Filip Debelva

International Double Taxation and the Right to Property

A Comparative, International and European Law Analysis

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International Double Taxation and the Right to Property

Honourable mention by the European Association of Tax Law Professors (European Academic Tax Thesis Award) and the International Fiscal Association (Mitchell B. Carroll Prize).

Why this book?

This book, which is the result of the author's doctoral research, provides the reader with an assessment framework for examining tax measures in the light of the right to property, based mainly on case law of the European Court of Human Rights. In addition, the book explains the similarities and differences between the Court's tax case law and its findings on the compatibility of social security measures with the right to property. By way of comparison, the book also contains an analysis of the interpretation and application of the indirect expropriation standard as included in bilateral investment treaties.

The author submits that relying on the right to property can yield positive results for the affected taxpayer, including in cases of international double taxation. In order to facilitate this assessment, the author develops a typology of situations of international double taxation. Lastly, the book includes a proposal to address the problems relating to the calculation of the quantum of the compensation that is to be paid in cases of violation of the right to property and the allocation of such compensation among multiple states.

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Abstract

International double taxation results from the concurrent application of tax legislation of multiple states. It can best be described as the imposition of comparable taxes in two (or more) states in respect of the same item of income. Despite the general consensus that it is detrimental from an economic as well as a philosophical perspective, the phenomenon is not fully resolved by unilateral domestic tax rules and bilateral tax treaties. In addition, the European Court of Justice has in the past dismissed claims made by taxpayers to resolve international double taxation on the basis of the free movement rules. This book aims to analyse the impact of the right to property on international double taxation, a potential remedy that has been left largely unexplored until now. The main research question that will be addressed is the following: *"To what extent can the right to property be used to impose a duty upon states to relieve international double taxation?"* In order to answer this research question, a comparative view has been adopted throughout. In particular, an assessment framework has been established on the basis of the case law of the European Court of Human Rights in relation to the right to property and tax measures. This has been further refined by the conduct of a functional comparison with (i) the case law on the right to property and social security measures; and (ii) the interpretation of the indirect expropriation standard as included in bilateral investment treaties. It is submitted that the right to property can indeed have a positive impact for the affected taxpayer, depending on the legal and factual circumstances, which are to be determined on a case-by-case basis. In order to facilitate this assessment, a typology of situations of international double taxation has been developed. Lastly, the book includes a proposal to address the problem of the allocation of compensation among multiple states in the case of a violation of the right to property.

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I would like to begin by debunking the longstanding cliché that conducting doctoral research is a work of solitude. Completing this project would not have been possible without the help of several persons.

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A special word of gratitude goes out to my supervisory committee. First, I am very grateful to Prof. Dr Pasquale Pistone for his relentless support. He has done his utmost to take me outside of my comfort zone. Aside from always pushing me from an academic point of view, his support made it possible for me to take up a plethora of research assignments and presentations abroad in the framework of the International Fiscal Association, the European Association of Tax Law Professors and IBFD, which certainly broadened my horizons. Second, I would like to thank Prof. Dr Koen Lemmens for providing me with useful suggestions from a human rights perspective. Given that the field of human rights was largely unknown to me when I commenced this research project, his expertise was more than welcome.

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Filip Debelva
September 2018

Chapter 1

Introduction: Overview of Research Project

1.1. An alternative approach to a classic problem

International double taxation has been the subject of a number of publications.[1] There seems to be a broad consensus that international double taxation is a problem that has not (fully) been resolved, for various reasons (*see* chapter 4).

There is an ongoing debate in tax literature regarding the question of whether taxpayers can rely (or, rather, should be able to rely) on primary EU law to impose a duty on EU Member States to eliminate international double taxation in cases in which merely relying upon secondary EU legislation does not grant sufficient protection. The existing debate is limited to the potential application of the free movement rules (for goods, services, capital and people) to the problem of international double taxation.[2] Despite the potential beneficial effects the complete elimination of international double taxation would have in respect of achieving the European Union's goal of attaining an internal market, it appears impossible to achieve this *de lege lata* (*see* section 4.3.).[3]

1. *See*, for example, E. Seligman, *Double Taxation and International Fiscal Cooperation* (The Macmillan Company 1928); W. Oualid, *Les solutions internationales du problème des doubles impositions*, 25 Revue de science et de législation financières, pp. 5-31 (1927); J.P. Niboyet, *Les doubles impositions au point de vue juridique*, 31 Recueil des Cours 1, pp. 5-105 (1930); A. Spitaler, *Das Doppelbesteuerungsproblem bei den direkten Steuern* (Otto Schmidt 1967); M.R. Reuvers, *Internationale dubbele belasting* (FED 1972); M. Pires, *International Juridical Double Taxation of Income* (Kluwer Law and Taxation Publishers 1989); R.J. Danon & H. Salomé, *De la double imposition internationale*, 37 Archiv für schweizerisches Abgaberecht 6-7, pp. 337-390 (2005).
2. *See*, for example, A. Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht: "Konvergenz" des Gemeinschaftsrechts und "Kohärenz" der direkten Steuern in der Rechtsprechung des EuGH* p. 857 et seq. (Otto Schmidt 2002); A. Rust, *How European Law Could Solve Double Taxation*, in *Double Taxation within the European Union* (A. Rust ed., Kluwer Law International 2011); M. Helminen, *The Principle of Elimination of Double Taxation under EU Law – Does it Exist?*, in *Principles of Law: Function, Status and Impact in EU Tax Law* (C. Brokelind ed., IBFD 2014), Books IBFD; and C. Marchgraber, *Double (Non-)Taxation and EU Law* pp. 223-312 (Kluwer Law International 2018).
3. According to the European Commission (2011), double taxation is not contrary to the EU treaties, as long as it results from the parallel exercise of tax sovereignty by the Member States concerned. *See* European Commission, *Double Taxation in the Internal Market*, COM(2011) 712 final, p. 5, citing ECJ, 14 Nov. 2006, Case C-513/04, *Kerckhaert and Morres*,

This book intends to apply a different methodology, namely, examining the impact of human rights on tackling the problem. More specifically, it will examine the extent to which relying upon the protection provided by the right to property[4] could solve the issue of international double taxation. To the best of the author's knowledge, no thorough research has yet been (or is being) conducted on the application of the right to property to this issue.

Tax scholars have often approached human rights with sceptical nihilism in the past. Despite the European Convention on Human Rights (ECHR) having been signed in 1950, the possibility of assessing tax measures in the light of human rights requirements did not receive much scholarly attention until the late 20th century. One of the first publications on this peculiar topic was the conference proceedings of a 1987 IFA Seminar titled Taxation and Human Rights, a topic which was then called "unusual for IFA".[5] The discussions at this seminar focused mostly on the right to a fair trial, the respect for private life and penalties for fiscal offences. Application of the right to property to tax measures was approached with even more caution as compared to the aforementioned human rights.

More recently, the application of human rights (including the right to property) has become increasingly common in tax disputes. Currently, there is a wide consensus to accept the applicability of the *procedural* guarantees contained within the right to property to tax measures (i.e. measures should be "sufficiently accessible, precise and foreseeable").[6] The impact of the *substantive* guarantees this article offers, however, has been left largely unexplored by commentators or simply denied. As argued by one author, "the Convention was not written to protect taxpayers".[7] On the other end of

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ECLI:EU:C:2006:713; ECJ, 12 Feb. 2009, Case C-67/08, *Block*, ECLI:EU:C:2009:92; ECJ, 16 July 2009, Case C-128/08, *Damseaux*, ECLI:EU:C:2009:471; and ECJ, 19 Sept. 2012, Case C-540/11, *Levy and Sebbag*, ECLI:EU:C:2012:581. This also appears from earlier case law, in which the ECJ concluded that the abolition of double taxation, while desirable in the interest of the free movement rules, in the absence of any rules in the EU treaties can only result from the harmonization of the national systems. *See*, for example, ECJ, 29 June 1978, Case 142/77, *Statens Kontrol*, ECLI:EU:C:1978:144, paras. 33-34; ECJ, 27 Oct. 1993, Case C-72/92, *Scharbatke v. Germany*, ECLI:EU:C:1993:858, paras. 14-15; and ECJ, 23 Apr. 2002, Case C-234/99, *Nygård*, ECLI:EU:C:2002:244, paras. 37-38. *See also* sec. 4.3.

4. As will be explained (*see* sec. 5.2.), the right to property as included in art. 1 Prot. 1 ECHR is the focus of this book.
5. M. Baltus, *Introduction*, in *Taxation and Human Rights* p. 83 (IFA ed., Kluwer Law and Taxation Publishers 1988).
6. ECtHR, 7 July 2011, *Serkov v. Ukraine* (Application no. 39766/05), ECLI:CE:ECHR:2011:0707JUD003976605, paras. 41-44.
7. C. Endresen, *Taxation and the European Convention for the Protection of Human Rights: Substantive Issues*, 45 Intertax 8/9, p. 514 (2017).

the spectrum, some authors[8] have argued there are "clear indications" that *excessive* or *confiscatory* taxation[9] might be prohibited under the right to property.[10]

A handful of authors have even brought up the idea that double taxation may sometimes lead to confiscatory taxation.[11] Baker, for example, submitted the following:

> To date, cases where the taxpayer has shown that the provisions of any country's tax laws infringe [the right to property] are rare. Suppose, however, that the combined effect of two countries' tax laws, including the absence of effective measures to relieve double taxation, have exactly that effect. Neither country has individually imposed an excessive burden; in combination, however, the domestic tax laws of the countries and the lack of effective means of relieving double taxation have resulted in an excessive burden. This is not to impose on states a positive duty to avoid an overlap in tax jurisdiction, but rather to ensure that their tax system contains effective measures to relieve any double taxation

8. *See*, for example, B. Peeters, *The Protection of the Right to Property in Article 1 of the First Protocol to the European Human Rights Convention Limiting the Fiscal Powers of States*, in *A Vision of Taxes within and outside European Borders – Festschrift in Honor of Prof. Dr. Frans Vanistendael* pp. 679-701 (L. Hinnekens & Ph. Hinnekens eds., Kluwer Law International 2008); A. Leszczyńska, *The European Convention on Human Rights as an Instrument of Taxpayer Protection*, in *Protection of Taxpayer's Rights: European, International and Domestic Tax Law Perspective* pp. 82-103 (W. Nykiel & M. Sęk eds., Kluwer Law International 2009); G. Maisto, *The Impact of the European Convention on Human Rights on Tax Procedures and Sanctions with Special Referene to Tax Treaties and the EU Arbitration Convention*, in *Human Rights and Taxation in Europe and the World* p. 384 (G.W. Kofler et al. eds., IBFD 2011), Books IBFD; and E. Poelmann, *Enige fiscale raakpunten van het Handvest van de grondrechten van de Europese Unie*, 7034 Weekblad voor Fiscaal Recht, pp. 150-159 (2014).

9. The difference between these two notions will be explained in chapter 2.

10. J. Englisch, *Ability to Pay*, *in Principles of Law: Function, Status and Impact in EU Tax Law* pp. 446-451 (C. Brokelind ed. IBFD 2014), Books IBFD; *see similarly* L. Ayrault, *L'imposition confiscatoire dans la jurisprudence de la Cour européenne des droits de l'homme*, 2017 Revue européenne et international de droit fiscal 2, pp. 158-159 (2017). Compare: "By way of illustration, the European Court of Justice (ECJ) has been criticized for its failure to declare that juridical double taxation should be prohibited as discriminatory, especially as regards its judgments in Damseaux … and Kerckhaert and Morres … . The result in these cases is a violation of the right to property, enshrined in art 17 of the EU Charter of Fundamental Rights, by reason of confiscatory double taxation to which the parties are subjected (in this case cross-border inheritance)" (A. Lazem & I. Bantekas, *The Treatment of Tax as Expropriation in International Investor-State Arbitration*, Arbitration International, p. 5 (2015). Compare Ch.J. Langereis, *Taxation and the Right to Property*, in *The Right to Property: The Influence of Article 1 Protocol No. 1 ECHR on Several Fields of Domestic Law* pp. 155-163 (J.-P. Loof et al. eds., Shaker Publishing 2000).

11. D. Gutmann, *Taking Human Rights Seriously: Some Introductory Words on Human Rights, Taxation and the EU*, in *Human Rights and Taxation in Europe and the World* p. 109 (G.W. Kofler et al. eds., IBFD 2011), Books IBFD.

> which may result from claims to tax cross-border transactions. Perhaps there is at least some obligation on states to include unilateral provisions for the relief of double taxation in their laws or to seek to enter into a network of double taxation conventions.[12]

On the same issue, Pistone also showed some optimism:

> There is, however, one more important dimension that is still to be explored within the European Union. The traditional interpretation of the protection of the right of property is related to problems arising in one single state. However, the author believes that unrelieved double taxation arising from cross-border tax disparities within the European Union represents a domain in which the protection of such right could further expand.[13]

A second group of authors has expressed doubts as to the viability of international double taxation being tackled by the right to property. Monsenego has submitted that it can hardly be denied that situations of international double taxation result in the violation of the peaceful enjoyment of one's possessions, but he indicated that such a situation may be a consequence of each state levying taxes normally, without wrongfully expropriating from a taxpayer his possessions. In addition, there might be difficulties in determining which state is responsible for eliminating the taxation. He concluded as follows: "it seems that the protection of possessions is a rather weak argument to challenge international double taxation".[14] Others have submitted that double taxation does not systematically lead to a confiscatory effect[15] or that the threshold for confiscatory taxation seems so high that, in most cases of double taxation, a conflict with the right to property seems unlikely.[16]

12. P. Baker, *Double Taxation Conventions and Human Rights*, in *Tax Polymath: A Life in International Taxation* p. 73 et seq. (P. Baker & C. Bobett eds., IBFD 2010), Books IBFD.
13. P. Pistone, *The EU Law Dimension of Human Rights in Tax Matters*, in *Principles of Law: Function, Status and Impact in EU Tax Law* p. 113 et seq. (C. Brokelind ed., IBFD 2014), Books IBFD. *See similarly* P. Pistone, *Ensuring the Effective Primacy of European Law Beyond Preliminary Ruling Procedures: Some Thoughts on Strengthening the Function of Letters of Complaint and Infringement Procedures in the Field of Direct Taxes*, in *Legal Remedies in European Tax Law* p. 213 (P. Pistone ed., IBFD 2009), Books IBFD; and A. Báez Moreno, *The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed – yet appropriate – Proposal for (Developing) Countries?*, 7 World Tax Journal 3, sec. 3.2.1.2.1. (2015), Journal Articles & Papers IBFD.
14. J. Monsenego, *Taxation of Foreign Business Income within the European Internal Market* pp. 278-279 (IBFD 2012), Books IBFD.
15. D. Gutmann, *How to avoid Double Taxation in the European Union?*, in *Allocating Taxing Powers within the European Union* p. 67 (I. Richelle et al. eds., Springer 2013).
16. Helminen (2014), at pp. 406-408.

Wattel was also sceptical on the idea of international double taxation qualifying as confiscatory taxation:

> To my knowledge, … there is nothing in the case law of the ECHR to suggest that the existence of international juridical double taxation as consequence of parallel exercise of source jurisdiction and residence jurisdiction by two different States would amount to an "individual and excessive burden" imputable to any of these States (or severally to both of them). Neither do I believe that the tax legislation in any of these two States would be "devoid of reasonable foundation" or "manifestly illogical and arbitrary" solely because their separate application leads to double taxation.[17]

From the limited amount of scholarship on this topic (which has been cited almost in its entirety in the preceding paragraphs), it appears that the lack of criteria for establishing double taxation and subsequently allocating the burden to compensate the taxpayer[18] will be the most important hurdles to overcome in this discussion. It is clear that there is a gap in the doctrine on this topic, which this book aims to fill. However, as summarized by Kofler and Pistone, "tackling this will not be an easy task".[19]

1.2. Research questions

In this book, the author will attempt to find an answer to the following research question: to what extent can the right to property be used to impose a duty upon states to relieve international double taxation? This main research question will be further divided into nine sub-questions, as detailed in Table 1.1.:

17. P.J. Wattel, *Passing the Buck Around: Who Is Responsible for Double Taxation? – Comments on Profs. Kofler and Rust's Analysis*, in *Double Taxation within the European Union* p. 163 (A. Rust ed., Kluwer Law International 2011).
18. *See*, for example, G.W. Kofler, *Double Taxation and European Law: Analysis of the Jurisprudence*, in *Double Taxation within the European Union* p. 134 (A. Rust ed., Kluwer Law International 2011).
19. G.W. Kofler & P. Pistone, *General Report*, in *Human Rights and Taxation in Europe and the World* p. 17 et seq. (G.W. Kofler et al. eds., IBFD 2011), Books IBFD.

Table 1.1.

Part I: International Double Taxation	
1. Preliminary question: How is international double taxation defined for the purposes of this book?	Chapter 2
2. How is international double taxation caused?	Chapter 3
3. What is the *status quaestionis* regarding the elimination of international double taxation at the domestic, international (double tax conventions) and supranational (European Union) levels?	Chapter 4
Part II: The Right to Property	
4. What are the prevalent views on the right to property and relevant sources of the right to property under positive law?	Chapter 5
5. What is the general assessment framework that is applied when assessing the compatibility of measures with the right to property?	Chapter 6
Part III: The Right to Property and Taxes	
6. How is the assessment framework that was established under question 5 applied to tax measures?	Chapter 7
7. How is the assessment framework that was established under question 5 applied to social security measures?	Chapter 8
8. How are tax measures assessed under the expropriation clause as included in bilateral investment treaties?	Chapter 9
General Assessment and Conclusions	
9. What is the result of the application of the normative framework as established in parts II and III to the issue of international double taxation as defined and analysed in part I?	Chapter 10

1.3. Methodology

1.3.1. Selection of relevant sources

Keeping in mind the limited time and resources available for conducting the present research, the author has attempted to consult as many relevant sources as possible. To ensure a sufficiently broad analysis of the legal doctrine, without being confined to a too narrow time frame or space, the author has chosen to consult Dutch, English, French and German doctrine[20] as from the late 19th century[21] to 2018.

20. A very limited number of publications in other languages have been consulted.
21. This appears to be the period as from which international double taxation started receiving an increasing amount of scholarly attention. *See* H. Wurzel, *Foreign Investment and Extraterritorial Taxation*, 38 Columbia Law Review 5, p. 813 (1938). Note that

Given the international nature of the problem of international double taxation, the author has chosen not to analyse domestic systems or domestic case law in too great detail. Nevertheless, some examples of national practices and judgements involving the right to property and taxation have been included in chapter 2 for the purpose of defining different types of high tax burdens.

This book focuses on the case law of the European Court of Human Rights (ECtHR) (and its predecessor, the European Commission of Human Rights (EComHR)). The online search engine HUDOC was used to find judgments involving the right to property and taxation. The results were cross-checked with older cases that are not (yet) electronically available (*see*, in particular, section 7.2.). For the sake of completeness, various surveys of case law on taxes and human rights were consulted.[22]

In order to respond to most of the research questions, jurisprudence and legal doctrine have been consulted (a traditional "black letter" approach). In order to find an answer to research question 5 (what is the general assessment framework that is applied when assessing the compatibility of measures with the right to property?), an inductive method was applied. Several cases of the ECtHR and doctrine on this topic were consulted in order to establish the Court's general assessment framework (a step-by-step approach) when dealing with alleged infringements of the right to property. A similar approach was taken for answering questions 6-8.

In order to answer the final research question, the author has established an expanded assessment framework, which consists of various elements: (i) elements used by the ECtHR for assessing tax measures (chapter 7); elements used by the ECtHR for assessing social security measures (chapter 8);

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earlier, dating from feudal times, the state's taxing power was sometimes used to impose severe disabilities on aliens via discriminatory "special levies", "retaliatory taxes" and 'extraordinary church taxes". *See*, for example, A. R. Albrecht, *The Taxation of Aliens under International Law*, 29 British Year Book of International Law, pp. 149-150 (1952).

22. M. Buquicchio-de Boer, *Tax matters and the European Convention on Human Rights*, in *Taxation and Human Rights – Proceedings of a Seminar Held in Brussels in 1987 during the 41st Congress of the International Fiscal Association* pp. 60-64 (IFA ed., Kluwer Law and Taxation Publishers 1988); P.J. Wattel, *Mensenrechten en belastingen*, in *40 jaar Europees verdrag voor de rechten van de mens* pp. 266-269 (A.W. Heringa et al. eds., NJCM 1990); M. Feteris, *50 jaar EVRM en het belastingrecht*, in *50 jaar EVRM: 50 jaar Europees Verdrag voor de Rechten van de Mens 1950-2000* pp. 485-486 (R.A. Lawson & E. Myjer eds., NJCM 2000); I. Foighel, *Do Human Rights Apply to Taxpayers?*, in *Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal* pp. 537-542 (P. Mahoney ed., Heymanns 2000); and P. Baker, *Taxation and the European Convention on Human Rights*, 4 British Tax Review, pp. 211-377 (2000).

and (iii) elements used by arbitral tribunals when assessing tax measures in the light of the indirect expropriation standard as included in bilateral investment treaties (BITs) (chapter 9). A deductive approach was taken by applying this assessment framework to the problem of international double taxation. An explanation as to this particular aspect of the methodology is given in section 1.3.2.

1.3.2. Comparative aspects

1.3.2.1. Introduction

Throughout this book, the author applies the analytical (or doctrinal) method of comparison. This method views the law as a body of coherent principles and aims to compare rules of different systems and formulate general principles.[23]

A functional method of comparison is applied, which means that the comparison starts from a problem (i.e. international double taxation) rather than a norm as such (a so-called comparison of the law in action or micro-comparison).[24] The functional approach starts from the premise that different legal systems face essentially the same problems and solve these problems by quite different means, but often with similar results.[25] This research method has been used for several research questions:

- In answering research question 2 (how is international double taxation caused?), the author makes a functional comparison with the law of jurisdiction, forming a part of the wider domain of public international law (*see* chapter 3). This comparison is justified by the fact that the exercise of tax jurisdiction is essentially an application of the general law of jurisdiction (*see* section 3.1.2.).
- To establish the aforementioned expanded assessment framework (*see* section 1.3.1.), the author relies upon notions and doctrines developed

23. G. Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 Harvard International Law Journal 2, p. 428 (1985).
24. G. Samuel, *An Introduction to Comparative Law Theory and Method* p. 65 (Hart Publishing 2014).
25. K. Zweigert & H. Kötz, *An Introduction to Comparative Law* p. 34 (Oxford University Press 1998).

in areas that are traditionally seen as distinct from both tax and the right to property, namely social security and the right to property (chapter 8) and the notion of indirect expropriation as included in BITs (chapter 9).

- Lastly, in chapter 10, the author compares the international law on liability with the approach taken by the ECtHR on the same subject (*see*, in particular, section 10.3.3.).

Chapter 9 of this book discusses the notion of indirect expropriation in BITs in order to see whether some inspiration can be found for applying the right to property as included in human rights conventions (notably article 1 of Protocol 1 to the ECHR; *see* section 5.2.). The choice to compare these two distinct areas of law deserves some explanation.

First, it should be noted that this book is not the first contribution aiming to introduce notions created in other fields of law into human rights law.[26] A number of authors have already attempted to bridge human rights with investment law, with varying conclusions.

Some authors have emphasized that investment arbitration has advantages over human rights procedures.[27] For example, contrary to the ECtHR, the International Centre for Settlement of Investment Disputes (ICSID) Convention does not prescribe prior exhaustion of domestic remedies for the admissibility of a request for arbitration.[28] According to Rosentreter,

> [a]s regards the prohibition of unlawful expropriation, the similarly motivated "right to property" appears in Article 17 of the UDHR, Article 21 of the American CHR, Article 14 of the African Charter on Human and Peoples' Rights and the Protocol to the ECHR. Even though these rights are often heavily qualified and provide rather less protection from expropriation than many investment treaties, it could still be *useful to take them into account for interpretative purposes*.[29] [Emphasis added.]

According to other scholars in the field of investment law, the ECtHR is "the only alternative for investment arbitration which could seriously be

26. *See*, notably, D. Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* (Nomos 2015).
27. C. Tomuschat, *The European Court of Human Rights and Investment Protection*, in *International Investment Law for the 21st Century* p. 641 (C. Binder et al. eds., Oxford University Press 2009).
28. This advantage is, however, mitigated in tax disputes due to the insertion of "tax filter" provisions (*see* sec. 9.3.2.).
29. Rosentreter (2015), at p. 87.

considered".[30] Tomuschat concludes that, "(o)n the whole, it will emerge that *at the level of substantive law, the ECtHR is not far away from the jurisprudence of the ICSID awards*" [emphasis added].[31]

Indeed, an analysis of arbitral awards reveals that tribunals, when dealing with the indirect expropriation standard as included in BITs, occasionally refer to case law of the ECtHR on the right to property and take principles into account which have been developed by the ECtHR (*see* section 9.5.1.). This shows that both branches of law are somehow interrelated and can benefit from a certain amount of cross-fertilization.

1.3.2.2. Legal coherence by comparative and systemic interpretation

This section aims to justify why, aside from academic curiosity, a comparison between the human right to property and the prohibition of expropriation under investment law is justified.

From a legal point of view, inspiration can be found in the doctrine of systemic interpretation. It can be used to complete the legal picture, fill gaps in a treaty, derive guidance from parallel treaty provisions to ascertain the meaning of uncertain treaty terms or, more generally, take international law developments into account.[32] However, this doctrine is not undisputed,[33] and certain scholars have expressed a reluctance to apply it.[34] Nevertheless, it could prove to be a powerful tool for shedding light on unclear treaty terms or even to counter the fragmentation of the international legal system in general.

30. Tomuschat (2009), at p. 637.
31. Id., at p. 649. Others have submitted that the approach of the ECtHR may inform the question of how other supranational courts and arbitral bodies should deal with similar questions. *See*, for example, H. Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, 11 New York University Environmental Law Journal 1, p. 137 (2003).
32. R.K. Gardiner, *Treaty Interpretation* p. 260 (Oxford University Press 2008).
33. *See*, for example, A. Rachovitsa, *The Principle of Systemic Integration in Human Rights Law*, 66 International and Comparative Law Quarterly 3, pp. 557-588 (2017).
34. UN International Law Commission, *Fragmentation of International Law: Difficulties Arising From The Diversification and Expansion of International Law* p. 218 (United Nations 2006). *See also* Ph. Sands, *Treaty, Custom and the Cross-fertilization of International Law* 1 Yale Human Rights & Development Law Journal 1, p. 95 (1998). This hesitance is not unfounded, as it carries an inherent risk of judicial activism by allowing the judge applying or interpreting the treaty to go beyond the strict boundaries of the treaty itself.

In the author's opinion, recourse to this method is indeed warranted. One should keep in mind that all treaties, including human rights conventions and BITs, belong to and form part of the wider legal system.[35]

The legal basis for applying the doctrine of systemic interpretation to treaty terms is article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT). According to article 31 of the VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31(3)(c) of the VCLT stipulates that, together with the context, "(a)ny relevant rules of international law applicable in the relations between the parties" shall be taken into account for the purposes of interpreting an international treaty.

This provision can equally be used to interpret provisions of human rights treaties, such as the ECHR, despite their alleged "hierarchical superiority" over other norms of international law.[36] We can indeed assume that the parties to the ECtHR did not intend to upset other rules of international law.[37] In the Court's case law, it was also confirmed relatively early that the ECtHR can rely on the interpretative articles of the VCLT to interpret the provisions of the ECHR (*see* section 6.3.).[38] It is clear that the provisions of the ECHR do not operate in a legal vacuum.[39]

35. McLachlan strikingly worded this as follows: "[T]reaties are developed in an iterative process in which many normative elements are shared. From having been a series of distinct conversations in separate rooms, the process of treaty-making is now better seen as akin to a continuous dialogue within an open-plan office." *See* C. McLachlan, *The Principle of Systemtic Integration and Article 31(3)(C) of the Vienna Convention*, 54 The International and Comparative Law Quarterly 2, p. 284 (2005).
36. R. Bernhardt, *The Convention and Domestic Law*, in *The European System for the Protection of Human Rights* p. 25 (R.St.J. Macdonald et al. eds., Nijhoff 1993).
37. *See*, for the reverse reasoning (i.e. importing human rights into investment law), B. Simma & T. Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in International Investment Law for the 21st Century p. 694 (C. Binder et al. eds., Oxford University Press 2009). This can also be seen as an application of the principle of good faith; *see* O. Dörr & K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* p. 561 (Springer 2012).
38. "The Court is prepared to consider, as do the Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties" (ECtHR, 21 Feb. 1975, *Golder v. The United Kingdom* (Application no. 4451/70), ECLI:CE:ECHR:1975:0221JUD000445170, para. 29).
39. At the same time, other international agreements also seem to respect obligations arising from human rights, as is evidenced by the Preamble to the VCLT: "[h]aving in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non interference in the domestic affairs of States, of the prohibition of the threat or use of force and of *universal respect for, and*

Some commentators, such as Higgins, have already pointed to the importance of the notion that questions relating to property and international law need to be looked at as a coherent whole, and those questions, including those relating to human rights, are intertwined.[40]

It is submitted that the areas of investment law and human rights can indeed be bridged by relying upon article 31(3)(c) of the VCLT. This will allow a cross-fertilization between the right to property as included in human rights conventions and the notion of indirect expropriation as used in investment law.

An in-depth analysis of the principle of systemic integration would greatly exceed the scope of this book, but it could be argued that this provision allows one to look at the notion of expropriation as contained in investment law to provide guidance for the application of the notion of the right to property as contained in the ECHR. In short, in order to achieve this, the external rule that is relied upon (*in casu* the prohibition of indirect expropriation) must fulfil three criteria: (i) it must qualify as a rule of international law; (ii) it must be considered relevant; and (iii) it must be applicable in the relations between the parties.

First, "rule of international law" is a broad term which refers to all sources of international law, as enumerated in article 38(1) of the Statute of the International Court of Justice (ICJ): customary law, treaties and general principles.[41] The adoption of investment law concepts in human rights law is easy to achieve through article 31(3)(c) of the VCLT. This can be explained by the fact that investment law is not only contained in treaties,

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observance of, human rights and fundamental freedoms for all …" [emphasis added]. Compare art. 2 TEU: "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and *respect for human rights*, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" [emphasis added].

40. R. Higgins, *The Taking of Property by the State: Recent Development in International Law*, 176 Recueil des Cours – Collected Courses of the Hague Academy of International Law 3, p. 375 (1982). In the context of the absence of legal certainty at the domestic level, the ECtHR also ruled that "the lack of consistency at the legislative level and the conflicting approaches by the domestic courts with regard to the nationalisation of property were likely to create a general climate of ambiguity and legal uncertainty" (ECtHR, 1 Dec. 2005, *Păduraru v. Romania* (Application no. 63252/00), ECLI:CE:ECHR:2005:1201JUD006325200, para. 99). As will be explained in chapter 9, the proportionality principle as used by the ECtHR has been seen as a possible solution to "the threshold problem of indirect takings" (*see* S. López Escarcena, *Indirect Expropriation in International Law* p. 10 (Edward Elgar 2013)).

41. McLachlan (2005), at p. 290; and Gardiner (2008), at p. 263.

which belong to the second category of sources of international law; rather, certain concepts of investment law are in fact derived from customary international law (and can under some circumstances be considered a codification thereof; *see* section 9.2.).[42] This criterion can thus be approached from several angles and hence should be easily fulfilled.

Second, the rule needs to be relevant. There is some scholarly debate regarding this notion.[43] Some authors are of the opinion that only rules that are directly applicable to the subject matter of the case should be considered.[44]

The author concurs with Simma and Kill, who support a broad interpretation of this requirement and submit that the term "relevant" cannot be directly equated with "relating to the same subject matter". The drafters of the VCLT chose to use the term "relevant", the ordinary meaning of which is broader than "addressing the same subject matter".[45] Other authors have also endorsed a broad interpretation and submit that external rules, regardless of their subject matter, can be relevant when they are created to solve the same or similar factual, legal or technical problems.[46]

Article 31(3)(c) of the VCLT has also been invoked a number of times by the ECtHR.[47] *Al-Adsani* (and two other related decisions rendered on the same date) is especially relevant in this respect. While other courts in the past had applied article 31(3)(c) of the VCLT to refer either to a term used within a treaty belonging to the *same area* of law, or the *same specific subject matter*,[48] the ECtHR took a broader view by combining terms in

42. As will be demonstrated in sec. 9.4.1., the notion of expropriation and the conditions leading to a justified "taking" of property under international investment agreements are in fact directly derived from customary international law. This criterion thus seems easily fulfilled.
43. M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* p. 433 (Martinus Nijhoff Publishers 2009). This is discussed in more detail in U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* pp. 177-181 (Springer 2007).
44. H.-J. Uibopuu, *Interpretation of Treaties in the Light of International Law: Art. 31, Para. 3(c) of the Vienna Convention on the Law of Treaties*, 40 Yearbook of the Association of Attendees and Alumni of the Hague Academy of International Law, p. 4 (1970).
45. Simma & Kill (2009), at p. 695.
46. Dörr & Schmalenbach (2012), at p. 565.
47. *See*, for example, ECtHR, 21 Feb. 1975, *Golder v. The United Kingdom* (Application no. 4451/70), ECLI:CE:ECHR:1975:0221JUD000445170; and ECtHR, 23 Mar. 1995, *Loizidou v. Turkey* [GC] (Application no. 15318/89), ECLI:CE:ECHR:1996:1218JUD001531889.
48. In UNCITRAL Interim Award, 26 June 2000, *Pope & Talbot Inc. v. The Government of Canada*, the fair and equitable treatment standard (*see* sec. 9.2.) of an investment treaty was discussed by referring to investment law in general. *See*, on this case, McLachlan (2005), at pp. 296-299.

two relatively unrelated areas of law and using the law of state immunity to interpret the right to a fair trial.[49] The Court made it very clear that it was open to using other relevant rules of international law for construing its treaty terms:

> [The Court] reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention … and that Article 31§3(c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account … . The Convention should so far as possible be *interpreted in harmony* with other rules of international law of which it forms part … .[50] [Emphasis added.]

This shows that article 31(3)(c) of the VCLT indeed enjoys a very broad application by the ECtHR.

Despite the different natures of investment law and human rights law (*see* section 9.1.), it is hard to argue that they deal with totally unrelated subject matters. The goal of investment law is to provide protection to investors. Security over property rights can be seen as an important (if not the predominant) precondition for an international investor to make an investment in a foreign country.[51] Taking into account the fact that the ECtHR is inclined to use norms that are not directly related to the context of the ECHR, this requirement should also be complied with.[52]

The third criterion is probably the most complex. The rule which is relied upon has to be applicable in the relations between the parties.[53] This is an

49. ECtHR, 21 Nov. 2001, *Al-Adsani v. The United Kingdom* [GC] (Application no. 35763/97), ECLI:CE:ECHR:2001:1121JUD003576397; ECtHR, 21 Nov. 2001, *Fogarty v. The United Kingdom* [GC] (Application no. 37112/97), ECLI:CE:ECHR:2001:1121 JUD003711297; and ECtHR, 21 Nov. 2001, *McElhinney v. Finland* [GC] (Application no. 31253/96), ECLI:CE:ECHR:2001:1121JUD003125396.

50. ECtHR, 21 Nov. 2001, *Al-Adsani v. The United Kingdom* [GC] (Application no. 35763/97), ECLI:CE:ECHR:2001:1121JUD003576397, para. 55.

51. A.R. Çoban, *Protection of Property Rights within the European Convention on Human Rights* p. 2 (Ashgate 2004).

52. A. Rachovitsa, *Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case law of the European Court of Human Rights*, 28 Leiden Journal of International Law 4, p. 878 (2015).

53. This criterion brings up several potential problems relating to the legal force attributed to the rule, the applicability of the rule *inter partes* and the temporal applicability of the rule. The latter should be distinguished from the use of subsequent agreements or practice between the parties regarding the interpretation or the application of treaty provisions. On the basis of art. 31(3)(a) and (c) VCLT, using such agreements or practices can also be

emanation of the principle of *pacta tertiis nec nocent nec prosunt* ("treaties can neither harm nor benefit third parties", article 34 of the VCLT). Usually the term "applicable" is understood as meaning "in force" or "binding".[54] Conversely, this means that non-binding rules cannot be relied upon for the purposes of applying article 31(3)(c) of the VCLT.[55]

However, international courts like the Court of Justice of the European Union (ECJ)[56] and the ECtHR have not opted for a strict application of this condition. The ECtHR in particular has on several occasions decided to use treaties that are neither binding on all ECHR Member States nor binding

taken into account to establish the "context" for interpretative purposes. This provision has a much narrower scope than art. 31(3)(c) VCLT, as it requires that those agreements and practices specifically relate to the interpretation or application of treaty provisions. In practice, examples of such agreements are rare (I. Sinclair, *The Vienna Convention on the Law of Treaties* p. 136 (Manchester University Press 1984)). Article 31(3)(c) VCLT itself does not clarify whether the applicable rules are to be determined as at the date on which the treaty was concluded or at the date on which the dispute arises; *see* Commission (2006), at p. 215 A classic statement in this respect is the award of judge Huber in *Las Palmas*: "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled" (Permanent Court of International Justice, 4 Apr. 1928, *The Island of Palmas Case* (*Las Palmas*)). Relevant for this book is the statement by The United Nations International Law Commission in its 2006 report on the application of art. 31(3)(c) VCLT, which explicitly mentions the notion of "expropriation" as a norm which could have an evolving meaning: "When might the treaty language itself, in its context, provide for the taking account of future developments? Examples of when this might be a reasonable assumption include at least: (a) Use of a term in the treaty which is 'not static but evolutionary'. This is the case where the parties by their choice of language intend to key into that evolving meaning without adopting their own idiosyncratic definition (*for example, use of terms such as 'expropriation'*) … [emphasis added]"; *see* UN International Law Commission (2006), at p. 242.

54. Simma & Kill (2009), at p. 697

55. Villiger (2009), at p. 433 This criterion hinders the application of non-binding norms being called upon through the method of systemic integration. In tax treaty cases, this requirement could prevent the *OECD Commentary* from being called upon through art. 31(3)(c) VCLT to interpret unclear treaty terms.

56. Under certain circumstances EU Member States are obliged to take non-binding instruments such as soft law into account. For example, "Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases *cannot in [itself] confer rights on individuals* upon which the latter may rely before national courts. However, national courts *are bound to take those recommendations into consideration* in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law" [emphasis added]. *See* ECJ, 13 Dec. 1989, Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles*, ECLI:EU:C:1989:646, para. 19; confirmed by, inter alia, ECJ, Case C-207/01, 11 Sept. 2003, *Altair Chimica*, ECLI:EU:C:2003:4511, para. 41; *see also* ECJ, 18 Mar. 2010, Case C-317/08, *Alassini and Others*, ECLI:EU:C:2010:146, para. 40.

on the respondent state in question.[57] The Court has even been willing to take into account non-binding instruments such as recommendations and resolutions in the process of interpreting convention terms and thus takes a more lenient approach than strictly dictated by the VCLT.[58] Therefore, this requirement should also be fulfilled.

It can be concluded from the foregoing that using concepts from investment law as guidance in human rights disputes should pose no problem, especially if the aim of the provisions that are being compared is the same (i.e. the protection of the investor and/or the taxpayer) and the concepts that are used to achieve that aim are also similar (i.e. the prohibition of expropriation and the right to property).[59] Applying this interpretative method should thus allow the prohibition of indirect expropriation and the right to property to be bridged.

However, enthusiasm about this theory should also be tempered.[60] One should not forget that the principle of systemic interpretation as enunciated in the VCLT is merely an interpretative rule. The interpreter must first consider the meaning of the term in its context and the object and purpose of the provision that is being applied.[61] These considerations might in fact lead to attaching different meanings to the same term in different treaties.[62]

It could be argued that the principle of systemic interpretation allows the ECHR to "absorb" relevant rules if they are to the benefit of the applicant in a particular case.[63] However, given the nature of the ECHR as a human

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57. Rachovitsa (2015), at p. 880
58. *See*, for example, ECtHR, 12 Nov. 2008, *Demir and Baykara v. Turkey* [GC] (Application no. 34503/97), ECLI:CE:ECHR:2008:1112JUD003450397, para. 75: "These methods of interpretation have also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies." *See* the examples given in F. Matscher, *Methods of Interpretation of the Convention*, in *The European System for the Protection of Human Rights* pp. 74-75, (R.S.J. MacDonald et al. eds., Nijhoff 1993).
59. *See*, on different types of interferences with the right of property, sec. 6.3.
60. *See*, in depth, V.P. Tzevelekos, *The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragementation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?*, 31 Michigan Journal of International Law 3, pp. 621-690 (2010).
61. McLachlan (2005), at p. 311.
62. *See*, for example, International Tribunal for the Law of the Sea, 3 Dec. 2001, *The Mox Plant Case* (*Ireland v. United Kingdom*), para. 51.
63. Tzevelekos (2010), at p. 685.

rights treaty that is considered a "living instrument"[64] and the ECtHR's progressive interpretation of its guarantees (*see* section 6.1.2.),[65] a harmonizing interpretation in the sense of article 31(3)(c) of the VCLT would in some cases lead to a lower level of protection than the standard adopted by the Court. It is fair to conclude that the ECtHR would probably discourage reliance on this interpretative method if it were to reduce the level of protection under the ECHR.[66]

At the same time, a certain amount of pragmatism should also be adopted. When similar problems arise before different judicial bodies, it is only logical for judges to be unwilling to reinvent the wheel each time when confronted with an issue that has already been dealt with by another court or tribunal.[67]

64. "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field" (ECtHR, 25 Apr. 1978, *Tyrer v. The United Kingdom* (Application no. 5856/72), ECLI:CE:ECHR:1978:0425JUD000585672, para. 31).

65. "[The Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (ECtHR, 28 July 1999, *Selmouni v. France* [GC] (Application no. 25803/94), ECLI:CE:ECHR:1999:0728JUD002580394, para. 101).

66. J. Udich, *Human Rights and Interpretation: Limits and Demands of Harmonizing Interpretation of International Law*, in *The Influence of Human Rights on International Law* p. 49 (N. Weiß & J.M. Thouvenin eds., Springer International Publishing 2015).

67. On several occasions, arbitral tribunals have taken into account the right to property as stipulated in art. 1 Prot. 1 ECHR when interpreting expropriation provisions in investment treaties. *See*, for an overview, Rosentreter (2015), at pp. 349-355. The following cases illustrate that this interpretative technique is used for various purposes:

- In *Lauder* (2001), the tribunal referred to the ECtHR distinction between formal and de facto deprivations (UNCITRAL, 3 Sept. 2001, *Ronald S. Lauder v. The Czech Republic*, para. 200).
- The tribunal in *Tecmec* (2003) followed this approach but also (extensively) quoted ECtHR cases to introduce a proportionality test (ICSID, 29 May 2003, Case No. ARB (AF)/00/2, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, paras.116 and 122).
- In determining whether a measure was indeed expropriatory, the tribunal in *Azurix* (2006) relied (under referral to *Tecmec* (2003)) upon ECtHR cases (ICSID, 14 July 2006, Case No. ARB/01/12, *Azurix Corp. v. The Argentine Republic*, para. 311).
- In *Saipem* (2007), the Court relied upon ECtHR case law to demonstrate that judicial decisions can qualify as possessions (ICSID, 21 Mar. 2007, Case No. ARB/05/07 *Saipem S.p.A. v. The People's Republic of Bangladesh*, paras. 130 and 132).

1.4. Innovative and cross-boundary character

This research project demonstrates scientific originality in several ways. From a contents point of view, no thorough research has yet been conducted (or is being conducted) on several elements of this topic (e.g. the link between the right to property and an excessive tax burden as a result of international double taxation). Even in most of the research that has been conducted so far on the relationship between taxation and human rights, discussion on the impact of human rights in tax matters has been (mostly) limited to the (lack of) procedural safeguards for taxpayers (e.g. the right to private life, the right to a fair trial and retroactive tax legislation). Far fewer contributions discuss the possible impact of human rights on substantive safeguards for the taxpayer (i.e. providing safeguards against excessive taxation; *see* section 1.1.).

The current research project studies the problem of international double taxation from a different angle (*see* section 1.1.) and brings new views to the existing debate. The topic of international double taxation is also placed in a wider context, namely the current lack of attention to taxpayers' rights in international and European policy developments (*see*, for example, chapter 4, section 7.3.4.3.4. and section 10.2.2.3.). The author expects this book to constitute an added value in this respect and to contribute to the debate in legal doctrine regarding the rights of taxpayers versus the tax administration's aim of increasing tax revenue.

This book also demonstrates structural originality. A systematic analysis of the problem of international double taxation was conducted and combined with the current solutions offered by European legislative incentives (*see* section 4.3.) in order to identify the current gaps in existing taxpayer protection. This, it is hoped, will also enhance accessibility to and comprehension of this complex problem.

The author has taken an intradisciplinary legal approach to finding the answers to the above-mentioned research questions, as multiple branches of law were analysed. Solutions to the research questions were sought in (international) tax law (in particular chapters 3 and 4), human rights law (in particular chapters 5, 6, 7, 8 and 10) as applied to both tax and social security disputes, international law (in particular chapter 3) and investment law (in particular chapter 9). To a lesser extent, the author has also relied on research that has been conducted in the field of economics to find support for some legal concepts (chapter 4).

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