjustments, such as appellate mechanisms or standing courts.⁵⁵ However, to be truly effective, these reform efforts should be conceptualized through the lens of comparative and international public law.

Reconceptualizing ISDS within a public law or constitutional framework is vital to address the democratic deficit and the imbalance between private rights and public interests that plague the current system.⁵⁶ These institutional shifts are part of a broader evolution in investor-state dispute settlement, where the focus is increasingly on balancing efficiency with legitimacy.⁵⁷ Moreover, the interaction between foreign direct investment and human rights remains one of the most contentious issues within these evolving dispute settlement frameworks.⁵⁸ However, many of the regime's most persistent criticisms are fundamentally normative, namely concerns about the perceived imbalance between investor protection and public interest regulation, marginalization of human rights considerations, and the democratic deficit associated with arbitral decision-making. Procedural reform alone cannot address these critiques if adjudicative reasoning continues to prioritize valuation over justification. Within the broader landscape of international dispute settlement, it is evident that substantive human rights arguments raised by the parties carry profound procedural implications that cannot be resolved by institutional redesign alone.⁵⁹ A legitimacy-oriented approach grounded in proportionality and systemic integration offers a way to re-

55 United Nations Commission on International Trade Law, UNCITRAL Working Group III: Investor-State Dispute Settlement Reform (2019).

56 Schill, S. W. (2017). Reforming investor-state dispute settlement: A (comparative and international) constitutional law framework. *Journal of International Economic Law*, 20(3), 649-672. <<https://doi.org/10.1093/jiel/jgx023>>.

57 De Brabandere, E. (2025). Investor-state dispute settlement. In *Routledge Handbook on International Economic Law*, Routledge, 311-330).

58 De Brabandere, E. (2018). Human rights and international investment law. (Unedited Version, *Research Handbook on Foreign Direct Investment*). Edward Elgar.

59 Merrills, J., De Brabandere, E. (2022). *Merrills' international dispute settlement*. Cambridge University Press; Papanastasiou, T. N. (2022). The role of human rights in international investment arbitration: Arguments raised by the parties and procedural implications. *The Law & Practice of International Courts and Tribunals*, 21(1), 149-177.

calibrate investment arbitration from within, enhancing normative coherence without dismantling the regime. One immediate implication of the proposed framework is a shift from compensation-centered analysis toward structured justification-centered adjudication. It would require investment tribunals to explicitly articulate the public purposes pursued by contested measures, to assess their necessity and proportionality as well as legitimacy before addressing compensation. Contemporary awards often acknowledge public interest objectives but devote disproportionate analytical attention to economic loss and compensation. Such an approach would enhance transparency and normative clarity without diminishing legal certainty. Tribunals would be compelled to explain not only how much compensation is due, but why interference is or is not justified in light of competing interests.

The framework also has implications for treaty interpretation and future treaty drafting. Systemic integration under Article 31(3) (c) VCLT offers an orthodox interpretative method for aligning investment obligations with states' human rights and broader international commitments, reinforcing coherence across regimes and mitigates fragmentation. Indeed, this fragmentation of international law has led to a critical intersection where international investment law and international human rights law often collide. Recent scholarship emphasizes that navigating this is not merely about resolving a conflict of rules, but requires a "mapping of human rights obligations" within the investment treaty framework to decouple traditional approaches by tribunals.⁶⁰ This includes the strategic application of regional human rights instruments, such as the European Convention on Human Rights, within the context of international investment disputes to ensure normative harmo-

ny.⁶¹ This perspective also aligns with emerging views from the Global South; for instance, the African experience provides a unique "regional paradigm" for promoting human rights through the specificity of international investment law.⁶² Achieving this international legal coherence requires a deep understanding of state human rights obligations as they intersect with international investment law.⁶³ Ultimately, moving towards a closer integration of human rights considerations into investment arbitrations is not merely a theoretical ideal, but a practical necessity for resolving normative conflicts.⁶⁴ As modern investment treaties increasingly include preambular references to sustainable development, public health, and human rights, as well as regulatory space,⁶⁵ proportionality-based reasoning can give substantive effect to these clauses without rewriting treaty text. From a drafting perspective, the framework supports trends toward clearer articulation of regulatory objectives, proportionality clauses, and context-sensitive compensation standards. Such provisions do not weaken investment protection; they clarify its limits and thereby reduce uncertainty and conflict.

The legitimacy deficit of investment arbitration is most acutely felt by host States in the Global South, where investment disputes

60 Das, A. (2024). Mapping human rights obligations in investment treaty arbitration: Decoupling by tribunals. *Indian Journal of International Economic Law*, 15(2), 2.

61 De Brabandere, E. (2013). Human rights considerations in international investment arbitration. In *The Interpretation and Application of the European Convention on Human Rights*, Brill Nijhoff, 183-215.

62 Bouyayachen, S. (2024). The African specificity of international investment law: Allegory of a regional paradigm for the promotion of human rights? *African Human Rights Yearbook*, 8, 123.

63 Bartels, L., Morgandi, T. (2024). International investment law and state human rights obligations. *University of Cambridge Faculty of Law Research Paper*, (37); McInerney-Lankford, S., Vasquez, M. C. (2022). International human rights law and international investment law: Perspective on international legal coherence. *Disp. Resol. Int'l*, 16, 45.

64 Al Mulla, J. (2022). The role of human rights in investment arbitrations: Towards a closer integration. *Int'l Rev. L.*, 190.

65 United Nations Conference on Trade and Development, *World Investment Report 2015: Reforming International Investment Governance* (2015), ch. IV.

often intersect with issues of development, redistribution, and post-colonial sovereignty. It is worthy to note that this approach responds to Global South critiques that investment law privileges foreign capital over domestic social priorities, by situating investor protection within a broader normative context attentive to development and social justice. Drawing on jurisprudence such as that of the Iran–United States Claims Tribunal and constitutional traditions emphasizing the social function of property over absolute ownership, this approach offers a pathway toward reconciling investment protection with host states’ normative commitments without dismantling international adjudication.

Ultimately, institutional reforms may improve consistency, but legitimacy depends not only on procedural design but on how decisions are reasoned and justified. A system that foregrounds justification through proportionality and systemic integration is therefore better positioned to restore credibility while preserving the core protective function of investment arbitration than a reformed institution that continues to prioritize valuation over justification.

CONCLUSION

Expropriation lies at the heart of the normative tension between international investment law and international human rights law. While investment jurisprudence has developed an elaborate doctrinal framework distinguishing lawful from unlawful expropriations, this article has argued that such analyses remain incomplete insofar as it privileges formal legality over substantive legitimacy. The resulting jurisprudence is technically sophisticated yet normatively fragile, capable of quantifying economic loss with precision while remaining largely silent on the justification and normative limits of state interference with property.

This study has demonstrated that in-

vestment tribunals routinely engage in implicit balancing of competing rights without a coherent normative methodology. This practice is underpinned by an unexamined presumption that investor property and human-rights-protected property claims are normatively equivalent, thereby obscuring the fundamentally different conceptual foundations of these rights.

By distinguishing between human rights as *a priori*, dignity-based rights and investor property rights as *posteriori*, consent-based constructs, the article has exposed a structural legitimacy deficit in expropriation jurisprudence, one reinforced by a positivist orientation that privileges compensation over justification and treats valuation as a surrogate for moral reasoning.

To address this deficit, this article has proposed a legitimacy-oriented framework grounded in proportionality and systemic integration. This framework does not seek to subordinate investment law to human rights law, nor does it establish a rigid normative hierarchy. Instead, it offers a principled method for reconciling investment protection with states’ human rights obligations and constitutional commitments, repositioning compensation as a remedial outcome rather than a source of legitimacy.

The implications of this approach extend beyond doctrinal coherence. By recalibrating arbitral reasoning toward structured justification, the framework addresses critiques of ISDS legitimacy and offers a path toward more credible, transparent, and context-sensitive adjudication. Ultimately, it suggests that the future of expropriation analysis, and of investment arbitration more broadly, depends not merely on procedural reform, but on a renewed commitment to principled normative reasoning grounded in public justification.

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