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Economic and Non-Economic Values in the Case Law of the European Court of Human Rights

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I. Opening Remarks

Some clues about the relationship between human rights and investment law can be drawn from the case law of the European Court of Human Rights (ECtHR), and in particular from the decisions relating to Article 1 of the Additional Protocol No 1 to the Convention, which establishes the right of every natural or legal person 'to the peaceful enjoyment of his possessions' (paragraph 1, first sentence). According to this provision, in fact: 'No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the *general principles of international law*' (paragraph 1, second sentence; emphasis added). In the well-known decisions in the cases of *James* and *Lithgow v United Kingdom,* the ECtHR stated that 'the conditions provided by the general principles of international law' apply *only* to non-nationals, on account of their position being different from that of citizens.[1] This conclusion has been criticized in the light of both Articles 1 and 14 (principle of non-discrimination) of the European Convention on Human Rights (ECHR).[2] In any case, it does *not* imply that the principles of international law on the taking of property

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[1] *James and ors v United Kingdom*, 21 February 1986 (App No 8793/79), at para 60; and *Lithgow and ors v United Kingdom*, 8 July 1986 (App No 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81), at para 112.

[2] According to Article 1 of the ECHR, the rights and freedoms provided for by the Convention have to be secured for '*everyone*' (italics added) within the jurisdiction of the contracting states; moreover, discriminations on grounds of *nationality* are forbidden both by ECHR, Art 14 and the relative case law of the ECtHR; on this basis – and for the purpose of securing the right to compensation (provided for by customary rules concerning the expropriation of foreign assets) also for citizens – it has been argued that the above-mentioned conditions should apply to citizens, too

must be applied to foreigners *in all cases*; in other words, even if *more favourable* principles could be deduced from the ECHR or from the relevant case law of the ECtHR. If it did, this would amount to a violation of the very rationale of the above provision, given that the reference to international law serves precisely – according to the Court – to guarantee the possibility of a treatment *more favourable* to the economic interests of non-nationals than nationals, especially with regard to the question of compensation.[3] Moreover, the principles set out by the Convention (or the case law of the ECtHR) are certainly applicable to foreigners when it comes to questions that *do not* concern the taking of property, given that the scope of application of the principles of international law is restricted to this latter case.

This clearly means that the stances of the case law of the ECtHR are (potentially) liable to affect the evolution of international investment law, not only influencing *from the outside* the case law of other courts dealing with foreign investments, but also helping *directly* to modify this legal regime.

That said, what stances genuinely deviating from the traditional trends on the subject of foreign investments can be deduced from the case law of the ECtHR? What aspects are affected by these stances? And how, within their scope, are economic and other values intertwined?

II. Economic and Non-Economic Values in the Evolution of the Notions of 'Possession' and 'Interference'

'Property' is, as we know, already a very broad concept in international investment law, given that it includes both 'corporeal property' and all of those rights that, despite not having a 'corporeal dimension', 'have a pecuniary or monetary value'.[4] Moreover, an analogously broad definition of 'investment' can easily be found in many bilateral investment treaties as well as in regional multilateral treaties and in the recent case law of investment tribunals.[5]

(see L Condorelli, 'Commentaire de l'article 1 du premier protocole additionnel' in L-E Pettiti, P-H Imbert, and E Decaux, *La Convention Européenne des Droits de L'Homme* (1999) 971, 986 rightly points out that this question has lost its importance, given that in the case law of the Court citizens are guaranteed the right to compensation in the framework of the assessment of proportionality: below, section IV).

[3] According to the Court:

> ... non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.

(see *James*, n 1 above, at para 63).

[4] See, eg *Liamco v Libya*, 12 April 1977, (1981) 20 ILM 103.

[5] On this aspect, see C Schreuer and U Kriebaum, 'The Concept of Property in Human Rights Law and International Investment Law' in S Breitenmoser et al, *Menschenrechte, Demokratie und*

The text of Article 1 of Protocol No 1 to the ECHR does not make reference to the concept of property, but instead to the more vague concept of 'possession'.[6] According to the ECtHR, the concept of possession covers not only an *actual* monetary or pecuniary right, but also a 'legitimate' and well-founded 'expectation' of realizing an economic interest.

This idea, which the decision on the *Pin Valley* case established,[7] was subsequently consolidated in ECtHR case law, and it was even extended to cases in which the 'substantive economic interest' of the applicant *was not* found to be accompanied by a *specific* 'legitimate expectation'.[8] What must be underlined here is that it has evolved not only in relation to the protection of *purely economic* interests, but also in close relation to the protection of *other interests.* One needs only think of the decision of the ECtHR Grand Chamber in the *Öneryldiz* case, from which it can be deduced that the infringement of a mere expectation may amount to a violation of Article 1 of Protocol No 1, if such an infringement is accompanied by a violation of the *right to life* (ECHR, Article 2).[9]

Furthermore, the notion of 'property' has been extended due to the need to protect interests of great *social* importance. Recently, in the *Stec* case, the Grand Chamber stated in fact that even 'a right to a non-contributory benefit' – and thus to a welfare benefit based on criteria of social solidarity – 'falls within the

Rechtsstaat: liber amicorum Luzius Wildhaber (2007) 743, 750 ff, as far as the recent case law of the ICSID tribunal is concerned.

[6] On the 'background' to the right of property under the ECHR, see A Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights* (2004) 123; for detailed descriptions of the progressive 'extension' of the scope of application of this concept in the case law of the Court, see W Peukert, 'Artikel 1 des 1. ZP (Schutz des Eigentums)' in W Peukert and JA Frowein, *Europäische Menschenrechtskonvention* (1996) 763, 766; and Condorelli, n 2 above, 976.

[7] In this case the Court established that an Irish judgment retrospectively declaring void an 'outline planning permission' – on the basis of which the applicants had purchased a piece of land – could be deemed an interference under Art 1 of the Protocol, given that 'that permission amounted to a favourable decision ... which could not be reopened by the planning authority', and that since the decision had been rendered 'the applicants had at least a legitimate expectation of being able to carry out their proposed development', see *Pin Valley Developments Ltd and ors v Ireland*, 29 November 1991, App No 12742/87, at para 51.

[8] In *Beyeler v Italy*, 5 November 2000, App No 33202/96, the ECtHR was, in fact, required to determine whether the legal position of the applicant – a famous Swiss gallery owner, who had purchased in Italy and (subsequently) taken possession of a painting by van Gogh, before being subjected to the exercise of a right of pre-emption by the Italian Ministry of Culture – could be deemed to constitute possession under Art1 of the Protocol, notwithstanding the lack of any *specific* basis in Italian law; see paras 100–106, concerning both the identification of the substantive economic interest at stake and the affirmative resolution adopted by the Court.

[9] *Öneryildiz v Turkey*, 30 November 2004, Grand Chamber, App No 48939/99, relating to the destruction of an *illegally* built slum dwelling, provoked by a methane explosion at a neighbouring rubbish tip, which caused the deaths of 12 of the applicant's relatives. In spite of the illegality of the above-mentioned building, the Court ruled that the Turkish authorities had not fulfilled their positive obligations, both under Art 2 of the Convention and Art 1 of the Protocol, since they had not done everything within their power to protect the applicants' lives and proprietary interests, see paras 117–118, concerning Art 2, and paras 133–138, concerning Art 1.

scope of Article 1 of Protocol No. 1'.[10] Overcoming the distinction drawn in its previous case law between contributory and non-contributory benefit, the Grand Chamber asserted that 'if ... a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest'.[11]

On the other hand, what we can glean in relation to the notion of 'interference' has little relevance to the purposes of the present analysis. This notion is, without any doubt, broader than the traditional notions of expropriation and nationalization, given that it covers, according to the Court, not only the taking of property (first paragraph, second sentence of the aforementioned Article 1) and the enforcement of legislative measures aimed at controlling 'the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties' (second paragraph) – but also *any other* interference with the right of property provided for by Article 1 (first paragraph, first sentence).[12] Furthermore, it is equally certain that this extension has coincided closely with the extension of the concept of property, mentioned earlier.[13] Nevertheless, the increased importance of *non*-economic interests in the Court's case law *cannot* be ascribed to the extension of the notion of 'interference' *as such*, but, rather, to the way in which the assessment of the proportionality of these interferences is carried out (below, section IV).[14]

[10] *Stec v United Kingdom* (adm.), 6 July 2005, Grand Chamber, App Nos 65731/01 and 65900/01, at paras 51–55; for previous case law of the ECtHR on this subject, see Peukert, n 6 above, 772; and Condorelli, n 2 above, 977.

[11] *Stec*, n 10 above, at para 54; on the previous case law on this subject, see Riza Çoban, n 6 above, 157 ff, as well as Peukert, n 6 above, 772; and Condorelli, n 2 above, 977. For a general overview of the Court's case law extending the protection afforded by the ECHR to the field of social security, see A Gómez Heredero, *Social Security as a Human Right* (2007).

[12] See, eg *Naumenko v Ukraine*, 9 November 2004, App No 41894/98, in which an interference with the peaceful enjoyment of the pension rights and state privileges of the applicant (a Chernobyl relief worker) was considered as a result of the lack of fairness of the proceedings in her case and the unreasonable length of time taken to enforce a judgement given in her favour (para 104).

[13] This aspect is underlined by M Pellonpä, *Concurring Opinion*, *Pressos Compañía Naviera and ors v Belgium*, 20 November 1995, App No 17849/91; and by ML Padelletti, *La tutela delle proprietà nella Convenzione europea dei diritti dell'uomo* (2003) 153; it can be deduced from the case law of the ECHR that some substantive economic interests *cannot* be subjected to an out-and-out *expropriation*, but only to a slighter interference by virtue of Art 1, para 1. Given that pecuniary rights, too, appear to be included among such interests, see *Stran Greek Refineries and Stratis Andreadis v Greece*, 9 December 1994, App No 13427/87, at para 66, in which a judicial decision rendering void a state pecuniary obligation towards the applicant was at stake; more recently, see also *Bruncrona v Finland*, 16 November 2004, App No 41673/98, at paras 79 ff; concerning a state interference with the long-term lease of some small Finnish islands (starting from 1720) provoked by the granting of fishing rights to third parties, it could be said – on a purely theoretical level – that the Court tends to frame expropriation in narrower terms than those emerging from the *Liamco* decision (n 4 above).

[14] This also explains why a specific analysis of the Court's case law relating to the hypothesis of interference does not seem necessary.

III. Public Utility and Non-Discrimination in International Law on Foreign Investments and in the European Convention

Different remarks can be made with regard to the two classic legal requirements for expropriation and nationalization according to general international law: the principle of 'public utility' and the principle of 'non-discrimination'.

As regards the first condition, what immediately emerges is that only in the French text of Article 1 of Protocol No 1 is there mention of the concept of 'public utility' ('*utilité public*') in relation to expropriation (first paragraph), whereas the English text refers to 'public interest' (first paragraph) and 'general interest' (second paragraph) as conditions for the lawfulness of interferences. The fact that this formulation differs from the expression 'public utility' in international law on foreign investments is not particularly significant, since (in the absence of common European legal standards on the subject) the ECtHR has regularly stated that the assessment of this aspect falls within the 'margin of appreciation' of the states parties to the Convention.[15] This means that the control exercised by the Strasbourg organs is *strictly* restricted – to this level – in order to prevent states from exercising arbitrary interferences,[16] in line with the similar function fulfilled traditionally by the concept of 'public utility' in international investment law.[17]

As far as the principle of non-discrimination is concerned, more significant observations can be made, in theory at least.

This principle *is not* expressly referred to in the text of Article 1 of Protocol No 1, not even with regard to the expropriation of non-nationals, in relation to whom it is commonly held to operate in the framework of international investment law. This is not particularly significant, however, given that the right provided for by Article 1 of Protocol No 1 – and indeed all of the other rights protected by the European Convention – are subject to the principle of non-discrimination provided for by Article 14 of the Convention itself. What must be pointed out here is that Article 14 has a *broader* scope than the

[15] For a catalogue of relevant policy choices held by the Court as being legitimate aims under the Convention, see Riza Çoban, n 6 above, 202.

[16] On the role played by the 'public interest' in preventing cases of arbitrary interference or '*detournement de pouvoir*' in the case law of the ECtHR, see P Van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (2006) 631; it must be added that in the context of the ECHR, the *non*-arbitrariness of the interferences is also guaranteed by the 'principle of legality', according to which: (1) they must have a *legal basis*, eg provision must be made for them by a domestic act (not necessarily a law in the strict sense of the word) that is 'sufficiently accessible, precise and foreseeable', see *Beyeler*, n 8 above, at para 109; and (2) they must be *lawful* (*Iatridis v Greece*, 25 March 1999, App No 31107/96, at para 58).

[17] On the condition of public utility, see, in general, R Higgins, *The Taking of Property by State: Recent Developments in International Law, Recueil des cours* (1982) III, 288, and, with specific regard to bilateral investment agreements, M Sornarajah, *The International Law on Foreign Investment* (2004) 317.

traditional rule as applied in the field of foreign investments, since it prohibits *all* forms of discrimination, not only discrimination on grounds of nationality.[18] With specific regard to foreigners, this could entail a greater degree of protection, determined by *non*-economic reasons, even though no specific decisions on this subject can be found in the case law of the Strasbourg organs. As a topical illustration of this point, Article 14 of the Convention could prove significant in cases of discriminatory interferences with foreign properties or investments which are dictated more by the need to contrast certain *political or religious* opinions than by any real public order or national security needs (for example, in the framework of the 'fight' against terrorism).[19]

That said, it is worth noting that, in the framework of the Court's case law, the principle of non-discrimination has played a significant role in broadening the interpretation of the notion of 'possession' under Article 1 of Protocol No 1 (first sentence, paragraph 1).[20] Indeed, given that Article 14 of the ECHR can be invoked only in conjunction with other substantial rights protected by the Convention, the Court has felt compelled to extend the scope of application *ratione materiae* of Article 1 of Protocol No 1 for the purpose of establishing its competence to review the compatibility of certain interferences with the said principle.[21] A clear-cut example of this approach and of its long-term effects on the interpretation of property rights may be found in the development of the Court's case law concerning the applicability of Article 1 to contributory and non-contributory social welfare benefit.[22]

[18] Discriminations on grounds of nationality have traditionally occurred in the field of foreign investments, but see the legal examination of the racial grounds of both the German expropriations (of Jewish properties) and the Ugandan expropriations (of Indian properties) carried out by Sornarajah, n 17 above, 318 ff.

[19] Art 14 has been applied to a case of discrimination (albeit *not* concerning the right of property) by the House of Lords in the framework of this 'fight': s 23 of the Antiterrorism Act 2001 provided for the detention of suspected international terrorists who were *not* UK nationals but *not* for the detention of suspected international terrorists who were UK nationals; see *Opinions Of the Lords of Appeal for judgment in the case A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v Secretary of State for the Home Department (Respondent)*, adopted 16 December 2004, available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>, at paras 45–73, 134–138, 157–159; see also the decision adopted by the ECtHR in *A and ors v UK*, 19 February 2009, App No 3455/05.

[20] See section II above.

[21] In this respect, see A Saccucci, 'Il divieto di discriminazione nella Convenzione europea dei diritti umani: portata, limiti ed efficacia nel contrasto a discriminazioni razziali o etniche' (2005) 3 *I diritti dell'uomo, cronache e battaglie* 11, notably at 15; and F Sudre, 'La perméabilité de la C.E.D.H. aux droits sociaux' in *Pouvoir et liberté. Etudes offertes à Jacques Mourgeon* (1998) 467.

[22] In addition to the *Stec* case, n 10 above, at para 2, see, among others, *Gaygusuz v Austria*, 16 September 1996, App No 17371/90, in which the Court held that the right to emergency unemployment benefit was a pecuniary right under Art 1, Protocol No 1, and that the distinction made between nationals and non-nationals was in breach of ECHR, Art 14; *Wessels-Bergevoet v the Netherlands*, 4 June 2002, App No 34462/97, concerning the discriminatory nature of the

IV. Economic and Non-Economic Values in the Framework of the 'Assessment of Proportionality'

Compensation is not *specifically* provided for, in Article 1, as a condition of the lawfulness of interferences with the right of property. As we know, the ECtHR does not consider this question independently, but instead by assessing the *proportionality* of a given interference (with the right of property) to the aims pursued by public authorities. In other words, compensation is one of the elements taken into consideration by the Strasbourg organs when making this assessment.[23]

That said, as far as the assessment of proportionality is concerned,[24] it is necessary to underline the clear emergence – in three respects at least – of a rationale that is *not* purely economic.

First, interference with the right of property has sometimes been accompanied by the violation of *other*, *non*-economic rights protected by the Convention, and this violation, in turn, has, *from the outside*, influenced the assessment of proportionality in favour of the existence of a violation of Article 1. This is precisely what happened in the *Chassanogou* case, in which the fact that the interference at stake was (also) found to be in breach of Article 11 of the Convention proved to be a *decisive* factor in the Court's assessment of this interference as 'disproportionate' with the right of property.[25] In other words, in situations in which the state action affecting the enjoyment of property rights also gives rise, *at the same time*, to the violation of another (non-economic) right protected by the Convention, the Court tends to deem the aforementioned restriction wrongful on the basis that it lacks a reasonable relationship of proportionality to the aim

reduction of the applicant's old-age pension on the basis of her married status; *Willis v United Kingdom*, 11 June 2002, App No 36042/97, where the refusal to pay the applicant benefits equivalent to those to which a widow would have been entitled was held to amount to a violation of Art 14 read in conjunction with Art 1, Protocol No 1.

[23] It is precisely for this reason (and not in view of a heightening of the economic aspect of the right of property compared to traditional international law on expropriation) that the Court has considered the aspect of compensation even when assessing forms of interference less serious than expropriation: see *Chassagnou and ors v France*, 28 April 2004, App Nos 25088/94, 28331/95, and 28443/95, at paras 80–85.

[24] An overview of the proportionality test regarding interferences with Art 1, Protocol No 1 is provided by Riza Çoban, n 6 above, 204; comprehensive analyses of the crucial role played by the principle of proportionality in balancing human rights and public interests in the case law of the ECtHR have recently been carried out by YA Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002); and S van Drooghenbroeck, *La proportionalité dans le droit de la convention européenne des droits de l'homme* (2001).

[25] In this judgment (n 23 above), the Court stated that 'compelling small landowners to transfer hunting rights over their land so that others can make use of them' was a disproportionate interference with their right of property, because they were obliged to do something that was 'totally incompatible with their beliefs', given their aversion to hunting; in fact, the Court concluded that compelling small landowners to transfer hunting rights to a municipal hunters' association was equivalent to forcing them to join such an association (para 117).

pursued. This was shown by the decision in the *Öneryldiz* case, which we have already mentioned with regard to the evolution of the idea of 'possession'.[26]

Secondly, *non*-economic interests, of both a *collective* and an *individual* nature, have played, sometimes, an important role *within* the assessment of proportionality.

By *collective* interests, we mean those alleged by states to justify interferences with the right of property. With regard to these interests, the ECtHR *has never* affirmed that they can completely exclude the duty of compensation, except in 'exceptional circumstances'.[27] On the contrary, the relevant case law does embody the principle that 'fair' compensation must bear a 'reasonable relationship' to the market value of the 'possession' which is subject to the state interference, regardless of whether this interference took the form of expropriation, nationalization, or some less drastic measure.[28] For all that, collective interests may call for something *less* than reimbursement of the full market value,[29] not only in the case of measures that are part of large economic reforms,[30] but also in that of interferences imposed by 'fundamental changes to a country's constitutional system, such as the transition from a monarchy to a republic',[31] the incorporation of a state into another[32] as well as, *a fortiori*, the transition towards a democratic regime.[33]

While it is true that, with regard to the above-mentioned interests, the ECtHR has basically confined itself to 'adapting' international principles on foreign investments to its own frame of reference, from the perspective of the influence of *individual* interests of a *non*-economic nature its case law appears much more interesting. In this regard it is worth noting that the availability of individual 'procedural remedies' to prevent the arbitrary exercising of state discretion has played a highly significant role within the scope of the Court's assessment of proportionality. More specifically, the availability of these remedies has constituted – as has rightly been pointed out[34] – an element for

[26] *Öneryildiz*, n 9 above, at para 1.

[27] *James and ors*, n 1 above, at para 54; this has never occurred in ECtHR case law.

[28] This takes place, eg when 'the situation is akin to a taking of property', *Beyeler*, n 8 above, at para 114; see also *Lithgow*, n 1 above, at paras 50–51.

[29] *Scordino v Italy*, 29 March 2006, App No 36813/97, at para 97.

[30] *Lithgow*, n 1 above, whereby a nationalization of companies engaged in the aircraft and shipbuilding industries was at stake.

[31] *The Former King of Greece and Ors v Greece*, 23 November 2000, App No 25701/94, at para 88.

[32] *Forrer-Niedenthal v Germany*, 20 February 2003, App No 47316/99, at para 48, where the interference with the right of property originated from a situation of exceptional nature carrying wide implications (the reunification of the German Democratic Republic (GDR) and the Federal Republic of Germany), which required a legislative intervention capable of resolving, in a uniform manner and in conformity with the reunification agreements, potential patrimonial disputes relating to assets located in the territory of the former GDR.

[33] *Broniowsky v Poland*, 22 June 2004, App No 31443/96, at para 182; and, more recently, *Velikovi and ors v Bulgaria*, 15 March 2007, App Nos 4327/98 ff, at para 172, where the Court stated expressly that in the specific context of the transition to a democratic society 'the underlying public interest ... is to restore justice and respect for the rule of law'.

[34] Padelletti, n 13 above, 242.

evaluating the compatibility of these interferences with the Convention that has, at times, been *decisive*.[35]

Third, an equally significant role has been played by individual *non*-economic interests *within* the assessment of compensation. This is the case of some disputes in which the properties involved came to the fore not only and not so much for their economic value as for the fact that they were crucial to the realization of *other* individual interests of some *social* importance. In *Lallement v France*, the compensation awarded to the applicant – a small French farmer – was in fact deemed unreasonable because it did not take into account that the expropriated land was his 'working instrument', that it would have been impossible for him to find in the same area another, similar piece of land, and that, as a result of this, he would have been unable to provide an adequate living for his family.[36] A similar line of reasoning was followed in the ambit of the 'Czech Cases' – in particular, *Pincová and Pinc v the Czech Republic*[37] – as well as in the recently decided *Velikovi and ors v Bulgaria*.[38] Although the right of housing is not a right expressly protected under the Convention, the ECtHR, in both of these cases, did in fact take into account, in the assessment of the compensation, the severe housing problems faced by the applicants following the implementation of the so-called Restitution Laws, adopted by the defendant governments within the framework of the transition towards democracy.[39]

V. Final Remarks

To sum up the main points of this analysis, it can be said that the relationship between ECtHR case law relating to Article 1 of Protocol 1 and the traditional principles of international law on foreign investments swings between a tendency to apply these principles, *adapting* them to the frame of reference of the Convention, and a tendency to *overcome them*.

The first tendency emerges in relation to the right of property, viewed in its *specific* and traditional dimension, as an *economic* right, expressly protected by the ECHR. It is mainly from this point of view that we can explain, for example,

[35] *Hentrich v France*, 22 September 1994, App No 13616/88, at para 49; see also, more recently, *Bruncrona v Finland*, n 13 above, at para 87, where the Court stated 'that the *procedure of terminating the applicants' proprietary interest* [a long-term lease of some small Finnish islands] ... was incompatible with the general right to the peaceful enjoyment of their possessions as guaranteed in the first sentence of the first paragraph of Article 1 of Protocol No. 1' (emphasis added), adding that, 'although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision' (para 69).

[36] *Lallement v France*, 11 April 2002, App No 46044/99, at para 18.

[37] *Pincová and Pinc v Czech Republic*, 5 November 2002, App No 36548/97.

[38] *Velikovi*, n 33 above.

[39] *Pincová and Pinc*, n 37 above, at paras 62–63; and *Velikovi*, n 33 above, at para 225.

the development of the idea of 'legitimate expectation'[40] through which the Court, in accordance with its constant endeavour to promote the broadest realization of the rights guaranteed by the Convention ('evolutive interpretation') has brought about the evolution of the concept of property. The importance that is attributed to the needs of the democratic transitions of the countries of Eastern Europe within the framework of the assessment of proportionality can be regarded in the same way – namely, as a sort of adaptation of the traditional principles. On the other hand, it must not be forgotten that the *traditional* principles of international economic law are firmly enshrined in the 'legal culture' of the ECtHR, if one considers the way in which they were applied – still with regard to the right of property – in the *Agrotexim v Greece* case.[41] It is well known, in fact, that in this decision, the Court stated that a shareholder cannot be identified with its company for the purpose of the 'victim requirement' (ECHR, Article 34), referring expressly to the 'corporate veil' principle affirmed by the International Court of Justice in the *Barcelona Traction* case,[42] even though contemporary treaty law on foreign investments tends to give an 'independent standing to shareholders'.[43] Moreover, it has to be stressed that the Court's most recent case law concerning the amount of compensation to be awarded in cases of expropriation tends to apply to nationals the traditional standard of 'prompt, adequate and effective' compensation, by stating – in principle – that, in the event of 'distinct expropriations', 'only full compensation can be regarded as reasonably related to the value of the property'.[44]

In a great many instances, the legal situations found in ECtHr case law have been somewhat *complex*, either because the violation of Article 1 was accompanied by violations of *other* rights protected by the Convention or because of the considerable *social* importance of the rights concretely asserted. For precisely this reason, the Court has, both with regard to the extension of the concept of 'property' and in the framework of the assessment of the proportionality of interference, displayed a tendency to *overcome* the principles of international law on foreign investments.

With regard to the first of these aspects, the Court has, in one way, linked *social* interests with the concept of 'property', as in the case of the *non-contributory* welfare benefits[45] mentioned earlier; and, in another, it has also deemed that the infringement of 'simple expectations' amounted to a violation

[40] Above, para 1. [41] *Agrotexim and ors v Greece*, 24 October 1995, App No 14807/89.

[42] *Case concerning Barcelona Traction, Light and Power Co (Belgium v Spain)*, ICJ Reports (1970), at para 66: according to the Court, 'the piercing of the "corporate veil" or the disregarding of a company's legal personality *will be justified only in exceptional circumstances*, in particular when it is clearly established that it is impossible for the company to apply to the Convention' (emphasis added); see M Emberland, 'The Corporate Veil in the Case Law of the European Court of Human Rights' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 945, also for some references to the subsequent case law.

[43] Schreuer and Kriebaum, n 5 above, 754, also for an accurate description of this tendency and of the relevant case law. [44] See *Scordino and ors*, n 29 above, at paras 256–257.

[45] See *Stec v United Kingdom*, n 10 above, at para 2.

of Article 1, in a case in which such infringement was accompanied by the violation of *another right* protected by the Convention.[46]

As far as the assessment of proportionality is concerned, the Court has tended, similarly, to judge disproportionate those interferences with the right to property that *also* lead to the violation of *other* (non-economic) *rights* protected by the Convention.[47] Furthermore, *within* this assessment, both the availability of *procedural* guarantees for the victims of these interferences[48] and the *social* importance of the individual interests involved (with specific regard to the assessment of 'reasonable compensation')[49] have – as we have said – played an independent and often decisive role.

[46] That is to say, the right to life, see, *Öneryildiz v Turkey*, n 9 above.
[47] See *Chassagnou*, n 23 above, at para 4; and *Öneryildiz*, n 9 above, at para 2.
[48] See *Hentrich*, n 35 above; and *Bruncrona v Finland*, n 13 above, at para 4.
[49] See *Velikovi*, n 33 above; and *Pincová and Pinc*, n 37 above.

11

Is the European Court of Human Rights an Alternative to Investor-State Arbitration?

Ursula Kriebaum

I. Introduction

In 1986, the European Court of Human Rights (ECtHR) for the first time decided a case concerning an interference with property rights of a foreigner (*Agosi v United Kingdom*[1]). Yet, it was only in the new millennium that cases of foreign investors containing facts typical for investment arbitration have been decided by the ECtHR.[2] In a few cases investors opted for parallel proceedings before arbitral tribunals and the ECtHR.[3] Therefore, the question arises: are the international mechanisms for the protection of human rights an alternative to investor-state arbitration?

There are several indicators which can be looked at to assess whether mechanisms for the protection of human rights can be an alternative to investor-state arbitration. Some are linked to jurisdictional questions, others concern substance, and a last group concerns procedural aspects, namely the accessibility of the protection system, the composition of the deciding organ,

[1] ECtHR, *Agosi v United Kingdom*, Judgment, 22 September 1986, Series A No 108.
[2] ECtHR, *Sovtransavto Holding v Ukraine*, No 48553/99, Judgment, 25 July 2002, ECHR 2002-VII; *Rosenzweig and Bonded Warehouses Ltd v Poland*, No 51728/99, Judgment, 28 July 2005; *Zlínsat, Spol SRO v Bulgaria*, no 57785/00, Judgment, 15 June 2006; *Bimer SA v Moldova*, No 15084/03, Judgment, 10 July 2007; and *Marini v Albania*, No 3738/02, Judgment, 18 December 2007.
Ruffert in 2000 therefore still had to note that no foreign direct investment case had been decided by the Court (M Ruffert, 'The Protection of Foreign Direct Investment by the European Convention on Human Rights' (2000) 43 German Yearbook of International Law 119).
[3] ECtHR, *Neftyanaya Kompaniya Yukos v Russia*, No 14902/04 – the case was declared admissible by the ECtHR on 29 January 2009. (In parallel arbitration was started based on the Energy Charter Treaty.) *Elekkroyuzhmontazh v Ukraine*, No 655/05 – the case is registered with a chamber, but no further procedural steps have been taken so far (in parallel a claim was filed with the Arbitration Institute of the Stockholm Chamber of Commerce under the Energy Charter Treaty – *Limited Liability Co AMTO v Ukraine*, SCC Case No 080/2005 (ECT), Award, 26 March 2008) and *Nomura and Saluka v Czech Republic*, No 72066/01. The case was declared inadmissible by the ECtHR on 4 September 2001. An UNCITRAL tribunal based on the Czech Republic–Netherlands BIT found a violation of the fair and equitable treatment standard of this BIT.