

University of Oxford, Faculty of Law

The implications of the structure of the regulatory expropriation enquiry in international investment law

M Phil Thesis

Candidate: Jonathan Bonnitcha
Supervisor: Professor Christopher McCrudden
Word Count: 30 550 words
Submitted October 2008

Abstract

The implications of the structure of the regulatory expropriation enquiry in international investment law

Jonathan Bonnitca, M Phil submission, Trinity Term 2008

This thesis examines the structure of enquiry that arbitral tribunals use to distinguish between regulatory expropriation and legitimate non-compensable regulation in international investment law. The thesis proposes a new taxonomy of the possible structures of enquiry: the enquiry could look exclusively to the effects of the measure on the protected property; exclusively to the characteristics of the impugned measure; or to both the effects on the property and the characteristics of the measure.

The application of this taxonomy shows that there is no agreed structure of enquiry in decisions on regulatory expropriation in international investment law. However, various threads of jurisprudence do show some degree of internal consistency. The thesis identifies six approaches in the decisions of arbitral tribunals: two that look exclusively to the effects of the measure; one that looks exclusively to the characteristics of the measure; and three that consider both the effects and the characteristics of the measure. Of the three approaches that consider both the effects and the characteristics of a measure, one is a direct adoption of US 5th Amendment jurisprudence and another is a direct adoption of ECHR Article 1 – Protocol 1 jurisprudence. Chapters 4 and 5 examine the jurisprudence of the US and ECHR in detail. These chapters show that, unlike international investment law, each of these jurisdictions has an established structure of enquiry in cases of regulatory expropriation.

All six approaches to regulatory expropriation are sketched as models. These model approaches are applied to the case study of *Piero Foresti*. The case study demonstrates the most significant conclusion of this thesis: that different structures of enquiry, and different approaches within those structures, necessarily entail different legal outcomes on the same facts.

Acknowledgements

A thesis is an individual project, but one that relies on the assistance and support of others. There are number of people I would like acknowledge, without whose support I could not have completed this work.

First, for his assistance throughout the M Phil project, I would like to thank my supervisor, Professor Christopher McCrudden. In particular I'm grateful for the initial germ of an idea that became the topic, and the flexibility he allowed me in working to my own timetable throughout the year.

I would like to record my enormous gratitude to the Rhodes Trust for giving me the opportunity to study at Oxford. The Trust has funded me for three years at Oxford, a financial commitment that goes far beyond the M Phil. I hope that this thesis is only the beginning of the Trust's return on its investment.

I'm indebted to friends who read and commented on various sections of the draft - Andrew Lodder, Ryan Manuel and Fiona Roughley. I'm also grateful to Jen Robinson for assistance in preparation for the viva.

Finally, and most of all, I would like thank the wonderful Emily Speers Mears. She read and commented on all the chapters of the thesis in a number of their incarnations, proof-read the entire final document and helped me stay sane while I finished writing-up the thesis in Paris. In the process she developed an impressive, if unwanted, ad hoc expertise in the law of expropriation. This thesis would not have been possible without her.

Table of Contents

Abstract.....	ii
Acknowledgements.....	iii
Table of abbreviations	vii
Table of cases	ix
European Convention on Human Rights cases.....	ix
International law cases.....	x
United States of America cases	xii
Table of treaties and statutes	xiv
Chapter 1: Introduction, parameters and methodology.....	1
A. Introduction	1
B. Parameters.....	2
i) Dimensions of the law of expropriation	2
ii) Treaty and custom in the international law of expropriation.....	3
iii) Regulatory expropriation	4
C. The taxonomy	4
D. Methodology.....	6
i) On history.....	6
ii) On comparativism	7
iii) On case study.....	8
iv) The choice of <i>Piero Foresti</i> as the case study.....	9
E. The stylised facts of <i>Piero Foresti v South Africa</i>	10
i) The Minerals Act (MA) 1991.....	10
ii) The interests owned by the claimant.....	11
iii) The relevant BIT.....	11
iv) The MPRDA 2002.....	12
v) The transition and conversion of mineral rights	13
vi) Direct or indirect expropriation?.....	15
F. Structure.....	15
Chapter 2: History	17
A. Introduction	17
B. The early development of international law on expropriation.....	17
C. Interwar cases on regulatory expropriation	20

D.	Codification and institution-building after the Second World War	24
i)	Havana Charter	24
ii)	Early efforts to establish a multilateral investment framework	25
iii)	ICSID	27
E.	Developing country opposition and the New International Economic Order (NIEO)	29
F.	Bilateral investment treaties and limited multilateralism.....	30
G.	Recent multilateral efforts to institutionalise international investment law	33
i)	The Multilateral Agreement on Investment.....	33
ii)	Investment at the World Trade Organisation	36
H.	Conclusion	37
Chapter 3: Regulatory expropriation in BITs.....		39
A.	Introduction	39
B.	Preliminary issues and the effects structure	39
i)	The jurisprudence of the Iran-US Claims Tribunal (IUSCT).....	39
ii)	The existence of criteria for an expropriation to be lawful.....	41
iii)	Subjective state intent to expropriate.....	41
C.	The effects structure	42
i)	The <i>Metalclad</i> approach: effect on economic value	42
ii)	Implications of the <i>Metalclad</i> approach for <i>Piero Foresti</i>	46
iii)	The <i>Pope & Talbot</i> approach: substantial deprivation of ownership rights.....	47
iv)	Implications of the <i>Pope & Talbot</i> approach for <i>Piero Foresti</i>	49
v)	The effect of <i>appropriation</i> : an alternative approach?	50
D.	The exception structure	51
i)	The exception structure and police powers	51
ii)	Recent cases invoking the exception structure.....	52
iii)	Implications of the <i>Methanex</i> approach for <i>Piero Foresti</i>	55
E.	The balancing structure	57
i)	The characterisation-as-balancing approach	57
ii)	Implications of the characterisation-as-balancing approach for <i>Piero Foresti</i>	60
iii)	<i>Tecmed v Mexico</i> : the ECHR approach	61
iv)	US and Canadian model BITs: the <i>Penn Central</i> approach.....	62
Chapter 4: Regulatory expropriation in US constitutional jurisprudence.....		64
A.	Introduction	64
B.	The legal context of US regulatory takings jurisprudence.....	65

C.	The denominator problem and the ‘parcel as a whole’ rule	65
D.	The balancing structure	67
i)	<i>Penn Central</i>	67
ii)	Unconstitutional exactions	73
E.	The effects structure	75
i)	<i>Loretto</i>	75
ii)	<i>Lucas</i>	75
F.	Implications of the US jurisprudence for <i>Piero Foresti</i> : the <i>Penn Central</i> approach	76
Chapter 5: Regulatory expropriation in ECHR jurisprudence.....		79
A.	Introduction	79
B.	The ‘ <i>three distinct rules</i> ’ of Article 1-P1	80
C.	Deprivation, control of use or interference?.....	81
i)	Deprivation	82
ii)	Control of use	85
iii)	Interference	85
D.	The proportionality test	85
i)	Deprivation	85
ii)	Control of use	86
iii)	Interference	88
E.	Implications of the ECHR approach for <i>Piero Foresti</i> : balancing by proportionality	89
Chapter 6: Conclusion.....		92
A.	Structures and approaches	92
B.	The implications of different structures and approaches	93
C.	Further questions	94
Bibliography.....		96

Table of abbreviations

American Journal of International Law	AJIL
Asia Pacific Economic Cooperation Forum	APEC
Association of South-East Asian Nations	ASEAN
Black Economic Empowerment	BEE
Bilateral Investment Treatment	BIT
British Yearbook of International Law	BYIL
European Convention on Human Rights	ECHR
Energy Charter Treaty	ECT
European Court of Human Rights	ECtHR
General Agreement on Trade in Services	GATS
General Agreement on Tariffs and Trade	GATT
International Centre for the Settlement of Investment Disputes	ICSID
Italy - South Africa Bilateral Investment Treaty	I-SA BIT
Iran-US Claims Tribunal	IUSCT
Minerals Act	MA
Multilateral Agreement on Investment	MAI
Mercado Común del Sur	MERCOSUR
Mineral Petroleum and Resources Development Act	MPRDA
North American Free Trade Agreement	NAFTA
Organization for Economic Cooperation and Development	OECD
Permanent Court of International Justice	PCIJ
South Africa	SA
Agreement on Trade-Related Investment Measures	TRIMS
United Nations	UN
United Nations General Assembly	UNGA
United Nations Commission on Trade and Development	UNCTAD

United States of America

US

WTO Working Group on the Relationship between Trade and Investment WGRTI

World Trade Organization

WTO

Table of cases

European Convention on Human Rights cases

<i>AGOSI v UK</i> (App no 9118/80) (1986) 9 EHRR 1	85
<i>Baner v Sweden</i> (App no 11763/85) (1989) 60 DR 128	83
<i>Beyeler v Italy</i> (App no 33202/96) (2001) 33 EHRR 62	81
<i>Bosphorus v Ireland</i> (App no 45036/98) (2006) 42 EHRR 1	85
<i>Bramelid and Malmstrom v Sweden</i> (App no 8588/79;8589/79) (1982) 29 DR 64	82
<i>Chassagnou v France</i> (App no 25088/94) (1999) 29 EHRR 615	87
<i>Erkner and Hofauer v Austria</i> (App no 9616/81) (1987) 9 EHRR 464	84, 88
<i>Fredin v Sweden</i> (App no 12033/86) (1991) 13 EHRR 784	82, 83, 84, 87
<i>Holy Monasteries v Greece</i> (App no 13092/87) (1995) 20 EHRR 1	83
<i>Hutten-Czapska v Poland</i> (App no 35014/97) (2007) 45 EHRR 4	82, 87, 90
<i>Jahn v Germany</i> (App no 46720/99) (2006) 42 EHRR 49	81
<i>James v UK</i> (App no 8793/79) (1986) 8 EHRR 123	79 - 82, 85, 86
<i>Katte Klitsche de la Grange v Italy</i> (App no 12539/86) (1995) 19 EHRR 368	84, 88 - 90
<i>Lithgow v UK</i> (App no 9006/80) (1986) 8 EHRR 329	81
<i>Marckx v Belgium</i> (App no 6833/74) (1979) 2 EHRR 330	79
<i>Matos e Silva v Portugal</i> (App no 15777/89) (1997) 24 EHRR 573	83, 84, 88
<i>Mellacher v Austria</i> (App no 10522/83;11011/84;11070/84) (1990) 12 EHRR 391	81, 82, 84 - 87, 90
<i>Papamichalopoulos v Greece</i> (App no 14556/89) (1993) 16 EHRR 440	83
<i>Phocas v France</i> (App no 17869/91) ECHR 23 April 1996	88, 89
<i>Pine Valley Developments v Ireland</i> (App no 12742/87) (1992) 14 EHRR 319	83 - 87, 90
<i>Pinnacle Meats v UK</i> (App no 33298/96) EComHR 21 October 1998	84

<i>Pressos Compania Naviera v Belgium</i> (App no 17849/91) (1997) 21 EHRR 301	83
<i>Soloduyk v Russia</i> (App no 67099/01) ECHR 12 July 2005	81
<i>Sovtransavto Holding v Ukraine</i> (App no 48553/99) (2004) 38 EHRR 44	81
<i>Sporrong and Lönnroth v Sweden</i> (App no 7151/75;7152/75) (1982) 5 EHRR 85	80 - 86, 88, 89
<i>Stran Greek Refineries v Greece</i> (App no 13427/87) (1994) 19 EHRR 293	82
<i>Tre Traktörer Aktiebolag v Sweden</i> (App no 10873/84) (1989) 13 EHRR 309	84 - 87, 90
<i>Vasilescu v Romania</i> (App no 27053/95) (1998) 28 EHRR 241	83

International law cases

<i>Award of the Tribunal of Arbitration Between the US and the Kingdom of Norway Under the Special Agreement of June 30 1921</i> (1923) 17 AJIL 362	21, 22
<i>Awards in the Matter of the 'Contested Property in Portugal'</i> (1921) 15 AJIL 99	19
<i>Azurix v The Argentine Republic</i> ICSID Case No ARB/01/12, Award, 14 July 2006	5, 62
<i>Biloune v Ghana</i> (1993) 95 ILR 183	57
<i>Biwater Gauff v United Republic of Tanzania</i> ICSID Case No ARB/05/22, Award, 24 July 2008	8, 49
<i>Case concerning certain German interests in Polish Upper Silesia (Germany v Poland)</i> (Merits) PCIJ Rep Series A No 7	4, 7, 22
<i>CME v Czech Republic</i> Partial Award, 13 September 2001	44, 45
<i>CMS Gas v Republic of Argentina</i> ICSID Case No ARB 01/08, Final Award, 12 May 2005 ...	44, 48
<i>Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic</i> ICSID Case No ARB/97/3, Award, 20 August 2007	41, 45
<i>Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica</i> ICSID Case No ARB(AF)/00/01, Final Award, 17 February 2000 (2000) 15 ICSID Review – FILJ 169	32
<i>Enron Corporation v Argentine Republic</i> ICSID Case No ARB/01/3, Award, 22 May 2007 ...	8, 15, 48
<i>Feldman v Mexico</i> ICISD Case No ARB(AF)/99/1, Award, December 16, 2002	3, 6, 9, 41, 44, 52, 57, 58

<i>Fireman's Fund Insurance Co v Mexico</i> ICSID Case No ARB(AF)/02/01, Award, 17 July 2006 ..	3, 41, 44, 48, 59
<i>Generation Ukraine v Ukraine</i> ICSID Case No ARB00/09, Award, 16 September 2003	59
<i>Lauder v The Czech Republic</i> Final Award, 3 September 2001	50
LG&E Energy v Argentina ICSID Case No ARB/02/1, Award, 25 July 2007	3, 44, 62
<i>Metalclad v Mexico</i> ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, (2001) 16 ICSID Review – FILJ 1	42 - 46, 58
<i>The United Mexican States v Metalclad</i> 2001 BCSC 664, 2 May 2001	44
<i>Methanex v United States</i> Final Award, 3 August 2005	6, 41, 42, 52 - 56
<i>Methanex v United States: Rejoinder of the Respondent</i> 23 April 2004	53, 54
<i>Methanex v United States: Reply of Claimant to Amended Statement of Defense</i> 19 February 2004	53
<i>Nykomb Synergistics Technology Holding v Republic of Latvia</i> Award, 16 December 2003 ...	48
<i>Occidental Exploration and Production Company v the Republic of Ecuador</i> LCIA Case No UN3467, Final Award, 1 July 2004	45, 46
<i>Olguin v Republic of Paraguay</i> ICSID Case No ARB/98/5, Award, 26 July 2001	50
<i>The Oscar Chinn Case (Great Britain v Belgium)</i> PCIJ Rep Series A/B No 63	7, 22 - 24
<i>Parkerings-Compagniet AS v Lithuania</i> ICSID Case No ARB/05/8, Award, 11 September 2007	41
<i>Phelps Dodge Corp. v Iran</i> (1986) 10 Iran-USCTR 121	39, 40
<i>Pope & Talbot Inc. v Canada</i> Interim Award, 26 June 2000	1, 3, 42, 44, 47 - 49, 52
<i>Saluka Investment BV v Czech Republic</i> Partial Award, 17 March 2006	52, 54 - 57
<i>SD Myers v Canada</i> Partial Award, 13 November 2000	3, 44, 57, 58
<i>Sedco Inc. v Iran</i> (1992) 28 Iran-USCTR 198	40
<i>Sempra Energy International v The Argentine Republic</i> ICSID Case No ARB/02/16, Award, 28 September 2007	15, 48, 49

<i>Siemens v Argentina</i> ICSID Case No ARB/02/8, Award, 6 February 2007	.....	6
<i>SPP v Egypt</i> Award, 20 May 1992, 3 ICSID Reports 189	.....	22
<i>Starrett Housing Corp. v Government of the Islamic Republic of Iran</i> (1983) 4 Iran-USCTR 122 ...		39, 40
<i>Técnicas Medioambientales Tecmed, S.A. v. United Mexican States</i> ICSID Case No ARB(AF)/00/02, Award, 29 May 2003	.....	3, 6, 8, 42, 44, 48, 61 - 62
<i>Telenor Mobile Communications v Republic of Hungary</i> ICSID Case No ARB/04/15, Award, 13 September 2006	.....	4, 44, 46
<i>Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran</i> Iran-US CTR		39, 40
<i>Tokios Tokelés v Ukraine</i> ICSID Case No ARB/02/18, Award, 26 July 2007	.....	45, 46
<i>Too v Greater Modesto Insurance Associates</i> (1989) 23 Iran-USCTR 378	.....	40
<i>The United States of America, on Behalf of Marguerite de Joly de Sabla v. The Republic of Panama</i> (1934) 28 AJIL 602	.....	23, 24
<i>Waste Management v Mexico (II)</i> ICSID Case No ARB(AF)/00/3, Final Award, 30 April 2004	.....	3, 46
United States of America cases		
<i>Agins v. City of Tiburon</i> 447 US 255 (1980)	.....	72
<i>Andrus v. Allard</i> 444 US 51 (1979)	.....	65
<i>Armstrong v. United States</i> 364 US 40 (1960)	.....	70
<i>Brown v. City of Twin Falls</i> 124 Idaho 39 (1993)	.....	69
<i>Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.</i> 508 US 602 (1993)	.....	66
<i>Dolan v. City of Tigard</i> 512 US 374 (1994)	.....	64, 73, 74, 77
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> 482 US 304 (1987)	.....	65, 72
<i>Hodel v. Irving</i> 481 US 704 (1987)	.....	72
<i>Kaiser Aetna v. United States</i> 444 US 164 (1979)	.....	68, 69

<i>Keystone Bituminous Coal Ass'n v. DeBenedictis</i> 480 US 470 (1987)	67
<i>Lingle, Governor of Hawaii, et al. v. Chevron USA Inc.</i> 544 US 528 (2005)	64, 65, 67 -75
<i>Loretto v. Teleprompter Manhattan</i> 458 US 419 (1982)	64, 75, 76
<i>Lucas v. South Carolina Coastal Council</i> 505 US 1003 (1992)	64, 65, 67, 71, 75, 76
<i>Monterey v. Del Monte Dunes at Monterey, Ltd.</i> 526 US 687 (1999)	73
<i>Mugler v. Kansas</i> 123 US 623 (1887)	71
<i>Nollan v. California Coastal Commission</i> 483 US 825 (1987)	64, 73, 74
<i>Palazzolo v. Rhode Island et al.</i> 533 US 606 (2001)	67, 70, 75, 76
<i>Penn Central Transportation Co v. New York City</i> 438 US 104 (1978)	57, 63 - 74, 76
<i>Pennsylvania Coal Co. v. Mahon</i> 260 US 393 (1922)	65, 67
<i>Tahoe-Sierra Preservation Council, Inc., et al v. Tahoe Regional Planning Agency et al.</i> 535 US 302 (2002)	66, 67, 70
<i>Texaco v. Short</i> 454 US 516 (1982)	78
<i>United States v. Locke</i> 471 US 84 (1985)	77, 78

Table of treaties and statutes

Agreement between the Republic of South Africa and the Belgo-Luxembourg Union on the Reciprocal Protection and Promotion of Investment (14 August 1998)	12
Agreement on Trade-Related Investment Measures (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3	36
APEC Non-Binding Investment Principles (November 1994)	32
Banking Act (1992) Act No 21/1992 Coll (Czech Republic)	54
Broad-Based Black Economic Empowerment Act (2003) No 53 (South Africa)	14
Convention on the Settlement of Investment Disputes between States and Nationals of other States (18 March 1965) 4 ILM 524	28
The Energy Charter Treaty (17 December 1994) (1995) 34 ILM 360	32
Framework Agreement on the ASEAN Investment Area (8 October 1998) http://www.asean.sec.org/6466htm	32
General Agreement on Trade in Services (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183	36
Havana Charter (24 March 1948) 62 UNTS 30	24 - 25
Helms Amendment 22 USC (1994) (United States)	32
International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195	9, 56
Italy - South Africa Bilateral Investment Treaty (9 June 1997)	11, 12
Mineral Petroleum and Resources Development Act (2002) No 28	9 - 15
Minerals Act (1991) No 50 (South Africa)	10
The Multilateral Agreement on Investment - Draft Consolidated Text (22 April 1998) DAFFE/MAI(98)7/REV1	33 - 36
North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 296	31

OECD Draft Convention on the Protection of Foreign Property 1967 (1968) 7 ILM 117	26
Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el MERCOSUR (17 December 1994) Mercosur/CMC/ No 13/93	32
Treaty Establishing the European Community (1957, as amended)	32

Chapter 1: Introduction, parameters and methodology

A. Introduction

International investment law exists at the intersection of law, politics and economics.¹ It is an area of law that has been understood, alternately, as protecting legitimate private rights, institutionalising the political power of capital exporting countries and promoting the economic development of capital importing countries. These competing interests and discourses have meant that the substance of this area of law has always been surrounded by controversy.

The competing interests of foreigners' property rights and the regulatory autonomy of host-states constitute a central tension in international investment law.² The former interest is directly protected by expropriation provisions, which require a host-state to compensate foreigners if it takes their property. Such expropriation provisions are included in nearly all international investment agreements.³ The principle that government regulation of property may constitute expropriation, without any intent on the part of the government to deprive foreigners of their investment, has been accepted in international law for some time.⁴ This liability for regulatory expropriation brings the protection of foreign property and host-state regulatory autonomy directly into conflict.⁵

The codification and institutionalisation of international investment law in bilateral investment treaties (BITs) has focused attention on the way the law of regulatory expropriation mediates between the interests of property protection and regulatory autonomy.⁶ Almost all BITs allow investors to bring claims directly against host-states through investor-state arbitration.⁷ A particularly controversial example currently before an International Centre for the Settlement of

¹ M Sornarajah, *The International Law on Foreign Investment* (Second edn, Cambridge University Press, Cambridge 2004) 1.

² V Lowe, 'Regulation or Expropriation?' (2002) 55 *Current Legal Problems* 447, 456.

³ UNCTAD, *International Investment Agreements: Key Issues Volume 1* (United Nations, Geneva 2004) 19.

⁴ *Pope & Talbot Inc. v Canada Interim Award*, 26 June 2000 [99].

⁵ A Weiner, 'Indirect Expropriations' (2003) 5 *International Law FORUM du droit international* 166, 166.

⁶ V Been and J Beauvais, 'The Global Fifth Amendment?' (2003) 78 *New York University Law Review* 30, 34.

⁷ UNCTAD (n 3) 19.

Investment Disputes (ICSID) tribunal is the case of *Piero Foresti v South Africa*. The case concerns allegations by Italian mining companies that the South African government's affirmative action policies in the mining sector have expropriated their investments in South Africa.

The structure of the regulatory expropriation enquiry shapes the way in which this body of law mediates between the interests of property protection and host-state regulatory autonomy. This thesis proposes a new taxonomy of the possible structures of enquiry in regulatory expropriation cases. The application of this taxonomy shows that there is no agreed structure of enquiry in decisions on regulatory expropriation in international investment law. However, various threads of jurisprudence do show some degree of internal consistency. The thesis identifies six approaches in the decisions of arbitral tribunals. Two of these approaches are drawn from United States of America (US) and European Convention on Human Rights (ECHR) jurisprudence. All six approaches to the structure of the regulatory expropriation enquiry are all sketched as simple models. The models are then applied to the case study of *Piero Foresti*. The case study demonstrates that different structures of enquiry result in very different outcomes in a given fact scenario.

B. Parameters

i) Dimensions of the law of expropriation

The law of expropriation can be divided into three distinct branches:⁸ firstly, the law that defines which particular rights constitute 'property' covered by the law of expropriation; secondly, the law that defines whether property, identified in the first stage of the analysis, is expropriated by any given governmental act; thirdly, when identified property has been expropriated according to the criteria established in the second stage, the law that defines what level of compensation is owed. This three-part analysis applies equally to the international law of expropriation, and the US and ECHR protections.

All three stages of the analysis have been politically controversial and legally unclear at certain points in the history of the law of expropriation.⁹ However, modern BITs have clarified the law on the first and third stages. At the first stage, BITs invariably designate the particular

⁸ R Dolzer, 'Indirect Expropriation of Alien Property' (1986) 1 ICSID Review - FILJ 41, 41.

⁹ On controversy at the third stage, see Dolzer (n 8) 42; for controversy at the first stage, see U Kriebaum and C Schreuer, 'The Concept of Property in Human Rights Law and International Investment Law' in S Breitenmoser (ed) *Human Rights, Democracy and the Rule of Law* (Nomos, Krakow 2007) 8.

‘investments’ that constitute protected property rights.¹⁰ At the third stage, BITs also specify the standard of compensation to be applied; normally by reference to market value.¹¹ In contrast, BITs provide little guidance to structure the second stage of the analysis.¹² The boundary between regulatory expropriation and legitimate non-compensable regulation lies at the heart of this uncertainty, situating this thesis within the second stage of the analysis.

ii) Treaty and custom in the international law of expropriation

This thesis focuses on treaty expropriation clauses and their interpretation. Opinions differ as to whether the expropriation provisions in BITs and other limited multilateral treaties are wider than customary international law on expropriation.¹³ This thesis does not address that issue. However, the development of customary international law remains relevant because, at a minimum, the customary standard is incorporated in BIT expropriation provisions.

A related question is whether arbitral decisions under different BITs constitute a single body of law. There is an exceedingly high degree of uniformity in the wording of investment treaty expropriation provisions.¹⁴ For this reason, arbitral tribunals treat expropriation decisions of other tribunals as highly persuasive authority.¹⁵ This thesis follows the practice of arbitral tribunals and academic commentators in treating arbitral decisions on regulatory expropriation as a single body of law, without addressing the question of whether this practice is justified.¹⁶

¹⁰ UNCTAD (n 3) 115.

¹¹ R Dolzer and M Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, The Hague 1995) 109.

¹² UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (United Nations, Geneva 2008) 56.

¹³ *Waste Management v Mexico (II)* ICSID Case No ARB(AF)/00/3, Final Award, 30 April 2004 [143], [155]; A Leeks, 'The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law' (2007) 65 *University of Toronto Faculty of Law Review* 1, 3; V Mosoti, 'Bilateral Investment treaties and the Possibility of a Multilateral Framework on Investment at the WTO' (2005) 26 *Northwestern Journal of International Law & Business* 95, 132.

¹⁴ A Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press, Oxford 2008) 559.

¹⁵ *Fireman's Fund Insurance Co v Mexico* ICSID Case No ARB(AF)/02/01, Award, 17 July 2006 [172].

¹⁶ For example *Feldman v Mexico* ICISD Case No ARB(AF)/99/1, Award, 16 December 2002 [100]; *LG&E Energy v Argentina* ICSID Case No ARB/02/1, Award, 25 July 2007 [185]; *Pope & Talbot* (n 4) [104]; *SD Myers v Canada* Partial Award, 13 November 2000 [280]; *Técnicas Medioambientales Tecmed, S.A. v. Mexico* ICSID Case No

iii) Regulatory expropriation

A wide range of terminology has been used to classify the different government actions that constitute expropriation in international law.¹⁷ For the purposes of this thesis, indirect expropriation is used as a broad label for all government action that constitutes expropriation, short of the direct and complete transfer of title. Regulatory expropriation is understood as a significant subset of indirect expropriation.¹⁸ Regulatory expropriation denotes those government measures regulating the use, enjoyment or disposal of property that international law regards as expropriations. Common examples include land-use restrictions and licensing regimes.

Under this definition, the category of regulatory expropriation is limited to measures governing the allegedly expropriated property. For example, the direct expropriation of a factory, which indirectly expropriates third party contracts to operate the factory, is not a regulatory expropriation because no regulatory action is taken relating to the contracts.¹⁹

C. The taxonomy

This thesis proposes a new taxonomy to classify the different structures of enquiry that are used to distinguish between regulatory expropriation and legitimate, non-compensable regulation. The taxonomy is used as a tool to highlight basic differences in legal reasoning that stem from disagreement as to which factors are relevant in the regulatory expropriation enquiry. The taxonomy also provides a framework for identifying specific approaches to reasoning in regulatory expropriation cases, within a given structure of enquiry.

The taxonomy invoked by this thesis places the fundamental policy tension that the law of regulatory expropriation must resolve at the forefront of the analysis, in that the competing interests of investors' property rights and governments' regulatory powers define its categories. The taxonomy is based on the postulate that there are three basic structures of reasoning which a legal

ARB(AF)/00/02, Award, 29 May 2003 [114]; *Telenor Mobile Communications v Republic of Hungary* ICSID Case No ARB/04/15, Award, 13 September 2006 [63].

¹⁷ B Weston, "'Constructive Takings" under International Law' (1975) 16 *Virginia Journal of International Law* 103, 111.

¹⁸ UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (n 12) 56.

¹⁹ See, *Case concerning certain German interests in Polish Upper Silesia (Germany v Poland) (Merits)* PCIJ Rep Series A No 7.

system could adopt to adjudicate between a private property right and a specific regulatory measure.

1. The enquiry could be directed *exclusively* to the effect of the regulation on the protected property. An enquiry of this sort might look at the effect on the rights of ownership, the effect on the value of the property, or whether the rights to the property are appropriated by some other party. These approaches share in common the structural characteristic that the legal enquiry is addressed solely to the effect on the property. This is the 'effects' structure.
2. The enquiry could be directed *exclusively* to the characteristics of the regulation. This sort of enquiry might interrogate any number of features of the regulation and the manner of its application, including, but not limited to, the purpose of the regulation. The regulation's satisfaction of exempting requirements would constitute both the necessary and sufficient criteria for placing it beyond the class of compensable regulatory expropriations. This is the 'exception' structure.
3. A third possible way to delimit the doctrine of regulatory expropriation lies between these two extremes. In this basic structure, both the effects on the property and characteristics of the regulation are relevant considerations. A balancing rule of some sort is then used to mediate between the two competing interests. This is the 'balancing' structure.

The categories of the taxonomy are mutually exclusive. Thus, decisions applying different structures of reasoning are inconsistent with one another, unless they follow from a higher legal rule that allocates distinct classes of cases to different structures of reasoning. At the same time, the taxonomy does not foreclose important questions of detail that may be unique to different legal regimes within each of the three possible structures of reasoning. This is an important consideration given the comparative methodology of the thesis.

This thesis has declined to adopt an alternate taxonomy, commonly used in international law scholarship, which divides regulatory expropriation jurisprudence between decisions that consider the purpose of the challenged regulatory measure and decisions which focus solely on the effects of the measure.²⁰ Commentators writing on regulatory expropriation in US and ECHR law

²⁰ For example R Dolzer, 'Indirect Expropriations' (2002) 11 New York University Environmental Law Journal 64, 79; R Dolzer and F Bloch, 'Indirect Expropriation' (2003) 5 International Law FORUM du droit international 155, 158; LY Fortier and S Drymer, 'Indirect Expropriation in the Law of International Investment' (2004) 19 ICSID Review - FILJ 293, 308; *Azurix v Argentina* ICSID CASE No ARB/01/12, Award, 14 July 2006 [309].

have not used this taxonomy. Its binary nature is unhelpful, particularly the use of 'purposes' to stand for everything that is not an effect. This reductionism is unjustifiable given decisions that consider both the form of the regulatory measure and the manner of its application to be relevant.²¹ Moreover, the focus on regulatory purpose elides the analytical distinction between a legal test where a sufficient regulatory purpose conclusively characterises a regulation as legitimate and non-compensable²² and a legal test where a legitimate purpose is weighed against the effect.²³

D. Methodology

i) On history

Chapter 2 presents the development of both the international law on regulatory expropriation and the legal institutions that apply this norm. One function of this chapter is descriptive: it provides an introduction to, and context for, the analytical chapters that follow.

The historical analysis in Chapter 2 performs two wider methodological functions within the thesis. Firstly, the chapter identifies profound and continuing disagreements over the way in which international investment law should mediate between the protection of property rights and state regulatory autonomy. This political contest militates in favour of a methodological focus on the structure of the regulatory expropriation enquiry. Different structures foreground different interests. In this way political disagreement is to some extent reflected in the substantive law. Political contest militates against the methodology of attempting to reconcile apparently inconsistent decisions as fact specific articulations of general principle.

Secondly, Chapter 2 reviews the formative cases in the development of customary international law on expropriation. These cases are often cited as establishing the basic principles in the law of regulatory expropriation.²⁴ This chapter shows that the relevance of these cases to the law of regulatory expropriation has been overstated. This has methodological significance: guidance on the way that the regulatory expropriation enquiry under a modern BIT ought to be structured

²¹ For example *Feldman* (n 16) [113]; *Methanex v US* Final Award, 3 August 3 2005 pt IV ch D [7]; *Tecmed* (n 16) [122].

²² For example, Article 10 (5) L Sohn and R Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545 art 10(5).

²³ *Tecmed* (n 16) [122].

²⁴ *Siemens v Argentina* ICSID Case No ARB/02/8, Award, 6 February 2007 [267].

should not be sought in further rereadings of cases like *Chorzow Factory* and *Oscar Chinn*. This justifies the focus on recent arbitral decisions in later chapters.

ii) On comparativism

In the international law of expropriation, the comparative method is sometimes harnessed for a positivist agenda; domestic state practice is held to show what the content of international *is*.²⁵ The aims of comparativism in this thesis are more modest. The comparative method is deployed to build models of the ways in which the boundary between regulatory expropriation and non-compensable regulation could be drawn. ECHR and US jurisprudence is particularly helpful in this regard, because both have confronted difficult conceptual questions that are yet to be resolved by international arbitral tribunals.

The primary basis for comparability between certain aspects of different legal regimes is their common *function*.²⁶ The functions of international investment law of expropriation, the 5th Amendment of the US constitution and Article 1 of Protocol 1 to the ECHR (Article 1-P1) correspond exceedingly closely: all three purport to protect private property rights from state interference; they all require compensation if these rights are expropriated; in all three systems, both individuals and companies may take direct legal action to enforce an expropriation claim against the state; and the jurisprudence of each regime recognises that governmental regulatory measures may sometimes interfere with property in a way that constitutes indirect expropriation. That the majority of regulation that touches on property is not regulatory expropriation is also accepted by all three. These close similarities in function demonstrate the comparability of the three regimes.

Further similarities that underscore the comparability of these regimes are found in the *form* of the texts. The relevant section of the US constitution, 'nor shall private property be taken for public use without just compensation', is formulated in exceedingly simple terms; this approach is common to most BITs.²⁷ In another interesting example of textual congruence, the ECHR formulation specifically refers to the international law on the subject. A final basis for comparability is the fact

²⁵ Dolzer, 'Indirect Expropriation of Alien Property' (n 8) 58-65.

²⁶ K Zweigert and H Kotz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press, Oxford 1998) 35.

²⁷ UNCTAD, *International Investment Agreements: Key Issues Volume 1* (n 3) 241.

that BITs, and arbitrations under them, have explicitly accepted US and ECHR jurisprudence as valid and relevant sources of comparative material.²⁸

These three regimes are comparable despite differences between the judicial institutions of the US and the ECHR, and the institutions of international ad hoc arbitration. Unlike courts, the decisions of arbitral panels are not subject to appeal, and they are only subject to review by domestic courts in very narrow circumstances. As individuals, arbitrators lack the presumed independence that comes from tenured judicial appointment.²⁹ These institutional dissimilarities may provide a partial explanation for differences in the way the law has evolved, but they are not so great as to invalidate comparisons between the substantive jurisprudence. Arbitrators sitting on ad hoc panels understand themselves to be applying law in an impartial manner to adjudicate on contentious cases. They describe themselves as judicial.³⁰ They do not understand themselves to be offering their services as mediators between the parties. This is sufficient to establish the comparability of regimes on the basis of common *function*.

iii) On case study

The use of a case study performs two simple methodological functions in this thesis. The first is that it illustrates the implications of different approaches to the structure of the regulatory expropriation enquiry. The second, related, function is that the case study demonstrates that the outcome in a given case can be very sensitive to the structure of legal enquiry adopted. Thus, the case study justifies a premise of this thesis: that inconsistency in the structure of the regulatory expropriation enquiry in international investment law decisions is problematic.

These methodological functions of a case study do not depend on the actual existence of the facts used to construct the case study. Therefore, *Piero Foresti* is a useful case study even though some of the specific facts of the case are not publicly available. For this thesis it is sufficient that a set of *stylised* facts of *Piero Foresti* can be constructed from publicly available material. The conceptual difficulty of the case is clear from these stylised facts.

²⁸ *Tecmed* (n 16) [122]; US Model Bilateral Investment Treaty (2004) annex B 4a).

²⁹ G Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford 2007) 152-175.

³⁰ *Biwater Gauff v United Republic of Tanzania* ICSID Case No ARB/05/22, Award, 24 July 2008 [473]; *Enron Corporation v Argentina* ICSID Case No ARB/01/3, Award, 22 May 2007 [340].

iv) The choice of *Piero Foresti* as the case study

The primary reason for choosing *Piero Foresti* as the case study is that it is a conceptually difficult case, even among regulatory expropriation cases. International law has tended to distinguish between measures that interfere with property rights on one hand, and *bona fide* non-discriminatory regulatory measures on the other.³¹ The regulations in *Piero Foresti* pursue legitimate policy objectives in good faith and, in doing so, interfere with property rights. The competing interests of state regulatory autonomy and property protection are both clearly present. The case is also interesting in that the claimant's best chance of success is their regulatory expropriation claim.³² Normally, claimants find it easier to succeed on a fair and equitable treatment claim, leaving the regulatory expropriation enquiry with little practical relevance.

Finally, the choice of *Piero Foresti* addresses a gap in the human rights literature. Activists regularly claim that foreign investor protection is in direct conflict with human rights, without specifying the nature of this conflict.³³ International investment tribunals have required a strict impossibility of simultaneous compliance with investment treaty obligations and other international obligations before finding a conflict between legal regimes.³⁴ There is no conflict between human rights law and investment law, in this sense, in *Piero Foresti*. Article 2(2) of the International Convention on the Elimination of all forms of Racial Discrimination empowers a country to take affirmative action measures when warranted, but it places no positive obligation on South Africa to apply affirmative action requirements to the ownership of foreign investments in the mining sector.³⁵ Therefore, the important matters of human rights policy in the case will be decided by the tribunal's approach to regulatory expropriation.

³¹ *Feldman* (n 16) [98]; American Law Institute, *Restatement of the Law Third - The Foreign Relations Law of the United States* (American Law Institute Publishers, St Paul 1987) s 712g.

³² M Coleman and K Williams, 'South Africa's Bilateral Investment treaties, Black Economic Empowerment and Mining' (2008) 9 (1) *Business Law International* 56, 58.

³³ For example 'Joint NGO Statement on the MAI of 27 October 1997' (1997) <<http://www.aidc.org.za/?q=book/view/90&PHPSESSID=33a88a240315c453ddfdb8fd68565ae>> (6 April 2008).

³⁴ M Hirsch, *Interactions between Investment and Non-Investment Obligations in International Investment Law* (Hebrew University International Law Research Paper No. 14-06, 2006) 32.

³⁵ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

E. The stylised facts of *Piero Foresti v South Africa*

The claim in *Piero Foresti* arises from the South African Mineral and Petroleum and Resources Development Act (MPRDA). The MPRDA extinguished mineral rights in South African law on 1 May 2004. A mineral right was an interest in land that gave its holder the right to mine the land. The interests of mineral rights holders were preserved by the transition and conversion provisions of the MPRDA. The basic effect of the conversion regime is to make the retention of the right to mine contingent upon meeting affirmative action, or black economic empowerment (BEE), criteria. The claimants, a group of Italian mining companies, claim that their mineral rights have been expropriated by the MPRDA.

i) The Minerals Act (MA) 1991

The previous regime governing mining and property law in South Africa was established by the 1991 Minerals Act (MA), three years before the end of white minority rule. At the time, South African commentators described the MA as being based on the twin pillars of:

- 'full recognition of the proprietary rights of common law mineral right holders'; and
- 'control by the state in order to ensure the fulfilment of the... objects of the Act, by requiring statutory authorisation from the State... to exercise common law rights'.³⁶

The MA reestablished the proprietary common law right of landowners to mine their land.³⁷ The exclusive right to mine and the ownership of any mineral extracted through mining together constituted the 'mineral right' in any piece of land. The MA recognised the ability of the landowner to sever the mineral right from the land and transfer it freely to any person, creating a 'limited real right' in favour of the purchaser.³⁸ A mineral right acquired from the landowner could be freely transferred, mortgaged or leased.³⁹ The lessee of a mineral right acquired a 'mineral lease'.⁴⁰

³⁶ M Dale, 'Current Developments in Mineral Law in South Africa' (1994) 12 *Journal of Energy and Natural Resources Law* 226, 230.

³⁷ Minerals Act (1991) No 50 s 5(1).

³⁸ PJ Badenhorst, 'Exodus of 'Mineral Rights' from South African Mineral Law' (2004) 22 *Journal of Energy and Natural Resources Law* 218, 218.

³⁹ *ibid* 221.

⁴⁰ *ibid* 222.

The MA regulated the exercise of mineral rights by requiring a mineral right holder to obtain a mining licence in order to mine. The award of a mining licence required the applicant to demonstrate their 'ability to make the necessary provision in regard to optimal utilisation, safety, health and rehabilitation'.⁴¹

ii) The interests owned by the claimant

The claimants in *Piero Foresti* are Italian investors engaged in granite mining. All their investments were purchased after the MA had entered into force, but before the passage of the MPRDA.⁴² The precise interests owned by their South African subsidiaries are not ascertainable from documents that are currently publicly available. The quantum of the claim, US\$380 million, suggests they hold an extensive range of mineral rights.⁴³ For the purpose of this case study, it is assumed that there are two major categories of rights owned by the Italian investors:

- Severed mineral rights where mining licences had been obtained and mining was occurring, which are used as an example of 'old order mining rights'; and
- Severed mineral rights where mining licences had not been obtained and mining was not occurring, which are used as an example of 'unused old order rights'.

iii) The relevant BIT

The Italy-South Africa BIT (I-SA BIT) defines 'investor' to include 'foreign subsidiaries... controlled in any way by the said natural or legal persons.'⁴⁴ Therefore, the South African subsidiaries owned indirectly by the Italian investors are investors under the I-SA BIT. The I-SA BIT defines 'investment' to include 'any economic rights conferred by law or by contract and any licence... including the right to prospect for, extract and exploit natural resources'.⁴⁵ Therefore, mineral rights, mineral leases and mining licences held by the Italian investors' South African subsidiaries are investments covered by the treaty's expropriation clause. The I-SA BIT protects the investments of investors from being

⁴¹ Dale (n 36) 232.

⁴² Coleman and Williams (n 32) 75.

⁴³ P Leon, *Resource nationalism or social transformation* (International Bar Association Annual Conference, Singapore 2007) 13.

⁴⁴ Italy - South Africa Bilateral Investment Treaty (9 June 1997) art 1(3).

⁴⁵ *ibid* art 1(1).

‘directly or indirectly... expropriated... or subjected to any measures having an equivalent effect’ except on payment of full compensation.⁴⁶ This formulation is typical of BIT expropriation provisions.

The Italian investors hold some of their assets indirectly through a Luxembourg incorporated company. This entitles the investors to lodge parallel claims under the Belgo-Luxembourg BIT, which they have done. The provisions of the Belgo-Luxembourg BIT are identical in substance to those of the I-SA BIT.⁴⁷ The same arbitral panel will hear the claims under both treaties concurrently. This thesis does not analyse the claims under the Belgo-Luxembourg BIT.

iv) The MPRDA 2002

Until the end of apartheid in 1994, the key policy platform of the African National Congress (ANC) was the 1994 Freedom Charter. The Freedom Charter explicitly called for the nationalization of the mining industry.⁴⁸ On assuming government in 1994, the ANC progressively moderated its position with respect to reform of the mining industry, while maintaining the view that the industry should be substantially reregulated.⁴⁹ The restructure of the mining industry was provided for by the MPRDA.

Section 3 of the MPRDA identifies the state as the ‘custodian’ of mineral resources for the benefit of all South Africans.⁵⁰ The MPRDA did not formally transfer mineral rights to the state. However, the basic effect of the Act was to excise mineral rights from the scope of land ownership. Mining on either public or private land now requires a mining right. Aside from the transitional and conversion regimes described below, these ‘new order’ mining rights are granted exclusively by the state under the MPRDA.⁵¹

⁴⁶ *ibid* art 5(2).

⁴⁷ Agreement between the Republic of South Africa and the Belgo-Luxembourg Union on the Reciprocal Protection and Promotion of Investment (14 August 1998) art 5(1).

⁴⁸ FT Cawood, ‘The Mineral and Petroleum Resources Development Act of 2002’ (2004) (1) *The Journal of The South African Institute of Mining and Metallurgy* 53, 54.

⁴⁹ *ibid* 54-58.

⁵⁰ Mineral Petroleum and Resources Development Act (2002) No 28, 2.

⁵¹ *ibid* s 3(1); Coleman and Williams (n 32) 67.

Although the MPRDA describes mining rights as ‘limited real rights’, they differ from the mineral rights they supersede in a number of other respects.⁵² They oblige the right holder to commence mining and to comply with the approved environmental, social and labour plans.⁵³ Mining rights may be terminated for non-compliance with these conditions following an administrative process of investigation and hearings.⁵⁴ Mining rights are neither transferable, nor mortgageable, without the consent of the Minister of Resources, although this consent must be granted if the transferee is capable of meeting the obligations of the transferor.⁵⁵ Unlike mineral rights, mining rights are not of perpetual duration; they are awarded for initial periods of up to 30 years with renewal available. A holder of a new order mining right does not require an additional mining licence to conduct mining operations, as was the case for a mineral right holder.⁵⁶

v) The transition and conversion of mineral rights

The transition regime for mineral rights is set out by Schedule II of the MPRDA. When the MPRDA entered into force, all mineral rights existing immediately prior to the commencement of the Act were automatically transformed into equivalent ‘old order rights’ of limited duration in the same land.⁵⁷ If mining was being conducted immediately prior to the commencement of the MPRDA, the mineral right was transformed into an ‘old order mining right’ valid for five years.⁵⁸ If mining was not being conducted immediately prior to the commencement of the MPRDA, the mineral right was transformed into an ‘unused old order right’ valid for one year.⁵⁹

The MPRDA gives holders of old order mining rights the exclusive right to convert them into the new order mining rights. The Minister must convert an old order right if the conditions

⁵² MPRDA (n 50) s 5(1).

⁵³ Badenhorst (n 38) 227.

⁵⁴ MPRDA (n 50) s 47(1).

⁵⁵ *ibid* s 11.

⁵⁶ Badenhorst (n 38) 227-228.

⁵⁷ MPRDA (n 50) Sch II item 7(1).

⁵⁸ *ibid* Sch II item 7(1), Sch II table 2.

⁵⁹ *ibid* Sch II item 8(1), Sch II table 3.

prescribed by the MPRDA for conversion are met.⁶⁰ Conversion is conditional on compliance with the BEE objectives of the MPRDA.⁶¹ BEE is an economy-wide program of affirmative action to redress past discrimination in South Africa.⁶² In the mining sector, BEE targets are set by the Mining Charter.⁶³ An associated scorecard provides a checklist for assessing satisfaction of the BEE criteria in conversion applications.⁶⁴ The content of the Mining Charter and the scorecard were agreed to by major players in the mining industry through a consultative process. The claimants did not participate in this process.⁶⁵

The two key targets of the Mining Charter relate to management and ownership of mining operations by historically disadvantaged South Africans (HDSAs). The targets are 40% HDSA management by 2009, 15% HDSA ownership by 2009 and 26% HDSA ownership by 2014. The HDSA ownership requirement can be satisfied either by sale of equity in the operation to HDSAs or by joint venture arrangements with HDSA-owned companies.⁶⁶ Because conversion of old order mining rights must be completed before these rights expire in May 1 2009, conversion is based on a demonstrated plan for compliance with BEE.

Conversion of unused old order rights is subject to more stringent conditions. Holders of unused old order rights have only one year to convert and must begin prospecting for minerals on award of a new order right.⁶⁷ This reflects the 'use it or lose it principle' of the MPRDA.⁶⁸

⁶⁰ *ibid* Sch II items 7(2), 7(3); Badenhorst (n 38) 233.

⁶¹ MPRDA (n 50) Sch II item 7 (2)(k).

⁶² Broad-Based Black Economic Empowerment Act (2003) No 53.

⁶³ Department of Minerals and Energy, *Mining Charter* (South African Government Gazette, 13 August 2004).

⁶⁴ Department of Trade and Industry, 'Scorecard for the broad based socio-economic empowerment charter for the South African mining industry' <www.thedti.gov.za/bee/beecharter/MiningCharter.pdf > (7 October 2008).

⁶⁵ Coleman and Williams (n 32) 54.

⁶⁶ Department of Trade and Industry (n 64) [3],[9].

⁶⁷ MPRDA (n 50) Sch II item 8(3); Badenhorst (n 38) 231.

⁶⁸ Coleman and Williams (n 32) 73.

vi) Direct or indirect expropriation?

Commentators sympathetic to the claimants imply that the MPRDA *directly* expropriated the investments. This argument is based on the fact that mineral rights ceased to exist under the same name upon the entry into force of the MPRDA.⁶⁹ If this were sufficient to constitute a direct expropriation of these rights, the only remaining question would be whether the transitional rights and conversion opportunities that replaced them constituted the required compensation under the I-SA BIT.

The proposition that the entry into force of the MPRDA *directly* expropriated mineral rights is untenable as a matter of international investment law. The distinction between direct expropriation and indirect expropriation was discussed in *Sempra Energy v Argentina*. The decisions reads: '[t]he Tribunal does not in fact believe that there can be a direct form of expropriation if at least some essential component of the property right has not been transferred to a different beneficiary.'⁷⁰ This statement was confirmed in *Enron v Argentina*.⁷¹

On the entry into force of the MPRDA, the investors retained some of the rights in each investment embodied in the transitional old order right. They also retained a contingent right to a new order mining right based on the satisfaction of the conversion conditions. These rights are both more limited than a mineral right, yet they are undoubtedly *essential components* of the original mineral right. They allow the same piece of land to continue to be used in the same way – for mining. Therefore, mineral rights are not directly expropriated by the MPRDA. This thesis proceeds on the basis that the relevant question for the case study is: did the entry into force of the MPRDA, and subsequent administrative actions taken under it, indirectly expropriate mineral rights owned by the Italian investors?

F. Structure

This thesis is divided into an introduction, four substantive chapters, and a conclusion. Chapter 2, the first substantive chapter, presents the institutional and legal history of the international law of expropriation. Chapter 3 applies the taxonomy to the current international investment law of regulatory expropriation. This chapter argues that there is no agreed structure for the regulatory expropriation enquiry in international investment law; it identifies six different approaches used by

⁶⁹ *ibid* 67-68.

⁷⁰ *Sempra Energy International v Argentina* ICSID Case No ARB/02/16, Award, 28 September 2007 [280].

⁷¹ *Enron* (n 30) [243].

tribunals. Chapters 4 and 5 apply the taxonomy to the US 5th Amendment jurisprudence and the ECHR Article 1-P1 jurisprudence respectively. These chapters show that both the US and the ECHR have developed clear structures for the regulatory expropriation enquiry. Throughout Chapters 3, 4 and 5 the case study is used to illustrate the implications of the various identified approaches. Chapter 6 concludes.

Chapter 2: History

A. Introduction

This chapter presents the development of the international law on expropriation and the legal institutions that apply this norm. It shows that the competing interests of the protection of foreign property and host-state regulatory autonomy have shaped the development of both. The issue of regulatory expropriation has emerged as a focal point of this tension. This chapter shows that a much higher degree of political contestation and uncertainty exists in international investment law than is commonly appreciated.

B. The early development of international law on expropriation

The law of expropriation evolved from the doctrine of diplomatic protection.¹ This doctrine held that an injury to an alien was an injury to the home state of that alien, for which the state was entitled to make an international claim.² While the doctrine is of European origin, the US did the most to extend the norm to injuries to an alien's property.³

The US practice developed over the course of more than a century in treaties of Friendship, Commerce and Navigation (FCN). The first of these treaties was signed in 1778 and there were more than eighty by the end of the Second World War.⁴ In their earliest formulations, treaty provisions were confined to general obligations of security and fair treatment, which applied both to the person and property of foreigners.⁵ Through the nineteenth century, US treaty practice evolved to

¹ G Biggs, 'The Latin American Treatment of International Arbitration and Foreign Investments and the Chile-U.S. Free Trade Agreement' (2004) 19 ICSID Review - FILJ 61, 66.

² D Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press, Minneapolis 1955) 5.

³ M Sornarajah, *The International Law on Foreign Investment* (Second edn, Cambridge University Press, Cambridge 2004) 37.

⁴ H Walker, 'Modern Treaties of Friendship, Commerce and Navigation' (1958) 42 Minnesota Law Review 805, 805.

⁵ R Wilson, *United States Commercial Treaties and International Law* (The Hauser Press, New Orleans 1960) 106.

include clauses exclusively addressing discriminatory treatment of foreign property, independently of the treatment of the alien.⁶

Clauses requiring compensation for expropriation began to appear in a minority of US treaties from the mid-nineteenth century,⁷ but it was not until the 1920s that the US settled on a consistent formulation for the expropriation provision in its FCN treaties.⁸ In 1923 the US-German Treaty stipulated that 'property shall not be taken without due process of law and without just compensation' and asserted that such treatment was 'required by international law'.⁹ This clause declared an international law standard on expropriation, independent of either discrimination or denial of justice in the treatment of foreign property. All subsequent US FCN treaties, up to the Second World War, included this standard clause.¹⁰

Prior to the Second World War, European practice was less consistent. In the nineteenth century, European powers' most significant foreign investments were in colonies. Direct colonial control made recourse to international law unnecessary.¹¹ Beyond their colonies, European powers often claimed exclusive extraterritorial jurisdiction over their nationals and their property.¹² Outside their sphere of control, some treaty protections of the inviolability of their nationals' property did exist.¹³

Nineteenth century treaties *between* European powers protected only lower order rights of foreigners, including rights to non-discriminatory treatment and free acquisition and disposal of property.¹⁴ An international law norm on expropriation was only occasionally invoked between

⁶ *ibid* 111.

⁷ K Vandeveld, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 *Cornell International Law Journal* 201, 204.

⁸ Wilson (n 5) 105.

⁹ *ibid* 126.

¹⁰ Vandeveld (n 7) 205-206.

¹¹ Sornarajah (n 3) 19.

¹² Shea (n 2) 4-5.

¹³ A Fachiri, 'Expropriation and International Law' (1925) 6 *BYIL* 159, 169.

¹⁴ C Calvo, *Le Droit International Theorique et Pratique* (5th edn, Paris 1896) 142-158; Fachiri (n 13) 169.

European states. In the context of a 1910 dispute with Portugal, the British government asserted a customary international law requirement of compensation for expropriation, even in the absence of discrimination.¹⁵ However, the claim was ultimately settled by the parties on a 'just and equitable' basis.¹⁶ In addition, post-war settlements often required the defeated party to compensate the victor's nationals for expropriated property.¹⁷

Both treaty and non-treaty based claims of diplomatic protection were almost always made by powerful capital-exporting states that could force unwilling weaker states to acquiesce to treaties, settlements and arbitrations. The role of gunboat diplomacy is not adequately recognised in the modern literature. For example, the Sicilian Sulphur Monopoly case of 1836 is often cited as a case of expropriation in violation of a treaty.¹⁸ Invariably left unmentioned, is that the Sicilian government only agreed to the arbitration of the claim when the British ordered their navy to be readied to sail to Naples.¹⁹ The French military interventions in Mexico in 1838 and 1861, the US military interventions in Santo Domingo in 1904 and Haiti in 1915 and the German and British blockade of Venezuela in 1902-03 were all justified by expropriation claims.²⁰

This US and European practice of exercising diplomatic protection to protect the property of foreigners caused considerable resentment in Latin America.²¹ This opposition led to the development of the Calvo Doctrine in the nineteenth century, based on the writings of Argentine jurist Carlos Calvo. This doctrine contains two principles;²² first, that international law entitled foreign-owned property only to national treatment; and, second, that states should not use force or

¹⁵ Fachiri (n 13) 167-168.

¹⁶ *Awards in the Matter of the 'Contested Property in Portugal'* (1921) 15 AJIL 99, 100; J Scott, 'Arbitration Resumed at the Hague' (1921) 15 AJIL 73, 74.

¹⁷ J Williams, 'International Law and the Property of Aliens' (1928) 9 BYIL 1, 5.

¹⁸ G Christie, 'What Constitutes a Taking of Property Under International Law?' (1962) 38 BYIL 307, 320.

¹⁹ Fachiri, 'Expropriation and International Law' (n 13) 164.

²⁰ Shea (n 2) 13.

²¹ Biggs (n 1) 66.

²² Shea (n 2) 17.

diplomatic protection as instruments to protect the interests of their nationals' foreign property.²³ The two propositions were intimately connected. It was Calvo's belief that the rhetoric of protecting foreign property had been used as a pretext for illegitimate foreign interference in Latin American economies that led him to advance the non-discrimination standard.²⁴ The Calvo Doctrine was also justified by the observation that the application of an external standard could, and had, obstructed domestic economic regulation and reform.²⁵

The Calvo Doctrine was never sufficiently widely accepted to pass into customary international law²⁶ and was consistently and vigorously opposed by the US.²⁷ Nevertheless, the Doctrine remained influential throughout most of the twentieth century. It was advocated by many developing states and incorporated in legislation, contracts and constitutions in Latin America.²⁸

This early history shows that capital-exporting states promulgated the law of expropriation as an alternative means of protecting property abroad where colonisation and exclusive extraterritorial jurisdiction were impractical.²⁹ The norm was opposed by developing countries in Latin America; equivalent opposition did not emerge elsewhere because of colonial rule. The early history of the norm is inextricable from this political context.

C. Interwar cases on regulatory expropriation

The modern literature regularly cites four cases from the interwar period as establishing the basic principles of the law of regulatory expropriation.³⁰ These cases did establish state liability for indirect expropriation, as a general proposition. However, the extent to which they examined the degree of

²³ A Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 40 AJIL 121, 121.

²⁴ Shea (n 2) 14-17.

²⁵ Sornarajah (n 3) 142.

²⁶ A Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press, Oxford 2008) 491-492.

²⁷ Shea (n 2) 37.

²⁸ Sornarajah (n 3) 38.

²⁹ M Sornarajah, 'A law for need or a law for greed' (2006) 6 International Environmental Agreements 329, 332.

³⁰ See Christie (n 18) 82; R Higgins, 'The Taking of Property by the State' (1982) 176 *Recueil des Cours de l'Académie de Droit International* 259, 322.

regulatory interference with property required to constitute an indirect expropriation has been exaggerated.

The first of these cases is the *Norwegian Ships* arbitration. In this case, the key issue was whether the US regulations, which took over ships under construction in the US during the First World War, expropriated Norwegian buyers who had contracted to purchase those vessels.³¹ The tribunal held that the contracts were expropriated.³² This case is sometimes seen as defining the customary international law of indirect expropriation.³³ Such an interpretation is problematic because the Tribunal explicitly resolved the question by applying the 5th Amendment of the US Constitution.³⁴ The sole basis for reading this judgment under US law as a statement of customary international law is the imprecise *dictum* of the tribunal that 'just compensation is due to the claimants under the municipal law of the United States, as well as under international law'.³⁵

Nor did the case consider the degree of interference with property required for an indirect expropriation.³⁶ The contentious question was whether contractual rights, in circumstances where neither party had performed their side of the contract, constituted 'property' within the meaning of the 5th Amendment.³⁷ Once these contractual rights were recognised as a protected class of property rights, it was obvious that the US had extinguished the shipbuilding contracts through the regulation.³⁸

³¹ *Award of the Tribunal of Arbitration Between the US and the Kingdom of Norway Under the Special Agreement of June 30 1921* (1923) 17 AJIL 362, 387.

³² *ibid* 388.

³³ See Christie (n 18) 311; Higgins (n 30) 323.

³⁴ *Norwegian Ships* (n 31) 388.

³⁵ *ibid*.

³⁶ Contrast Christie (n 18) 311.

³⁷ *Norwegian Ships* (n 31) 387-388.

³⁸ *ibid*; R Dolzer, 'Indirect Expropriation of Alien Property' (1986) 1 ICSID Review - FILJ 41, 45.

A second interwar case, the *Chorzow Factory* dispute between Germany and Poland, raised the same legal issue and resulted in the same outcome as *Norwegian Ships*.³⁹ The only difference from *Norwegian Ships* is that *Chorzow Factory* was a dispute under a treaty.⁴⁰ Article 6 of the relevant Geneva Convention allowed Poland to expropriate certain German government owned assets in satisfaction of liability for war reparations, but prohibited all other expropriations.⁴¹ In applying the Convention, the Permanent Court of International Justice (PCIJ) had to decide whether the explicit expropriation of the factory also expropriated another firm's contract for the management and use of the factory.⁴² Once the Court accepted these contractual claims as proprietary rights capable of expropriation, it only required the observation that the property in the contracts was 'concentrated in the factory' to proceed to a finding of expropriation.⁴³

The third celebrated interwar case, *Oscar Chinn*, failed to reach the issue of expropriation. However, the case has significance beyond *Norwegian Ships* and *Chorzow Factory* because it was the first case in which the PCIJ considered the customary international law on regulatory expropriation. The case also considered separate treaty claims, which has confused subsequent commentary.⁴⁴ The case was brought by the United Kingdom on behalf of Oscar Chinn, a British national engaged in shipping in the Belgian Congo. In 1931 the Belgian government ordered a sharp reduction of the tariffs of the majority government-owned shipping line. In return the government agreed to compensate the government-owned line for any losses to that company that might result from implementing their instruction. The Belgian government-owned shipping line was Oscar Chinn's principal competitor and the British government claimed that this pricing policy forced Oscar Chinn out of business.⁴⁵

³⁹ *Case concerning certain German interests in Polish Upper Silesia (Germany v Poland) (Merits)* PCIJ Rep Series A No 7.

⁴⁰ Lowenfeld (n 26) 475.

⁴¹ *Chorzow Factory* (n 39) 21.

⁴² *ibid* 43.

⁴³ *SPP v Egypt Award*, 20 May 1992, 3 ICSID Reports 189, [165]; *Chorzow Factory* (n 39) 44.

⁴⁴ See Christie (n 18) 321.

⁴⁵ *The Oscar Chinn Case (Great Britain v Belgium)* PCIJ Rep Series A/B No 63, 70-77.

The PCIJ did not adopt the statement of customary international law that had been asserted by US treaties since 1923. Instead, it defined the customary international law on expropriation as ‘the obligation incumbent upon all States to respect the vested rights of foreigners in their territories’.⁴⁶ The PCIJ dispensed with the claim on the basis that Chinn’s interests were not proprietary rights protected from expropriation. The Court was:

... unable to see in his [Oscar Chinn’s] original position – which was characterized by the possession of customers and the possibility of making a profit – anything in the nature of a genuine vested right. Favourable business conditions and good-will are transient circumstances, subject to inevitable changes.⁴⁷

The case did not consider the degree of interference that would be required to expropriate a proprietary right.

De Sabla, a decision of the United States-Panama Claims Commission, did reach the question of regulatory expropriation. The US claim arose out of the restructuring of the Panamanian land register. The new system allowed either permanent ownership or temporary cultivation licences over unowned land to be granted to Panamanian nationals, on application.⁴⁸ To avoid these rights being awarded over unregistered privately owned land, the new system included an opposition procedure. This was the only mechanism by which an unregistered landowner could block claims over their land. A number of claims were lodged over sections of de Sabla’s estate. He failed to oppose a vast majority of the applications, resulting in the loss of over half his estate.⁴⁹

The Tribunal stated that ‘it is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility’,⁵⁰ and that ‘no imputation of bad faith or discrimination’ was required.⁵¹ However, the Tribunal did not apply its statement of law to the facts, instead focusing on the ‘*hardship*’ the system of opposition imposed on the claimant

⁴⁶ *ibid* 81.

⁴⁷ *ibid* 88.

⁴⁸ *The United States, on Behalf of Marguerite de Joly de Sabla v. Panama* (1934) 28 AJIL 602, 602.

⁴⁹ *ibid* 603.

⁵⁰ *ibid* 611.

⁵¹ *ibid*.

and the fact that the Panamanian authorities were on notice that the de Sabla estate was privately owned.⁵²

Of these four interwar cases, only *de Sabla* reached the question of regulatory expropriation, yet it is a particularly unsatisfactory precedent to inform a modern enquiry into regulatory expropriation. The statement of international law is unsourced and inconsistent with the PCIJ's articulation of the customary international law on expropriation in *Oscar Chinn*, one year later. Borchard, writing at the time, doubted that *De Sabla* was correctly decided and questioned both the independence and competence of the Tribunal.⁵³ It is also important to note the context of the Commission's formation: the US had been an occupying power in Panama in the early twentieth century.

D. Codification and institution-building after the Second World War

i) Havana Charter

The 1948 Havana Charter of the International Trade Organisation (ITO) attempted to establish an integrated framework for international economic governance. Fearing that negotiation by consensus could lead to the institutionalisation of a weak standard of protection for foreign property, the US government's 1946 draft of the Charter did not include provisions addressing investment.⁵⁴ This strategy of keeping investment out of the ITO failed. Instead, the result of the negotiating process was precisely the sort of lowest common denominator outcome the US had sought to avoid.⁵⁵ The final text imposed only two weak and general obligations with respect to foreign property. Member states were to refrain from 'unreasonable or unjustifiable action... injurious to the rights or interests of nationals of other Members in the enterprise'⁵⁶ and to provide '...adequate security for existing and future investments'.⁵⁷ On the other hand, the Charter specifically asserted the right of states to

⁵² *ibid* 605, 607.

⁵³ E Borchard, 'The United States-Panama Claims Arbitration' (1935) 29 AJIL 99, 101-103.

⁵⁴ Lowenfeld (n 26) 482.

⁵⁵ R Gardner, 'Private Foreign Investment Convention' (1960) 9 Journal of Public Law 176, 182.

⁵⁶ Havana Charter (24 March 1948) 62 UNTS 30, art 11 1(b).

⁵⁷ *ibid* art 12 2(a)(i).

regulate foreign investment, recognising the right 'to prescribe and give effect to other reasonable requirements with respect to existing and future investments'.⁵⁸

The failure of the US to ratify the ITO Charter in 1950 meant the Organisation never came into existence.⁵⁹ Whether this was due to the weakness of the provisions on the protection of foreign property is unclear.⁶⁰ This experience of multilateralism led capital-exporting states to shift their attention to those multilateral fora in which they could control the agenda.

ii) Early efforts to establish a multilateral investment framework

Between 1945-1970 large scale expropriations and nationalisations occurred in Cuba, Eastern Europe, China, Indonesia, Iran, Egypt, Algeria and much of South and Central America.⁶¹ These actions ensured that the general goal of expounding and institutionalising the law of expropriation remained a political priority for developed countries.⁶² Two draft multilateral investment agreements emerged in this period.

The first was launched in 1959.⁶³ This new proposal for a multilateral investment protection treaty was formulated by an organisation representing private investors and sponsored by the German government, and was known as the Abs-Shawcross Draft after its two principal authors.⁶⁴ It embodied a strong position on the inviolability of private property.⁶⁵ The expropriation provision read: 'no Party shall take any measures against nationals of another Party to deprive them directly or

⁵⁸ *ibid* art 12 1(c)(iv).

⁵⁹ Lowenfeld (n 26) 482.

⁶⁰ Contrast Lowenfeld (n 26) 483; with A Fatouros, 'An International Code to Protect Private Investment - Proposals and Perspectives' (1961) 14 *University of Toronto Law Journal* 77, 80.

⁶¹ Lowenfeld (n 26) 483-484.

⁶² M Domke, 'Foreign Nationalizations' (1961) 55 *AJIL* 585, 585-587.

⁶³ G Schwarzenberger, *Foreign Investments and International Law* (Stevens & Sons, London 1969) 137.

⁶⁴ S Metzger, 'Multilateral Conventions for the Protection of Private Foreign Investment' (1960) 9 *Journal of Public Law* 133, 133.

⁶⁵ *ibid*.

indirectly of their property'.⁶⁶ There were no exceptions or qualifications to this obligation, making it wider than customary international law at the time.⁶⁷

The Abs-Shawcross Draft was accepted as the basis for negotiations at the Organization for European Economic Cooperation (OEEC, from 1961 the Organization for Economic Cooperation and Development (OECD)).⁶⁸ The original text was toned down in both the 1962 OECD draft and again in the 1967 OECD draft.⁶⁹ The final, 1967, draft reproduced the substance of the Abs-Shawcross text,⁷⁰ with an added official commentary to the text that sought to clarify the meaning of 'indirect deprivation'. The commentary stated that the provision was intended to cover measures 'with the intent of wrongfully depriving the national concerned of the substance of his rights and resulting in such loss'.⁷¹ The means by which the 'intent' of a measure would be inferred were not articulated, and the use of 'wrongful' in defining regulatory expropriation is circular. The examples of regulatory expropriation included in the commentary, such as 'excessive or arbitrary taxation' and 'refusal of access to raw material or of essential export or import licences',⁷² are more helpful, but no attempt was made to link them to the criterion of 'intent to wrongfully deprive'. The Convention was never opened for signature, due to lack of support from developing countries.⁷³

The second attempt to codify international investment law was the Harvard Draft Convention on the Responsibility of States for Injuries to the Economic Interests of Aliens, authored by Professors Sohn and Baxter.⁷⁴ The 1961 Harvard Draft was submitted to the International Law

⁶⁶ H Abs and H Shawcross, 'Draft Convention on Investments Abroad' 9 *Journal of Public Law* 116 art III.

⁶⁷ Gardner (n 55) 180-183; Metzger (n 64) 139; G Schwarzenberger, 'Private Foreign Investment Convention' (1960) 9 *Journal of Public Law* 147, 156.

⁶⁸ Schwarzenberger, *Foreign Investments and International Law* (n 63) 153.

⁶⁹ *ibid.*

⁷⁰ OECD Draft Convention on the Protection of Foreign Property 1967 (1968) 7 *ILM* 117 art 3.

⁷¹ *ibid* commentary on art 3, 4(a).

⁷² *ibid* commentary on art 3, 4(b).

⁷³ Schwarzenberger, *Foreign Investments and International Law* (n 63) 168.

⁷⁴ L Sohn and R Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 *AJIL* 545.

Commission, with the intention that it would become the official position of the ILC on the current state of customary international law, and a basis for multilateral agreement through the United Nations.⁷⁵ Ultimately, the ILC did not adopt a statement of the law of expropriation.

The Draft's primary definition of regulatory expropriation was the 'unreasonable interference with the use, enjoyment, or disposal of property'. The explanatory note recognised the indeterminacy of this statement and provided that: 'the unreasonableness of an interference with the use, enjoyment, or the disposal of property must be determined in conformity with the general principles of law recognized by the principal legal systems of the world.'⁷⁶ This apparently cautious call for comparative enquiry sits uneasily with the examples of expropriation offered in the Explanatory Note. For example, setting 'wages of local employees of the enterprise at a prohibitively high level' was given as an example of regulatory expropriation, without any evidence from national legal systems.⁷⁷ State liability for regulatory expropriation was also circumscribed by exceptions for measures '*in the maintenance of public order, health or morality*' and effects '*incidental to the normal operation of the laws of the state*'. In the latter case, the Explanatory Note limited 'incidental' operation to the enforcement of judgements,⁷⁸ again interpreting the primary text in a manner favourable to property rights.

The concurrent development of two markedly different provisions in draft multilateral texts shows that, in the early 1960s, no specific consensus on regulatory expropriation existed, even among developed countries that favoured the codification and institutionalisation of the law in this area. The Harvard Draft's definition of regulatory expropriation focused primarily on the effect of interference with property rights. This effect-based enquiry was qualified by a comparative enquiry into 'unreasonableness' and limited by narrow exceptions. In contrast, the Abs-Shawcross Draft required an examination of the intent of the measure.

iii) ICSID

The only successful multilateral agreement in the area of international investment law in the first decades after the Second World War related exclusively to the institutions of dispute settlement, rather than the substance of the law. The Convention on the Settlement of Investment Disputes

⁷⁵ibid 546.

⁷⁶ ibid 559.

⁷⁷ ibid.

⁷⁸ ibid 562.

between States and Nationals of other States was concluded under the auspices of the World Bank in 1965, and established ICSID.⁷⁹ The Convention provided an institutional framework for dispute settlement directly between foreign investors and host governments, without any role for the home state of the investor. ICSID operates under a consensual model: signatory states must accept the jurisdiction of ICSID in a class of disputes before investors of other signatory states can bring a claim.⁸⁰ However, once a given dispute falls within the scope of a consent to jurisdiction, that jurisdiction is compulsory and cannot be unilaterally retracted for a specific dispute.⁸¹ The awards made by ICSID tribunals are monetary, binding and enforceable in all signatory states to the Convention.⁸²

ICSID initially had limited institutional importance: there were no recorded cases until 1987 and only fourteen were brought between 1987 and 1998.⁸³ It was only through the growth in the number of BITs in the 1990s, which normally contain both substantive obligations of states to investors and the mutual consent of the signatory states to arbitration, that ICSID began to assume a systemic role. ICSID now has 155 signatory states,⁸⁴ and consent to ICSID arbitration is included in the vast majority of BITs.⁸⁵ ICSID's case load has grown in proportion with the growth of BITs and consents to jurisdiction. 34 new cases were registered in 2007.⁸⁶ By providing an institutional structure for investor-state arbitration, ICSID has given greater enforceability to treaty protections on expropriation.

⁷⁹ Convention on the Settlement of Investment Disputes between States and Nationals of other States (18 March 1965) 4 ILM 524 art 1.

⁸⁰ *ibid* art 26.

⁸¹ *ibid* art 27.

⁸² Schwarzenberger, *Foreign Investments and International Law* (n 63) 148-149.

⁸³ UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (United Nations, Geneva 2008) 8.

⁸⁴ 'ICSID Website' <www.worldbank.org/icsid> (5 May 2008).

⁸⁵ See model BITs of Guatemala, Italy, Kenya, Uganda UNCTAD, *International Investment Instruments: A Compendium Volume XII* (United Nations, Geneva 2003); Ghana, Romania UNCTAD, *International Investment Instruments: A Compendium Volume XIII* (United Nations, Geneva 2005); and Canada UNCTAD, *International Investment Instruments: A Compendium Volume XIV* (United Nations, Geneva 2005).

⁸⁶ Author's count, 'ICSID Website' (n 84).

E. Developing country opposition and the New International Economic Order (NIEO)

At the same time as capital-exporting countries were attempting to establish a multilateral regime of investor protection, and partly in reaction to those efforts, developing countries were using their numbers in the United Nations (UN) to articulate a very different vision of international investment law, the NIEO.⁸⁷ Like the Calvo Doctrine before it, the NIEO entailed not so much a position on regulatory expropriation, as a complete rejection of the idea that non-discriminatory regulation could ever amount to compensable expropriation in international law.

The first UN Resolution on Permanent Sovereignty over Natural Resources, carried in 1962, recognised a state's right to expropriate 'as overriding purely individual or private interests, both domestic and foreign' but required 'appropriate compensation... in accordance with international law'.⁸⁸ While the resolution was ambiguous, the requirement that states 'shall' compensate, and the reference to international law, were enough to win the support of capital-exporting countries.⁸⁹ In two subsequent resolutions on Permanent Sovereignty over Natural Resources, a coalition of developing and communist countries moved the agenda sharply toward opposition to an international standard on expropriation.⁹⁰ The 1966 Resolution emphasised the right of developing countries to appropriate a greater share of the benefits of foreign investment, presumably through regulatory control.⁹¹ The 1973 Resolution proclaimed a right to nationalise property, subject only to national legal review.⁹² Neither resolution made reference to international law. Both votes were carried by the support of developing countries, with key capital-exporting states, including the US, abstaining.⁹³

The 1974 Charter of Economic Rights and Duties of States marked the apex of developing countries' attempts to reject the substance of the international law of investor protection asserted

⁸⁷ Lowenfeld (n 26) 492.

⁸⁸ UNGA Res 1803 (XVII) (14 December 1962).

⁸⁹ Lowenfeld (n 26) 488-489.

⁹⁰ *ibid* 490.

⁹¹ UNGA Res 2158 (XXI) (25 November 1966).

⁹² UNGA Res 3171 (XXVIII) (17 December 1973).

⁹³ Lowenfeld (n 26) 491.

by developed countries.⁹⁴ Article 2 (a) proclaimed a freestanding right to regulate, and added that 'no state shall be compelled to grant preferential treatment to foreign investment'. Article 2 (c) asserted a right to expropriate, subject to appropriate compensation – as determined by domestic law in domestic courts.⁹⁵ By then, the political and economic basis of the NIEO was dissipating. The debt crisis in the 1980s made developing countries' need for foreign capital more acute.⁹⁶ The argument that international legal protection was necessary for developing countries to attract foreign capital became the most common justification for the law of expropriation.⁹⁷

F. Bilateral investment treaties and limited multilateralism

The failed multilateral efforts to establish an international regime of investor protection contrast with the rapid spread of BITs. They now form the backbone of an incomplete system of international investor protection law, which is complemented by other regional agreements and multilateral instruments of limited scope that echo BIT provisions. Although BIT coverage is not universal, BITs can be described as constituting a system because their coverage is so extensive and because they are remarkably similar in their terms. An expropriation clause is standard in BITs.

The first BIT was signed between West Germany and Pakistan in 1959.⁹⁸ Other Western European states began BIT programs in the late 1960s. Japan signed its first BIT in 1977, and the first BIT of the US program was signed in 1982.⁹⁹ There are now some 2500 of these treaties.¹⁰⁰ BITs exhibit a considerable uniformity in general, and a very high degree of uniformity in their expropriation provisions.¹⁰¹ The Argentina-Sweden BIT is typical. It requires compensation for any

⁹⁴ *ibid* 492.

⁹⁵ UNGA Res 3281 (XXIX) (9 December 1974).

⁹⁶ E Lauterpacht, 'International Law and Private Foreign Investment' (1997) 4 *Indiana Journal of Global Legal Studies* 259, 265.

⁹⁷ A Guzman, 'Why LDCs Sign Treaties that Hurt Them' (1998) 38 *Virginia Journal of International Law* 639, 659; Sornarajah, *The International Law on Foreign Investment* (n 3) 274.

⁹⁸ J Salacuse, 'BIT by BIT' (1990) 24 *The International Lawyer* 655, 655.

⁹⁹ Guzman (n 97) 653.

¹⁰⁰ UNCTAD, 'The Entry into Force of Bilateral Investment Treaties (BITs)' [2006] (3) *International Investment Agreements Monitor*.

¹⁰¹ UNCTAD, *International Investment Agreements: Key Issues Volume 1* (United Nations, Geneva 2004) 19.

'other measure having the same nature or the same effect' as expropriation.¹⁰² Similarly, Article 1110 of the North American Free Trade Agreement (NAFTA) stipulates that: '[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment'.¹⁰³ BITs almost never define regulatory expropriation beyond drawing an analogy to direct expropriation. No structure is provided for the legal enquiry by which such equivalence is to be identified.¹⁰⁴ Two important exceptions are the Interpretative Annexes added to the 2004 US and Canadian Model BITs, discussed in the following chapter.

Most BITs currently in force have been negotiated between developed and developing countries, at the request of the developed country.¹⁰⁵ However, BITs are increasingly signed between developing countries. China, for example, is a signatory of over 110 BITs, the majority of which are with other developing states.¹⁰⁶ Developed countries have not signed BITs with each other,¹⁰⁷ although identical provisions are contained in regional economic agreements to which developed states are parties.¹⁰⁸ It is no coincidence that NAFTA, perhaps the only non-sector specific expropriation clause between two developed states, has done more than any BIT to focus academic and policy attention on the issue of regulatory expropriation.¹⁰⁹

¹⁰² *ibid* 241.

¹⁰³ North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 296 art 1110(1).

¹⁰⁴ Dolzer, 'Indirect Expropriation of Alien Property' (n 38) 56.

¹⁰⁵ R Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2006) 37 *International Law and Politics* 952, 955.

¹⁰⁶ S Schill, 'Tearing Down the Great Wall' (2007) 15 *Cardozo Journal of International and Comparative Law* 73, 74-76.

¹⁰⁷ 'ICSID Website' (n 84).

¹⁰⁸ NAFTA (n 103).

¹⁰⁹ For example V Been, 'Foreword: Introduction to Regulatory Expropriations in International Law and Case Summaries' (2002) 11 *New York University Environmental Law Journal* 1; S Subedi, 'The Challenge of Reconciling the Competing Principles with the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' (2006) 40 *The International Lawyer* 121.

Among other regional economic agreements, the Mercado Común del Sur (Mercosur) requires governments to compensate foreign investors for expropriation, including ‘other measures which have the same effect’, and provides for compulsory investor state arbitration.¹¹⁰ A weaker obligation is contained in the Asia Pacific Economic Cooperation Forum (APEC) Non-Binding Investment Principles, which suggests that states should aspire to compensation for expropriation and ‘measures that have a similar effect’.¹¹¹ Other regional bodies neglect expropriation altogether.¹¹²

The Energy Charter Treaty (ECT), an instrument limited by sector rather than by region, binds its fifty-one signatory states to provide compensation for expropriation of energy sector investments. The ECT definition of expropriation includes ‘a measure or measures having effect equivalent to nationalization or expropriation’.¹¹³

Alongside treaties, a number of unilateral legal practices and international institutions have promoted and institutionalised the expropriation standard common to BITs. Unilaterally, the actions of the US have been important in reinforcing the systemic character of the expropriation provisions of BITs. A number of US legislative acts authorise retaliation in US trade and foreign aid policies against countries that expropriate US investors’ property.¹¹⁴ For example, US aid conditionality under the 1994 Helms Amendment was responsible for Costa Rica accepting the jurisdiction of an ICSID tribunal in *Santa Elena v Costa Rica*.¹¹⁵

International institutions have also pushed for countries to accept the legal obligation to compensate foreign property owners for expropriation. The 1992 World Bank Guidelines on the

¹¹⁰ Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el MERCOSUR (17 December 1994) Mercosur/CMC/ No 13/93 art 4(1).

¹¹¹ APEC Non-Binding Investment Principles (November 1994).

¹¹² Treaty Establishing the European Community (1957, as amended); Framework Agreement on the ASEAN Investment Area (8 October 1998) <http://www.aseansec.org/6466.htm>.

¹¹³ The Energy Charter Treaty (17 December 1994) (1995) 34 ILM 360 art 13(1).

¹¹⁴ E Mendes, ‘The Canadian National Energy Program’ (1981) 14 Vanderbilt Journal of Transnational Law 475, 495.

¹¹⁵ *Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica* ICSID Case No ARB(AF)/00/01, Final Award, 17 February 2000 (2000) 15 ICSID Review – FILJ 169 [25]; Helms Amendment 22 USC (1994) s 2378 a.

Treatment of Foreign Direct Investment recommends states compensate foreigners for expropriation including 'measures which have similar effects'.¹¹⁶ The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) insures foreign investors against the risk of 'expropriation and similar measures'.¹¹⁷ However, this Convention does not directly place obligations on host governments.

These BITs and limited multilateral treaties represent the extent of the codification and institutionalisation of international law of expropriation today.

G. Recent multilateral efforts to institutionalise international investment law

i) The Multilateral Agreement on Investment

In 1995 the OECD Ministerial launched negotiations for a Multilateral Agreement on Investment (MAI).¹¹⁸ The MAI was intended to codify and generalise the investment rules that already existed in a large number of BITs and limited multilateral agreements.¹¹⁹ The US pushed for negotiations to be conducted through the OECD, despite the EU preference for the WTO.¹²⁰ The rationale was that the smaller membership of the OECD would make agreement on a high standard of investment protection easier, and the MAI would then be offered for signature to countries outside the OECD as a *fait accompli*.¹²¹

An expropriation clause standard in BITs, requiring compensation for direct or indirect expropriation or 'any measure or measures having equivalent effect', remained in the MAI

¹¹⁶ World Bank Guidelines on the Treatment of Foreign Direct Investment (1992) 31 ILM 1363.

¹¹⁷ *ibid.*

¹¹⁸ D Henderson, *The MAI Affair: A Story and its Lessons* (The Royal Institute of International Affairs, London 1999) 1.

¹¹⁹ R Geiger, 'Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment' (2002) 11 New York University Environmental Law Journal 94, 98; P Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 The International Lawyer 1033, 1036.

¹²⁰ Muchlinski (n 119) 1039.

¹²¹ R Dattu, 'A Journey from Havana to Paris' (2000) 24 Fordham International Law Journal 275, 276; S Zia-Zarifi, 'Protection without Protectionism' in MB E. Nieuwehuys (ed) *Multilateral Regulation of Investment* (Kluwer Law International, The Hague 2001) 131.

Negotiating Text throughout the negotiations.¹²² A compulsory investor-state dispute settlement mechanism was also a foundational element of the agreement.¹²³

From the beginning of negotiations, a number of NGOs campaigned against the MAI.¹²⁴ They opposed investor protection without corollary international regulation of the conduct of foreign investors.¹²⁵ This general opposition fastened onto the issue of regulatory expropriation in September 1996, when Ethyl Corporation filed a Notice of Intent under NAFTA to sue the Canadian government for banning the import of gasoline additive MMT.¹²⁶ The Canadian government had justified the ban on public health grounds. One of the bases for the claim was the allegation that the import ban expropriated Ethyl's business manufacturing MMT. The *Ethyl* claim remained unresolved throughout the MAI negotiations¹²⁷ and had a particularly 'chilling effect on the negotiators'.¹²⁸

In August 1997 the Negotiating Text was leaked, which fuelled the expansion of the opposition movement.¹²⁹ The degree of critical publicity against the MAI forced the Negotiating Group to meet with some 50 NGOs in October 1997.¹³⁰ The NGOs presented a united position at this meeting. One of their four substantive demands was the scrapping of the expropriation clause, in order to safeguard state regulatory autonomy.¹³¹

¹²² The Multilateral Agreement on Investment - Draft Consolidated Text (22 April 1998) DAF/MAI(98)7/REV1.

¹²³ N Schrijver, 'A Multilateral Investment Agreement from a North-South Perspective' in MB E. Nieuwehuys (ed) *Multilateral Regulation of Investment* (Kluwer Law International, The Hague 2001) 32.

¹²⁴ Muchlinski (n 119) 1039.

¹²⁵ Sornarajah, *The International Law on Foreign Investment* (n 3) 59.

¹²⁶ Muchlinski (n 119) 1046.

¹²⁷ A Swan, 'Ethyl Corporation v. Canada, Award on Jurisdiction' (2000) 94 AJIL 159, 160.

¹²⁸ Geiger (n 118) 97.

¹²⁹ Henderson (n 118) 22.

¹³⁰ M Sikkil, 'How to Establish a Multilateral Framework for Investment?' in MB E. Nieuwehuys (ed) *Multilateral Regulation of Investment* (Kluwer Law International, The Hague 2001) 165.

¹³¹ 'Joint NGO Statement on the MAI of 27 October 1997' (1997) <<http://www.aidc.org.za/?q=book/view/90&PHPSESSID=33a88a240315c453ddfdb8fd68565ae>> (6 April 2008).

In 1997 the Negotiating Group sought to address concerns about state regulatory autonomy in sensitive policy areas through general provisions.¹³² References to the environment and labour rights were added to the Preamble; clauses stating that it was inappropriate to relax labour and environmental standards to attract investment were inserted into the body of the agreement.¹³³ These additions remained in bracketed text in the Draft when the negotiations broke down.¹³⁴ It was only in the final Report to the Negotiating Group that negotiating states confronted the question of regulatory expropriation directly.¹³⁵ In that session, one state suggested a GATT Article XX-style exception, which would have excluded certain regulatory competences of governments from the reach of the expropriation provision. Other states recorded their opposition to any exception to the expropriation principle, and the proposal was not included in the Draft when negotiations broke down.¹³⁶

The final Chairman's Report included two clarifications that attempted to assuage concerns about regulatory expropriation. The first was an explicit 'right to regulate'; a concession that would have been of little consequence as it only applied 'provided measures are consistent with this agreement'.¹³⁷ The second was an interpretative note, explaining that the expropriation provision: 'does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.'¹³⁸ However, political support from corporations and the US

¹³² OECD, *Report to the Negotiating Group (December 1997)* (DAFFE/MAI/DG3(97)19/FINAL, 1997); OECD, *Report to the Negotiating Group (February 1997)* (DAFFE/MAI/DG3(97)4, 1997); OECD, *Report to the Negotiating Group (March 1997)* (DAFFE/MAI/DG3(97)7, 1997); OECD, *Report to the Negotiating Group (January 1998)* (DAFFE/MAI/DG3(98)1, 1998).

¹³³ C McCrudden, 'Property Rights and Labour Rights Revisited' in M English (ed) *The Auto Pact: Investment, Labour and the WTO* (Kluwer, The Hague 2003) 311.

¹³⁴ The Multilateral Agreement on Investment - Draft Consolidated Text (22 April 1998), Preamble and ch III.

¹³⁵ OECD, *Report to the Negotiating Group on Labour and Environment (January 1998)* (DAFFE/MAI/DG3(98)2, 1998).

¹³⁶ MAI (n 134) ch VI art 1.

¹³⁷ OECD, *The Multilateral Agreement on Investment (Report by the Chairman to the Negotiating Group)* (DAFFE/MAI(98)17, 4 May 1998).

¹³⁸ *ibid* art 5 n5.

government began to recede as it became clear that the MAI might generalise a lower level of investor protection than that commonly conferred by BITs.¹³⁹ The MAI project officially failed in October 1998 when the French government withdrew from negotiations at the OECD, partly out of opposition to the perceived breadth of the protection given to investors against regulatory expropriation.¹⁴⁰

ii) Investment at the World Trade Organisation

Two of the 1994 WTO Agreements contain disciplines affecting the regulation of investment. The first, the Agreement on Trade-Related Investment Measures (TRIMS), is limited to clarifying that local content regulations were inconsistent with the National Treatment and Quantitative Restrictions provision of the General Agreement on Tariffs and Trade (GATT).¹⁴¹ The second, the General Agreement on Trade in Services (GATS), lists the commercial presence of foreign service-suppliers – that is, foreign direct investment – as one of the four recognised modes of supply.¹⁴² GATS commitments are voluntary; very few countries have made bindings with respect to commercial presence.¹⁴³

Following the collapse of the MAI negotiations at the OECD, a number of countries submitted proposals to start negotiations for a multilateral investment agreement at the WTO to the 1999 Seattle Ministerial.¹⁴⁴ The Seattle Ministerial failed. It was not until the 2001 Doha Ministerial that the Working Group on the Relationship between Trade and Investment (WGRTI) was given a mandate to prepare a framework for a multilateral investment instrument. The Doha Declaration

¹³⁹ Henderson (n 118) 24; Sikkel (n 130) 176.

¹⁴⁰ Henderson (n 118) 31.

¹⁴¹ Agreement on Trade-Related Investment Measures (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3.

¹⁴² General Agreement on Trade in Services (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183.

¹⁴³ Author's search WTO, 'WTO Services Database' <<http://tsdb.wto.org/wto/WTOHomepublic.htm>> (11 May 2008).

¹⁴⁴ M Koulen, 'Foreign Investment in the WTO' in MB E. Nieuwehuys (ed) *Multilateral Regulation of Investment* (Kluwer Law International, The Hague 2001) 197, 197.

emphasised that this framework should respect the interests of developing countries and all states' 'right to regulate in the public interest'.¹⁴⁵

The reports of the meetings of the WGRTI between Doha and Cancún show intractable disagreement. In the final 2003 report, a number of countries recorded their opposition to proceeding to formal negotiations.¹⁴⁶ Others pointed out that there was no clarity on how a 'right to regulate' was compatible with making binding commitments.¹⁴⁷ At the 2003 Cancún Ministerial, less than twelve countries supported the launching of investment negotiations while sixty countries opposed it.¹⁴⁸ The WGRTI has not met since Cancún.¹⁴⁹ With the WTO unable to reach consensus on the core trade matters of the Doha Round, the more controversial issue of investment is completely off the WTO agenda.¹⁵⁰

The failure to conclude a multilateral investment agreement at either the OECD or the WTO highlights both the general ongoing tension between property protection and host-state regulatory autonomy and specific disagreement about the boundary of regulatory expropriation.

H. Conclusion

This chapter has explained the development of the web of BITs and limited multilateral agreements that codify and institutionalise international investment law on expropriation. Almost all BITs and limited multilateral treaties protect foreign investment from measures equivalent to expropriation without providing a structure within which to identify the nature of this equivalence. The ease with which investors can enforce treaty rights has made determining the boundary of regulatory expropriation of practical significance for both investors and governments.¹⁵¹

¹⁴⁵ WTO, *Doha Ministerial Declaration - 20 November 2001* (WT/MIN(01)/DEC/1, 2001) [22].

¹⁴⁶ WTO, *Working Group on the Relationship between Trade and Investment: Report on the meeting held on 10 and 11 June 2003* (WT/WGTI/M/22, 2003) [44],[50],[82].

¹⁴⁷ *ibid.*

¹⁴⁸ C Hamilton and P Rochwerger, 'Trade and Investment' (2005) 18 *New York International Law Review* 1, 39.

¹⁴⁹ WTO, 'Trade and Investment ' (2008) <http://www.wto.org/english/tratop_e/invest_e/invest_e.htm> (10 May 2008).

¹⁵⁰ Subedi (n 109) 139.

¹⁵¹ R Dolzer, 'Indirect Expropriations' (2002) 11 *New York University Environmental Law Journal* 64, 68.

This chapter has also identified profound and continuing political disagreement over the way in which international investment law should mediate between the protection of property rights and state regulatory autonomy. Legal consensus on the structure of the regulatory expropriation enquiry is unlikely to have emerged within a system of decentralised treaty interpretation, given political disagreement. Nor can any consensus on the structure be found in early cases on indirect expropriation. Disagreement over the boundary of regulation expropriation is also an explanation for why the current system is incomplete. Such disagreement is a key reason why attempts to conclude a multilateral investment agreement have failed. The extent to which modern decisions have bypassed this political disagreement and established a common structure for the regulatory expropriation enquiry is the subject of the following chapter.

Chapter 3: Regulatory expropriation in BITs

A. Introduction

The text of the expropriation provisions in BITs is brief and does not prescribe a specific structure for the enquiry into regulatory expropriation.¹ This chapter applies the taxonomy developed in chapter 1 to draw out the structure of enquiry used in the decisions of arbitral tribunals on regulatory expropriation. The application of the taxonomy shows that these arbitral decisions are inconsistent in their structure of enquiry. This inconsistency stems from disagreement as to whether the effects of a regulatory measure, the measure's characteristics or both its effects and characteristics are relevant in drawing the boundary between regulatory expropriation and legitimate non-compensable regulation. The taxonomy also shows that different threads of jurisprudence within each structure have developed some degree of internal coherence and analytic sophistication.

This chapter identifies six model approaches to regulatory expropriation in international investment law: two different approaches within the effects structure, one within the exception structure and three within the balancing structure. Two of the approaches within the balancing structure are direct adoptions of the US and ECHR jurisprudence respectively. These are dealt with in the following chapters. The other four models are developed and applied to the case study. Before moving to the analysis of modern arbitral decisions, this chapter begins by addressing arguments that are sometimes thought to require an effects structure of enquiry in international law regulatory expropriation cases.

B. Preliminary issues and the effects structure

i) The jurisprudence of the Iran-US Claims Tribunal (IUSCT)

Three IUSCT cases are repeatedly cited as authority for an exclusive focus on the effects of a measure in all indirect expropriation cases:² *Starrett v Iran*, *Tippetts v Iran* and *Phelps Dodge v Iran*.³ Of these, *Phelps Dodge* made the widest assertion of an effects-based approach to indirect expropriation. Control of the investor's business was transferred to government-appointed managers, authorised by a pre-revolutionary law to secure debts owed to workers and public

¹ R Dolzer, 'Indirect Expropriation of Alien Property' (1986) 1 ICSID Review - FILJ 41, 56.

² R Dolzer, 'Indirect Expropriations' (2002) 11 New York University Environmental Law Journal 64, 86-90.

³ *Starrett Housing Corp. v Government of the Islamic Republic of Iran* (1983) 4 Iran-USCTR 122, 154; *Tippetts, Abbott, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran* Iran-US CTR 226.

authorities.⁴ This amounted to indirect expropriation of Phelps Dodge's minority shareholding in the company. The Tribunal said that it understood 'the financial, economic and social concerns that inspire the law pursuant to which it [the state] acted, but those... concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss.'⁵

In *Phelps Dodge* severe non-regulatory interferences were assessed jointly with regulatory interference.⁶ The majority shareholders in the business had already been nationalised and Phelps Dodge's contractual rights of control had already been formally abrogated. As in the other state-management cases of *Starrett* and *Tippetts*, the investor received neither correspondence nor dividends from the government managers and had been forced to flee the country.⁷ The arbitrary and discriminatory character of these non-regulatory interferences make the state-management cases weak authority for any particular structure of enquiry in cases concerned only with regulation of property.

Indeed, the IUSCT itself distinguished such state-management cases from cases limited to the regulation of property. In *Sedco v Iran* the Tribunal distinguished 'outright transfer of title [from] incidental economic injury'.⁸ It indicated that, in the latter circumstance, it would recognise an exception to liability for expropriation for bona fide regulation.⁹ In *Too v US* the IUSCT confronted an expropriation claim based on the seizure of the claimant's liquor licence by the US in satisfaction of an outstanding tax liability. The Tribunal distinguished 'economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of State' from expropriation.¹⁰ This excursion through the jurisprudence of the IUSCT shows that state-management cases provide little guidance on the question of regulatory expropriation.

⁴ *Phelps Dodge Corp. v Iran* (1986) 10 Iran-USCTR 121 [21].

⁵ *ibid* [22].

⁶ *ibid* [19].

⁷ G Aldrich, 'What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal' (1994) 88 AJIL 585, 588-593.

⁸ *Sedco Inc. v Iran* (1992) 28 Iran-USCTR 198, 275.

⁹ Aldrich (n 7) 605.

¹⁰ *Too v Greater Modesto Insurance Associates* (1989) 23 Iran-USCTR 378 [26].

ii) The existence of criteria for an expropriation to be lawful

Customary international law and BITs both require an expropriation to meet certain criteria in order to be lawful. States may only expropriate foreign property for a public purpose, in a non-discriminatory way and complying with a minimum due process requirement.¹¹ The enquiry into whether a measure constitutes an expropriation is logically prior to this *legality* question.¹² They are analytically separate stages of enquiry.¹³ Schreuer argues that evaluating public purpose and non-discrimination in the regulatory expropriation enquiry would render the subsequent legality requirements superfluous.¹⁴ This reasoning is flawed. The legality requirements would only be rendered superfluous if the satisfaction of the public purpose and non-discrimination criteria were sufficient to place *all* measures outside the category of 'expropriation'. However, the decisions that evaluate the purpose and application of *regulatory* measures do not purport to establish criteria that would excuse direct expropriations.¹⁵

iii) Subjective state intent to expropriate

Arbitral decisions and academic commentary are unanimous in agreeing that a professed intent of a state to expropriate is not a necessary requirement for a finding of regulatory expropriation or any other sort of expropriation.¹⁶ Schreuer, Reisman and Sloane suggest that the absence of a subjective intent requirement proves that a regulatory expropriation must be identified exclusively by its effects.¹⁷ This confuses the point. The absence of a subjective intent requirement is independent

¹¹ UNCTAD, *International Investment Agreements: Key Issues Volume 1* (United Nations, Geneva 2004) 239.

¹² *Fireman's Fund Insurance Co v Mexico* ICSID Case No ARB(AF)/02/01, Award, 17 July 2006 [174]; *Parkerings-Compagniet AS v Lithuania* ICSID Case No ARB/05/8, Award, 11 September 2007 [456].

¹³ *Feldman v Mexico* ICISD Case No ARB(AF)/99/1, Award, 16 December 2002 [98].

¹⁴ C Schreuer, *The Concept of Expropriation under the ECT and other Investment Protection Treaties* (Universitat Wien, Vienna 2005) 2. See also: R Higgins, 'The Taking of Property by the State' (1982) 176 *Recueil des Cours de l'Académie de Droit International* 259, 331; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina* Case No ARB/97/3, Award, 20 August 2007 [7.5.21].

¹⁵ See, for example, *Methanex v US* Final Award, 3 August 3 2005 pt IV ch D [7].

¹⁶ Schreuer (n 14) 39; W Reisman and R Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2003) 74 *BYIL* 115, 121; R Dolzer and F Bloch, 'Indirect Expropriation' (2003) 5 *International Law FORUM du droit international* 155, 164.

¹⁷ Reisman and Sloane (n 16) 121; Schreuer (n 14) 36-39.

from the question of whether an objective assessment of the characteristics of a measure is relevant in the regulatory expropriation enquiry.¹⁸

C. The effects structure

The previous section has shown that neither the authority of the IUSCT, the existence of legality requirements for expropriation, nor the absence of a subjective state intent requirement for an expropriation *necessarily* mandates an effects structure of enquiry into regulatory expropriation. However, none of these factors preclude an effects structure of enquiry. So it is no surprise that a number of modern arbitral decisions have drawn the boundary between regulatory expropriation and legitimate non-compensable regulation by looking exclusively to the effects of the measure in question. This section identifies two distinct approaches within the effects structure of enquiry in the jurisprudence of international arbitral tribunals: one following from the decision of *Metalclad v Mexico*, the other from *Pope & Talbot v Canada*.¹⁹

i) The *Metalclad* approach: effect on economic value

Metalclad had purchased a site in Mexico on which to build a hazardous waste landfill. It obtained the permits to operate the landfill from both state and federal agencies and had been told by federal officials that it did not need any additional authorisations.²⁰ When construction was well under way, the Municipality issued a stop work order, claiming a municipal construction permit was also required. The Municipality ultimately refused to grant the permit and, despite having been completed in the interim, the landfill could not begin operation.²¹ *Metalclad* alleged that the Municipality's refusal to issue the permit expropriated its investment. After *Metalclad* had initiated proceedings, the state governor issued an 'Ecological Decree' establishing a Natural Area for the protection of rare cacti. The Area encompassed *Metalclad*'s landfill and 'effectively and permanently

¹⁸ See, *Methanex* (n 15) pt IV ch D [7]; *Técnicas Medioambientales Tecmed, S.A. v. Mexico* ICSID Case No ARB(AF)/00/02, Award, 29 May 2003 [122]. In both decisions the Tribunals examined the objective characteristics of the measure in question to determine whether it was expropriatory, without doubting the settled view that a State could expropriate without a subjective intent to do so.

¹⁹ *Metalclad v Mexico* ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, (2001) 16 ICSID Review – FILJ 1; *Pope & Talbot Inc. v Canada* Interim Award, 26 June 2000.

²⁰ *Metalclad* (n 19) [30]-[44].

²¹ *ibid* [46]-[62].

precluded [its] operation'.²² The Ecological Decree was the basis for a second, distinct expropriation claim.

In evaluating the denial of permit claim, the Tribunal defined expropriation as 'covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the state.'²³ The legal equivalence of covert and incidental interference in the *Metalclad* approach implies that the characteristics of a measure are irrelevant. Covert interference suggests measures calculated to expropriate a particular investment by pretence of form. On the other hand, incidental interference includes the inadvertent effect of general regulations pursuing some other objective in good faith. The Tribunal was more explicit in evaluating the second claim. It held that it 'need not decide or consider the motivation or intent of the adoption of the Ecological Decree'.²⁴ The Ecological Decree was an expropriation, on the basis that it 'had the effect of barring forever the operation of the landfill'.²⁵

The definition of expropriation provided by the *Metalclad* Tribunal refers to incidental interference with the *reasonably-to-be-expected benefits* of an investment independently of any deprivation of property *rights*. This approach focuses the enquiry on the effect of loss of economic value attributable to a measure. The Tribunal did assert that Metalclad was denied the 'the right to operate the landfill',²⁶ but this assertion was not based on a determination of the powers of Mexican municipalities to issue construction permits under Mexican law.²⁷ Interference with property rights will normally entail economic loss, but there is a crucial conceptual difference between an enquiry that looks immediately to the effect of economic loss and one that primarily focuses on the effect of interference with rights.

²² *ibid* [58]-[59].

²³ *ibid* [103].

²⁴ *ibid* [111].

²⁵ *ibid* [109].

²⁶ *ibid* [105].

²⁷ *ibid* [86]; V Lowe, *Changing Dimensions of International Investment Law* (University of Oxford Faculty of Law Legal Studies Research Paper Series 2007) 64.

Criticisms of Metalclad

By ignoring international law sources and commentary, *Metalclad* suggests that the NAFTA expropriation provision, which covers measures ‘tantamount to expropriation’, extends regulatory expropriation wider than customary international law. This point has now been settled. *Pope & Talbot v Canada* explicitly held that the NAFTA standard was not wider than international law.²⁸ Within and beyond NAFTA, subsequent cases have followed *Pope & Talbot*.²⁹ The three NAFTA member states have consistently supported this approach.³⁰

More specific criticisms were made of *Metalclad* in the review of the decision by the Supreme Court of British Columbia.³¹ In reviewing the second expropriation finding the judge noted that ‘the Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110... [which was] sufficiently broad to include a legitimate rezoning of property’.³² Despite these doubts, he held that the legal test for regulatory expropriation concerned a question of law which the reviewing court did not have jurisdiction to revisit.³³

Subsequent decisions applying the Metalclad approach

The criticisms of the British Columbia court, coupled with decisions that clarify the meaning of ‘tantamount to expropriation’, explain why the *Metalclad* formulation has not been applied by any subsequent NAFTA tribunal. Nonetheless, the *Metalclad* approach has retained credibility beyond NAFTA.³⁴ In *CME v Czech Republic*, a Dutch media investor challenged changes made to the regulatory regime governing the foreign ownership of television broadcast licences in the Czech Republic. These changes to the regulatory regime did not directly alter the claimant’s legal rights in

²⁸ *Pope & Talbot* (n 19) [96].

²⁹ *Feldman* (n 13) [100]; *Fireman's Fund* (n 12) [172]; *LG&E Energy v Argentina* ICSID Case No ARB/02/1, Award, 25 July 2007 [185]; *SD Myers v Canada* Partial Award, 13 November 2000 [286]; *Tecmed* (n 18) [114]; *Telenor Mobile Communications v Republic of Hungary* ICSID Case No ARB/04/15, Award, 13 September 2006 [63].

³⁰ G Sampliner, ‘Arbitration of Expropriation Cases under U.S. Investment Treaties - A Threat to Democracy of the Dog That Didn't Bark’ (2003) 18 ICSID Review - FILJ 1, 6.

³¹ *Mexico v Metalclad Corporation* 2001 BCSC 664, 2 May 2001 [68], [73], [77], [83].

³² *ibid* [99].

³³ *ibid*.

³⁴ *CME v Czech Republic* Partial Award, 13 September 2001 [606]; *CMS Gas v Republic of Argentina* ICSID Case No ARB 01/08, Final Award, 12 May 2005 [262].

their investment. Rather, the case was argued on the basis that the changes allowed the claimant's local business partner to alter its contractual relationship with the claimant, undermining the value of the claimant's business. The key finding of fact was that the media regulator eliminated the legal protection of the use of the Licence, allowing the investor to lose the exclusive use of the Licence at a later point.³⁵

The Tribunal began its discussion of expropriation by asserting that measures 'that effectively neutralize the benefit of the property, are subject to expropriation claims'.³⁶ The Tribunal found that the facts in question amounted to regulatory expropriation because the government's actions 'destroyed... the commercial value of the investment'.³⁷ The focus on the commercial value of the investment, independently of the rights of which the investor had been deprived, was justified on the authority of *Metalclad*.³⁸ In a single paragraph, the *CME* Tribunal acknowledged that 'deprivation of property... must be distinguished from ordinary [regulatory] measures in the proper execution of the law'.³⁹ However, the Tribunal did not articulate any basis for identifying ordinary regulatory measures, other than the absence of economic loss that would constitute indirect expropriation.

More recently, the *Metalclad* approach has been endorsed in both *Tokios Tokelés v Ukraine* and *Vivendi v Argentina (II)*.⁴⁰ Other decisions have used the *Metalclad* approach differently. In *Occidental v Ecuador* the Tribunal held that it need not elect between competing views on the boundary of regulatory expropriation. It accepted that *Metalclad* established a 'rather broad' legal test for regulatory expropriation, but held that the measure in question would not be expropriatory,

³⁵ *CME* (n 34) [599].

³⁶ *ibid* [604]-[608].

³⁷ *ibid* [591].

³⁸ *ibid* [606].

³⁹ *ibid* [603].

⁴⁰ *Tokios Tokelés v Ukraine* ICSID Case No ARB/02/18, Award, 26 July 2007 [120]; *Vivendi* (n 14) [7.5.11].

even under the *Metalclad* test.⁴¹ The *Metalclad* approach was similarly applied, without being accepted, in *Waste Management v Mexico* and *Telenor v Hungary*.⁴²

ii) Implications of the *Metalclad* approach for *Piero Foresti*

The *Metalclad* approach looks exclusively to the effects of a measure. A measure that causes an investment to lose significant economic value will amount to a regulatory expropriation, independently of an assessment of the measure's interference with legal rights in the investment. Removing the disjunctives, 'incidental interference with the use of property which has the effect of depriving the owner... in significant part of... reasonably-to-be-expected economic benefit of property' establishes expropriation.⁴³ *Tokios Tokelés* described the standard as requiring deprivation 'of a "substantial" part of the value of the investment.'⁴⁴

Old order mining rights

The MPRDA undoubtedly reduced the value of active mineral rights. The 26% divestment to HDSAs required for the conversion of old order mining rights is unlikely to occur at open-market value, because a relatively large number of sellers – the claimants among them – must court a relatively small number of HDSA buyers. The procedure of divestment also imposes an economic burden in itself. If conversion is successful, ongoing requirements of HDSA management participation, active mining operations and formulating environmental social and labour plans impose additional costs. So do ongoing controls on mortgage and transfer.

The economic benefit of an old order mining right depends on the profitability of active mining operations that occur on it. Assessing the loss of value is an empirical task that requires a comparison of the pre-MPRDA profitability of a mining operation on an active mineral right to its profitability under the MPRDA. Old order rights that were highly profitable before the MPRDA could continue to support profitable mining operations, notwithstanding the one-off costs of conversion and the ongoing costs imposed by the MPRDA; their economic value would not be significantly affected. On the other hand, the additional costs would have a severe effect on the value of old

⁴¹ *Occidental Exploration and Production Company v the Republic of Ecuador* LCIA Case No UN3467, Final Award, 1 July 2004 [87].

⁴² *Telenor* (n 29) [67]; *Waste Management v Mexico (II)* ICSID Case No ARB(AF)/00/3, Final Award, 30 April 2004 [154], [159].

⁴³ *Metalclad* (n 19) [103].

⁴⁴ *Tokios Tokelés* (n 40) [120].

order rights of more marginal profitability. The MPRDA would deprive less-profitable of a substantial part of their value and potentially render them unviable. The claimants could reasonably have expected the economic benefit from the exploitation of active mineral rights because these benefits are based on legal rights conferred by mineral rights at the time of their purchase.

Under the *Metalclad* model less-profitable old order mining rights are expropriated by the MPRDA.

Unused old order rights

Unused old order rights are easier to assess in the abstract. Presumably, inactive mineral rights were not being mined because it was either unprofitable or impractical to do so at the time the MPRDA entered into force. The majority of an inactive mineral right's value would have been attributable to the exclusive, ongoing right it conferred to mine a particular parcel of land at some point in the future. This economic benefit is destroyed by the conversion regime for unused old order rights, which requires the commencement of prospecting and then mining. As with old order mining rights, it was reasonable for the claimants to have expected the original values.

Under the *Metalclad* model, unused old order rights are expropriated by the MPRDA.

iii) The *Pope & Talbot* approach: substantial deprivation of ownership rights

In *Pope & Talbot* the investor challenged Canada's Export Control Regime, which imposed a quota on the investor's export of softwood lumber to the US. The Tribunal accepted that the investor's access to the US market was a property interest subject to protection by Article 1110.⁴⁵ To determine whether this property interest had been expropriated the Tribunal stated that 'the test is whether the interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner'.⁴⁶ The Tribunal restated the standard as: 'expropriation requires a substantial deprivation', making it clear that the test of 'taking' refers to the effects of the regulatory measure. The Tribunal rejected the investor's claim because, while it suffered reduced profits, its right of access to the US market was not fully extinguished. Furthermore, Pope & Talbot retained full rights of ownership and control over its business.⁴⁷ Thus, in *Pope & Talbot* the effect of substantial deprivation was linked to the rights of the investor, particularly the right of control.

⁴⁵ *Pope & Talbot* (n 19) [96].

⁴⁶ *ibid* [102].

⁴⁷ *ibid* [100]-[101].

The *Pope & Talbot* standard of substantial deprivation of an investor's rights in the investment has been widely cited since. A number of cases invoking balancing and exception structures require an effect of substantial deprivation before the balancing or exception question arises.⁴⁸ The basis for treating *Pope & Talbot* as authority for an effects structure of enquiry is the Tribunal's statement that Article 1110 'does cover non-discriminatory regulation that might be said to fall within the exercise of a state's so-called police powers'.⁴⁹ In support of this interpretation the Tribunal cited a passage from the Third Restatement of the Foreign Relations Law of the US, that 'a state is responsible as for an expropriation of property... when it subjects alien property to taxation, regulation or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property'.⁵⁰ However, the Tribunal did accept that 'special care' should be taken when reviewing the state's exercise of police powers.⁵¹ The *Pope & Talbot* decision did not indicate what special care would involve.

Subsequent decisions applying the Pope & Talbot approach

The *Pope & Talbot* approach was applied in *Sempra*, *Enron*, *Nykomb v Latvia* and *CMS v Argentina*.⁵²

The *Sempra* Tribunal gave the most comprehensive articulation of the approach:

Substantial deprivation results... from depriving the investor of control over the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part.⁵³

⁴⁸ *Fireman's Fund* (n 12) [176]; *Tecmed* (n 18) [115].

⁴⁹ *Pope & Talbot* (n 19) [115].

⁵⁰ American Law Institute, *Restatement of the Law Third - The Foreign Relations Law of the United States* (American Law Institute Publishers, St Paul 1987).

⁵¹ *Pope & Talbot* (n 19) [99].

⁵² *Enron Corporation v Argentina* ICSID Case No ARB/01/3, Award, 22 May 2007 [245]; *Nykomb Synergistics Technology Holding v Republic of Latvia* Award, 16 December 2003, 33; *CMS* (n 34) [263].

⁵³ *Sempra Energy International v Argentina* ICSID Case No ARB/02/16, Award, 28 September 2007 [284].

The *Sempra* Tribunal acknowledged that its list was not exhaustive but explained that regulatory expropriation by any other means ‘would still have to meet the standard of having as a result a substantial deprivation of rights.’⁵⁴

In *Biwater v Tanzania* the Tribunal applied the *Pope & Talbot* approach, stressing the distinction between rights and value. It said: ‘[a] distinction must be drawn between (a) interference with rights and (b) economic loss. A substantial interference with rights may well occur without actually causing any economic damage’.⁵⁵ The Tribunal found that Tanzania had effectively extinguished Biwater’s rights in a water concession contract. It quantified the compensation owing for this expropriation at zero.⁵⁶

iv) Implications of the *Pope & Talbot* approach for *Piero Foresti*

The *Pope & Talbot* Tribunal required a *substantial deprivation* for a finding of expropriation. This approach looks to the deprivation of property rights; the catalogue of examples of regulatory expropriation provided by the *Pope & Talbot* Tribunal are all ‘actions ousting the Investor from full ownership or control of the Investment.’⁵⁷

Old order mining rights

The case of old order mining rights is relatively straightforward under the *Pope & Talbot* model. The MPRDA does not deprive the claimants of effective control nor of ownership. The conversion process requires active steps to be taken by the claimants, but the prerogatives of management subsist. The 26% divestment requirement allows the claimants to retain effective majority control of their property. The requirement that active mining operations be continued is not a meaningful restriction on rights of control and use because the old order mining rights are already being actively mined. Therefore, old order mining rights are not expropriated by the MPRDA under the *Pope & Talbot* model.

Unused old order rights

The case of unused old order mining rights is more difficult under the *Pope & Talbot* model. The obligation to take positive steps to put property to a specified use is an intrusion into the normal

⁵⁴ *ibid.*

⁵⁵ *Biwater Gauff v United Republic of Tanzania* ICSID Case No ARB/05/22, Award, 24 July 2008 [464].

⁵⁶ *ibid* [519].

⁵⁷ *Pope & Talbot* (n 19) [100].

prerogatives of ownership. This action is required by the MPRDA to prevent the complete extinguishment of an unused old order right. Prior to the entry into force of the MPRDA the claimants had decided not to begin mining on these sites, making this obligation all the more arduous.

The claimants do retain control of unused old order rights during the one year conversion period, and are free to elect between conversion and forfeit of their rights. However, the severe interference with the ownership rights of the claimants in either alternative – enforced commencement of prospecting or total loss of the right – suggests that unused old order rights probably are expropriated by the MPRDA under the *Pope & Talbot* model.

v) The effect of *appropriation*: an alternative approach?

Newcombe argues that the competing strands of jurisprudence on regulatory expropriation in international investment law can be reconciled by ‘rereading’ them as instances of the *appropriation* of property by the state or a third party.⁵⁸

Only two arbitral decisions could support Newcombe’s view: *Lauder v Czech Republic*⁵⁹ and *Olguin v Paraguay*.⁶⁰ The statements in both decisions were intimately tied to their contexts and did not purport to establish a more general legal approach. In *Olugin*, the relevant passage justified the finding of fact that an omission of the government had not *caused* the alleged loss.⁶¹ In *Lauder*, the Tribunal accepted that regulatory expropriation normally involved appropriation, but explicitly formulated its finding in terms of deprivation.⁶² Whatever the policy merits of a legal test based on appropriation, no established strand of jurisprudence in international investment law supports this approach.

⁵⁸ A Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 ICSID Review - FILJ 1, 7-15.

⁵⁹ *Lauder v The Czech Republic* Final Award, 3 September 2001 [203].

⁶⁰ *Olguin v Republic of Paraguay* ICSID Case No ARB/98/5, Award, 26 July 2001 [84].

⁶¹ *ibid.*

⁶² *Lauder* (n 59) [200]-[201].

D. The exception structure

BITs and limited multilateral treaties do not contain exception clauses to their expropriation provisions. Therefore, if an exception for certain regulatory measures exists, it must be found within the meaning of 'expropriation'.

i) The exception structure and police powers

In practice, the exception structure of enquiry in international investment law is based on a particular interpretation of the police powers doctrine. Opinions differ as to the etymology of 'police powers'.⁶³ What is agreed is that the judicial use of the term was popularised by the US Supreme Court in the nineteenth century.⁶⁴ The Supreme Court understood the police power as a positive power to regulate the use of property and described it as 'incapable of any very exact definition or limitation'.⁶⁵ In late nineteenth and early twentieth century US jurisprudence, the fact a measure was enacted by exercise of this positive police power did not exempt it from expropriation claims.⁶⁶

The way in which the concept of police powers migrated from US law to international investment law is not well understood. Written exceptions to expropriation were not included in any multilateral attempts to codify international investment law in the twentieth century, except for the US-authored Harvard Draft.⁶⁷ The term 'police power' was first used in international law in 1962 by Christie, also from the US, to describe this Harvard Draft exception.⁶⁸

By whatever route, the concept of police powers is now recognised in international investment law. The US-authored *Third Restatement* says: 'a state is not responsible for loss of property... resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not

⁶³ JL Montrose, 'Taking Property without Compensation' (1954) 11 Northern Ireland Legal Quarterly 278; J Williams, 'International Law and the Property of Aliens' (1928) 9 BYIL 1, 23.

⁶⁴ Montrose (n 63) 280.

⁶⁵ Williams (n 63) 23.

⁶⁶ J Sax, 'Takings and the Police Power' (1964) 74 The Yale Law Journal 36, 38-41.

⁶⁷ L Sohn and R Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545 art 10(5).

⁶⁸ G Christie, 'What Constitutes a Taking of Property Under International Law?' (1962) 38 BYIL 307, 338.

discriminatory'.⁶⁹ This has since been cited as the principal authority for the existence of 'police powers' in both commentary⁷⁰ and arbitral decisions.⁷¹ The *Third Restatement* formulation suggests an exception from expropriation for bona fide, non-discriminatory regulation. However, the same paragraph of the *Third Restatement* also asserts that a state is responsible for expropriation through 'regulation... that... unreasonably interferes with... effective enjoyment of an alien's property'.⁷² It is not clear how these two statements should or can be reconciled. Reflecting this indeterminacy, some tribunals have understood that a balancing structure of enquiry,⁷³ or even an effects structure,⁷⁴ should be used to distinguish the legitimate exercise of police powers from expropriation. This section concentrates exclusively on cases that have used the exception structure.

ii) Recent cases invoking the exception structure

The leading arbitral decision applying an exception structure is *Methanex v US*. Methanex was the world's largest producer of methanol, the chemical building block of the fuel additive MTBE.⁷⁵ The company challenged a Californian regulation that banned the sale and use of MTBE. This regulation was motivated by the public health and environmental risks of MTBE contamination of groundwater.⁷⁶

⁶⁹ American Law Institute (n 50) s 712g.

⁷⁰ V Heiskanen, 'The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation' (2003) 5 International Law FORUM du droit international 176, 177; B Kunoy, 'Developments in Indirect Expropriation Case Law in ICSID Transnational Arbitration' (2005) 6 The Journal of World Investment & Trade 467, 470; A Weiner, 'Indirect Expropriations' (2003) 5 International Law FORUM du droit international 166, 167; C Yannaca-Small, "*Indirect Expropriation" and the "Right to Regulate" in International Investment Law* (Working Papers on International Investment 2004) 5.

⁷¹ *Feldman* (n 13) [105]; *Saluka Investment BV v Czech Republic Partial Award*, 17 March 2006 [260]; *Too* (n 10) [26].

⁷² American Law Institute (n 50) s 712g.

⁷³ *Feldman* (n 13) [105].

⁷⁴ *Pope & Talbot* (n 19) [96].

⁷⁵ *Montrose* (n 63) 280.

⁷⁶ *Methanex* (n 15) pt III ch A.

Methanex argued that the regulation was expropriatory because it significantly deprived it of its 'customer base, market share and goodwill'.⁷⁷ The US denied the claim of significant deprivation.⁷⁸ It also argued the regulation was a public health measure within its police powers, citing the *Third Restatement*.⁷⁹ However, the US proposed a more qualified formulation than the *Third Restatement*; submitting only that '**as a general matter**, States are not liable to compensate . . . for economic loss incurred as a result of a nondiscriminatory action to protect the public health.'⁸⁰ (emphasis added) This statement concedes that non-discriminatory action to protect public health could be expropriatory.⁸¹ The US pointedly declined to argue that measures for environmental purposes were within the police power. Methanex accepted the US's statement of the law and contested the case on the facts.⁸²

The Tribunal dealt with the police powers issue before discussing whether the measure would otherwise have amounted to an expropriation. It formulated its own conception of the police powers with uncommon clarity and simplicity:

... a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process, and which affects, inter alios a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government... to refrain from such regulation.⁸³

Contrary to the US's submission, the Tribunal's statement clearly positioned the police powers as an exception. The Tribunal presented the statement of law as a 'matter of general international law',⁸⁴ without any supporting authority. In applying this legal test to the facts, the Tribunal concentrated

⁷⁷ *ibid* pt IV ch D [5].

⁷⁸ *Methanex v US: Rejoinder of the Respondent* 23 April 2004 [191].

⁷⁹ *ibid* [194].

⁸⁰ *ibid*.

⁸¹ *ibid*.

⁸² *Methanex v US: Reply of Claimant to Amended Statement of Defence* 19 February 2004 [207].

⁸³ *Methanex* (n 15) pt IV ch D [7].

⁸⁴ *ibid*.

on the criteria of non-discrimination, due process and non-violation of commitments. Through a detailed enquiry into the history of the regulation, the Tribunal found them all easily satisfied.⁸⁵

The other decision that applied an exception structure in the regulatory expropriation enquiry was *Saluka v Czech Republic*. Saluka was a major foreign shareholder in the Czech bank IPB. The Banking Act required all banks to maintain payment ability through a minimum 'liquidity cushion'.⁸⁶ In 2000 the Czech Banking Regulator found IPB had continuously failed to maintain payment ability and forced it into liquidation, as it was entitled to do under the Banking Act.⁸⁷

The Tribunal cited the *Harvard Draft*, the *Third Restatement* and *Methanex* to support the statement of law that 'states are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare'.⁸⁸ In ruling that the measure was 'valid and permissible within its [the state's] regulatory powers, notwithstanding that the measure had the effect of eviscerating Saluka's investment in IPB',⁸⁹ the Tribunal confirmed that these characteristics of the regulation were not to be balanced against its effects.

It is not clear why the *Saluka* Tribunal declined to adopt the *Methanex* formulation directly. Unlike *Methanex*, the *Saluka* decision began with a finding of deprivation.⁹⁰ The analysis then turned to the issue of whether the regulatory action was justified by the police powers. International law sources favour the sequence followed in *Methanex* of addressing the police powers question before assessing whether the extent of deprivation would otherwise support a finding of expropriation.⁹¹ However, the sequence of the rule-exception enquiry will not affect the outcome of any case, so long as the same substantive legal test for regulatory expropriation is applied.

⁸⁵ *ibid* [8]-[15].

⁸⁶ Banking Act (1992) Act No 21/1992 Coll.

⁸⁷ *ibid*.

⁸⁸ *Saluka* (n 71) [255].

⁸⁹ *ibid* [272].

⁹⁰ *ibid* [267].

⁹¹ *Methanex v US: Rejoinder of the Respondent* (n 78) [194]; American Law Institute (n 50).

Despite the differences in terminology, the legal tests in both cases were remarkably similar. The *Saluka* Tribunal appears to have inferred a low level requirement of procedural and substantive justification by the state from the concept of ‘normal exercise’.⁹² On the facts, the measures were justified because both the final decision of the banking regulator and the process by which the decision was reached were reasonable.⁹³ These two observations are consistent with the public purpose and due process requirements of *Methanex*.

iii) Implications of the *Methanex* approach for *Piero Foresti*

Methanex is the archetype of the exception structure of the regulatory expropriation enquiry. The legal test stated in that decision is schematic and clear. A measure will not be classed as expropriatory if it meets the requirements of being:

1. a regulation;
2. that is non-discriminatory;
3. for a public purpose;
4. enacted in accordance with due process; and
5. made without specific commitments by the regulating government to refrain from such regulation.

The *Methanex* criteria have not been fully fleshed out. In particular, international law is yet to develop a taxonomy of legitimate ‘public purposes’,⁹⁴ a point also recognised in *Saluka*.⁹⁵ The interpretation of this criterion is crucial to the scope of the exemption provided for regulatory measures. Other areas of international law could be helpful in demonstrating that an objective is a legitimate public purpose,⁹⁶ but this approach has not yet been considered by any international tribunal.

⁹² *Saluka* (n 71) [265], [271].

⁹³ *ibid* [272].

⁹⁴ *Weiner* (n 70) 171.

⁹⁵ *Saluka* (n 71) [262], [263].

⁹⁶ *Weiner* (n 70) 174.

Old order mining rights

1. The MPRDA is a regulation because it imposes conditions on the use of certain property rights; because these conditions are clear rather than discretionary; and because the Act applies generally.
2. The MPRDA does not discriminate between the claimants and other foreign investors in the mining sector. Nor does the MPRDA discriminate between the claimants and South African non-HDSA-owned firms. These two classes of firms make up the vast majority of the SA mining sector, and are the appropriate comparators for determining whether the MPRDA is discriminatory. The BEE conditions of the MPRDA are discriminatory between the claimants and HDSA-owned firms. In the context of a fair and equitable treatment claim, the *Saluka* Tribunal said unlawful discrimination occurs 'if (i) similar case are (ii) treated differently (iii) without reasonable justification.'⁹⁷ Discrimination between the claimants and the tiny minority of HDSA-owned mining companies is justified. In international human rights law, and almost all domestic legal orders, affirmative action taken to redress past racial discrimination does not amount to unlawful discrimination.⁹⁸
3. Affirmative action to redress historic disadvantage is a legitimate governmental function recognised by international human rights law. Extensive regulation of the mining sector is common to most domestic legal orders. Although there is no authority on either point within international investment law, it is highly likely both would be recognised as legitimate public purposes.
4. The MPRDA was enacted in accordance with due process. The Act itself was promulgated by a democratic legislature. The content of the Mining Charter was agreed to by the industry through a consultative process. Individual determinations under the MPRDA can be challenged in normal administrative law procedures.
5. The government did not make any commitment to refrain from such regulation. Indeed, the transition from apartheid and the policies of the ANC indicated that regulation should have been expected.

All five criteria being satisfied, the MPRDA clearly falls within the exception of the *Methanex* model and cannot amount to regulatory expropriation under that approach.

⁹⁷ *Saluka* (n 71) [313].

⁹⁸ Article 2(2) International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; General Comment No. 18 'Report of the Human Rights Committee' (1990) UN Doc A/45/40.

Unused old order rights

The five *Methanex* criteria exclusively address the characteristics of a measure. The MPRDA regime for inactive mineral rights is no more discriminatory, nor less in pursuit of a public purpose than the regime for active mineral rights. It is still a regulatory measure, enacted with due process that does not violate prior commitments made by the government. The more severe effects on the property rights of former holders of inactive mineral rights are irrelevant. The MPRDA again falls within the exception of the *Methanex* model.

E. The balancing structure

Unlike the effects and exception structures, the balancing structure is not associated with a particular thread of academic writing. Balancing, in its various forms, is a practical technique of reasoning used by tribunals to deal with the pressure of competing interests in regulatory expropriation arbitrations. This section organises use of the balancing structure under three different sub-categories: characterisation, proportionality and the *Penn Central* factors.⁹⁹

i) The characterisation-as-balancing approach

The most common balancing approach applied by tribunals involves characterisation of the measure. The clearest statement of the characterisation approach is from *Feldman v Mexico*: ‘the essential determination is whether the actions... constitute an expropriation or nationalization, or are valid governmental activity’.¹⁰⁰ The language of characterisation is sometimes invoked by tribunals using effects or exception structures.¹⁰¹ Within the balancing structure, characterisation refers to a more specific method of reasoning. Characterisation-as-balancing treats a wide range of effects on the investor and characteristics of the measure as potentially relevant. All these factors are weighed against each other and the tribunal then makes a fact-specific conclusion.

The brief decision of *SD Myers v Canada* laid out a basic framework for the characterisation approach. *SD Myers* challenged Canada’s temporary export ban on polychlorinated biphenyl. The Tribunal determined that ‘expropriation’ should be interpreted consistently with ‘the whole body of state practice, treaties and judicial interpretations of that term’.¹⁰² This approach contrasts markedly with decisions applying both the effects and exception models, which tend to cite narrowly from the

⁹⁹ *Penn Central Transportation Co v. New York City* 438 US 104 (1978).

¹⁰⁰ *Feldman* (n 13) [98].

¹⁰¹ See *Biloune v Ghana* (1993) 95 ILR 183 [603]; *Saluka* (n 71) [264].

¹⁰² *SD Myers* (n 29) [280].

line of authority that supports their approach. In *SD Myers* the Tribunal positioned effect at the centre of characterisation, saying ‘expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference.’¹⁰³ Beyond this initial assessment ‘international law makes it appropriate to consider both the purpose and effect of governmental measures’.¹⁰⁴ The decision did not refer to any ‘purpose’ elements as the facts fell short of establishing the effect necessary for expropriation.

In *Feldman*, the Tribunal balanced the effects of a regulatory measure against its characteristics in a more even way. The claimant operated a business which exported cigarettes. After a number of years of inconsistent statements, the Mexican authorities decided that Feldman was no longer entitled to the tax rebates he had previously received.¹⁰⁵ Although the claimant alleged an ‘agreement’ with the authorities, the Tribunal found that the claimant had no right to the rebates under Mexican law.

In formulating the legal standard, the Tribunal ‘sought guidance’ from both *Metalclad* and the *Third Restatement*. It recognised that regulations could amount to expropriation,¹⁰⁶ but held that expropriation should be distinguished from noncompensable regulation ‘in light of all the circumstances’.¹⁰⁷ The Tribunal identified four relevant factors in the case in question.¹⁰⁸ The first and fourth concerned the characteristics of the measure. They were the *general* character of the tax and the fact that the regime had a ‘rational public purpose’.¹⁰⁹ The second and third factors concerned the effects of the measure. They were the fact that the absence of a tax rebate did not deprive the claimant of any legal right and the fact that the investor retained control of the investment.¹¹⁰ All four factors pointed against regulatory expropriation. The Tribunal’s characterisation-as-balancing approach was most explicit in its conclusion: ‘while none of these

¹⁰³ *ibid* [282].

¹⁰⁴ *ibid* [281].

¹⁰⁵ *Feldman* (n 13) [109].

¹⁰⁶ *ibid* [110].

¹⁰⁷ *ibid* [106], [102].

¹⁰⁸ *ibid* [111].

¹⁰⁹ *ibid* [112]-[116], [136]-[137].

¹¹⁰ *ibid* [111], [117]-[134].

factors alone is necessarily conclusive, in the Tribunal's view, taken together they tip the expropriation/regulation balance away from a finding of expropriation'. *Feldman* was followed in *Generation Ukraine v Ukraine*.¹¹¹

The most comprehensive expression of the characterisation-as-balancing approach was made in *Fireman's Fund v Mexico*. The Tribunal said that:

To distinguish between a compensable expropriation and a noncompensable regulation by a host state, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; the bona fide nature of the measure.¹¹²

It added that the effect on an investor's 'investment backed expectations' could also be considered.¹¹³ The concept of investment backed expectations originated in the case law of the US 5th amendment and is examined in the following chapter.¹¹⁴ The Tribunal did not specify how the six elements listed above were to be reconciled or balanced against each other.

The application of the law to the facts in *Fireman's Fund* did not clarify the balancing or weighing process to be applied in characterisation. However, it did clarify the structure of the enquiry by requiring an initial threshold of effect, before moving to the balancing process. *Fireman's Fund* challenged five separate regulatory measures in the recapitalization of a Mexican bank in which it was a major investor. The measure which came closest to expropriation was the repurchase of debentures by the state, which discriminated between peso-denominated debentures, held by Mexican nationals, and dollar-denominated debentures, held by *Fireman's Fund*.¹¹⁵ The Tribunal

¹¹¹ *Generation Ukraine v Ukraine* ICSID Case No ARB00/09, Award, 16 September 2003 [20.34].

¹¹² *Fireman's Fund* (n 13) [176].

¹¹³ *ibid.*

¹¹⁴ S Rose-Ackerman and J Rossi, 'Disentangling Deregulatory Takings' (2000) 86 *Virginia Law Review* 1435 n166.

¹¹⁵ *Fireman's Fund* (n 12) [202].

dismissed the regulatory expropriation claim, saying ‘*a discriminatory lack of effort by a host State to rescue an investment that has become virtually worthless, is not a taking of that investment.*’¹¹⁶

ii) Implications of the characterisation-as-balancing approach for *Piero Foresti*

Fireman’s Fund embodies the current state of the characterisation-as-balancing approach. The approach can be restated as:

1. A minimum threshold of effect, substantial deprivation, is required for expropriation.
2. Beyond this threshold, the characteristics of the regulation – police power, purpose, discrimination, *bona fide*, proportionality – are all potentially relevant in the regulatory expropriation enquiry, as are the severity of the effects, including interference with investment backed expectations.
3. Tribunals consider all the relevant elements on the specific facts and then characterise the measure as either expropriation or legitimate regulation.

Old order mining rights

Applying the conclusion under the *Pope & Talbot* approach earlier in the chapter, it is highly unlikely that the claimants are substantially deprived of active mineral rights by the MPRDA. Even if the required threshold of deprivation were exceeded, the characteristics of the measure with respect to old order mining rights point more toward characterisation of the MPRDA as legitimate regulation than regulatory expropriation.

Unused old order rights

The case of unused old order rights would be considerably more difficult. The application of the *Pope & Talbot* model showed that it is probable that the claimants have been substantially deprived of their inactive mineral rights by the MPRDA. As such, the characteristics of the measure should be taken into account.

The application of the *Methanex* approach showed that the MPRDA pursues two legitimate public purposes in a non-discriminatory manner. The MPRDA was enacted in good faith, as demonstrated by its general character and the fact it does not violate any prior commitments made by the government. These observations would support characterisation as legitimate regulation.

On the other hand, in the case of unused old order rights, the conditions advancing the purpose of mining sector regulation, not those setting affirmative action targets, place the greater burden on the claimants. The claimants must begin prospecting within a year to avoid losing their

¹¹⁶ *ibid* [207].

unused old order rights. It is arguable that the MPRDA's 'use-it-or-lose-it' objective could be achieved by more accommodating means – for example, by applying the five year conversion period for old order mining rights. There is no authority in international investment law as to whether the existence of a less restrictive regulatory alternative is evidence that a measure is not reasonably proportionate. The criterion of investment-backed expectations is also indeterminate. The original purchase of mineral rights demonstrates an expectation of the ability to mine, but the claimants had not undertaken the additional investment required to actually begin mining.

It is impossible to anticipate how all these factors would be weighed. Beyond the initial threshold of effect, the characterisation-as-balancing approach does not articulate a structure for the balancing enquiry, nor does it state a balancing rule.

iii) *Tecmed v Mexico*: the ECHR approach

Tecmed operated a landfill in Mexico. The Mexican authorities refused to reissue the permit required for the landfill to operate due to local opposition to it.¹¹⁷ The Tribunal found the denial of the permit caused the minimum threshold of effect on the investment to be classed as an expropriation: Tecmed had been '*radically deprived of the economical use and enjoyment of its investment*'. It held that there was no exception to expropriation for regulatory measures even if they were '*beneficial to society as a whole*'.¹¹⁸ Instead, the Tribunal accepted that certain characteristics of the regulation should be balanced against the effect of deprivation using the principle of proportionality. For a measure to be classed as a non-compensable regulation '*there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized*';¹¹⁹ the Tribunal found no such relationship of proportionality.¹²⁰

The proportionality test in *Tecmed* is explicitly drawn from the jurisprudence of the ECHR. In explaining this test, the Tribunal cited four leading ECHR decisions on regulatory expropriation at length.¹²¹ In another section of the decision, the Tribunal held that an investor's legitimate

¹¹⁷ *Tecmed* (n 18) [132].

¹¹⁸ *ibid* [119]-[122].

¹¹⁹ *ibid* [122].

¹²⁰ *ibid* [128], [139], [144].

¹²¹ *ibid* [116], [122].

expectations concerning the use of its property should also be evaluated in the regulatory expropriation enquiry, even in the absence of a formal legal right to such use.¹²² ECHR jurisprudence also introduces legitimate expectations into the enquiry in this way. Together, these two elements show that *Tecmed* directly adopted the ECHR regulatory expropriation jurisprudence.

Both *Azruix v Argentina* and *LG&E Energy v Argentina* have followed the proportionality approach of *Tecmed*.¹²³ *Azurix* recognised that the proportionality doctrine was originally drawn from the ECHR.¹²⁴ *Azurix* also agreed with the *Tecmed* Tribunal's view that any legitimate expectations of the investor created by assurances made by the state on which the investor then relied should carry additional weight in the enquiry.¹²⁵

The ECHR approach will be considered in detail and applied to *Piero Foresti* in Chapter 5.

iv) US and Canadian model BITs: the *Penn Central* approach

A final approach to balancing in international investment law is embodied in the 2004 Canadian and US model BITs. Both include annexes which document 'understandings' on the interpretation of expropriation. The US Model states:

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by case, fact-based inquiry that considers, among other factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

¹²² *ibid* [149]-[150].

¹²³ *Azurix v Argentina* ICSID CASE No ARB/01/12, Award, 14 July 2006 [311]; *LG&E Energy* (n 29) [195].

¹²⁴ *Azurix* (n 123) [311]-[312].

¹²⁵ *ibid* [316]-[318].

(iii) the character of the government action.¹²⁶

The Canadian Model BIT articulates the same three factors, and is worded almost identically.¹²⁷ Both annexes are 'integral parts' of their respective treaties.¹²⁸ They require the boundary of regulatory expropriation to be drawn within a balancing structure; criteria i) and ii) refer to the effect of a measure, while criterion iii) refers to its characteristics.

The same three criteria are the *Penn Central* factors from US constitutional regulatory expropriation jurisprudence, as they were understood between 1979 and 2005.¹²⁹ This replication is no accident. The promulgation of a new US Model BIT in 2004 resulted from a 2002 instruction from Congress to the US Trade Representative to 'establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice.'¹³⁰

Both model BITs include a further paragraph in the understanding on expropriation, stating that 'except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.'¹³¹ This paragraph does not create an additional exception to the *Penn Central* approach because it recognises that, in rare circumstances, legitimate non-discriminatory regulations for public welfare objectives can constitute expropriation. Rather, the additional paragraph clarifies the *Penn Central* approach.

The Annexes have not yet been considered by international arbitral tribunals. The *Penn Central* approach will be considered in detail and applied to *Piero Foresti* in Chapter 4.

¹²⁶ US Model Bilateral Investment Treaty (2004) annex B 4(a).

¹²⁷ Canada Model Foreign Investment Protection Agreement (2004) annex B 13(1).

¹²⁸ *ibid* art 35; US Model BIT (n 126) art 52(1).

¹²⁹ A Newcombe, 'Canada's New Model Foreign Protection Agreement' (2004) <<http://ita.law.uvic.ca/documents/CanadianFIPA.pdf>> (7 May 2008) 6.

¹³⁰ M Porterfield, 'International Expropriation Rules and Federalism' (2004) 23 *Stanford Environmental Law Journal* 3, 42.

¹³¹ US Model BIT (n 126) annex B 4(1).

Chapter 4: Regulatory expropriation in US constitutional jurisprudence

A. Introduction

US constitutional regulatory takings jurisprudence establishes a clear structure of enquiry for determining whether a measure expropriates – ‘takes’ in the US terminology – property.¹ The framework is set out in *Lingle v Chevron*, a rare unanimous decision of the US Supreme Court handed down in 2005.² *Lingle* overruled one line of regulatory taking jurisprudence and clarified the relationship between the other leading cases.³ The Court affirmed that, outside of three narrow categories, ‘regulatory takings challenges are governed by the standards set forth in *Penn Central*’.⁴ *Lingle* also provided some guidance on the ‘vexing subsidiary questions’,⁵ within the *Penn Central* enquiry.

This chapter applies the taxonomy developed in Chapter 1 to US case law. The *Penn Central* approach treats both the effect on the property and the characteristics of the regulation as relevant and therefore adopts a basic balancing structure. US regulatory takings law contains three other legal tests of narrow applicability. The unconstitutional exaction jurisprudence, developed in *Nollan v California Coastal Commission* and *Dolan v City of Tigard*,⁶ also falls within the balancing structure. The *per se* tests of both *Loretto v Teleprompter Manhattan*⁷ and *Lucas v South Carolina Coastal Council*⁸ fall within the basic effects structure.

¹ This chapter adopts the US constitutional law expression ‘regulatory taking’ in place of the international investment law term ‘regulatory expropriation’.

² *Lingle, Governor of Hawaii, et al. v. Chevron USA Inc.* 544 US 528 (2005).

³ M Kent, ‘Construing the Canon’ (2008) 16 New York University Environmental Law Journal 63, 64.

⁴ *Lingle* (n 2) 538.

⁵ *ibid* 539.

⁶ *Nollan v. California Coastal Commission* 483 US 825 (1987); *Dolan v. City of Tigard* 512 US 374 (1994).

⁷ *Loretto v. Teleprompter Manhattan* 458 US 419 (1982).

⁸ *Lucas v. South Carolina Coastal Council* 505 US 1003 (1992).

B. The legal context of US regulatory takings jurisprudence

The final clause of the 5th Amendment of the US Constitution reads '[N]or shall private property be taken for public use without just compensation.' The Supreme Court has applied this clause 'to secure compensation in the event of otherwise proper interference amounting to a taking.'⁹ As in international investment law, the right to compensation for the taking of property is nested in independent obligations of due process and public use. These enquires are analytically distinct from the issue of whether a regulatory measure 'takes' certain property. Accordingly, a taking that fails to meet the public use requirement or violates the due process clause is impermissible, regardless of the amount of compensation paid.¹⁰

Originally it was thought that the 5th Amendment applied only to direct takings.¹¹ It was not until *Pennsylvania Coal v Mahon*¹² that the Supreme Court recognised that regulations could sometimes amount to a taking.¹³ In that case Justice Holmes declared that 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.'¹⁴ Although different legal tests – explored later in this chapter – have been developed to determine when a regulation 'goes too far', they share a common touchstone of seeking 'to identify regulatory actions that are functionally equivalent' to a classic direct taking.¹⁵

C. The denominator problem and the 'parcel as a whole' rule

It is generally accepted that property comprises a bundle of legal rights.¹⁶ For example, a fee simple in real estate includes severable rights over all the vertical and horizontal area within the geographic boundary of the property; the rights of the owner to put the area to many – but not all – conceivable

⁹ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* 482 US 304 (1987), 314; *Lingle* (n 2) 536-537.

¹⁰ *Lingle* (n 2) 543-544.

¹¹ *Lucas* (n 8) 1014, 1028.

¹² *Pennsylvania Coal Co. v. Mahon* 260 US 393 (1922).

¹³ *Lingle* (n 2) 537.

¹⁴ *Penn Coal* (n 12) 415.

¹⁵ *Lingle* (n 2) 539.

¹⁶ *Andrus v. Allard* 444 US 51 (1979) 65.

uses; and the existence of these rights for an indefinite duration. Thus, the rights intrinsic in any property interest have spatial, functional and temporal dimensions.¹⁷ This raises a difficult conundrum for effects-based reasoning. On the one hand, 'to the extent that any portion of property is taken [by a regulation], that portion is always taken in its entirety'.¹⁸ On the other hand, even if a measure takes particular rights, the property-owner is likely to be left with other rights of some value. From the former perspective, the claimant's rights are completely destroyed, from the latter, merely qualified.

Resolving this issue is a prerequisite for evaluating the economic impact of an interference with rights. It is not possible to determine the proportion of a property's value taken by a regulatory measure without both quantifying the loss, the numerator, and specifying a denominator against which this loss is to be compared.¹⁹ In US regulatory takings jurisprudence this is called the denominator problem.²⁰ A solution to the denominator problem was given in *Penn Central*:

'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.²¹

This 'parcel as a whole' rule defines the denominator as the full bundle of rights that inhere in a given property interest.

The rule has some awkward implications: it makes it easier for a property owner with a narrow property interest, such as a mining lease, to establish that a given regulatory measure

¹⁷ *Tahoe-Sierra Preservation Council, Inc., et al v. Tahoe Regional Planning Agency et al.* 535 US 302 (2002) 318; FP Hubbard, 'Palazzolo, Lucas and Penn Central' (2001) 80 Nebraska Law Review 465, 494; R Meltz, 'Takings Law Today' (2007) 34 Ecology Law Quarterly 307, 347.

¹⁸ *Tahoe-Sierra* (n 17) 331; citing *Concrete Pipe & Products of Cal., Ince. v. Construction Laborers Pension Trust for Southern Cal.* 508 US 602 (1993) 644.

¹⁹ J Keene, 'When Does a Regulation "Go Too Far"' (2006) 14 Penn State Environmental Law Review 397, 418.

²⁰ Hubbard (n 17) 494.

²¹ *Penn Central Transportation Co v. New York City* 438 US 104 (1978) 130-131.

constitutes a taking than it would be for a property owner with a wider interest.²² Discomfort with this logic led the majorities in *Lucas* and again in *Palazzolo* to question the rule.²³ Despite these doubts, the parcel as a whole rule was affirmed by a six-judge majority in *Tahoe-Sierra*. In that case, the majority applied the parcel as a whole rule to find that a 32 month total moratorium on development of land could not be understood as completely taking the property during the defined time period.²⁴ *Lingle's* strong endorsement of *Penn Central*, albeit without explicit reference to the parcel as a whole rule, suggests the rule is now firmly embedded in US regulatory takings jurisprudence.

D. The balancing structure

i) *Penn Central*

The facts in *Penn Central* arose from a New York law to preserve historic landmarks. The Penn Central Railway Station was designated a landmark under that law in 1967. A few months later, the owner of the station sought permission to build a 53-story office building above the station, which was refused on the basis of the landmark preservation law.²⁵

The majority recognised that many measures that affect the value of property do not qualify as takings and observed that previous decisions did not provide 'set formulas' to identify the measures that do constitute takings. Instead, the majority called for 'ad hoc, factual inquiries' and, in the statement for which the case is now famous, sought to articulate the relevant factors in these enquiries.²⁶ The passage reads: '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, or course, relevant considerations. So, too, is the character of the governmental action.'²⁷

²² Compare *Penn Coal* (n 12) to *Keystone Bituminous v. DeBenedictis* 480 US 470 (1987); Meltz (n 17) 351.

²³ *Lucas* (n 8) 1016-1017, 1054; *Palazzolo v. Rhode Island et al.* 533 US 606 (2001) 631.

²⁴ *Tahoe-Sierra* (n 17) 331-332.

²⁵ *Penn Central* (n 21) 107-117.

²⁶ *ibid* 124.

²⁷ *ibid*.

The following year the Supreme Court described the relevant factors in the *Penn Central* analysis as ‘the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action.’²⁸ In doing so, the court subtly reformulated the *Penn Central* assessment, severing investment-backed expectations from economic impact to give the familiar three-part formulation.²⁹ This schema is reproduced in the 2004 US and Canadian model BITs. In 2005, *Lingle* returned to the original formulation of *Penn Central*, which has two limbs: economic impact, with special reference to investment backed expectations; and the character of governmental action.³⁰

Economic impact and interference with investment-backed expectations

‘[T]he Penn Central inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests’.³¹ US courts usually quantify the economic impact of a regulation. The most commonly used method of quantification is comparing the fair market value of the property – that is, the parcel as a whole – with and without the challenged regulation.³² Although there is no defined percentage loss required for a taking, the loss must be severe.³³ A regulation that leaves a reasonable economic use for the property is unlikely to be a taking.³⁴ Takings are seldom found below 85% loss of value; a loss above 90% does not conclusively establish a taking.³⁵

Although the inquiry refers to ‘economic impact’, it is clear that only economic impact that results from an alteration of the claimant’s rights in a particular piece of property is relevant in the

²⁸ *Kaiser Aetna v US* 444 US 164 (1979) 175.

²⁹ *Kent* (n 3) 67.

³⁰ *Keene* (n 19) 422; *Kent* (n 3) 97.

³¹ *Lingle* (n 2) 540.

³² J Echeverria, 'Making Sense of Penn Central' (2006) 23 *Journal of Environmental Law* 171, 180.

³³ *ibid.*

³⁴ *Keene* (n 19) 422.

³⁵ *Meltz* (n 17) 335.

takings analysis. A loss of economic value that does not flow from a direct interference with property rights cannot support a takings claim.³⁶

At a conceptual level, investment-backed expectations are a prism through which economic impact is assessed. They are relevant to the analysis of economic impact because 'the severity of the harm resulting from the regulation... will depend to some degree on the extent and characteristics of the owner's particular investment.'³⁷ *Penn Central* required investment-back expectations to be distinct in order to merit consideration. A general expectation of profit is insufficiently distinct. *Kaiser-Aetna v United States* added that the expectation must also be reasonable.³⁸ Subsequent case-law has required an investment-backed expectation to be both distinct and reasonable to carry any additional weight in the economic impact calculus.³⁹

Some commentators have criticised investment-backed expectations for introducing a 'psychological element' to the jurisprudence.⁴⁰ Such criticism misrepresents the way the doctrine operates in practice. The requirement that expectations be investment-backed directs attention to the way the owner has dealt with the property in question, rather than to the owner's state of mind. For example, in *Penn Central*, Justice Brennan described the ability to continue with an established use as the 'primary' investment-backed expectation.⁴¹ The fact that existing use was not interfered with proved decisive in *Penn Central*.⁴² Activity and expenditure preparing property for a specific future use also demonstrates a distinct investment-backed expectation.⁴³

³⁶ *Brown v. City of Twin Falls* 124 Idaho 39 (1993).

³⁷ Kent (n 3) 97.

³⁸ *Kaiser Aetna* (n 28) 175.

³⁹ *Lingle* (n 2) 538-539, 544; Kent (n 3) 98-99; Meltz (n 17) 339.

⁴⁰ Meltz (n 17) 398.

⁴¹ *Penn Central* (n 21) 136.

⁴² RS Radford and JD Breemer, 'Great Expectations' (2001) 9 New York University Environmental Law Journal 449, 458-459.

⁴³ *ibid* 454.

The reasonableness of an investment backed expectation turns largely on the regulatory environment.⁴⁴ The fact that the challenged regulation was in place at the time the investor acquired the property is relevant in assessing whether an investment-backed expectation was reasonable,⁴⁵ although it is not, of itself, conclusive.⁴⁶ In a similar vein, investors who enter a '*heavily regulated field*' will find it more difficult to assert that expectations based on the absence of regulation were reasonable and, subsequently, that the economic loss caused by a regulation constituted a taking.⁴⁷

The character of governmental action

The relevant considerations under the character factor are less clear.⁴⁸ The most important general consideration in the character analysis is the extent to which an action 'single[s] out' an individual property owner.⁴⁹ This reflects the purpose of the takings clause 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'.⁵⁰ The 'singling out' consideration has been applied in two slightly different ways.⁵¹ The first looks to whether the measure gives the individual 'a reciprocity of advantage'.⁵² On that interpretation, a property owner is singled out if she bears the burden of a regulation without sharing in the general benefits it provides. The second looks to whether the measure applies generally. On this interpretation, an individual is singled out if the regulation does not share its burden broadly and evenly. If the rationale is reciprocity, case law suggests that only a loose reciprocity of advantage is required to tilt the balance against a taking.⁵³ However, the better view is

⁴⁴ Echeverria (n 32) 183.

⁴⁵ *Tahoe-Sierra* (n 17) 336; quoting Justice O'Connor *Palazzolo* (n 23) 632.

⁴⁶ *Palazzolo* (n 23) 626-628.

⁴⁷ Meltz (n 17) 340.

⁴⁸ *ibid* 341.

⁴⁹ *Tahoe-Sierra* (n 17) 341.

⁵⁰ *Penn Central* (n 21) 123-124; citing *Armstrong v. US* 364 US 40 (1960) 49.

⁵¹ Echeverria (n 32) 192.

⁵² *Tahoe-Sierra* (n 17) 341.

⁵³ C Goodin, 'The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis' (2007) 29 *University of Hawai'i Law Review* 437, 448.

that singling out is underpinned by a generality rationale.⁵⁴ This explains why tax measures are not takings.⁵⁵ It also accords with *Lingle's* focus on burden sharing, rather than reciprocal benefit, when alluding to the character factor.⁵⁶

A second general consideration under the character factor is whether a measure prevents harm or, alternately, confers benefits on the public or the government. Before *Penn Central* this distinction was widely invoked in US takings law.⁵⁷ Measures that prevented damage to neighbouring property or the public were much less likely to be identified as takings.⁵⁸ *Penn Central* approved the previous cases that invoked harm-prevention as a relevant factor, presumably subsuming them within the character factor.⁵⁹ In 1993, the *Lucas* majority questioned the distinction between harm-prevention and benefit-conferral, arguing that most measures were capable of either characterisation.⁶⁰ However, in *Lucas* the harm-preventing nature of a measure was pleaded as a defence to a total taking. Strictly speaking, it did not deal with the harm/benefit distinction in the context of the character factor of *Penn Central*.⁶¹ Moreover, in referring to underlying principles of nuisance law, *Lucas* reintroduced a limited harm-prevention logic to the total taking analysis.⁶² Since *Lucas*, lower courts operating within the *Penn Central* rubric have continued to apply the distinction between harm-prevention and benefit-conferral.⁶³ The strong reaffirmation of *Penn Central* in *Lingle* suggests that this distinction remains a relevant consideration under the character factor.

The Supreme Court has occasionally identified additional specific considerations as relevant under the character factor. For example, interfering with the right to devise property was an aspect

⁵⁴ Echeverria (n 32) 204; Kent (n 3) 100.

⁵⁵ J Fee, 'The Takings Clause as a Comparative Right' (2003) 76 California Law Review 1003, 1007.

⁵⁶ *Lingle* (n 2) 543.

⁵⁷ For example *Mugler v. Kansas* 123 US 623 (1887) 665; Meltz (n 17) 343.

⁵⁸ Echeverria (n 32) 194.

⁵⁹ *Penn Central* (n 21) 126.

⁶⁰ *Lucas* (n 8) 1026.

⁶¹ Echeverria (n 32) 207.

⁶² *ibid* 194.

⁶³ Meltz (n 17) 343.

of character that pointed strongly in favour of a taking in *Hodel v Irving*.⁶⁴ This indicates a degree of openness as to the considerations that might be relevant under the character factor. Nevertheless, recent jurisprudence has specified a number of considerations that are not relevant.

A line of cases stemming from *Agins v City of Tiburon* had held that a measure that did not 'substantially advance legitimate state interests' would amount to a regulatory taking.⁶⁵ *Lingle* excised *Agins* from regulatory takings law, confining it to the constitutional due process clause.⁶⁶ The Court said that 'the "substantially advances" inquiry reveals nothing about the **magnitude or character of the burden** a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is **distributed** among property owners.' (emphasis in original)⁶⁷ In this way, *Lingle* invalidated any differentiation between measures that effectively and ineffectively serve a particular purpose within the character enquiry.⁶⁸

The implications of *Lingle* are broader still. In 1987, a dissenting minority in *First English Lutheran Church v County of Los Angeles* had argued that government purpose was relevant under the character factor.⁶⁹ The unanimous court in *Lingle* quoted the majority in *First English* in confining the evaluation of purpose to the inquiry of whether a given taking was for a 'public use'. In doing so it entirely removed the consideration of government purpose from the enquiry into whether a regulatory taking has occurred.⁷⁰ The focus on the character of the *burden* in *Lingle*, as opposed to the character of the *measure*, supports the conclusion that public purpose is not relevant under the character factor in *Penn Central*.⁷¹ This does not mean that some government purposes will not receive greater *de facto* weight in the character assessment than others. For example, measures

⁶⁴ *Hodel v. Irving* 481 US 704 (1987) 716.

⁶⁵ *Agins v. City of Tiburon* 447 US 255 (1980).

⁶⁶ *Lingle* (n 2) 540.

⁶⁷ *ibid* 542.

⁶⁸ *ibid* 543.

⁶⁹ *First English* (n 9) 325-326.

⁷⁰ *Lingle* (n 2) 543-544.

⁷¹ Echeverria (n 32) 206; Goodin (n 53) 441-446; D Whitman, 'Deconstructing Lingle' (2007) 40 *John Marshall Law Review* 573, 581.

protecting public health tend to be general and harm-preventing in character. To this extent, they will be subject to a deferential assessment.⁷²

Finally, *Monterey v Del Monte Dunes* recognised that government cannot burden property by repetitive or unfair land-use procedures.⁷³ However, no case has explicitly connected this 'burden' to the taking enquiry. The excision of due process reasoning from the regulatory takings analysis in *Lingle*, means that any explicit evaluation of the procedural burden imposed by a measure must be confined to the due process clause.⁷⁴

Combining the two factors

Beyond the comment that the economic impact factor carries greater weight than the character factor, courts have provided little guidance as to the way the two *Penn Central* factors are to be combined.⁷⁵ *Penn Central* itself treated the factors as tools to direct the overall characterisation in favour or against a regulatory taking. The Supreme Court has never treated the factors as elements to be weighed against one another. In practice, the high degree of economic impact required by the *Penn Central* analysis has made it very difficult for litigants to succeed under this test.

ii) Unconstitutional exactions

A highly structured, yet narrowly applicable, balancing test was developed in *Nollan* and *Dolan*. Both cases arose from challenges to local authorities which had conditioned the grant of real estate development approval on the formal conveyance of an easement by the property owner to the government. In both cases the planning authorities had legitimate grounds to refuse planning permission outright.⁷⁶ In both cases a requirement to convey an easement, independently of the planning process, would have amounted to a direct, compensable taking of property.⁷⁷ Drawing on

⁷² Echeverria (n 32) 205.

⁷³ *Monterey v. Del Monte Dunes at Monterey, Ltd.* 526 US 687 (1999) 698.

⁷⁴ Echeverria (n 32) 202.

⁷⁵ *ibid* 209.

⁷⁶ *Lingle* (n 2) 547.

⁷⁷ D Callies and C Goodin, 'The Status of *Nollan v California Coastal Commission* and *Dolan v City of Tigard* after *Lingle v Chevron USA*' (2007) 40 *John Marshall Law Review* 539, 555.

their general jurisprudence of unconstitutional conditions, the Supreme Court developed a special regulatory takings test to discipline the use of regulatory powers to ‘extort’ property.⁷⁸

The test has two consecutive elements. First, there must be an ‘essential nexus’ between the regulatory power and the exaction of property demanded.⁷⁹ In other words, the condition must advance the same public interest that would allow the authorities to deny regulatory approval altogether.⁸⁰ Second, the condition must bear a ‘rough proportionality’ to the impact of the proposed development.⁸¹ This element requires that the nature and extent of the exaction must be compared to the likely degree of the proposal’s interference with the public interest identified in the first limb. An exaction that does not meet both elements will be a taking.⁸²

The more difficult question is when US courts would apply the exactions test, rather than evaluating the regulatory approval as a whole within the *Penn Central* framework. At the very least, the exactions test can only operate when the government conditions the conferral of a benefit on a direct forfeit of property.⁸³ It is likely the test operates more narrowly still. Arguably, it only applies to administrative land-use decisions.⁸⁴ In *Lingle* the Court described the test as relating to ‘land-use exactions’, ‘adjudicative land-use exactions’ and ‘adjudicative exactions requiring the dedication of private property’.⁸⁵ Lower court decisions since have taken these descriptions to mandate narrow application of the test, refusing to apply the exactions test beyond challenges to adjudicative land-use measures.⁸⁶

⁷⁸ *Nollan* (n 6) 837.

⁷⁹ *ibid.*

⁸⁰ *Lingle* (n 2) 548.

⁸¹ *Dolan* (n 6) 391.

⁸² *Callies and Goodin* (n 77) 549.

⁸³ *ibid* 547.

⁸⁴ J Needleman, ‘Exactions: Exploring exactly when *Nollan* and *Dolan* should be triggered’ (2006) 28 *Cardozo Law Review* 1563, 1572-1577.

⁸⁵ *Lingle* (n 2) 538, 546, 547.

⁸⁶ *Meltz* (n 17) 368.

E. The effects structure

i) *Loretto*

Loretto dealt with a measure requiring landlords to permit cable companies to install cable facilities in apartment buildings.⁸⁷ No significant economic impact was alleged.⁸⁸ The case established a *per se* rule that ‘where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation’.⁸⁹

ii) *Lucas*

The second *per se* rule in US regulatory takings jurisprudence was established in *Lucas*. The case arose from a coastal management regulation that permanently prevented all construction on Lucas’ beachfront property.⁹⁰ The trial court entered a finding of fact that the regulation rendered the property valueless.⁹¹ The majority of the Supreme Court held that when regulation deprives property of ‘all economically beneficial us[e]’ (emphasis in original) it constitutes a taking.⁹² The characteristics of the measure would be irrelevant.

The majority in *Lucas* described this total taking as an ‘extraordinary circumstance’, reflecting the improbability that a regulation would not leave property with an available use.⁹³ Subsequent cases have demonstrated the difficulty of establishing a total taking, given the parcel as a whole rule. In *Palazzolo*, the Supreme Court found that the \$200 000 residual value of the property, compared to the developed value of \$3 150 000, comfortably put the case outside the *Lucas* test.⁹⁴

The only qualification to the *Lucas* test is that a regulation which merely embodies ‘the restrictions background principles of the... law of property and nuisance already place upon land

⁸⁷ *Loretto* (n 7) 421.

⁸⁸ *ibid* 425.

⁸⁹ *Lingle* (n 2) 538.

⁹⁰ *Lucas* (n 8) 1009.

⁹¹ *ibid*.

⁹² *ibid* 1019.

⁹³ *ibid* 1017.

⁹⁴ *Palazzolo* (n 23) 630-632.

ownership' will not be classified as a total taking.⁹⁵ The rationale is that, if the general law would have prevented the activity 'the prescribed use interests were not part of his [the property owner's] title to begin with', and, therefore, the specific regulation has not taken property.⁹⁶ *Palazzolo* clarified that, for the purpose of the *Lucas* test, a background principle must be a legal rule that applies to property generally. A specific regulation that applies to some owners but not to others cannot be a background principle that would excuse liability for a total taking.⁹⁷

F. Implications of the US jurisprudence for *Piero Foresti*: the *Penn Central* approach

The *Penn Central* approach governs the vast majority of regulatory takings claims under US constitutional law. The only significant exception is that a measure that deprives property of *all* economically beneficial use will automatically amount to a regulatory taking under the *Lucas* test. Two other tests, *Loretto* and unconstitutional exactions, operate in narrowly and clearly defined fact-scenarios.

As in international investment law, the *Penn Central* approach calls for 'essentially ad hoc, factual inquiries'.⁹⁸ Unlike international investment law, the *Penn Central* assessment provides clear guidance as to which factors are relevant and which factors are irrelevant in these enquiries. To qualify as a taking a measure must interfere with property *rights*. The economic impact of this interference with rights is the most important factor in the analysis. The economic impact must be severe and is normally quantified. The consideration of investment backed expectations allows this economic impact to be evaluated in the context of the specific position of the property owner and the regulatory environment. The character of the government's action is also relevant, particularly whether it singles out individual property owners and whether it is harm-preventing or benefit-conferring. The following factors are not relevant: public purpose; effectiveness in achieving public purpose; due process; and good faith.

Old order mining rights

The entry into force of the MPRDA does not render an active mineral right worthless. The transitional old order mining right and the conditional right to conversion are valuable. Therefore,

⁹⁵ *Lucas* (n 8) 1029.

⁹⁶ *ibid* 1027.

⁹⁷ *Palazzolo* (n 23) 630.

⁹⁸ *Penn Central* (n 21) 124.

the *Lucas* test does not apply. The divestment requirement of the MPRDA is an obligation to sell, rather than forfeit, a portion of the claimants' shareholding. The MPRDA is a legislative, rather than adjudicative measure. For both reasons the MPRDA does not fall within the exactions test of *Nollan* and *Dolan*, notwithstanding that the divestment requirement is somewhat analogous to an exaction taken in exchange for the conferral of a benefit. The *Penn Central* approach governs.

The relevant parcel would be the active mineral right. The conversion requirements and ongoing regulatory regime of the MPRDA impose costs on the claimants, but the resulting loss does not approach the severe economic impact required for a taking under *Penn Central*. Nor have the claimants' investment-backed expectations been thwarted; they can continue current mining operations. It is not necessary to move to the character factor.

The MPRDA does not take old order mining rights under the *Penn Central* assessment.

Unused old order rights

The case of unused old order rights would be more difficult. As explained in the application of the *Metalclad* approach, the MPRDA's economic impact on inactive mineral rights is serious. The claimants' investment-backed expectations have an inconclusive effect on the assessment of this economic impact. On the one hand, the original purchase of mineral rights demonstrates an expectation of the ability to mine; on the other, the claimants entered a heavily regulated field in a time of regulatory transition and they had not undertaken additional investment to actually begin mining. The character of the government's action is also indeterminate. The MPRDA is a general measure, suggesting legitimate regulation, but the divestment requirement is benefit-conferring, pointing towards a regulatory taking.

Guidance on how the *Penn Central* approach would operate can be found in *US v Locke*. The case concerned a federal act which imposed an obligation on the owners of mining claims to file annual reports. Mining claims were proprietary rights of indefinite duration. The claimant's mining claims were extinguished for filing the required reports one day late. This Supreme Court held that this extinguishment did not constitute a regulatory taking: '[r]egulation of property rights does not "take" private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.'⁹⁹ This *ratio* applies the standard of reasonableness to the assessment of the conditions imposed for retention of title. US takings law recognises that 'use-it-or-lose-it' is a

⁹⁹ *US v. Locke* 471 US 84 (1985) 107.

reasonable principle in the regulation of vested mining rights.¹⁰⁰ In the context of post-apartheid South Africa, requiring an investor to begin prospecting in order to retain their inactive mineral right seems reasonable.

Relying on the authority of *US v Locke*, the MPRDA would probably not constitute a regulatory taking of unused old order rights.

¹⁰⁰ *Texaco v. Short* 454 US 516 (1982) 518.

Chapter 5: Regulatory expropriation in ECHR jurisprudence

A. Introduction

The text of Article 1-P1 is markedly different from the expropriation provisions of BITs and the US 5th Amendment. It is not organised around the concept of expropriation, nor does it mention compensation. Article 1-P1 reads:

Article 1: Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. 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.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

However, in its early decisions, the European Court of Human Rights (ECtHR) cast Article 1-P1 as a protection of property from certain forms of interference – including expropriation – without compensation. The first step in this process was *Marckx v Belgium*. The Court reviewed the travaux préparatoires and held that the Article ‘is in substance guaranteeing the right to property.’¹ Then, in *James v UK*, the Court held that the protection of property provided by the Article required some compensation for the expropriation of property in all but exceptional circumstances.² In this way, despite the facial differences, Article 1-P1 performs a very similar function to BIT expropriation provisions and the takings clause.

One important distinction between the structure of enquiry under Article 1-P1, on one hand, and BIT expropriation provisions and the US 5th Amendment, on the other, should be stated from the outset. Under Article 1-P1 the amount of compensation is weighed together with the degree of interference with the property and the public interest in regulation to determine if the applicant’s

¹ *Marckx v Belgium* (App no 6833/74) (1979) 2 EHRR 330, [63].

² *James v UK* (App no 8793/79) (1986) 8 EHRR 123, [54].

right to property has been breached.³ Under both BITs and the 5th Amendment the question of whether a regulatory expropriation has occurred must be answered in the affirmative before the assessment of compensation has any relevance.

In the terms of the taxonomy of the thesis, all ECHR cases address regulatory expropriation through a basic structure of balancing. Both a measure's effect on property and the aim it pursues are always relevant.

B. The '*three distinct rules*' of Article 1-P1

The ECHR has a unique tripartite formulation.⁴ As a prelude to almost every decision, the ECtHR reiterates that Article 1-P1:

... comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.⁵

The characterisation of these rules as *distinct* is a considerable overstatement. In its other routine invocation, the ECtHR explains that:

[t]he three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.⁶

³ A Van Rijn, 'Right to the Peaceful Enjoyment of One's Possessions' in Van Dijk (ed) *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia, Antwerp 2006) 881.

⁴ R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, Oxford 2008) 99.

⁵ *Sporrong and Lönnroth v Sweden* (App no 7151/75;7152/75) (1982) 5 EHRR 85, [61].

⁶ *James* (n 2) [37].

In fact, the rules are so closely connected that the proportionality enquiry, developed in the context of the general rule concerning *interference* with property,⁷ is also applied in cases concerning the two specific rules on *deprivation*⁸ and *control of use*.⁹ Any measure affecting property 'must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'¹⁰ Striking a fair balance requires 'a reasonable relationship of proportionality between the means employed and the aim pursued.'¹¹

The common approach to the structure of the enquiry means that classification within one rule is not strictly necessary.¹² Although the ECtHR normally specifies which rule a case falls within, where 'the factual and legal complexity' of case make classification difficult it applies the general approach of the Article directly.¹³ That is not to say that categorisation within one of the three rules is irrelevant. A deprivation of property will almost always require some compensation to be proportionate,¹⁴ while compensation is seldom required for a control of use.¹⁵ The three rules operate as sub-categories within the wider ECHR balancing structure based on proportionality.

C. Deprivation, control of use or interference?

The characterisation of regulation of property within one of the three rules proceeds in a settled order. First the ECtHR ascertains if the regulation amounts to a deprivation of property. If not, the

⁷ *Sporrong and Lönnroth* (n 5) [69].

⁸ *James* (n 2) [50].

⁹ *Mellacher v Austria* (App no 10522/83;11011/84;11070/84) (1990) 12 EHRR 391, [48].

¹⁰ *ibid.*

¹¹ *ibid*; D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London 1995) 525; Van Rijn (n 3) 876.

¹² Harris, O'Boyle and Warbrick (n 11) 522.

¹³ *Beyeler v Italy* (App no 33202/96) (2001) 33 EHRR 62, [106] *Solodyuk v Russia* (App no 67099/01) ECHR 12 July 2005, [29]; *Sovtransavto Holding v Ukraine* (App no 48553/99) (2004) 38 EHRR 44, [93].

¹⁴ *Lithgow v UK* (App no 9006/80) (1986) 8 EHRR 329, [120]. The only case in which compensation has not been required for a deprivation is *Jahn v Germany* (App no 46720/99) (2006) 42 EHRR 49.

¹⁵ T Allen, 'Analysis: *Trailer & Marina*' (2005) 17 *Journal of Environmental Law* 245 n16.

question is then whether it can be characterised as a control of use.¹⁶ If the measure falls into neither specific rule, it is reviewed under the general rule governing interference with the right to property.¹⁷

i) Deprivation

A measure must amount to a formal or de facto expropriation of property to be classified as a deprivation.¹⁸ The second sentence of Article 1-P1 is unclear as to whether deprivation, and the subsidiary concepts of formal and de facto expropriation, should be interpreted in conformity with 'general principles of international law' on expropriation. The Commission linked the meaning of deprivation to the definition of expropriation in international law in its early decision of *Bramelid and Malmstrom v Sweden*.¹⁹ However, this construction was firmly rejected in *James*; the Court held that the 'general principles of international law' did not define deprivation, and would only be relevant in cases where a state deprived an alien of her property. Subsequent ECtHR decisions have avoided any recourse to international law on expropriation, even when the facts invite its consideration.²⁰ In this way, the ECtHR has given 'deprivation', including the subsidiary concept of de facto expropriation, a meaning that is autonomous from international law.²¹

Under the ECHR, a de facto expropriation is identified by the effect of the measure on the property in question.²² The standard is normally phrased in the negative: there will be no de facto

¹⁶ YA Takahashi, *The margin of appreciation doctrine and the principle of proportionality* (Intersentia Uitgevers, Antwerp 2002) 147.

¹⁷ *Sporrong and Lönnroth* (n 5) [61].

¹⁸ *Hutten-Czapska v Poland* (App no 35014/97) (2007) 45 EHRR 4, [145]; *Mellacher* (n 9) [44]; H Ruiz Fabri, 'The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriations" of the Property of Foreign Investors' (2002) 11 New York University Environmental Law Journal 148, 155.

¹⁹ *Bramelid and Malmstrom v Sweden* (App no 8588/79;8589/79) (1982) 29 DR 64, 82.

²⁰ For example, in *Stran Greek Refineries v Greece* (App no 13427/87) (1994) 19 EHRR 293, [72] the Court discussed the positive power of a state to terminate its contracts in international law, without considering when this action would amount to an expropriation in international law.

²¹ D Anderson, 'Compensation for Interference with Property' (1999) (6) European Human Rights Law Review 543, 549.

²² *Fredin v Sweden* (App no 12033/86) (1991) 13 EHRR 784, [45].

expropriation unless all reasonable manner of exploiting the property has disappeared.²³ Sale is treated as a manner of exploiting the property; an applicant's retention of the right to dispose of property indicates a de facto expropriation has not occurred.²⁴ The enquiry looks to the rights of ownership, not the loss of commercial value.²⁵

In practice, it has proved exceptionally difficult for applicants to establish deprivation by de facto expropriation.²⁶ This is partly due to the ECtHR's implicit adoption of the parcel-as-a-whole rule in defining the relevant unit of property. In *Fredin v Sweden* the Court refused to treat a gravel pit as a unit of property separate from the applicant's adjacent landholdings, even though the pit had been legally severed.²⁷ As a result, ongoing farming on other sections of the applicant's land meant that a ban on gravel mining did not take away all meaningful use.²⁸

The complete, unconditional extinguishment of a class of property rights and the semi-permanent military occupation of land – precluding the owner's access, use and sale – are two situations in which de facto expropriation has been acknowledged.²⁹ Both are forms of indirect expropriation which fall beyond the category of regulatory expropriation.

The only case in which an arguably regulatory measure has constituted a deprivation was in *Holy Monasteries v Greece*.³⁰ The Greek government passed a law deeming all land to belong to the state, unless the occupants could produce title deeds to their properties. The monasteries that brought the case had owned their land for centuries, but could not present title deeds.³¹ Thus, the

²³ *ibid*; *Matos e Silva v Portugal* (App no 15777/89) (1997) 24 EHRR 573, [85].

²⁴ *Papamichalopoulos v Greece* (App no 14556/89) (1993) 16 EHRR 440, [45]; *Sporrong and Lönnroth* (n 5) [63].

²⁵ *Pine Valley Developments v Ireland* (App no 12742/87) (1992) 14 EHRR 319, [56].

²⁶ *Harris, O'Boyle and Warbrick* (n 11) 528.

²⁷ *Fredin* (n 22) [45]; see also *Baner v Sweden* (App no 11763/85) (1989) 60 DR 128, 140; *Harris, O'Boyle and Warbrick* (n 11) 529.

²⁸ *Fredin* (n 22) [46].

²⁹ *Pressos Compania Naviera v Belgium* (App no 17849/91) (1997) 21 EHRR 301, [34]; *Vasilescu v Romania* (App no 27053/95) (1998) 28 EHRR 241, [53]; *Papamichalopoulos* (n 24) [45].

³⁰ *Holy Monasteries v Greece* (App no 13092/87) (1995) 20 EHRR 1.

³¹ *ibid* [58].

measure had the effect of completely and permanently extinguished the monasteries' titles. Although the monasteries remained in control and possession of their properties up to the time of the ECtHR's decision, the fact that they could have been evicted at any point by a routine administrative order enforcing the new law was sufficient to constitute a deprivation.³²

In contrast, the provisional transfer of legal title to an applicant's farmland was not a de facto expropriation in *Erkner v Austria* because it was revocable and the applicant retained limited rights of possession and use.³³ Indeed, the Court has not found a de facto expropriation in any land use case.³⁴ In *Matos e Silva v Portugal* the applicant claimed that significant limitations on the usage of land, including the banning of building and development and restrictions on the primary uses of fish farming and salt production, amounted to a de facto expropriation.³⁵ The ECtHR found no de facto expropriation because 'all reasonable manner of exploiting the property had not disappeared seeing that the applicants continued to work the land.'³⁶

The difficulty of establishing de facto expropriation under the ECHR is best illustrated by two cases where regulatory action directly and permanently terminated claimants' businesses. In *Tre Traktörer v Sweden* the applicant's liquor licence was withdrawn for failure to meet standards of book-keeping for alcohol sales. This caused the immediate closure of the applicant's restaurant.³⁷ In *Pinnacle Meats v UK* a ban on the sale of cattle head meat, following the outbreak of BSE, forced the closure of the claimant's cattle head deboning business.³⁸ Both decisions looked exclusively to the effect of the measure on the applicant to determine whether a de facto deprivation had occurred. In

³² *ibid* [65].

³³ *Erkner and Hofauer v Austria* (App no 9616/81) (1987) 9 EHRR 464, [74].

³⁴ See *ibid*; *Fredin* (n 22) [47]; *Katte Klitsche de la Grange v Italy* (App no 12539/86) (1995) 19 EHRR 368, [38]; *Matos e Silva* (n 23) [85]; *Mellacher* (n 9) [44]; *Pine Valley* (n 25) [56]; *Sporrong and Lönnroth* (n 5) [63].

³⁵ *Matos e Silva* (n 23) [11].

³⁶ *ibid* [85].

³⁷ *Tre Traktörer Aktiebolag v Sweden* (App no 10873/84) (1989) 13 EHRR 309, [55].

³⁸ *Pinnacle Meats v UK* (App no 33298/96) EComHR 21 October 1998.

each, retained ownership and resale value of the assets of the business were sufficient to preclude a de facto expropriation.³⁹

ii) Control of use

If a measure does not amount to a deprivation, the next question is whether it qualifies as a control of use. In general, the ECtHR treats this characterisation as self-evident.⁴⁰ When the Court does explain its reasoning, it considers if the purpose of the measure is to control the use of property or, alternately, to achieve some other goal.⁴¹ The Court is more likely to characterise measures of general application as controls of use. For example, in *Sporrong and Lönnroth* limitations placed on the development of residential property by preliminary expropriation permits did not amount to a control of use because the permits were intended to facilitate the expropriation of the specific properties at a later time.⁴² The ECtHR's decisions also show that a forfeiture of property, resulting from failure to comply with legal conditions attached to its use, will be categorised as a control of use rather than a deprivation.⁴³

iii) Interference

Any regulation affecting property that does not fall within either the category of deprivation or of control of use will be examined as an interference under the general rule of Article 1-P1.

D. The proportionality test

i) Deprivation

To comply with Article 1-P1 a deprivation of property must: be provided for by law; pursue 'a legitimate aim "in the public interest"'; and be proportionate.⁴⁴ The first criterion demands a legal

³⁹ *ibid*; *Tre Traktörer* (n 37) [55]; for criticism see H Mountfield, 'Regulatory Expropriations in Europe' (2002) 11 New York University Environmental Law Journal 136, 156.

⁴⁰ *Mellacher* (n 9) [44]; *Pine Valley* (n 25) [56].

⁴¹ K Reid, *A Practitioner's Guide to the European Convention on Human Rights* (2nd edn, Sweet & Maxwell, London 2004) 460.

⁴² *Sporrong and Lönnroth* (n 5) [65].

⁴³ *AGOSI v UK* (App no 9118/80) (1986) 9 EHRR 1, [51]; *Bosphorus v Ireland* (App no 45036/98) (2006) 42 EHRR 1, [142].

⁴⁴ *James* (n 2) [50].

basis for the deprivation, and is a safeguard against arbitrariness.⁴⁵ In establishing that a legitimate aim has been pursued under the second criterion, states are entitled to a substantial 'margin of appreciation'.⁴⁶ No deprivation has ever been found to lack the requisite public interest.⁴⁷

The most important criterion is the third: proportionality. The proportionality analysis is common to all three rules within Article 1-P1. A measure is disproportionate if a person is made to bear 'an individual and excessive burden'.⁴⁸ Both the procedural and the substantive burdens placed on the individual are weighed against the legitimate aim identified under the second criterion.⁴⁹ In all but exceptional circumstances, a deprivation requires some compensation to strike a fair balance.⁵⁰ However, the quantum of compensation is only one aspect of the overall balance.⁵¹ As such, compensation to the 'full market value' of the property is not normally required.⁵²

ii) Control of use

A control of use must meet the same three criteria for compliance with Article 1-P1 as a deprivation: lawfulness; legitimate aim and proportionality.⁵³ The Court's treatment of lawfulness and legitimate aim criteria is usually perfunctory. With respect to the criterion of a legitimate aim, the ECtHR has not given any legal significance to the textual difference between the terms 'public interest' and 'general interest' in the deprivation and control of use rules respectively.

The proportionality analysis for a control of use follows the same structure as for deprivation, but with states given a far wider margin of appreciation.⁵⁴ Once a measure is classified

⁴⁵ Harris, O'Boyle and Warbrick (n 11) 530.

⁴⁶ Y Winisdoerffer, 'Margin of Appreciation and Article 1 of Protocol No 1' (1998) 19 Human Rights Law Journal 18, 19.

⁴⁷ Van Rijn (n 3) 880.

⁴⁸ *Sporrong and Lönnroth* (n 5) [73].

⁴⁹ Winisdoerffer (n 46) 19.

⁵⁰ *James* (n 2).

⁵¹ Anderson (n 21) 552.

⁵² *James* (n 2) [54].

⁵³ *Pine Valley* (n 25) [57]; *Tre Traktörer* (n 37) [56].

⁵⁴ *Mellacher* (n 9) [45]; Takahashi (n 16) 148.

as a control of use, it will invariably comply with Article 1-P1, even without compensation. This additional deference was given more precise legal content by *Mellacher v Austria* and *Tre Traktörer v Sweden*, where the ECtHR held that the existence of less restrictive alternative means to achieve the same regulatory objectives did not prove that the measures taken were disproportionate.⁵⁵

The treatment of legitimate expectations by the ECtHR is further evidence of the deference given to states under the control of use rule. The notion of legitimate expectations developed in the jurisprudence on the scope of 'possessions' protected by Article 1-P1.⁵⁶ In *Fredin*, the concept was introduced to the proportionality analysis. The fact that the property owners knew their licence to operate the gravel pit was of limited duration demonstrated that the withdrawal of the licence was not disproportionate: they had no legitimate expectation of indefinite operation.⁵⁷ In contrast, in *Pine Valley v Ireland* the ECtHR recognised that the applicants had purchased their property relying on an irrevocable planning permission, which was later annulled by a judicial decision. The Court recognised a legitimate expectation in the validity of the permission.⁵⁸ However, even the frustration of Pine Valley's legitimate expectation did not prove that the control of use was disproportionate. Rather, a commercial venture 'involved an element of risk' that the applicants should bear.⁵⁹

One of the rare cases where a control of use upset the fair balance was *Hutten-Czapska v Poland*.⁶⁰ Rent controls on residential property set rent below the ongoing maintenance costs of the property. Landowners were required by law to meet these costs and were unable to evict tenants or cease renting their properties. The situation had continued for more than ten years.⁶¹ The effect of this control of use went far beyond reduced profitability; the rent controls 'necessarily and unavoidably entail[ed] losses' for the proprietors.⁶² This exceptional situation imposed a

⁵⁵ *Mellacher* (n 9) [54]; *Tre Traktörer* (n 37) [62].

⁵⁶ P Popelier, 'Legitimate Expectations and the Law Maker in the Case Law of the European Court of Human Rights'[2006] (1) European Human Rights Law Review 9, 12.

⁵⁷ *Fredin* (n 22) [54].

⁵⁸ *Pine Valley* (n 25) [51].

⁵⁹ *ibid* [56].

⁶⁰ *Hutten-Czapska* (n 18) [185]; another was *Chassagnou v France* (App no 25088/94) (1999) 29 EHRR 615.

⁶¹ *Hutten-Czapska* (n 18) [12].

⁶² *ibid* [186].

‘disproportionate and excessive burden... which [could] not be justified by any legitimate interest of the community pursued by them.’⁶³

iii) Interference

Strictly speaking, an interference with property under the general rule of Article 1-P1 must only meet the single criterion of proportionality, or ‘fair balance’.⁶⁴ Nevertheless, both the arbitrariness of an interference and its legitimate aim have been subsumed into the proportionality analysis, reflecting the tendency of the three rules of Article 1-P1 to collapse into one another.

The proportionality analysis for an interference follows the same structure as a deprivation or control of use, except there is no implicit presumption either for or against compensation. Unlike in control of use cases, the fact that a given legitimate aim could be achieved by means involving lesser interference with property suggests that a measure is disproportionate,⁶⁵ as does the failure of the state to act consistently with its purported aim.⁶⁶

The proportionality analysis in interference cases shows a particular concern with the procedural burden placed on the individual.⁶⁷ For example, in *Sporrong and Lönnroth* the fact that the expropriation permits made the applicants’ titles ‘precarious and defeasible’⁶⁸ was less important than the finding that the persistence of this situation for twenty-five years without any procedure for recourse was ‘irreconcilable with the... rule of law.’⁶⁹ This concern with arbitrariness and uncertainty is well illustrated by three other interference cases concerning land use restrictions imposed by preliminary steps to formal expropriation. In *Erkner* the interference was disproportionate because it endured for sixteen years without any opportunity for the applicants to clarify their legal position.⁷⁰ In contrast, in both *Katte* and *Phocas* similarly restrictive measures designed to achieve the same legitimate aim were not disproportionate, because procedural

⁶³ *ibid* [188].

⁶⁴ Harris, O’Boyle and Warbrick (n 11) 524.

⁶⁵ *Sporrong and Lönnroth* (n 5) [70].

⁶⁶ *Matos e Silva* (n 23) [89].

⁶⁷ Harris, O’Boyle and Warbrick (n 11) 526; Van Rijn (n 3) 876.

⁶⁸ *Sporrong and Lönnroth* (n 5) [60].

⁶⁹ *ibid* [72].

⁷⁰ *Erkner* (n 33).

avenues had existed for the claimants to pursue specific land use authorisation⁷¹ and compensation⁷² respectively.

E. Implications of the ECHR approach for *Piero Foresti*: balancing by proportionality

The ECtHR applies a basic structure of balancing in the regulatory expropriation enquiry. Within this basic structure, ECHR cases use an approach of means-ends proportionality. Internal to this one approach are three sub-rules concerning deprivation, control of use and general interference. A measure is classified within the deprivation rule purely on the basis of its effect on property rights; the retention of any meaningful property right by the applicant will preclude a deprivation. A control of use is identified by its purpose and its general character. All other measures fall within the interference rule.

The same proportionality analysis is then applied to measures falling into all three rules. Both the procedural and substantive burdens on the property owner are weighed against the measure's legitimate aim. The degree of deference shown to a measure will depend on the rule it falls within. Compensation is almost always required for deprivations, while states have a very wide margin of appreciation to control the use of property.

Old order mining rights

Upon the introduction of the MPRDA an active mineral right was replaced by an old order mining right and a conditional right to conversion. One might say that, although the original mineral right 'lost some of its substance, it did not disappear.'⁷³ The claimants could continue to use their property for mining. Therefore, the measure cannot be classed as a deprivation of old order mining rights. Rather, on 1 May 2004 mineral rights became subject to a regime which had the clear purposes of controlling the usage of land for active mining operations and encouraging affirmative action. The MPRDA was general in character. Therefore, it was a control of use.

The control of use was lawful because it was enacted by legislation and because individual conversion decisions could be challenged by normal administrative law actions. It pursued the legitimate aims of affirmative action and regulation of the mining sector. The proportionality analysis would be relatively straight-forward. A state has a wide margin of appreciation to control the use of

⁷¹ *Katte* (n 34) [46].

⁷² *Phocas v France* (App no 17869/91) ECHR 23 April 1996, [60].

⁷³ *Sporrong and Lönnroth* (n 5) [63].

property. The conversion regime is a reasonable policy choice to advance a legitimate aim. Neither a partial loss of value of the property nor the availability of less restrictive regulatory alternatives is decisive.⁷⁴ The MPRDA is not disproportionate.

Old order mining rights are not expropriated under the ECHR.

Unused old order rights

The case of unused old order rights would present more of a challenge. It is possible that the effect of the MPRDA on inactive mineral rights could amount to a de facto expropriation, as the property in question would disappear completely if the condition to begin prospecting were not met within one year. However, this conclusion is unlikely for two reasons. First: in every case where a loss of property has resulted from a property-owner's failure to comply with prospective conditions, the deprivation rule has been rejected.⁷⁵ Second: in every case concerning land use restrictions, including the extreme case of *Hutten-Czapska*, the deprivation rule has been rejected.⁷⁶ The same observations made above on the purpose and generality of the MPRDA also apply to unused old order rights. The MPRDA would again fall within the control of use rule.

Given the greater degree of interference with unused old order rights, does the MPRDA lack the requisite proportionality or 'fair balance'? It is conceivable that it does but, within the control of use rule, this conclusion is highly unlikely. The aims of affirmative action and restructuring the mining sector after apartheid would weigh heavily in the fair balance, as would the fact that these aims are pursued through lawful and general measures. The claimants' unused old order rights are circumscribed but the claimants could have had no legitimate expectation of regulatory stability in the context of post-apartheid transition. The ECtHR is not sympathetic to commercial losses.⁷⁷ Nor does the fact a claimant must take positive steps to establish a meaningful use for their property, in itself, upset the fair balance.⁷⁸ The existence of legal procedure to challenge individual decisions, and of objective criteria for conversion, show that the claimants do not bear an excessive procedural burden. The weight of all these factors against the effect on the claimants suggests the MPRDA does not upset the fair balance with respect to unused old order rights.

⁷⁴ *Mellacher* (n 9) [54].

⁷⁵ *Tre Traktörer* (n 37) [55]; See also n 43.

⁷⁶ See n 34.

⁷⁷ *Pine Valley* (n 25) [59].

⁷⁸ *Katte* (n 34) [46].

Unused old order rights are probably not expropriated under the ECHR.

Chapter 6: Conclusion

A. Structures and approaches

The structure of the regulatory expropriation enquiry shapes the way in which this body of law mediates between the interests of property protection and host-state regulatory autonomy. This thesis proposes a new taxonomy to classify the possible structures of enquiry. To distinguish between regulatory expropriation and non-compensable regulation, the enquiry could look exclusively to the effects of the measure on the protected property; exclusively to the characteristics of the impugned measure; or to both the effects on the property and the characteristics of the measure. Within these three basic structures, distinct subsidiary approaches are possible. The application of this taxonomy shows that there is no agreed structure of enquiry within international investment law; various threads of jurisprudence show some degree of internal consistency.

Within the effects structure there are two approaches: the *Metalclad* approach, which looks to loss of economic value; and the *Pope & Talbot* approach, which requires a substantial deprivation of the rights of the investor in the investment. Within the exception structure there is one approach based on the criteria articulated in *Methanex*. There are three approaches within the balancing structure: the characterisation-as-balancing approach, which requires a minimum threshold of deprivation and then considers the characteristics of the measure; the *Tecmed* approach, which is a direct adoption of ECHR jurisprudence; and the US model BIT approach, which directly adopts the *Penn Central* approach from US constitutional law. Decisions applying approaches within the effects or exception structures tend to cite narrowly from authority that supports their approach. Decisions applying approaches within the balancing structure tend to cite broadly and recognise the indeterminacy in the existing law.

In 2002 Dolzer wrote that 'recent jurisprudence of arbitral tribunals reveals a remarkable tendency to shift the focus of the analysis away from the context and the purpose and focus more heavily on the effects on the owner.'¹ The trend in the last six years has been in the opposite direction. Tribunals have tended toward broader identification of relevant facts, including both effects and characteristics of the regulation. Notwithstanding this general drift towards the balancing structure, many tribunals still apply the effects and exception structures. Convergence to one structure is unlikely in the near future. The current institutional arrangements – namely, the absence of any multilateral investment instrument or interpretative mechanism, the resolution of

¹ R Dolzer, 'Indirect Expropriations' (2002) 11 New York University Environmental Law Journal 64, 91.

investor-state disputes through ad hoc arbitration and the absence of an appeal or review process – do not establish a framework for overcoming substantive disagreement and inconsistency.

In contrast to the incoherence of international investment law, US and ECHR jurisprudence specify clear approaches to the structure of the regulatory expropriation enquiry. Both operate within the basic balancing structure. In the US, apart from three narrowly defined circumstances, regulatory expropriation claims are dealt with under the *Penn Central* approach. This approach considers both the economic impact of the measure and the character of the government action. Under the ECHR, any interference with property is reviewed according to the requirement of means-end proportionality.

B. The implications of different structures and approaches

This thesis has used the case study of *Piero Foresti* as an analytic tool to explore the implications of different structures and approaches. The case is well-suited to this purpose because the MPRDA significantly interferes with property rights *and* has the indicia of legitimate regulation.

The application of the six different approaches to the case study illustrates that each approach focuses the legal enquiry on a different combination of effects and characteristics of the measure. The different approaches entail divergent legal reasoning and different outcomes. The *Metalclad* approach provides the greatest protection to the interests of the investor from interference; the *Methanex* and ECHR approaches are the most deferent to state regulatory autonomy. However, the most significant conclusion of the case study is simpler: different structures of enquiry, and different approaches within those structures, necessarily entail different legal outcomes on the same facts.

A common defence of arbitral decisions on regulatory expropriation is that apparent inconsistencies in legal reasoning are attributable to factual nuances of the cases in question. On this view, there is no ‘magical formula, susceptible to mechanical application’ that would identify regulatory expropriation. Rather, arbitrators must, and do, ‘exercise their judgment in each case’.² This view is usually buttressed by the assertion that other legal systems have been unable to provide

² J Paulsson, 'Indirect expropriation: is the right to regulate at risk?' (Making the most of international investment agreements OECD, Paris 2005) 1; see also V Lowe, *Changing Dimensions of International Investment Law* (University of Oxford Faculty of Law Legal Studies Research Paper Series 2007) 76.

any greater guidance on the issue of regulatory expropriation.³ This view is common in international investment law scholarship.⁴ It is a view that this thesis has shown to be of doubtful merit.

The taxonomy invoked in this thesis shows that different arbitral decisions adopt mutually inconsistent positions on which effects and which characteristics of a measure are relevant in any given fact scenario. This inconsistency exists prior to an assessment of the facts in a given case. The case study shows that these inconsistencies lead to different outcomes on a given set of facts. Contrary to Paulsson's assertion, comparative scholarship reinforces the conclusion that international investment law is conceptually incoherent. The US and ECHR approaches do not provide mechanical tests, but they do provide settled structures for the regulatory expropriation enquiry that specify which factors are relevant and which are irrelevant.

In both US and ECHR law, the effect of a measure must be assessed in light of the rights of the investor in the 'parcel as a whole'. In international law, it is unclear what the relevant denominator is; indeed, no arbitral tribunal has yet observed that a rigorous effects-based jurisprudence requires engagement with the denominator problem. In US jurisprudence, interference with legal rights can support a regulatory expropriation claim, but the extent of interference with rights is assessed by the economic impact it causes. In ECHR jurisprudence, interference with either legal rights or legitimate expectations can support an Article 1-P1 claim. In international investment law, it is unclear if the relevant 'effects' of a measure are the interferences with rights, legitimate expectations or value.

Both the *Penn Central* and ECHR approaches make it clear that a general measure is less likely to amount to a regulatory expropriation than one that singles out the property-owner. In international investment law, whether this factor ought to carry any weight depends on the approach. In the *Penn Central* approach, a measure's effectiveness in achieving its purpose is irrelevant. In the ECHR approach, this factor is relevant. In international investment law, whether this factor ought to carry any weight again depends on the approach.

C. Further questions

By demonstrating this incoherence in international investment law, this thesis raises a number of questions. The most obvious of these is the normative question of which of the six approaches to

³ Paulsson (n 2) 2.

⁴ For example C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive principles* (Oxford University Press, Oxford 2007) [8.124].

regulatory expropriation is the 'best'. If the law of regulatory expropriation mediates between the protection of foreign property and host state regulatory autonomy, then the *Metalclad* approach is unjustifiable. Protecting foreign investors from financial loss, independently of interference with property rights, advances neither the interest of property protection nor that of regulatory autonomy. The remaining five approaches are all justifiable by one or other of these interests. Expressing a preference between them would require a normative theory of the extent to which the interest of the protection of foreign property ought to intrude into host-state regulatory autonomy. This thesis has not expounded such a theory and, as Chapter 2 demonstrates, the question remains a subject of fundamental political disagreement.

At a more institutional level, one might wonder whether questions of political and financial importance ought to turn on arbitrations applying the law of regulatory expropriation, which often lack the legal rigour and coherence that would be expected in either the US Supreme Court or the ECtHR. Perhaps international investment arbitration, as it currently stands, can be commended only as being an improvement on the practice of diplomatic protection via gunboat diplomacy, from which it evolved. The conclusions of this thesis raise concerns, which invite further research, about the legitimacy of arbitral panels. This thesis has provided a framework within which these normative questions can be addressed.

Bibliography

- H Abs and H Shawcross, 'Draft Convention on Investments Abroad' 9 *Journal of Public Law* 116
- G Aldrich, 'What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal' (1994) 88 *American Journal of International Law* 585
- T Allen, 'Analysis: *Trailer & Marina*' (2005) 17 *Journal of Environmental Law* 245
- American Law Institute, *Restatement of the Law Third - The Foreign Relations Law of the United States* (American Law Institute Publishers, St Paul 1987)
- D Anderson, 'Compensation for Interference with Property' (1999) (6) *European Human Rights Law Review* 543
- PJ Badenhorst, 'Exodus of 'Mineral Rights' from South African Mineral Law' (2004) 22 *Journal of Energy and Natural Resources Law* 218
- J Beauvais, 'Regulatory Expropriations under NAFTA: Emerging Principles & Lingered Doubts' (2002) 10 *New York University Environmental Law Journal* 245
- V Been, 'Foreword: Introduction to Regulatory Expropriations in International Law and Case Summaries' (2002) 11 *New York University Environmental Law Journal* 1
- V Been and J Beauvais, 'The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine' (2003) 78 *New York University Law Review* 30
- G Biggs, 'The Latin American Treatment of International Arbitration and Foreign Investments and the Chile-U.S. Free Trade Agreement' (2004) 19 *ICSID Review - FILJ* 61
- E Borchard, 'The United States-Panama Claims Arbitration' (1935) 29 *American Journal of International Law* 99
- I Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press, Oxford 2008)
- D Callies and C Goodin, 'The Status of *Nollan v California Coastal Commission* and *Dolan v City of Tigard* after *Lingle v Chevron USA*' (2007) 40 *John Marshall Law Review* 539
- C Calvo, *Le Droit International Theorique et Pratique* (5th edn, Paris 1896)
- Canada Model Foreign Investment Protection Agreement (2004)

FT Cawood, 'The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa' (2004) (1) *The Journal of The South African Institute of Mining and Metallurgy* 53

G Christie, 'What Constitutes a Taking of Property Under International Law?' (1962) 38 *British Yearbook of International Law* 307

J Coe and N Rubins, 'Regulatory expropriation and the Tecmed case: Context and contributions' in T Weiler (ed) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, London 2005)

M Coleman and K Williams, 'South Africa's Bilateral Investment treaties, Black Economic Empowerment and Mining: a Fragmented Meeting?' (2008) 9 (1) *Business Law International* 56

M Dale, 'Current Developments in Mineral Law in South Africa' (1994) 12 *Journal of Energy and Natural Resources Law* 226

R Dattu, 'A Journey from Havana to Paris: The fifty-year quest for the elusive multilateral agreement on investment' (2000) 24 *Fordham International Law Journal* 275

Department of Minerals and Energy, Mining Charter (South African Government Gazette, 13 August 2004)

Department of Trade and Industry 'Scorecard for the broad based socio-economic empowerment charter for the South African mining industry' <www.thedti.gov.za/bee/beecharter/MiningCharter.pdf> (7 October 2008)

R Dolzer, 'Indirect Expropriation of Alien Property' (1986) 1 *ICSID Review - FILJ* 41

R Dolzer, 'Indirect Expropriations: New Developments?' (2002) 11 *New York University Environmental Law Journal* 64

R Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2006) 37 *International Law and Politics* 952

R Dolzer and F Bloch, 'Indirect Expropriation: Conceptual Realignments?' (2003) 5 *International Law FORUM du droit international* 155

R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, Oxford 2008)

- R Dolzer and M Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, The Hague 1995)
- M Domke, 'Foreign Nationalizations: Some aspects of contemporary international law' (1961) 55 *American Journal of International Law* 585
- J Echeverria, 'Making Sense of Penn Central' (2006) 23 *Journal of Environmental Law* 171
- A Fachiri, 'Expropriation and International Law' (1925) 6 *British Yearbook of International Law* 159
- A Fachiri, 'International Law and the Property of Aliens' (1929) 10 *British Yearbook of International Law* 32
- A Fatouros, 'An International Code to Protect Private Investment - Proposals and Perspectives' (1961) 14 *University of Toronto Law Journal* 77
- J Fee, 'The Takings Clause as a Comparative Right' (2003) 76 *California Law Review* 1003
- I Foighel, *Nationalization* (Greenwood Press, Westport 1957)
- LY Fortier and S Drymer, 'Indirect Expropriation in the Law of International Investment: I Know it When I See It, or *Caveat Investor*' (2004) 19 *ICSID Review - FILJ* 293
- A Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 40 *American Journal of International Law* 121
- R Gardner, 'Private Foreign Investment Convention' (1960) 9 *Journal of Public Law* 176
- R Geiger, 'Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment' (2002) 11 *New York University Environmental Law Journal* 94
- General Comment No. 18 'Report of the Human Rights Committee' (1990) UN Doc A/45/40
- C Goodin, 'The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis' (2007) 29 *University of Hawai'i Law Review* 437
- A Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639
- C Hamilton and P Rochwerger, 'Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties' (2005) 18 *New York International Law Review* 1
- D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London 1995)

V Heiskanen, 'The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation' (2003) 5 International Law FORUM du droit international 176

D Henderson, *The MAI Affair: A Story and its Lessons* (The Royal Institute of International Affairs, London 1999)

R Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 Recueil des Cours de l'Académie de Droit International 259

M Hirsch, *Interactions between Investment and Non-Investment Obligations in International Investment* (Hebrew University International Law Research Paper No. 14-06, 2006)

FP Hubbard, 'Palazzolo, Lucas and Penn Central: The Need for Pragmatism, Symbolism and Ad Hoc Balancing' (2001) 80 Nebraska Law Review 465

'ICSID Website' <www.worldbank.org/icsid> (5 May 2008)

'Joint NGO Statement on the MAI of 27 October 1997' (1997) <<http://www.aidc.org.za/?q=book/view/90&PHPSESSID=33a88a240315c453ddfdb8fd68565ae>> (6 April 2008)

J Keene, 'When Does a Regulation "Go Too Far?": The Supreme Court's analytical framework for drawing the line between an exercise of the police power and an exercise of the power of eminent domain' (2006) 14 Penn State Environmental Law Review 397

M Kent, 'Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence after Lingle v. Chevron' (2008) 16 New York University Environmental Law Journal 63

M Koulen, 'Foreign Investment in the WTO' in MB E. Nieuwehuys (ed) *Multilateral Regulation of Investment* (Kluwer Law International, The Hague 2001)

U Kriebaum and C Schreuer, 'The Concept of Property in Human Rights Law and International Investment Law' in S Breitenmoser (ed) *Human Rights, Democracy and the Rule of Law* (Nomos, Krakow 2007)

B Kunoy, 'Developments in Indirect Expropriation Case Law in ICSID Transnational Arbitration' (2005) 6 The Journal of World Investment & Trade 467

E Lauterpacht, 'International Law and Private Foreign Investment' (1997) 4 Indiana Journal of Global Legal Studies 259

A Leeks, 'The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach' (2007) 65 *University of Toronto Faculty of Law Review* 1

P Leon, *Resource nationalism or social transformation: an assessment of South Africa's new mineral regulatory regime three years on* (International Bar Association Annual Conference, Singapore 2007)

V Lowe, 'Regulation or Expropriation?' (2002) 55 *Current Legal Problems* 447

V Lowe, *Changing Dimensions of International Investment Law* (University of Oxford Faculty of Law Legal Studies Research Paper Series 2007)

A Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press, Oxford 2008)

F McCarthy, 'Deprivation without Compensation: the exceptional circumstances of *Jahn v Germany*' [2007] (3) *European Human Rights Law Review*

C McCrudden, 'Property Rights and Labour Rights Revisited: International Investment Agreements and the Social Clause Debate' in M English (ed) *The Auto Pact: Investment, Labour and the WTO* (Kluwer, The Hague 2003)

C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive principles* (Oxford University Press, Oxford 2007)

R Meltz, 'Takings Law Today: A Primer for the Perplexed' (2007) 34 *Ecology Law Quarterly* 307

E Mendes, 'The Canadian National Energy Program: An example of assertion of economic sovereignty or creeping expropriation in international law' (1981) 14 *Vanderbilt Journal of Transnational Law* 475

S Metzger, 'Multilateral Conventions for the Protection of Private Foreign Investment' (1960) 9 *Journal of Public Law* 133

JL Montrose, 'Taking Property without Compensation' (1954) 11 *Northern Ireland Legal Quarterly* 278

V Mosoti, 'Bilateral Investment treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?' (2005) 26 *Northwestern Journal of International Law & Business* 95

H Mountfield, 'Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights' (2002) 11 *New York University Environmental Law Journal* 136

P Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 *The International Lawyer* 1033

P Muchlinski, 'Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations' (2003) 3 *Non-State Actors and International Law* 123

J Needleman, 'Exactions: Exploring exactly when Nollan and Dolan should be triggered' (2006) 28 *Cardozo Law Review* 1563

A Newcombe 'Canada's New Model Foreign Protection Agreement' (2004) <<http://ita.law.uvic.ca/documents/CanadianFIPA.pdf>> (7 May 2008)

A Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 *ICSID Review - FILJ* 1

OECD, *Report to the Negotiating Group (December 1997)* (DAFFE/MAI/DG3(97)19/FINAL, 1997)

OECD, *Report to the Negotiating Group (February 1997)* (DAFFE/MAI/DG3(97)4, 1997)

OECD, *Report to the Negotiating Group (March 1997)* (DAFFE/MAI/DG3(97)7, 1997)

OECD, *The Multilateral Agreement on Investment (Report by the Chairman to the Negotiating Group)* (DAFFE/MAI(98)17, 4 May 1998)

OECD, *Report to the Negotiating Group (January 1998)* (DAFFE/MAI/DG3(98)1, 1998)

OECD, *Report to the Negotiating Group on Labour and Environment (January 1998)* (DAFFE/MAI/DG3(98)2, 1998)

J Paulsson, 'Indirect expropriation: is the right to regulate at risk?' (Making the most of international investment agreements OECD, Paris 2005)

M Paparinskis, *Regulatory Expropriation* (University of Oxford 2006)

J Paulsson and Z Douglas, 'Indirect Expropriation in Investment Treaty Arbitrations' in N Horn (ed) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law, Hague 2004)

P Popelier, 'Legitimate Expectations and the Law Maker in the Case Law of the European Court of Human Rights' [2006] (1) *European Human Rights Law Review* 9

M Porterfield, 'International Expropriation Rules and Federalism' (2004) 23 *Stanford Environmental Law Journal* 3

RS Radford and JD Breemer, 'Great Expectations: Will Palazzolo v. Rhodes Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?' (2001) 9 *New York University Environmental Law Journal* 449

K Reid, *A Practitioner's Guide to the European Convention on Human Rights* (2nd edn, Sweet & Maxwell, London 2004)

W Reisman and R Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2003) 74 *British Yearbook of International Law* 115

S Rose-Ackerman and J Rossi, 'Disentangling Deregulatory Takings' (2000) 86 *Virginia Law Review* 1435

H Ruiz Fabri, 'The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriations" of the Property of Foreign Investors' (2002) 11 *New York University Environmental Law Journal* 148

J Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *The International Lawyer* 655

G Sampliner, 'Arbitration of Expropriation Cases under U.S. Investment Treaties - A Threat to Democracy of the Dog That Didn't Bark' (2003) 18 *ICSID Review - FILJ* 1

J Sax, 'Takings and the Police Power' (1964) 74 *The Yale Law Journal* 36

S Schill, 'Tearing Down the Great Wall: The new generation investment treaties of the People's Republic of China' (2007) 15 *Cardozo Journal of International and Comparative Law* 73

C Schreuer, *The Concept of Expropriation under the ECT and other Investment Protection Treaties* (Universitat Wien, Vienna 2005)

N Schrijver, 'A Multilateral Investment Agreement from a North-South Perspective' in MB E. Nieuwehuys (ed) *Multilateral Regulation of Investment* (Kluwer Law International, The Hague 2001)

G Schwarzenberger, 'Private Foreign Investment Convention' (1960) 9 *Journal of Public Law* 147

G Schwarzenberger, *Foreign Investments and International Law* (Stevens & Sons, London 1969)

J Scott, 'Arbitration Resumed at the Hague' (1921) 15 *AJIL* 73

D Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press, Minneapolis 1955)

E Shenkman, 'Could Principles of Fifth Amendment Takings Jurisprudence Be Helpful in Analyzing Regulatory Expropriation Claims Under International Law?' (2002) 11 *New York University Environmental Law Journal* 174

M Sikkel, 'How to Establish a Multilateral Framework for Investment?' in MB E. Nieuwehuys (ed) *Multilateral Regulation of Investment* (Kluwer Law International, The Hague 2001)

L Sohn and R Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 *American Journal of International Law* 545

M Sornarajah, *The International Law on Foreign Investment* (Second edn, Cambridge University Press, Cambridge 2004)

M Sornarajah, 'A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment' (2006) 6 *International Environmental Agreements* 329

J Stiglitz, 'Regulating Multinational Corporations: Towards principles of cross-border legal frameworks in a globalized world balancing rights with responsibilities' (2008) 23 *American University International Law Review* 451

S Subedi, 'The Challenge of Reconciling the Competing Principles with the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' (2006) 40 *The International Lawyer* 121

A Swan, 'Ethyl Corporation v. Canada, Award on Jurisdiction' (2000) 94 *American Journal of International Law* 159

YA Takahashi, *The margin of appreciation doctrine and the principle of proportionality* (Intersentia Uitgevers, Antwerp 2002)

UNCTAD, *International Investment Instruments: A Compendium Volume XII* (United Nations, Geneva 2003)

UNCTAD, *International Investment Agreements: Key Issues Volume 1* (United Nations, Geneva 2004)

UNCTAD, *International Investment Instruments: A Compendium Volume XIII* (United Nations, Geneva 2005)

UNCTAD, *International Investment Instruments: A Compendium Volume XIV* (United Nations, Geneva 2005)

UNCTAD, 'The Entry into Force of Bilateral Investment Treaties (BITs)' [2006] (3) *International Investment Agreements Monitor*

UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (United Nations, Geneva 2008)

UNGA Re 1803 (XVII) (14 December 1962)

UNGA Res 2158 (XXI) (25 November 1966)

UNGA Res 3171 (XXVIII) (17 December 1973)

UNGA Res 3281 (XXIX) (9 December 1974)

United States Model Bilateral Investment Treaty (2004)

G Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford 2007)

A Van Rijn, 'Right to the Peaceful Enjoyment of One's Possessions' in Van Dijk (ed) *Theory and Practice of the European Convention on Human Rights* (4th edn Intersentia, Antwerp 2006)

K Vandeveld, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 *Cornell International Law Journal* 201

T Waelde and A Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' (2001) 50 *International and Comparative Law Quarterly* 811

H Walker, 'Modern Treaties of Friendship, Commerce and Navigation' (1958) 42 *Minnesota Law Review* 805

A Weiner, 'Indirect Expropriations: The Need for a Taxonomy of "Legitimate" Regulatory Purpose' (2003) 5 *International Law FORUM du droit international* 166

B Weston, "'Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation"' (1975) 16 *Virginia Journal of International Law* 103

D Whitman, 'Deconstructing Lingle: Implications for Takings Doctrine' (2007) 40 *John Marshall Law Review* 573

J Williams, 'International Law and the Property of Aliens' (1928) 9 *British Yearbook of International Law* 1

R Wilson, *United States Commercial Treaties and International Law* (The Hauser Press, New Orleans 1960)

Y Winisdoerffer, 'Margin of Appreciation and Article 1 of Protocol No 1' (1998) 19 *Human Rights Law Journal* 18

World Bank Guidelines on the Treatment of Foreign Direct Investment (1992) 31 *ILM* 1363

B Wortley, *Expropriation in Public International Law* (Cambridge University Press, Cambridge 1959)

WTO 'WTO Services Database' <<http://tsdb.wto.org/wto/WTOHomepublic.htm>> (11 May 2008)

WTO, *Doha Ministerial Declaration - 20 November 2001* (WT/MIN(01)/DEC/1, 2001)

WTO, *Working Group on the Relationship between Trade and Investment: Report on the meeting held on 10 and 11 June 2003* (WT/WGTI/M/22, 2003)

WTO 'Trade and Investment ' (2008) <http://www.wto.org/english/tratop_e/invest_e/invest_e.htm> (10 May 2008)

C Yannaca-Small, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* (Working Papers on International Investment 2004)

S Zia-Zarifi, 'Protection without Protectionism: Linking a Multilateral Investment Treaty and Human Rights' in MB E. Nieuwehuys (ed) *Multilateral Regulation of Investment* (Kluwer Law International, The Hague 2001)

K Zweigert and H Kotz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press, Oxford 1998)