HumAn RIgHts And Investment ARbItRAtIon:
A bRIef note on some metHodologIcAl PRoblems

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Of late, it has become fashionable to remark upon the “fragmentation” of international law—the rise of scholarly and legal practice communities that are largely segregated from the substantive work of other legal métiers. The lawyers who inhabit a specialized trade may not see much advantage in seeking to test its jurisprudence against the tenets of other communities of thought. The problem has intensified with the rise of the regulatory state, the economic pressures and commercial ambition of the hyper-specialization of private law practice, and the sad end of the age of the generalist.

In principle, academic lawyers still enjoy a leisure and liberty to explore the underbrush of many more fields of law, but the recruitment of the professoriate at younger ages (eschewing law practice as somehow deforming) has brought the separate defect of an absence of any practical experience, and certainly a lack of familiarity with the “lived” sociology of various lawmaking organs.

Such segregation also separates the worlds of international human rights law and international investment law. Geneva and Strasbourg are a long distance, in mood and materiel, from the activities of the ICC and ICSID in Paris and Washington. This writer’s recent experience in a norm-setting organ of international human rights law in Geneva may thus serve to cast some light on particular difficulties likely to arise in the reconciliation of these two practice communities and academic specialties. In particular, the application of the standards of investment law—in guaranteeing fair and equitable treatment and protection against

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expropriation for foreign investors—may be affected by some of the less obvious practices in the development of human rights law.

At the level of abstraction, various writers have suggested that international human rights law—framed in regional or United Nations treaties and through customary legal norms—may lay claim to a role in the interpretation of investment norms. On the positive side, there is a right to private property protected by several human rights treaties, including Protocol I of the European Convention on Human Rights and the American Convention on Human Rights. However, the advent of the Cold War soon after the close of World War Two determined that “property” as such would not be protected in binding United Nations instruments, since the collectivization of property in the Soviet Bloc was still a fact of life, and the revolutionary movements in former colonies of the global south were not then interested in attracting foreign investors. While the Universal Declaration of Human Rights of 1948 did enunciate a right to “own property alone as well as in association with others” and a right against arbitrary deprivation of property, this was a General Assembly resolution and not a binding treaty. The International Covenant on Economic, Social and Cultural Rights, negotiated in its final form in 1966 and entering into force in 1976, also sidesteps the question of private property by admitting only a right to enjoy “an adequate standard of living,” and the International Covenant on Civil and Political Rights avoids both topics.

This lacuna may seem irrelevant in light of the self-sufficiency of modern international investment law. A modern bilateral investment treaty or “BIT” staunchly promises to foreign investors protection of their private property and capital projects, even over a long time horizon, by pledging both “national treatment” and “fair and equitable” treatment of the investment. With a guarantee of “national treatment,” there can be no discrimination against the foreign investor. And with “fair and equitable treatment,” a foreign investor is protected, at least in principle, from the turns of political fortune that may tempt a host government to traduce the expectations of both foreign and domestic investors alike. In other words, there is an absolute floor below which the host state cannot go, even if the measures are nondiscriminatory.

So, too, in each modern BIT, there is a guarantee of private property and private investment against any uncompensated expropriation. This is the international equivalent of American “takings” law—the feature of the Fifth Amendment of the U.S. Constitution that forbids the government from taking private property except for a public purpose and with the provision of just compensation. The constitutional jurisprudence of “takings” recognizes that expropriation can occur directly or indirectly, either by the outright seizure of property, or by regulatory restrictions that are unanticipated and deprive property of any viable use. Modern international investment law provides standards that are much the same.

But the seeming simplicity of these investment guarantees may be affected by arguments offered in the language of international human rights law. In particular, though no host government could credibly defend actions that discriminate