STATES' PRESCRIPTIVE JURISDICTION AND THE 'POLICE POWERS DOCTRINE'

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ABSTRACT

States' ability to promote the 'public interest', and to pursue their social, environmental, economic and fiscal objectives in light of widening and deepening international economic regulation has generated significant discussion. This dissertation critically examines the 'police powers doctrine' developed in arbitral practice and academic discussion concerning international law on investment protection. It considers whether police powers can be reconciled with the 'traditional' approach to States' regulatory authority in general international law, the rules governing prescriptive jurisdiction.

Three main issues are considered: (i) how general international law governs States' ability to create and apply laws within their territory; (ii) the origins of the police powers doctrine and how it has featured in arbitral practice on investment protection; and (iii) whether police powers can be doctrinally and conceptually reconciled with the general international law governing States' prescriptive jurisdiction.

It is demonstrated that police powers suffers from critical flaws when considered from both legal validity and coherence perspectives. The dissertation's central argument however is that police powers is more broadly irreconcilable with the general international law governing States' prescriptive jurisdiction. It is shown that police powers represents a significant departure from the extant law on States' prescriptive jurisdiction in three respects: (i) it changes the nature of States' authority to create and apply laws within their territory from one of residual plenary freedom to one based on conditional authorisation; (ii) it shifts from an approach based on legality to one based on 'legitimacy'; and (iii) it shifts the focus away from the legal content and consequences of States' assumed obligations, with corresponding consequences for auto-limitation as the basis of obligation in the protection of foreign investment.

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TABLE OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
ECT	Energy Charter Treaty
FET	Fair and equitable treatment
GAL	Global administrative law
ICJ	International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes
IIA	International investment agreement
ILC	International Law Commission
ISDS	Investor-State dispute settlement
IUSCT	Iran-US Claims Tribunal
IWA	Internationally wrongful act
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-Operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
SICJ	Statute of the International Court of Justice
UNCITRAL	UN Commission on International Trade Law
UNCTAD	UN Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties

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NOTE ON CITATION

Citation in this dissertation follows a modified OSCOLA convention. Authors' first names are omitted throughout. Books are cited using a short title and the year of publication. Articles are cited without the title and only the journal reference. Book chapters are cited without the title, but merely the book reference (using the editors and year). Numbers in square brackets indicate paragraphs: they supplement pinpoint citations to pages or are given when no page references are available. Only the numbers of UN and other international organisations' documents are given. Full citations are provided for all consulted sources in the Bibliography and Tables of Authorities.[1]

Unless otherwise indicated, reference to cases and primary materials is accurate at the time of writing, 1 May 2015.

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1 For use of this citation convention, see eg: Tzanakopoulos, *Disobeying the Security Council* (OUP 2011)

2 European Commission, 'In focus: Transatlantic Trade and Investment Partnership' (2015) <http://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 13 Sep 2015; Weiler, 'European Hypocrisy: TTIP and ISDS' (21 Jan 2015) <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/>

CHAPTER 1:
GENERAL INTRODUCTION

States' ability to promote the 'public interest', and to pursue their social, environmental, economic, and fiscal objectives in light of widening and deepening international economic regulation has generated significant discussion. As the on-going public debates concerning the Transatlantic Trade Investment Partnership[2] and Trans-Pacific Partnership[3] attest, this is perhaps no more prevalent than in relation to investor-State dispute settlement (ISDS). Numerous high profile investment disputes involving non-investment-related regulatory measures have generated interest and debate in the effect of obligations States assume under international investment agreements (IIAs).[4] This has generated significant debate on the role of States as regulators, and the values underpinning international investment protection. As Lowe presciently noted in 2002, in reviewing States' regulatory measures, 'however they go about their task, arbitral tribunals adjudicating upon investment disputes are deciding questions that bear directly on profound questions of allocation of power and authority.'[5]

Debate has taken place in many contexts and under many headings:

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2 European Commission, 'In focus: Transatlantic Trade and Investment Partnership' (2015) <http://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 13 Sep 2015; Weiler, 'European Hypocrisy: TTIP and ISDS' (21 Jan 2015) <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/>

3 Department of Foreign Affairs & Trade, 'Trans-Pacific Partnership Agreement' (*Australian Government*, 2015) accessed 13 Sep 2015; French (2015) 26 PLR 155

4 see: *Vodafone v India* (UNCITRAL, 2014) (pending arbitration under the India-Netherlands BIT); *Philip Morris v Australia* (2012) UNCITRAL, PCA Case No. 2012-12; *Philip Morris Brands v Uruguay* (2010) ICSID Case No. ARB/10/7; *Piero Foresti & ors v South Africa* [Award] (4 August 2010) ICSID Case No. ARB(AF)/07/01; *Glamis Gold v USA* [Award] (9 July 2009) UNCITRAL; and *Burlington Resources v Ecuador* [Decision on Liability] (14 December 2012) ICSID Case No. ARB/08/5

5 Lowe (2002) 55(1) CLP 447, 466

'prescriptive' and 'legislative sovereignty',[6] 'regulatory sovereignty',[7] States' 'right to regulate'[8] and 'margin of appreciation',[9] the 'global public interest'[10] and the 'public purpose doctrine'.[11] Similar issues have been discussed in the contexts of the 'constitutionalization'[12] of the international legal order or the purported emergence of a 'global administrative law' (GAL).[13] The issue has also been discussed in relation to States' reserved domain of domestic jurisdiction,[14] historical and contemporary practice concerning interpretative presumptions[15] and restrictive interpretation of States' obligations,[16] the standards of review applicable in reviewing domestic regulation in international dispute settlement,[17] the normative content of State sovereignty,[18] or 'statehood',[19] and in debates concerning 'permanent sovereignty

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6 Shan & ors (eds), *Redefining Sovereignty* (Hart 2008) 311

7 Martinez-Fraga and Reetz, *Public Purpose* (CUP 2015)

8 Schrijver, *Sovereignty* (CUP 1997) 278-279; Paulsson (2006) 3(2) TDM [online]; Henckels (2013) 4(1) JIDS 197; Bonnitcha, *Substantive Protection under Investment Treaties* (CUP 2014) 32-33

9 *Renta 4 SVSA & ors v Russia* [Award] (20 Jul 2012) (SCC No. 24/2007)

10 Kulick, *Global Public Interest* (CUP 2012)

11 Martinez-Fraga and Reetz (2015) (n 7)

12 Klabbers & ors, *Constitutionalization of International Law* (OUP 2009)

13 see: Alvarez (2011) 344 RCADI 193; Kingsbury and Donaldson, in Fastenrath & ors (eds) (OUP 2011); Krisch (2006) 17(1) EJIL 247; Dunoff and Trachtman (eds), *Ruling the World?*, (CUP 2009); Van Harten, *Investment and Public Law* (OUP 2008); Van Harten and Loughlin (2006) 17(1) EJIL 121; Montt, *State Liability* (Hart 2009); Schill, *Investment and Comparative Public Law* (OUP 2010); Schill (2010) 23(2) LJIL 401

14 Waldock (1954) 31 BYBIL 96; Schrijver (1999) 70 BYBIL 65, 70; Brownlie, *Principles* (7th edn, OUP 2008) 292

15 Quane (2014) 84 BYBIL 240

16 Brownlie (n 14) 290-291; Crema (2010) 21(3) EJIL 681; d'Aspremont, *Formalism* (OUP 2011) 157-159

17 Fisher, *Risk Regulation* (Hart 2007); Peel (2012) 61 ICLQ 427; Henckels (2012) 15(1) JIEL 223; Ortino (2012) 3(1) JIDS 31; Miles, *Origins* (CUP 2013); Roberts (2013) 107(1) AJIL 45; Lowe (2012) 61(1) ICLQ 209

18 see: Brownlie, *The Human Right to Development* (Human Rights Unit, Commonwealth Secretariat 1989); Schachter, in MacDonald (ed) (Nijhoff 1994); Koskenniemi (2008) 79(1) BYBIL 353; Koskenniemi (2011) 1(1) AsianJIL 61; Peters (2009) 20(3) EJIL 513; Viñuales, in Douglas & ors (eds) (OUP 2014)

19 Koskenniemi (1991) 32 HarvInt'lLJ 397

over natural resources'.[20]

It is in this broader context that the 'police powers doctrine' has emerged. The 'police power' is allegedly a State's 'all-encompassing power of regulation […] for the purpose of promoting peace, order, and good government.'[21] This power or 'right' is purported in arbitral practice and academic discussion to exist as a matter of customary international law. Since it entered the discourse concerning international investment protection and the property interests of foreign nationals in 1985 through the IUSCT's award in *Sedco v NIOC,*[22] the police powers doctrine has been the focus of significant academic attention.[23] Much of this literature is written from 'within' international investment law: it is concerned with the law and practice on the content and consequences of particular investment protection standards, and in finding internal consistency between arbitral approaches. To date, only a handful of authors have engaged critically with police powers, or investigated it from a 'generalist' international legal perspective.[24]

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20 Lowe (n 5) 450-451; Brownlie (n 14) 539-544 14

21 Loughlin, *Foundations* (OUP 2010) 422

22 *Sedco, Inc. v National Iranian Oil Company and the Islamic Republic of Iran* [Interlocutory Award, 24 October 1985] (1985) 9 IUSCTR 248. As Higgins presciently predicted, see: Higgins (1982) RCADI 259, 330-331

23 see: Viñuales (2010) 80(1) BYBIL 244, 309-310; Viñuales, *Investment and the Environment* (CUP 2012) 367-369; Viñuales (n 18) 329 et seq; Newcombe and Paradell, *Law and Practice of Investment Treaties* (Kluwer 2009) 357; Alvik, *Contracting with Sovereignty* (Hart 2011) 260 et seq; Henckels (n 17) 225; Yannaca-Small, in Yannaca-Small (ed) (OUP 2010) 448; Spears, in Miles and Brown (eds) (CUP 2011) 277; Subedi, *Investment Law* (Hart 2012) 157-159; Paparinskis, in Cordonier Segger & ors (eds) (Kluwer 2011) 313; Paparinskis, *IMS and FET* (OUP 2013) 223; Kurtz, in Douglas & ors (eds) (OUP 2014) 294; Bonnitcha (n 8) 256; Sornarajah, *Foreign Investment* (2nd edn, CUP 2004) 353-354; McLachlan & ors, *Investment Arbitration* (OUP 2008) 267, 287; López Escarcena, *Indirect Expropriation* (Elgar 2014) 188; Montt (n 13) 236; Vadi, *Cultural Heritage in Investment Law* (CUP 2014)

24 Notable exceptions include: Paparinskis (2011) (n 23) 311 et seq; Kurtz (n 23) 294-295; Mitchell, 'Accommodating the public interest in international investment treaties: police powers, expropriation and treaty interpretation' (MPhil Thesis, University of Oxford 2014) <http://solo.bodleian.ox.ac.uk/OXVU1:ORA919f365e-befb-425e-a394-02c48a879207>

In the present study, I seek to answer three core questions: (i) how does general international law govern States' ability to create and apply laws within their territory?; (ii) what is the police powers doctrine, and how has it featured in arbitral practice on investment protection?; and (iii) can police powers be doctrinally and conceptually reconciled with general international law?

The study's aim is to take the police powers doctrine apart and subject it to critical examination. General international law, and particularly the rules concerning States' (prescriptive) jurisdiction, provide the toolset for this examination. In spite of arguments to the contrary, there is nothing:

> conceptually different, innovatory, or sui generis about investment protection law […] neither the particular elements nor the broader systemic structure present any conceptual or sui generis challenges to traditional canons of international legal reasoning.[25]

Situated as it is within general international law, any approach to regulatory authority in investment law ought to be reconcilable with the principles of the order of which it is part. This consideration underlies the present investigation into police powers.

This thesis consists of five substantive chapters. In Chapter 2 I investigate how States' ability to create and apply laws is governed under general international law through the concepts of prescriptive jurisdiction and the reserved domain of domestic jurisdiction. I examine the relationship between prescriptive jurisdiction and sovereignty, and consider whether the customary rules on prescriptive jurisdiction merely regulate States' *entitlement* to exercise regulatory authority, or whether general international law also regulates the *content* of that entitlement. I demonstrate that general international law recognises States' plenary freedom to regulate within a

[25] Paparinskis, in Douglas & ors (eds) (OUP 2014) 73

sphere of competence. This freedom is subject only to auto-limitation, or 'voluntary-subtraction'.[26]

In Chapter 3 I introduce police powers and attempt to track its origins. I consider how police powers is purported to apply in the context of investment protection. I show that there are two models of police powers, one 'narrow' in which police powers makes up part of the customary definition of expropriation, and one 'broad' under which police powers more generally connotes a State's sovereign right to regulate in the public interest.

In Chapter 4 I describe how investment tribunals have employed police powers in ISDS. I show that arbitral practice invoking police powers is split into two approaches. Under the first, police powers is a factor *precluding* a finding of indirect expropriation. Under the second, a finding that something is within a State's police powers is merely a *relevant* factor to be considered alongside several others.

In Chapter 5, I consider how police powers has been critiqued in academic discussion to date, and demonstrate it faces significant obstacles from both legal validity and coherence perspectives. In Chapter 6, I develop the dissertation's central argument: that the police powers doctrine cannot be doctrinally or conceptually reconciled with the general international law governing States' regulatory authority. I show that police powers represents a significant departure from the extant law on States' prescriptive jurisdiction in three respects: it changes the nature of States' authority to create and apply laws within their territory from one of residual plenary freedom to one based on conditional authorisation; it shifts from an approach based

[26] Allott, *Eunomia* (OUP 1990) 312

on legality to one based on 'legitimacy'; and it shifts the focus away from the legal content and consequences of States' assumed obligations.

CHAPTER 2:
PRESCRIPTIVE JURISDICTION

In this chapter I seek to outline how general international law regulates States' ability to create and apply laws. I raise and attempt to answer three core questions: (i) how does international law *define* the ability[27] to prescribe and what is the relationship between 'jurisdiction' and 'sovereignty'?; (ii) how does general international law *regulate* the internal and external aspects of States' ability to prescribe; and (iii) what is the *content* of States' ability to prescribe laws and how does general international law determine how this content is determined?

2.1 'Sovereignty' as a legal concept

In order to understand how international law regulates States' authority to prescribe laws, it is helpful to consider 'sovereignty' as a legal concept. Clearly sovereignty 'is a disputed term'.[28] According to Reisman, '[f]loods of ink have washed over the term and congealed into an almost theo-legal carapace.'[29] 'Sovereignty' may be an 'essentially contestable concept', a label under which parties dispute values,[30] but that is incapable of bearing a 'single' or 'authoritative' definition.[31] Debate has centred on, for example, sovereignty's normative value,[32] the distinction between 'internal and

27 I use the term 'ability' at this stage to indicate the *factual* reality - States can, and do, regulate.

28 Simma & ors (eds), *The Charter of the United Nations: A Commentary*, (2nd edn, OUP 2002) 150

29 Reisman (2012) 351 RCADI 9, 217

30 Sarooshi (2003-2004) 25 MichJInt'lL 1107, 1109; co-opting: Waldron (2002) 21(2) L& Phil 137. On the term's development, see: Gallie (1955) 56 Proceedings of the Aristotelian Society 167

31 Sarooshi (2003-2004) (n 30) 1109; Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2007) 4-6; Lowe, in Shan & ors (eds) (Hart 2008) 81-83

32 Endicott, in Besson and Tasioulos (eds) (OUP 2010) 255; Koskenniemi (2011) (n 18)

'external' sovereignty,[33] whether sovereignty is factual or legal,[34] and sovereignty as 'autonomy'[35] or as 'independence'.[36] The intractability of these debates seems 'as frustrating as the little boys' dispute about whether God Almighty can create a stone so big He Himself cannot lift up.'[37]

I will not engage directly in a reassessment of sovereignty here. Rather, I proceed on the basis of an assumption. In analysing prescriptive jurisdiction and the police powers doctrine, I assume that the term 'sovereignty' is a corollary of formal recognition of statehood describing the amalgamation of a State's rights and powers under positive international law.[38] Under this 'legal approach',[39] sovereignty is a 'collective or umbrella term'[40] covering the complement of States' legal powers (delimited by customary international law) at any given time, with each power 'traceable to a distinct legislative source'.[41] This does not exclude sovereignty also bearing moral or political meaning, but such uses must be considered separately of sovereignty as a *legal* concept.[42]

This approach to sovereignty, as 'simply the totality of the powers and rights which every independent State claims in virtue of its statehood and in its relations

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33 Lowe (n 31) 79-80

34 A recurring theme in: Schmitt, *Nomos* (Telos Press 2006); Kelsen, *Principles* (Rinehart 1952); Kammerhofer, in Orakhelashvili (ed) (Elgar 2011)

35 Hart, *Concept of Law* (OUP 1961) 217-218

36 Reisman (n 29) 217; Henkin (1999) 68(1) Fordham LRev 1, 4-5

37 Koskenniemi, *Apology to Utopia* (CUP 2005) 244-245

38 Kelsen (n 34); von Bernstorff, *The Theory of Hans Kelsen* (CUP 2010) 63-64

39 Koskenniemi (n 37) 228-231

40 Fassbender, in Walker (ed) (Hart 2003) 129

41 Koskenniemi (2011) (n 18) 62

42 Fassbender (n 40) 140-142

with other States'[43] has received significant support. Lowe, drawing on Huber's analysis as sole arbitrator in *Island of Palmas*,[44] views sovereignty as 'a signifier rather than a legal norm or principle',[45] which 'forms no more than the framework within which more specific debates, about rights and duties and rules that are truly part of the international legal order, must take place.'[46] Viñuales adopts this approach in the context of State regulatory authority in investment protection claims, arguing that sovereignty 'is but a set of more specific actionable concepts that are intended to express the special position enjoyed by the state as a historical unit of social organisation.'[47]

2.2 The relationship between sovereignty and prescriptive jurisdiction

It is a foundational general principle of customary international law that States may 'make, apply, and enforce rules of conduct' within their designated sphere of competence.[48] 'In its widest sense, jurisdiction … means an entity's entitlement to authoritatively say "what the law is".'[49] The ILC considered the issue in Article 2 of its Draft Declaration on Rights and Duties of States, which provides that a State 'has the right to exercise jurisdiction over its territory and over all persons and things therein'.[50] However, 'jurisdiction' is 'a term used to denote a number of different ideas.'[51]'The term '"jurisdiction" refers to particular aspects of the substance [of

43 Waldock (1962) 106 RCADI 1, 156

44 *The Island of Palmas Case (US v The Netherlands)* [PCA] Award (4 April 1928) 1

45 Lowe (n 31) 77

46 ibid 84

47 Viñuales (n 18) 317-318

48 Lowe and Staker, in Evans (ed) (3rd edn, 2010) 313

49 Simma and Müller, in Crawford and Koskenniemi (eds) (CUP 2012) 134

50 ILC (12 April 1949) UN Doc A/CN.4/13

51 Jennings (1962) 32 Nordisk Tidsskrift Int'l Ret 209, 212

States' legal personality] especially rights (or claims), liberties, and powers'.[52] Jurisdiction describes 'all questions about the reach, the ambit or scope, of a State's laws'[53] and concerns the competence of a State to create, apply and enforce laws regarding subjects, persons or events. Jurisdiction is therefore 'the authority to engage in activity of control or regulation within a certain geographic area.'[54]

The majority of jurists differentiate between a State's jurisdiction to *prescribe* (and apply) law and its jurisdiction to *enforce* law.[55] Prescriptive jurisdiction 'designates a State's international right to make legal rules'.[56] As O'Keefe notes:

> prescriptive jurisdiction – sometimes called 'legislative' jurisdiction – refers […] to a state's authority under international law to assert the applicability of its […] law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling.[57]

It is in this sense that I use the phrase 'prescriptive jurisdiction' in the present study - the totality of States' ability to create and apply laws through legislative, executive, and judicial bodies.[58]

Questions relating to jurisdiction seem inextricably tied up with the concept of State sovereignty.[59] The power to prescribe laws has variously been described as

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52 Brownlie (n 14) 106

53 Lowe and Staker (n 48) 318

54 Byers, *Custom* (CUP 1999) 53

55 Mann (1964) 111 RCADI 1, 13

56 ibid

57 O'Keefe (2004) 2(3) JICJ 735, 736

58 As such, questions concerning *enforcement* jurisdiction are not considered.

59 Ryngaert, *Jurisdiction* (OUP 2008) 5

'flowing from',[60] a 'corollary',[61] 'manifestation'[62] and 'concomitant'[63] of State sovereignty. As customary rules of a general nature attaching to the legal personality of the State, in accordance with the 'legal' approach adopted above, the customary rules concerning prescriptive jurisdiction can therefore be considered 'specific rights'[64] or 'actionable legal concepts'[65] which fall under the umbrella term 'sovereignty'. Although 'sovereignty' and 'jurisdiction' are sometimes used interchangeably to describe 'all questions of a State's territorial and personal limits',[66] as an important component of the bundle of rules attached to international legal personality, the jurisdiction to prescribe laws should be seen as expressing, but not as being 'co-extensive' with, the concept of sovereignty.[67] It is the rules on jurisdiction, rather than the concept of sovereignty, which do the legal legwork in delimiting States' regulatory authority. Jurisdiction describes 'a State's *right* to exercise certain of its powers […] like all attributes of sovereignty this liberty is subject to the overriding question of entitlement.'[68]

This way of thinking about prescriptive jurisdiction finds clear support in PCIJ and ICJ jurisprudence. In *Lotus* the PCIJ considered that a State's 'title to exercise jurisdiction rests in its sovereignty.'[69] The PCIJ further recognised the existence of

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60 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, 124

61 Brownlie (n 14) 299

62 Jennings (n 51) 209

63 Mann (n 55) 24

64 Lowe (n 31) 80

65 Viñuales (n 18) 317-318

66 Mann (n 55) 16

67 ibid 16-17

68 ibid 9

69 *The Case of the SS Lotus (France v Turkey)* (Judgment) PCIJ Rep Series A No 10, 19

States' inherent 'sovereign legislative power' in its *German Settlers* advisory opinion.[70] In the *Eastern Greenland Case*, the PCIJ commented that '[l]egislation is one of the most obvious forms of the exercise of sovereign power'.[71] Similarly, the ICJ remarked in *Nicaragua* that the power to regulate arose 'by virtue' of State sovereignty over territory.[72] In *Jurisdictional Immunities*, the ICJ considered that 'each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory.' [73] In recent territorial and maritime delimitation cases, the ICJ has emphasised that 'legislative acts' are both related to and evidence sovereign authority.[74]

2.3 The external aspects of prescriptive jurisdiction: entitlement and priority

Historically, judicial, arbitral and academic treatment of the customary international law concerning prescriptive jurisdiction has centred on two central issues: (i) the allocation of States' *entitlement* to regulate persons and events; and (ii) the allocation of *priority* where entitlements compete, overlap or coincide. I consider these the 'outward-looking'[75] or 'external' elements of prescriptive jurisdiction – each concerns the permissibility of a State's regulatory exercise 'with respect to their interaction with

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70 Though it reserved judgment on the content or operation of this right, see: *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) PCIJ Rep Series B No 6, 36

71 *Case Concerning the Legal Status of Eastern Greenland (Denmark v Norway)* PCIJ Rep Series A/B No 53, 48

72 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 111

73 *Jurisdictional Immunities*, 123-124; although the case largely centred on *enforcement* jurisdiction, the sentiment expressed extends also to the ability to *prescribe* laws.

74 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, 713; *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624, 655

75 Tzanakopoulos (2011) 34 LoyLAInt'l & CompLRev 133, 138

other States on the international plane.'[76] These external aspects concern the 'lawful coexistence' of formally equal (sovereign) legal subjects.[77]

Though in the present section I aim to outline how international law regulates the 'inward-looking'[78] or 'internal' elements of States' regulatory authority – how and when they regulate in respect of events and persons within their sphere of competence - the 'internal' aspects of jurisdiction essentially relate to the 'external' aspects of States' ability to prescribe.

2.3.1 *Allocating entitlement*

The first element of international law's regulation of the external aspect of prescriptive jurisdiction is the allocation of (legal) entitlement to regulate in respect of subjects, events, persons and property. Fundamentally, the rules concerning entitlement are concerned with apportioning competence between formally equal (sovereign) legal subjects. According to Mann, this element of jurisdiction 'is concerned with what has been described as one of the fundamental functions of public international law, viz. the function of regulating and delimiting the respective competences of States.'[79] The rules on jurisdiction's purpose can be viewed as setting limits to the 'lawful exercise of State power'.[80] Ryngaert describes this 'regulating purpose' as 'delimiting States' spheres of action' in order to reduce the risk of conflict.[81] Such questions of entitlement are intrinsically linked to the:

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76 ibid

77 Mills, *Confluence of Public and Private International Law* (CUP 2009) 188

78 Tzanakopoulos (n 75) 138

79 Mann (n 55) 15

80 Jennings (n 51) 209

81 Ryngaert (n 59) 21

> general principles of self-determination and non-intervention in the domestic affairs of another State – themselves corollaries of the sovereign equality and independence of States which is a fundamental datum of contemporary international law.[82]

These fundamental customary principles are reflected, for example, in the 1970 Friendly Relations Declaration,[83] and Articles 2(1) and 2(7) UN Charter, which recognise the sovereign equality of States[84] and 'guarantee [States'] exclusive authority within their assigned spheres of jurisdiction.'[85] The rules on jurisdiction are therefore inherently protective in nature. This protection is achieved:

> partly by prohibitions and limitations placed on the extent to which any State can step outside its own sphere and encroach on that of others, but partly also by a positive licence in certain cases for a State to act precisely in this way, for the protection of its rights and competences.[86]

This same concern can be seen in the ICJ's dictum in *Jurisdictional Immunities* concerning the interplay between sovereign immunity, sovereign equality and States' jurisdiction 'over events and persons within [their] territory'.[87]

To determine whether a regulatory exercise is within a State's sphere of competence international law has developed rules to determine the appropriateness of regulation based on the 'nexus' between a State and a set of facts.[88] The appropriateness of regulation is assessed by the degree of connection.[89] International law has thus developed categories of connection that are deemed proximate enough to

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82 Lowe (1985) 34(4) ICLQ 724, 740

83 (24 October 1970) UN Doc A/RES/25/2625

84 Bowett (1982) 53 BYBIL 1, 15-17

85 Waldock (n 43) 191

86 Fitzmaurice (1957) 92 RCADI 1, 168

87 *Jurisdictional Immunities*, 123-124, at [57]

88 Simma and Müller (n 49) 137

89 Staker, in Shaw (ed) (4th edn, OUP 2014) 315

bring facts or persons within a State's sphere of competence. The allocation of entitlement to validly exercise jurisdiction is therefore discussed in terms of a principle establishing a 'base' or 'ground' of jurisdiction. Although jurists and States contest the exact contours of each ground, four bases of entitlement are generally accepted in state practice: jurisdiction based on territory; jurisdiction based on nationality; jurisdiction based on the protection of States' essential interests; and universal jurisdiction.[90] States are entitled to exercise 'prescriptive jurisdiction based on one of two types of connecting factors – territoriality, reflecting the intimate connection between territorial control and statehood in international law, and nationality, reflecting ideas of individual subjectivity to sovereign power.'[91]

As the PCIJ noted in *Lotus* and the ICJ emphasised in *Jurisdictional Immunities*, control of territory is the conceptual foundation of the rules on jurisdiction.[92] Similarly the other recognised grounds of jurisdiction stem from and are defined by the territoriality principle as the starting point of entitlement.[93] In this study, I am essentially concerned with how international law regulates States' regulatory authority *within* their territory. As such, the examination of the 'police powers doctrine' below is essentially concerned with territoriality as a base of entitlement. It is important to stress that the territoriality principle permits States to legislate in respect of all persons, events and property within their territory. This entitlement includes the regulation of foreign nationals and foreign-owned property

90 ibid 316-322

91 Mills (n 77) 196

92 *Lotus*, 18-19; *Jurisdictional Immunities*, 123-124.

93 see: Jennings (n 51) 210; Ryngaert (n 59) 42; Mann (1984) 186 RCADI 9, 20-21

present in a State's territory.[94]

2.3.2 *Allocating priority*

The second issue within the external aspect of the international law of prescriptive jurisdiction concerns circumstances in which two or more valid entitlements to prescribe in respect of persons, subjects or events overlap or compete – referred to as 'overlapping', 'concurrent' or 'parallel' jurisdiction.[95] The facts underlying the dispute in *Barcelona Traction* illustrate the complex issues arising when jurisdiction based on nationality and territoriality overlap.[96] Nothing factually or legally precludes two or more States having a 'genuine connection' with the subject of regulation.[97] Allocating priority becomes the concern in such circumstances. However, unlike when assessing a State's entitlement to prescribe, international law has not yet developed a comprehensive body of rules governing issues of priority when entitlements overlap. As Mills notes; 'th[e] rules [on jurisdiction] do not pretend to eliminate entirely the possibility of overlapping regulation. Some limited risk of potentially conflicting exercises of public authority remains an accepted feature of international law'.[98] Although some commentators argue that territorial jurisdiction has primacy over other bases,[99] as a 'manifestation of the equality of states, international law does not establish a hierarchy of jurisdictional principles' but rather

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94 Mann (n 55) 37

95 Simma and Müller (n 49) 150

96 *Barcelona Traction, Light and Power Company, Limited (second phase) (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3

97 Ryngaert (n 59) 35

98 Mills (n 77) 188

99 Jennings and Watts (eds), *Oppenheim's International Law*, (9th edn, Longman 1992) 458

States are 'perfectly on par' in exercising jurisdiction within their entitlements.[100]

Many of the approaches to resolving such issues of priority have taken place in domestic courts or through non-legal avenues, rather than through dispute settlement before international tribunals. This is not to say that there are no rules of international law relevant to resolving issues of priority, merely that they do so in a less direct fashion than the principles governing entitlement discussed above. Simma and Müller identify four main ways through which issues of priority are addressed in international relations: through 'jurisdictional battles', in which States assert and exercise jurisdiction fully cognisant of competing jurisdictional claims;[101] formal or *ad hoc* cooperation through which States attempt to regulate issues of priority before they arise;[102] through the international law of immunities; and through judicial self-restraint and comity.[103] Of the above, the last two means deserve special attention.

Customary and treaty law concerning the jurisdictional immunities of States and their property,[104] and of diplomatic and consular officials[105] are important elements in international law's regulation of situations involving concurrent

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100 Simma and Müller (n 49) 151

101 see: Lowe (n 82) 725-728; Simma and Müller (n 49) 152-153. This theme is present for example in the facts leading to the *Estai* dispute, see: *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432, 440-446

102 see: Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws [1995] OJ L95/47

103 Simma and Müller (n 49) 151-155

104 Although not in force and not all its provisions reflect customary law, see: UN Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, opened for signature 17 January 2005) UN Doc A/59/508, especially Arts 5-9.

105 eg: Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95, Arts 31-32; and: Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 596 19 March 1967) 596 UNTS 261, Art 43

jurisdiction going to issues of both entitlement and priority.[106] Immunity essentially concerns situations in which bases of jurisdiction – territoriality and nationality – coincide. The rules on immunity can be seen as *ex ante* recognition of another State's 'primordial' interest in regulating certain matters and a general agreement that the territorial State will not pursue its entitlement in such circumstances.[107] Immunity remains an issue of priority as the territorial State continues to have a valid entitlement to regulate, but absent their waiver, the rules on immunity block the *exercise* of this entitlement.[108]

Domestic courts have developed varied rules and approaches to the question of when to refrain from determining a case in circumstances of concurrent jurisdiction.[109] This practice generally occurs through the application of legal principles like the act of state doctrine,[110] 'non-justiciability, *forum non conveniens* or comity' which debar courts from exercising jurisdiction on legal policy grounds.[111] However, given the wide range of approaches evident in the practice of States' courts, and doubt as to whether domestic courts exercise judicial restraint 'because an international legal rule obliges them to',[112] comity and related conflict-avoidance mechanisms are 'discretionary' rather than based in a 'binding norm of customary

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106 The ICJ noted that the rules on immunity constitute a 'departure from the principle of territorial sovereignty and the jurisdiction which flows from it': *Jurisdictional Immunities* 124, at [57]

107 Simma and Müller (n 49) 151

108 ibid

109 see: Van Harten, *Sovereign Choices* (OUP 2013) 5-7; Fatima, *Using International Law in Domestic Courts* (Hart 2005) 385-388

110 see: Higgins (1982) 29 NILR 265; Alderton (2011) 12(1) MelbJlIntLaw 1

111 Simma and Müller (n 49) 153

112 Ryngaert (n 59) 135

international law'.[113] It is important to note that the rules of private international law also play a vital role in regulating issues of priority.[114]

2.4 The internal aspects of prescriptive jurisdiction

Some commentators emphasise that a transnational element must exist for the law of jurisdiction to apply.[115] Most accounts of jurisdiction abruptly stop once the issues of entitlement and priority discussed above are addressed. This view restricts our understanding of jurisdiction to those rules regulating the 'external' aspect of States' regulatory authority. However, general international law also regulates the 'internal' aspect of States' prescriptive jurisdiction. By the 'internal' aspect, I mean circumstances where no issues of entitlement or priority arise and a regulatory exercise is clearly within a States' allocated competence. The clearest example is the regulation of events, persons or property within a State's sovereign territory. By describing such situations as 'internal' I am not suggesting that the regulatory exercise concerned will have no cross-border element. As numerous examples illustrate, the 'internal' exercise of prescriptive jurisdiction does not preclude the regulatory exercise having transnational effects felt by third States.[116] These internal aspects of States' prescriptive jurisdiction are of most interest and relevance to the present investigation of the 'police powers doctrine'.

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113 On this issue, see generally: Mills (n 77) 208-209. This is notwithstanding that issues of comity and arbitral or judicial self-restraint equally arise in international dispute settlement. see: *The MOX Plant Case (Ireland v UK)* [PCA] (Procedural Order No 3) (24 June 2003) at [28]; and: *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v UK)* [PCA] (Final Award) (2 July 2003) at [23]. See generally: Schneiderman (2011) 2(2) JIDS 471

114 Mills (n 77)

115 Mann (n 55) 37; Ryngaert (n 59) 5-6

116 eg: *Fisheries Case (United Kingdom v Norway*) (Judgment) [1951] ICJ Rep 116

2.4.1 *Recognition and delimitation*

There are two interlocking components to general international law's regulation of the internal aspect of States' prescriptive jurisdiction. Firstly, and as discussed above, customary international law recognises a general entitlement of States to prescribe laws within their sphere of competence, as that sphere is defined through the rules on entitlement and priority.[117] Secondly, international law gives content to this general authority and places limits on it. The *content* and *limits* of the general authority to prescribe derive from general international law's treatment of the reserved domain of domestic jurisdiction. The PCIJ addressed the issue of reserved domain in *Nationality Decrees* when it held that:

> [t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations. Thus, in the present state of international law, questions of nationality are … in principle within this reserved domain.[118]

The Court then noted that:

> it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.[119]

In cases where a relevant rule of international law is found to exist,

> the dispute as to the question whether a State has or has not the right to take certain measures becomes in the circumstances a dispute of an

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117 Ryngaert (n 59) 35

118 *Nationality Decrees Issues in Tunis and Morocco* (Advisory Opinion) PCIJ Series B Rep No 4, 24

119 ibid

> international character and falls outside the scope of the exception contained in [Article 15(8) Covenant].[120]

In *Nicaragua the* ICJ approved of, and applied, the PCIJ's reasoning in *Nationality Decrees*, remarking that there 'is nothing to debar a State … from undertaking obligations towards other States in respect of matters which otherwise would be within its exclusive jurisdiction.'[121]

The PCIJ's reasoning in *Nationality Decrees* has been picked up and elaborated in academic discussion of domestic jurisdiction. Brierly considered the phrases 'domestic jurisdiction' and 'reserved domain' to be interchangeable and simply to refer to matters to which 'no rule of [international] law is applicable.'[122] According to Waldock:

> [t]he doctrine of the sovereignty of States … does not place any limit upon the subordination of States to the regulation of international law. In the *Wimbledon* and other cases the [PCIJ] is quite explicit that there are no spheres of activity in which a State's sovereign powers are imprescriptible and incapable of being brought within the control of international law by treaty or by custom.[123]

Waldock further notes that the concept of reserved domain:

> does not … establish in regard to defined categories of matters a fixed distribution of powers between international jurisdiction and the reserved jurisdiction of the individual State. … The boundary of the reserved domain of each State alters with every development of general international law. It also contracts or expands for each State according to the particular international obligations, and, especially treaty obligations, from time to time undertaken by that State.[124]

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120 ibid

121 *Nicaragua*, at [245]

122 Brierly (1925) 6 BYBIL 8, 11

123 Waldock (n 43) 173

124 ibid 179; Waldock (n 14) 140

From both the conceptual and doctrinal perspectives, according to Kelsen:

> there are no matters which, by their very nature, are reserved to regulation by national law and are not susceptible of regulation by international law. … International law may regulate all matters, even such as are normally regulated by national law only'.[125]

Importantly for the present discussion, Brownlie emphasises that 'in particular contexts, international law may place restrictions on the *"internal" territorial competence of states*'.[126] Likewise Nolte notes that the range of issues unregulated by international law, and therefore within the reserved domain of States' domestic jurisdiction, is steadily shrinking as international law extends into hitherto unregulated areas.[127]

2.4.2 *The content of the entitlement to prescribe*

The content of a State's entitlement to create laws within its jurisdictional competence is thus always determined by the existence or absence of applicable rules of international law.[128] Such regulation can concern the relations between States, or increasingly more commonly, constitute an 'inward-looking' obligation that 'demand[s] a state to take, or refrain from certain conduct within its domestic jurisdiction'.[129] Such inward-looking obligations in areas such as 'human rights, environmental protection, investment, and trade, or the secondary law of international organizations' form a large part of the recent substantive development of international

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125 Kelsen (n 34)191-192

126 Brownlie (n 14) 293 (my emphasis)

127 Nolte, in Simma & ors (eds) (2nd edn, OUP 2002) 171

128 See the PCIJ's reasoning in *Case of the Free Zones of Upper Savoy and the District of Gex* (Judgment) [1932] PCIJ Series A/B No 46, 96, 166

129 Tzanakopoulos and Tams (2013) 26(3) LJIL 531, 533 Cohen, *Globalization and Sovereignty* (CUP 2012) 160-162

law.[130] States' authority to create and apply laws domestically remains one of 'freedom-limited-by-voluntary-subtraction'[131]. The *content* of a State's ability to prescribe laws is defined residually by the international legal obligations it has assumed at any particular time.[132] Any question concerning a State's regulatory measures therefore always proceeds from a presumption of legality - a State may regulate for whatever purposes and in whatever manner it wishes, provided it does so consistently with the matrix of international legal obligations it has assumed ('regardless of [their] source')[133] and that are applicable in the given conditions.[134] These include the substantive protection standards afforded to foreign investors under CIL and IIAs.

When considering the content of prescriptive jurisdiction, we must therefore identify and interpret the customary and treaty-based rules that affect the residual ability to regulate in the context in question. The ICJ's judgment in *Anglo-Norwegian Fisheries* provides an illustrative example. In considering Norwegian laws fixing baselines for maritime delimitation, the ICJ looked to the existence and extent of applicable international law.[135] Finding that in regulating the fixing of baselines, existing international law was limited to 'certain principles'[136] providing for 'certain [general] criteria' to be considered when assessing the drawing of baselines,[137] the ICJ

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130 Tzanakopoulos and Tams (n 129) 533-534 The customary and treaty rules on indirect expropriation are such inward-looking obligations.

131 Allott (n 26) 312

132 Although outside the scope of the present investigation, arguably this rule constitutes a 'metarule' or 'core' or 'organizing principle' of a foundational or constitutional nature. see: D'Amato (2014) 108(4) AJIL 650, 651 Cohen (n 129)

133 Art 12, Articles on Responsibility of States for Wrongful Acts (2001) UN Doc A/56/10

134 Commentary to Article 12, UN Doc A/56/10, 54-55

135 *Anglo-Norwegian Fisheries*, 132

136 ibid

137 ibid 133

held that Norway's regulatory exercise did not breach any applicable rule of international law. In large part, the Court focused on the reactions of third States to the Norwegian laws. The absence of opposition to the measures was held to indicate the absence of a customary rule prohibiting straight baselines.[138]

Similarly, in *Nottebohm*, the ICJ held that although States were free as a matter of international law to determine the criteria for the granting of nationality, recognition of nationality by third States for the purposes of diplomatic protection was subject to certain general customary rules.[139] In *Barcelona Traction*, the ICJ held that international law did not regulate the creation of corporate entities, which were established 'in a domain essentially within [States'] domestic jurisdiction.'[140] As Judge Huber found in *Island of Palmas* 'the point of departure' for any question concerning regulatory exercise remains 'the exclusive competence of the State in regard to its own territory'.[141] The *content* of this competence will vary from case to case depending on the network of international legal rules applicable to a particular State's action. Even the granting of nationality has been subjected to international regulation.[142]

2.5 Categorising States' prescriptive jurisdiction

International law recognises a State's (otherwise factual) ability to regulate events and persons within a certain sphere of competence. In recognising and delimiting this

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138 ibid 137-139

139 *Nottebohm Case (second phase) (Liechtenstein v Guatemala)* (Judgment) [1955] ICJ Rep 4, 23-26

140 *Barcelona Traction*, at 33, 42

141 *Island of Palmas*, 8

142 see: Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (completed 29 May 2006, entered into force 1 May 2009) CETS 200

ability, international law elevates it to a *legal* entitlement.[143] Further, this entitlement stems from sovereignty: it inheres in a State's legal personality. States' entitlement takes the form of a plenary freedom to regulate within a sphere of competence, subject to any international legal obligations the State is subject to. The content of the entitlement is defined residually and is always context-dependant.

There is some support for the argument that this freedom exists because of a general 'permissive principle' in international law. According to the permissive principle attributed (*inter alios*) to the PCIJ in *Lotus,* anything that is not prohibited by a positive rule of international law is permitted.[144] The existence of and normative justification for the permissive principle as a closing rule has formed a central theme in debate,[145] and was the subject of marked disagreement between ICJ judges in both the *Nuclear Weapons* and *Kosovo* AOs.[146] It is a factual and legal reality that anything not prohibited is *legally available* to the subjects of the international legal order. Although we may lack an express, positive 'permissive principle',[147] the order operates primarily on the basis of consent and auto-limitation. It relies on a *de facto*

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143 Byers (n 54) 53

144 Said to derive from the logic of the Court's rejection of the requirement that Turkey prove the existence of a 'permissive rule' supporting its exercise of jurisdiction. see: *Lotus*, 18-20; Kelsen (n 34) 304-306; Fitzmaurice (n 86) 50. On 'closing rules' generally: Raz, *Authority* (OUP 1979) 61-62, 77

145 eg: Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 78-92, 95-97; Stone (1959) 35 BYBIL 124, 136; Kammerhofer (2009) 80 BYBIL 333, 337; Quane (n 15) 256

146 see: *Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 Declaration of President Bedjoui, 270-272 at [12] [15-16] and Judge Guillaume's apparent approval of *Lotus* in his Separate Opinion, 291 at [10]; and: *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, the ICJ's focus on finding a positive prohibition at 425, and Judge Simma's Declaration criticising this approach and strongly rejecting *Lotus* as authority for the permissive principle, at 478, 480-481.

147 Kammerhofer (n 145) 337

principle that what is not forbidden is permitted.[148]

Rather than seeing it as dependant on a pre-existent permissive principle however, it is preferable to consider States' prescriptive jurisdiction as a 'right'. States' entitlement is recognised in State practice, in the decisions of international courts and tribunals and in the writings of eminent publicists. It is recognised as such by the law-makers in the international order (States) and is conditional insofar as only certain subjects of the international legal order (entities that fulfil the criteria of Statehood) can exercise it. There are rules governing both the internal and external aspects of its exercise.

There are of course many ways we can conceive of rights. Although only one of many models, Hohfeld's much cited nomenclature is helpful in thinking about States' prescriptive jurisdiction. The core of Hohfeld's model is that rights can be considered to consist of four main elements: privileges, claims, powers and immunities.[149] A right is a *privilege* if its holder has no duty *not* to act;[150] it is a *claim* if its fulfilment requires a third-party to fulfil a duty owed to its holder;[151] it is a *power* if it permits the holder to create or change a claim or duty held by a third-party;[152] it is an *immunity* if it prevents a third party from creating or changing the holder's claim.[153] The most useful element of Hohfeld's model is that a single right can consist of *several* interlinking elements.

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148 Kelsen (n 34) 383

149 Hohfeld, in Cook (ed) (OUP 1919) 36 et seq

150 ibid 39-40

151 ibid 37-38, 70-72

152 ibid 50 et seq

153 ibid 60 et seq

States simultaneously have the (discretionary) privilege-right to prescribe laws in respect of persons and events within their sphere of competence and a corresponding claim-right that other States refrain from interfering with this privilege. The content of the right to prescribe can be viewed as a power-right as States have the ability to affect the claims and privileges (the 'legal relations')[154] of those subject to their jurisdiction. Prescriptive jurisdiction can also be viewed as an immunity-right as it cannot be affected by third States, but inheres in the legal personality of the State. States' prescriptive jurisdiction can be seen as a 'complex aggregate',[155] a molecular right made up of different aspects capable of being categorised in different ways.[156] It exhibits a different character depending on whether we consider its internal or external aspects, its intra-State or inter-State elements.

Ultimately though, it does not matter how we categorise States' entitlement to create and apply laws within their sphere of competence (either as a 'right' or the consequence of a 'permissive principle'). The result is the same: a States' prescriptive jurisdiction takes the form of a plenary freedom subject only to the limits placed upon it by conventional and customary international law. The structure of the entitlement generates a presumption in favour of the legality of a regulatory exercise within a State's assigned sphere of competence. This presumption will be displaced (only) to the extent that the regulatory measure breaches an assumed obligation.

Although typically discussed in relation to the external aspects of States' regulatory authority, the rules governing prescriptive jurisdiction regulate both the

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154 Cook, in Cook (ed) (OUP 1919) 7

155 ibid 14

156 See generally: 'Rights' (*Stanford Encyclopedia of Philosophy*, 2005) <http://plato.stanford.edu/entries/rights/> accessed 22 Feb 2015

internal and external aspects of States' entitlement to create and apply laws. States may legislate within their recognised sphere of competence (defined through connection to territory, persons, or events) for whatever purpose and in whatever manner provided they do so consistently with their obligations under conventional and customary international law.

CHAPTER 3:
THE 'POLICE POWERS DOCTRINE'

In this chapter I consider the 'police powers doctrine' as an approach to States' regulatory authority adopted in the context of investment protection. In Section 3.1 I define police powers and trace its origins. In Section 3.2 I consider the relationship between police powers and indirect expropriation. I identify the first of two models of police powers, the 'narrow' model in which police powers forms part of the customary definition of expropriation. In Section 3.3 I describe the second model of police powers endorsed in academic discussion, the 'broad' model of police powers as an 'autonomous' customary principle designating a State's 'right to regulate'.[157]

3.1 Defining police powers

Loughlin traces the historical and theoretical origins of the 'power of police' to attempts to rationalise the growth of government's administrative powers in the seventeenth- and eighteenth-centuries, when European public law theory saw a 'shift in focus from the rights of citizens to the functions of government'.[158] During this period questions concerning governments' role in promoting and regulating 'the general welfare'[159] became acute:

> *Polizei*, the power of police, was conceived [predominantly in public law theory in the German-speaking countries] as an all-encompassing power of regulation vested in the ruler for the purpose of promoting peace, order, and good government. This police power formed part of

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157 This view has been expressed, with varying degrees of conviction, in, eg: Viñuales (n 18) 329 et seq; Newcombe and Paradell (n 23) 357; Alvik (n 23) 260 et seq; Henckels (n 17) 225; Yannaca-Small (n 23) 448; Spears (n 23) 277

158 Loughlin (n 21) 407-408

159 ibid 408

> the prerogatives of the ruler […][160]

The concept was subsequently picked up in France and Britain.[161] In Britain, it entered the writings of Smith and Bentham, and is present in Blackstone's Commentaries:

> [t]he concept of police was […] widely recognised in eighteenth-century European jurisprudence and [acquired] an enhanced importance in the light of the growth in responsibilities of modern government. But its nature and scope remained ambiguous.[162]

From these origins, 'police powers' entered into US public law.[163]

It is generally accepted that police powers entered the discourse on States' ability to regulate foreign investors from US constitutional practice on public interference with private property.[164] How the US Supreme Court has defined police powers may therefore assist us to understand the concept. Discussing the concept in an early case concerning public interference with private property interests, Chief Justice Taney stated that the 'police powers':

> are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions […] whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercise the same power; that is to say, the power of sovereignty, the power to cover men and things within the limits of its dominion. It is by virtue

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160 ibid 422

161 ibid 423-425

162 ibid 425

163 ibid 426

164 see: Higgins (n 21) 330-331; Paparinskis (2011) (n 23) 313; Paparinskis (2013) (n 23) 223; Kurtz (n 23) 294; Subedi (n 23) 159; Viñuales (n 18) 326, 335-336; Perkams, in Schill (ed) (OUP 2010) 108-109, 122; Bonnitcha (n 8) 256; Sornarajah (n 23) 353-354; McLachlan & ors (n 23) 267, 287; Newcombe and Paradell (n 23) 357; López Escarcena (n 23) 188

of this authority that it legislates.[165]

It is important to note that when referring to 'States' and 'sovereignty', in the quote above the Court is considering the US federal States' powers, *not* the powers of States in international law. Around thirty years later, Chief Justice Waite considered that under its 'police powers', 'the government regulates the conduct of its citizens one towards another and the manner in which each shall use his own property when such regulation becomes necessary for the public good.'[166] These early cases have been significantly expanded upon and limitations and conditions on the exercise of police powers have been developed in the Court's subsequent jurisprudence.[167]

Epstein notes that 'the [US] Constitution itself does not contain the phrase', and '[t]he place of the police power in American constitutional law has always been difficult to determine'.[168] Epstein considers that the 'police power' can be seen as a residual implied authority involving 'those grants of power to the federal and state government that survive the explicit limitations found in the [written] Constitution': effectively a 'universal' qualification.[169] In Epstein's (libertarian) view, the Lockean social contract *requires* a residual power that *cannot be limited* because doing so

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165 *License Cases* (1847) 5 Howard 504, 583, extracted in: Burdick, *The law of the American Constitution* (GP Putnam's Sons 1922) 465

166 *Munn v Illinois* (1876) 94 US 113, in: Burdick (n 165) 466

167 *Lochner v New York* 198 US 45 (1905); *Muller v Oregon* 208 US 412 (1908); *Gitlow v People* 268 US 652 (1925); *Village of Euclid v Ambler Realty Co* 272 US 365 (1926); *Erznoznik v City of Jacksonville* 422 US 205 (1975); *Whalen v Roe* 429 US 589 (1977); *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982); *Nollan v California Coastal Commission* 458 US 419 (1987); *Lucas v South Carolina Coastal Council* 505 US 1003 (1992); *Maryland v Wilson* 519 US 408 (1997); *United States v Morrison* 529 US 598 (2000); *Palazzolo v Rhode Island* 533 US 606 (2001)

168 Epstein, *Takings* (HUP 1985) 107

169 ibid

would prevent the government from exercising its sole function - governing:[170]

> The central purpose of government is to maintain peace and order within the territory, so the prohibition against taking private property [contained in eg the Fifth Amendment] could not be read to prevent the government from discharging the very mission that justifies its existence.[171]

Any inquiry into whether a measure is justified by the 'police power' is thus an examination of the permissible aims, means and functions of government - whether a 'legitimate state interest' was pursued.[172] This is essentially a question of *justification*: '[t]he sovereign is demystified; at every stage he is required to justify his own assertion of power.'[173] Both Epstein and Loughlin consider that the ambiguity in defining the limits of the 'police power' arises because what is a 'legitimate' or 'justifiable' function of government depends entirely on socio-economic conditions and political conceptions of the public welfare.[174] These themes run throughout other notable writings on police powers in US public law.[175]

In international law, police powers entered into the debate concerning public interference with private property interests through a reference made by Higgins in her 1982 Hague Course:

> [US] case law has made it clear that [the Fifth Amendment's prohibition of taking] is not to be regarded as on all fours with a taking of property in pursuance of the so-called 'police power', i.e. for regulatory purposes. […] while it is acknowledged that property may be indirectly 'taken' through regulation, this does *not* attract the duty to

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170 ibid 108

171 ibid 14

172 ibid 108-110

173 ibid 13, 102

174 ibid 108 et seq; Loughlin (n 21) 426

175 L. (1923) 11(3) California LR; Sax (1964) 74 Yale LJ 36

> compensate. The position seems to be […] that a taking for public user requires just compensation to be paid; whereas an indirect taking for a regulatory purpose does not. The distinction seems to lie not between formal and indirect taking, but rather in the *purposes* of the taking.[176]

Higgins was writing before the growth of ISDS and referred to this practice in discussing the then-recently-constituted IUSCT and the 'extremely interesting questions concerning indirect takings of property, and State responsibility' it would have to consider.[177]

Two sources of authority are often cited in support of the view that police powers constitutes a customary international law principle relevant to interferences with foreign property:[178] the 1961 Harvard Draft Convention on the Responsibility of States for Injuries to the Economic Interests of Aliens[179] completed by Sohn and Baxter, and the American Law Institute's 1986 Third Restatement of the Foreign Relations Law of the United States completed by Henkin, Lowenfeld, Sohn and Vagts.[180]

According to Article 10 of the Harvard Draft:

> 1. The taking, under the authority of the State, of any property of an alien, or of the use thereof, is wrongful:
>
> (a) if it is not for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking, or
>
> (b) if it is in violation of a treaty.
>
> 2. The taking, under the authority of the State, of any property of an

176 Higgins (n 21) 330-331

177 ibid 328-329

178 Viñuales (n 18) 329

179 Sohn (1961) 55 Am J Int'l L 545

180 *Third Restatement* (ALI 1987)

> alien, or of the use thereof, for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if it is not accompanied by prompt payment of compensation […]
>
> 5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; *or is otherwise incidental to the normal operation of the laws of the State* shall *not* be considered wrongful, provided:
>
> (a) it is not a clear and discriminatory violation of the law of the State concerned;
>
> (b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention;
>
> (c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and
>
> (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

In their commentary to Article 10(5), Sohn and Baxter considered that absent such a qualification, 'a State would be denied the means of depriving an alien of property, without compensation, under circumstances *which are universally recognized* as properly calling for such action.'[181] In commentary, the authors also stressed that the phrase 'incidental to the normal operation of the laws of the State', was intended to cover judgments of national courts 'in a civil case or a fine or penalty in criminal proceedings'.[182] Interestingly, police powers is absent from both the draft article and commentary, except for the authors' explanation that 'sub-paragraph 5(d) requires the judicial, fiscal, and police powers of the State not be used to cloak an uncompensated

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181 Sohn (n 179) 561

182 ibid

seizure of an alien's property.'[183] The only other explicit reference to 'police power' is in the commentary to Article 9(2) on destruction of property by the State 'in the maintenance of public order, health, or morality'.[184]

According to Section 712 of the Third Restatement:

> A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of property of a national of another state that
>
> (a) is not for a public purpose, or
>
> (b) is discriminatory, or
>
> (c) is not accompanied by provision for just compensation; […]
>
> (2) a repudiation or breach by the state of a contract with a national of another state […]
>
> (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.[185]

In commentary to Section 712 entitled 'expropriation or regulation' the drafters considered that:

> [§712(1)] applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions […] that have the effect of "taking" the property, in whole or in large part […]. A state is responsible for an expropriation […] 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 or its removal from the state's territory. […] A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, *or other action of the kind*

183 ibid 562

184 ibid 551-552

185 ALI (n 180) 196-197

> *that is commonly accepted as within the police power of states*, if it is not discriminatory […] and is not designed to cause the alien to abandon the property to the state or sell it at a distress price. As under United States constitutional law, the line between 'taking' and 'regulation' is sometimes uncertain.[186]

This brief mention of 'the police power of states' has been influential in both arbitral practice and academic writings. I discuss the weight to be given to the Harvard Draft and Restatement in Chapter 5 when I consider whether police powers has been 'internationalized'[187] into CIL.

3.2 Indirect expropriation and police powers

It is outside the remit of the present study to attempt an authoritative overview of the customary and conventional law on indirect expropriation. Because police powers has been most frequently considered in relation to indirect expropriation, in this section I attempt to provide enough of a picture to make it possible to assess arbitral practice and academic discussion on police powers.

3.2.1 *Defining indirect expropriation*

As a matter of customary international law, '[c]onsistent with the notion of territorial sovereignty, the classical rules of international law have accepted the host state's right to expropriate alien property *in principle*.'[188] As an ancillary of territorial sovereignty, and tied up with permanent sovereignty over natural resources and political and economic independence of States, expropriation - the taking of or assignment by the State to a third party of private interests in property - is *per se* lawful, but has been subjected to certain conditions under customary and conventional international law,

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186 ibid 200-201 (my emphasis)

187 Paparinskis (2011) (n 23) 313

188 Dolzer and Schreuer, *Principles* (2nd edn, OUP 2012) 98 (my emphasis)

including the duty to pay compensation.[189]

However, legality, in principle, of expropriation remains unchanged even if a State becomes party to an IIA. As Dolzer and Schreuer contend, '[t]reaty law typically addresses only the conditions and consequences of an expropriation, leaving the right to expropriate as such unaffected'.[190] Schill similarly considers that:

> In general, both direct and indirect expropriations are lawful under international investment treaties […] if they fulfill a public purpose, are implemented in a non-discriminatory manner, and observe due process of law. […] Finally, and most importantly, both direct and indirect expropriations require compensation.[191]

In finding that property had been 'taken' or 'expropriated' where no formal transfer of title had occurred, the PCIJ's decision in *Chorzów Factory*[192] and the tribunal's award in *Norwegian Shipowners*[193] are widely considered to support the view that customary international law generates a duty to pay compensation for 'indirect' expropriation.[194] The PCIJ's discussion in *Oscar Chinn* also seems to support the idea that general regulatory measures can in principle amount to a taking of property.[195] 'Indirect expropriation' therefore describes situations where 'an investor's legal title is not extinguished but the actions of a state are, in legally significant respects, analogous to direct expropriation.'[196] Importantly for present purposes, and whether or not it was

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189 Brownlie (n 14) 533-534

190 Dolzer and Schreuer (n 188) 98

191 Schill, *Multilateralization* (CUP 2009) 83

192 *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v Poland)* (Merits) [1928] PCIJ Series A, No 17

193 *Norwegian Shipowners' Claim (Norway v United States of America)* [Award of the Tribunal] (13 October 1922) PCA

194 see: Higgins (n 21) 322-323; Dolzer and Schreuer (n 188) 101-102

195 *The Oscar Chinn Case* [1934] PCIJ Series A/B, No 63, 86, 88

196 Bonnitcha (n 8) 230

always the case as a matter of customary international law,[197] it is now generally accepted in arbitral practice and academic writings[198] that indirect expropriation can occur through States' exercise of regulatory powers.

However, as Higgins noted in her 1982 Hague Course, when considering indirect expropriation:

> there is an additional major problem: what acts of the state *are* 'takings' of property? […] In other words, what sort of governmental interferences with privately held property amount to a 'taking' under international law?[199]

Despite over thirty years of considering this question, as numerous writers have noted,[200] and the sheer number of approaches to the issue in arbitral practice attests, international lawyers continue to struggle with this question. Despite arguably having had the opportunity to do so in *Barcelona Traction*, *ELSI*,[201] and *Diallo*,[202] the ICJ has not yet provided guidance on these issues. We must consider police powers within this context of definitional uncertainty.

3.2.2 *Indirect expropriation in treaties in force*

IIAs in force employ a variety of terms in regulating what may be considered 'indirect expropriation'. For example Article 3(1) of the 1993 US-Ecuador BIT requires that

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197 see: Sornarajah (n 23) 89, 90-93; Miles (n 17) 75, 85-90, 100

198 see: Lowe (n 5) 452; Fortier and Drymer (2004) 19(2) ICSID Review 293, 293-295; Paparinskis (2011) (n 23) 311-313; Subedi (n 23) 157; Dolzer and Schreuer (n 188) 120-121

199 Higgins (n 21) 322

200 see: Brownlie (n 14) 532; Dolzer and Schreuer (n 188) 101; Kingsbury and Schill, in Schill (ed) (OUP 2010) 90; Perkams (n 164) 108; Schill, in Schill (ed) (OUP 2010) 336; Miles (n 17) 156; Bonnitcha (n 8) 230

201 *Case Concerning Elettronica Sicula SpA (US v Italy)* (Judgment) [1989] ICJ Rep 15

202 *Case Concerning Ahmadou Sadio Diallo (Guinea v DRC)* (Judgment) [2010] ICJ Rep 639

investments 'shall not be expropriated or nationalized either directly or indirectly through measures *tantamount* to expropriation or nationalization' except for a public purpose, in a non-discriminatory manner, in accordance with due process and against compensation.[203] Article 7(1) of the 1996 Canada-Venezuela BIT concerns 'measures having an effect *equivalent* to nationalization or expropriation'.[204] Article 5(1) of the 2001 Finland-Ecuador BIT imposes limits on measures 'having the *same* effect' as expropriation. Article 4(1) of the 1992 China-Argentina BIT concerns measures 'having *similar* effect' to nationalization or expropriation. Article 4(1) of the 2008 Colombia-China BIT requires that: '[n]either Contracting Party shall expropriate, directly or indirectly, nationalize *or take other similar measures*'. [205] At the multilateral level, Article 1110 NAFTA requires that parties may not 'directly or indirectly nationalize or expropriate and investment … or take a measure *tantamount* to nationalization or expropriation'. Article 13(1) ECT applies to measures 'having *equivalent effect* to nationalization or expropriation'.

3.2.3 *Inductive approaches to indirect expropriation*

In addition to the variations of language used in addressing indirect expropriation in IIAs, tribunals assessing claims of indirect expropriation have adopted a variety of approaches in distinguishing between indirect expropriation and 'non-compensable' regulation. Most writers attempt to distil this varied practice to isolate the elements of indirect expropriation through an 'inductive'[206] process. These authors[207] focus on

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203 Art 3(1) 1993 US-Ecuador BIT; see also: Article 4(2) 2003 China-Germany BIT; Ad Art 3 1979 Germany-Romania BIT

204 The same language is used in, eg: Art 5(1) 1995 India-Netherlands BIT; Art 6(1) 1992 Australia-Indonesia BIT.

205 Though importantly Art 4(2) goes on to define indirect expropriation, largely adopting the approach of the 2004 US Model BIT.

206 Bonnitcha (n 8) 230

understanding how tribunals have distinguished between lawful regulation and unlawful interference with private property amounting to indirect expropriation.[208] Such approaches centre on the development of taxonomical categories into which different strands of arbitral practice can be sorted. Although different writers use different taxonomies in assessing these elements and emphases, three types of approach are commonly identified: effects-oriented approaches; balancing or proportionality approaches; and purpose-oriented approaches.[209]

Within the first approach, tribunals focus exclusively or primarily on the effect of the measure on the investment, excluding assessing the measure's purpose. Within the second approach, tribunals accept the measure's purpose as relevant to a broader balancing test, and/or assess the proportionality of the measure's effects vis-à-vis its purported purpose.[210] Within the third approach, tribunals consider that certain regulatory purposes preclude a finding of expropriation, regardless of the measure's effect.[211] As I demonstrate below, tribunals have employed the language of 'police powers' both in awards that can be seen to fall within the balancing/proportionality and the purpose-oriented approaches to indirect expropriation.

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207 eg: Lowe (n 5); McLachlan & ors (n 23) 265 et seq; Bonnitcha (n 8); Newcombe and Paradell (n 23) 340-341; Yannaca-Small (n 23); López Escarcena (n 23); Perkams (n 164); Fortier and Drymer (n 198); Dolzer and Schreuer (n 188) 98 et seq; Paulsson and Douglas, in Horn and Kröll (eds) (Kluwer 2004)

208 see: Lowe (n 5) 457

209 see: Perkams (n 164) 110

210 See eg: *Robert Azinian & ors v Mexico* [Award] (1 November 1999) ICSID Case No ARB(AF)/97/2; *Generation Ukraine Inc v Ukraine* [Award] (16 September 2003) ICSID Case No ARB/00/9

211 Awards adopting this approach include: *Starrett Housing v Iran* [Award] (14 August 1987) (1988) 16 IUSCTR 112; *Santa Elena v Costa Rica* [Final Award] (17 February 2000) ICSID Case No ARB/96/1; *RFCC v Morocco* [Award] (22 December 2003) ICSID Case No ARB/00/6; *CMS Gas Transmission Company v Argentina* [Award] (12 May 2005) ICSID Case No ARB/01/8; *Telenor Mobile Communications v Hungary* [Award] (13 September 2006) ICSID Case No ARB/04/15

3.2.4 *Police powers as a carve-out or claw-back*

The 2012 UNCTAD Expropriation Report provides a helpful starting point in our assessment of the relationship between indirect expropriation and police powers:

> According to the doctrine of police powers, certain acts of States are not subject to compensation under the international law of expropriation. Although there is no universally accepted definition […] this doctrine covers State acts such as (a) forfeiture or a fine to punish or suppress crime; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights; and (d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war.[212]

The majority view of those commentators endorsing the police powers approach to distinguishing between indirect expropriation and 'non-compensable regulation' considers that police powers constitutes part of the customary definition of indirect expropriation. Within this 'narrow' model, police powers operates as a carve-out or claw-back, shielding regulatory measures enacted to fulfil a public purpose from generating a duty to pay compensation where a measure has deleterious effects on a covered investment:

> The police powers doctrine recognizes host states' right to regulate or take other measures significantly affecting foreign investors' property interests *without a finding of expropriation* where such measures fall within the ambit of the state's general regulatory or administrative powers, pursue a legitimate purpose, are aimed at the general welfare, and are non-discriminatory.[213]

Here police powers is part of the CIL definition of expropriation, based on State practice and *opinio juris* concerning the distinction between compensable and non-

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[212] UNCTAD, 'Expropriation' UNCTAD Series on Issues in International Investment Agreements II (2012) 79

[213] Mitchell and Henckels (2013) 14 Chi J Int'l L 93, 123 (my emphasis)

compensable measures.[214] If we accept that there is settled practice regarding when a measure will be compensable (or at least what factors are relevant to such an assessment), the essential question becomes the extent to which the terms of a particular IIA's expropriation provision can accommodate reference to CIL. Whether a measure is within a State's police powers will determine if it amounts to indirect expropriation, or is 'tantamount to' or has 'equivalent effect' to expropriation or nationalisation. In this narrow model, even though it may express a State's sovereign authority to regulate, police powers is applicable only in relation to a single protection standard.

3.3 Police powers as an autonomous customary principle

In addition to this 'narrow' model of police powers, several writers have endorsed a 'broad' model: the view that police powers forms an autonomous principle of customary international law recognising a State's 'right to regulate'[215]. Although present in a number of writings, Viñuales provides the most detailed endorsement of this broad model:[216]

> As a legal concept, the police powers doctrine is […] a norm of customary international law, which operates distinctly and autonomously from treaty or contract law. It is a concept of general application, which means that it does not depend on the type of investment discipline or the type of interference with property. The confusion in this regard comes from the fact that, historically, the two main investment disciplines recognized by general international law (and thereby those with which police powers interacted) were

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214 Different accounts are given of *when* 'police powers' is said to have developed as part of the CIL definition of indirect expropriation. See: López Escarcena (n 23) 188-189

215 This view has been expressed, with varying degrees of conviction, in, eg: Viñuales (2010) (n 23) 309-310; Viñuales (2012) (n 23) 367-369; Viñuales (n 18) 329 et seq; Newcombe and Paradell (n 23) 357; Alvik (n 23) 260 et seq; Henckels (n 17) 225; Yannaca-Small (n 23) 448; Spears (n 23) 277

216 Viñuales (n 18)

expropriation and denial of justice. […]

According to Viñuales,'the idea that states have the inherent legal authority to regulate, even if that harms the economic interests of aliens, has ever since [Vattel] been increasingly elaborated and applied in international jurisprudence.'[217] Viñuales further asserts that following its 'codification', in *inter alia* the Harvard Draft and Third Restatement, police powers exists both as a matter of North American public law practice and under 'general international law'.[218] He considers that '[t]he international recognition of the doctrine of police powers, or in other words, the international source of this doctrine, is a result of a generalisation of municipal practice [regarding government interference with private property interests].'[219] Viñuales argues that 'arbitral practice is unanimous' that 'police powers doctrine exists as a matter of customary international law.'[220] Relying on Article 31(3)(c) VCLT, Viñuales contends that a given treaty under consideration does not have to recognise the principle for it 'to deploy legal effects in an investment dispute'[221] but that '[a]s […] a norm of customary international law, [it] operates distinctly and autonomously from treaty or contract law.'[222]

According to Viñuales, '[t]he police powers doctrine is not an exception but the legal expression of the rule of state sovereignty'[223], nor 'a component of an investment discipline', but rather 'a customary autonomous concept expressing the

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217 ibid 327

218 Viñuales (2012) (n 23) 367, 368-369

219 ibid 369

220 Viñuales (n 18) 329

221 ibid

222 ibid 344

223 ibid 343

inherent right and duty of states to regulate'.[224] Police powers gives rise to 'a presumption of regularity'

Similarly, Henckels argues that '[c]ustomary international law recognizes host states' right to regulate or take other measures significantly affecting foreign investors' property interests without a finding of compensable expropriation in certain circumstances (the police powers doctrine).'[225] Alvik takes his argument further: '[p]olice powers denotes […] the right and duty of the state under international as well as municipal law to protect and manage the public interests through the exercise of regulatory (and executive) authority.'[226] Importantly, and unlike in the 'narrow' model, police powers derives from and expresses State sovereignty, and therefore is not limited to expropriation claims, but applies to all claims under IIAs:[227] 'police powers, conceived as a right to regulate and envisaged as an inherent capacity of the state function, necessarily inserts itself into any relevant standard of investment protection.'[228] Alvik takes this argument further, and suggests that police powers is also applicable in the context of States' contractual undertakings with private parties.[229] Schill, finding support for his position 'in the major domestic legal systems',[230] argues that the 'police powers doctrine' applies equally to investor-state contracts covered by umbrella clauses. According to Schill, police powers is a 'general principle of public law' that can be 'read in':

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224 ibid 332

225 Henckels (n 17) 225

226 Alvik (n 23) 262

227 Viñuales (n 18) 319-320, 328

228 Alvik (n 23) 264

229 ibid 268-269

230 France, England, Australia, New Zealand, Canada and the US: Schill (2010) (n 200) 339-340

> because of the host state's duty to act in the public interest, a duty that has always been recognized under customary international law and domestic legal systems as a general principle of law and that arguably has not been superseded by the inclusion of seemingly unrestricted umbrella clauses in investment treaties.[231]

From the above, it is possible to draw out a definition of police powers that can be expressed in four parts, common to both the narrow and broad models: (i) the State has a 'right' to regulate in the public interest; (ii) this right is recognised (in whatever manner) in customary international law; (iii) in exercising this right the State may interfere with private property interests; and (iv) at least in some circumstances, the State will not have to compensate the interest-holder for a 'valid'[232] or 'legitimate'[233] exercise of this right.

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231 ibid 336 (my emphasis)

232 *Saluka v Czech Republic* [Partial Award] (17 March 2006) UNCITRAL [263-264];

233 see: *Suez and Vivendi v Argentina* [Decision on Liability] (30 July 2010) ICSID Case No ARB/03/19 [139]; *Renée Rose Levy de Levi v Republic of Peru* [Award] (26 February 2014) ICSID Case No ARB/10/17 [476]

CHAPTER 4:
POLICE POWERS IN ARBITRAL PRACTICE

Police powers clearly has its origins in domestic public law and legal theory. Above, I tracked how the concept has migrated from US domestic public law into the international legal discourse on State interference with the private property of foreign nationals. In this chapter, I describe how police powers has featured in arbitral practice and consider whether it is indeed 'unanimous'.[234]

Although certain 'new generation' BITs contain public interest regulation clauses or clauses elaborating what is meant by indirect expropriation,[235] the phrase 'police powers' does not feature in any publicly available IIAs. Although the concept has been employed by a number of investment tribunals it is difficult to determine unequivocally what is meant by 'police powers'. As Paparinskis notes, the concept appears 'classically ambiguous'.[236] This ambiguity derives largely from tribunals and commentators using the phrase in a number of ways and with different effect.

The awards referring to police powers can be organised into three groups. In the first (and largest) group, either a party (or the tribunal) employed the phrase 'police powers', without this being picked up or elaborated upon in the tribunal's reasoning. In the second group, the characterisation of a measure as within police powers precludes a finding of indirect expropriation.[237] In the third group, tribunals have treated a State's 'police powers' as one factor to be considered *amongst others* in assessing whether a measure amounts to indirect expropriation, generally as part of a

234 Viñuales (n 18) 329

235 See s.3.2 above.

236 Paparinskis (2013) (n 23) 222

237 Though it is not always clear how, this is generally framed as either part of the customary definition of expropriation, or as a customary exception.

broader balancing or proportionality approach. For the sake of clarity, it is important that I stress that these categories are independent of (and do not correspond to) the 'broad' and 'narrow' models of police powers discussed in Chapter 3.

There are a number of widely cited awards that discuss States' regulatory authority and its relationship with the obligations assumed under IIAs without employing the language of 'police powers'.[238] In this chapter (with a few exceptions) I consider only the awards that *explicitly* refer to 'police powers'.

4.1 Awards in which the tribunal did not engage with police powers

In a significant number of awards, parties refer to 'police powers' in their arguments without the tribunal employing the phrase in its reasoning or engaging with parties' arguments. Such awards are not immaterial as potential evidence of state practice and *opinio juris* in assessing whether police powers constitutes a customary principle. However, tribunals' lack of engagement makes them of little use in pinning down a legal definition of police powers. In the majority of these awards, 'police powers' was used by the respondent in its arguments on indirect expropriation. However, tribunals did not directly engage with the respondents' arguments, generally because it was held that the impugned measures were not expropriatory in effect.[239]

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238 *SD Myers v Canada* [Partial Award] (13 November 2000) UNCITRAL, esp [280]-[282]

239 As of 15 May 2015, fifteen such awards are publicly available in English: *Lauder v Czech Republic* [Award] (3 September 2001) UNCITRAL [201]-[202]; *William Nagel v Czech Republic* [Award] (9 September 2003) SCC Case No. 049/2002 [211] [334]-[335]; *Telenor Mobile Communications AS v Hungary* [Award] (13 September 2006) ICSID Case No. ARB/04/15, citing *Tecmed* at [65]; *Sempra Energy International v Argentina* [Award] (28 May 2007) ICSID Case No. ARB/02/16 [277] [283]-[285]; *Enron v Argentina* [Award] (22 May 2007) ICSID Case No. ARB/01/3 [219] [239] [246]-[250]; *Invesmart BV v Czech Republic* [Award] (26 June 2009) UNCITRAL [479]-[480] [494]-[495]; *EDF (Services) Ltd v Romania* [Award] (8 October 2009) ICSID Case No. ARB/05/13 [180] [292]-[294]. [308] [311] [313]; *RosInvestCo UK Ltd v Russia* [Award] (12 September 2010) SCC Case No.

The NAFTA award in *Feldman v Mexico*[240] is one such award that requires special mention because it is frequently cited in awards employing the phrase 'police powers'. *Feldman* concerned review under Article 1110 NAFTA of the Mexican authorities' refusal to grant the claimant certain tax rebates on '"gray market" exports of cigarettes'.[241] In its assessment of the authorities' application of the relevant regulatory regime, the tribunal considered that '[d]rawing the line between expropriation and regulation has proved difficult both in the pre-NAFTA context and for the handful of Chapter 11 tribunals that have considered the issue.'[242] The tribunal considered that regulatory measures, including general taxation, could fall within the scope of measures 'tantamount' to expropriation under Article 1110 NAFTA.[243] The tribunal then drew heavily on the Third Restatement, and quoted the Restatement's commentary to Section 712 employing the language of 'police powers'.[244] Although the tribunal cited the Restatement favourably and considered it to reflect customary international law,[245] it did not itself employ the language of 'police powers', but rather held that the claimant had 'at no relevant time [been] afforded […] a "right" to export cigarettes'.[246] The tribunal focused primarily on the effect of the measures on the

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V079/2005 [4] [10] [456] [558]; *Ron Fuchs v Georgia* [Award] (3 March 2010) ICSID Case No. ARB/07/15 [387]; *InterTrade Holding GmbH v Czech Republic* [Award] (29 May 2012) UNCITRAL, PCA Case No. 2009-12 [253] [277]; *EDFI et al v Argentina* [Award] (11 June 2012) ICSID Case No. ARB/03/23 [428] [1113]-[1117]; *CE Projektmanagement v Czech Republic* [Award] (19 September 2013) UNCITRAL, PCA Case No. 2010-5 [4.363]-[4.364] [4.538] [4.814]-[4.816]; *Anatolie Stati & ors v Kazakhstan* [Award] (19 December 2013) SCC Arbitration V (116/2010) [1163] [1203]-[1206]; *Mr Franck Charles Arif v Moldova* [Award] (8 April 2013) ICSID Case No. ARB/11/23 [227] [274] [307] [417]-[418] [420]; *Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania* [Award] (30 March 2015) ICSID Case No. ARB/11/24 [527]-[529] [573] [577] [580]

240 *Marvin Feldman v Mexico* [Award] (16 December 2002) ICSID Case No ARB(AF)/99/1

241 ibid [111]

242 ibid [104]

243 ibid [100]-[101]

244 ibid [105]-[106]

245 ibid [103]

246 ibid [111]

investment in finding that no expropriation had occurred.[247]

In a handful of disputes parties or the tribunal have referred to 'police powers' outside the context of indirect expropriation. In *Siemens*, in arguing that the claim was contractual rather than treaty-based, Argentina contented that 'at no time […] it took measures that could be regarded as an exercise of its police powers as a State'.[248] The tribunal adopted the language of police powers in its analysis on acts of state, in differentiating between 'acts *iure imperiii* and *iure gestionis*',[249] concluding that 'Argentina acted in use of its police powers rather than as a contracting party'.[250] Likewise, in *National Grid*, Argentina invoked the concept of police powers and cited the Harvard Draft and *Saluka* award in its arguments on necessity.[251] The tribunal did not engage with the argument on police powers in finding that Argentina had contributed to the state of emergency.[252] In *Continental Casualty*, Argentina again used the phrase in its arguments concerning an essential security clause.[253] In *Renta 4 v Russia*, Russia invoked the concept of police powers in its preliminary objections.[254] In *Roussalis v Romania*[255] and *Deutsche Bank v Sri Lanka*[256] the respondents used the language of police powers in their arguments on FET. Similarly, in *Unglaube v Costa Rica*, the tribunal used the language of police powers when discussing FET, but did so

247 ibid [111]-[134]

248 *Siemens AG v Argentina* [Award] (17 January 2007) ICSID Case No. ARB/02/8 [246]

249 ibid [247]

250 ibid [260]

251 *National Grid plc v Argentina* [Award] (3 November 2008) UNCITRAL [140]

252 ibid [148] [154]

253 *Continental Casualty v Argentina* [Award] (5 September 2008) ICSID Case No. ARB/03/9 [85]

254 *Renta 4* [63]

255 *Spyridon Roussalis v Romania* [Award] (11 December 2011) ICSID Case No. ARB/06/1 [662]-[664]; [718]-[719]

256 *Deutsche Bank AG v Sri Lanka* [Award] (21 October 2012) ICSID Case No. ARB/09/2 [416]

in an adjectival fashion without engaging with the concept in legal terms.[257] As with the above awards, none of the tribunals in these awards engaged with the legal meaning or consequences of police powers.

4.2 The preclusion approach

Of the awards available in English in which the tribunal employs the language of 'police powers', six awards treat a finding that a regulatory measure is within a State's 'police powers' as *precluding* a finding of indirect expropriation and a duty to compensate.[258]

Many of the awards in the preclusion group can be traced back to a statement made in passing by the IUSCT in an 1985 award in *Sedco v NIOC*. In *Sedco* the tribunal remarked that:

> [i]t is an established principle of international law that an act of expropriation does not require a formal decree of nationalization. […] It is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide "regulation" within the accepted police power of states.'[259]

In support of this latter 'principle', the tribunal relied upon the then-draft Third Restatement, the award of the Upper Silesian Arbitral Tribunal in *Kügele v Polish State*,[260] and a 1975 article by Burns Weston.[261] *Sedco* was largely concerned with fixing the date of expropriation in circumstances in which title to the claimant's

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257 *Marion Unglaube v Costa Rica* [Award] (16 May 2012) ICSID Case No. ARB/08/1 [245]-[247]

258 Bonnitcha, employing a different taxonomy to my own, and focuses more generally on indirect expropriation, describes many of the awards discussed below as part of an 'exceptions' approach to indirect expropriation. See: Bonnitcha (n 8) 247-260

259 *Sedco*, 274-275

260 *Kügele v Polish State* [Award, 5 Feb 1932] (1945) 6 ILR 69

261 Weston (1975) 16 Va J Int'l L 103

property, in this case shares, had in fact been transferred. The issue was whether in light of the later outright taking the earlier appointment of temporary managers could be seen as expropriation. The above reference to the 'police power' was the only time the tribunal used the phrase.

The IUSCT's award in *Too v Greater Modesto Insurance*[262] is also sometimes cited in awards adopting a preclusion approach to police powers[263]. In *Too*, the claimant alleged that the US Internal Revenue Service had 'wrongfully expropriated his liquor license, his home in Modesto, California, and a New York bank account.'[264] The tribunal noted that 'the Respondent has conceded that the IRS did, in fact, seize the Claimant's California general eating place liquor license in order to satisfy over U.S. $70,000 worth of overdue withholding taxes.'[265] The tribunal held however that:

> a State is not responsible for loss of property or for any other action that *is commonly accepted as within the police power of States*, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.[266]

As in *Sedco*, the *Too* tribunal cited the Third Restatement and *Kügele* as authority. It also cited a 1903 arbitration between Germany and Venezuela, *Brewer, Moller & Co*, as authority that non-discriminatory taxation was non-compensable.[267] The tribunal, in finding no expropriation held that

> [t]he IRS's action was as a result of the Claimant's failure to pay taxes

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262 *Emanuel Too v Greater Modesto Insurance Associates and the United States of America* [Award, 29 Dec 1989] (1991) 23 IUSCTR 378

263 *Saluka* [262]

264 *Too*, 387 [24]

265 ibid, 387 [26]

266 ibid, 387 [26] (my emphasis)

267 (1960) 10 Rep. Int'l Arb 423

> withheld by him on his employees' salaries. Nowhere does the Claimant suggest that this tax levy was imposed against him because he was an Iranian national. Nor has the Claimant proved that the IRS deliberately intended to cause him to abandon the property to the State or to see it as a distress price.[268]

Above, I indicated that this chapter would focus on those awards that explicitly used the phrase 'police powers'. There is one award however that deserves discussion that does *not* use the phrase: *Methanex Corp v USA*.[269] The award in *Methanex* concerns a claim against the Californian State government's 'ban on the sale and use of the gasoline additive known as "MTBE"' by Methanex Corporation, 'the world's largest producer of methanol, a feedstock for MTBE'[270] for alleged breach (inter alia) of NAFTA Article 1110(1) on the basis that the ban was 'tantamount to expropriation'.[271] One paragraph of the award has been frequently cited by subsequent awards in the context of police powers:[272]

> Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. *But as a matter of general international law, 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 the then putative foreign investor contemplating investment that the government would refrain from such regulation.[273]

The tribunal went on to conclude that the impugned regulation 'was made for a public purpose, was non-discriminatory and was accomplished with due process' and was

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268 *Too*, 387-388 [27]

269 *Methanex Corporation v USA* [Final Award of the Tribunal on Jurisdiction and Merits] (3 August 2005) UNCITRAL

270 ibid, Part I [1]

271 ibid, Part II [28]

272 see: *Saluka [*262]; *Suez and Vivendi v Argentina* [Decision on Liability] (30 July 2010) ICSID Case No ARB/03/19 [139]; *Renée Rose Levy de Levi v Republic of Peru* [Award] (26 February 2014) ICSID Case No ARB/10/17 [270]

273 *Methanex,* Part IV [7] (my emphasis)

therefore 'a lawful regulation and not an expropriation' under Article 1110(1).[274] Despite the lack of reference to 'police powers', the factors deemed to separate 'lawful regulation' from 'expropriation' in *Methanex* have largely been taken up in subsequent awards that adopt a preclusion approach. What is unclear in the *Methanex* award is whether the tribunal is referring to a stand-alone principle such as police powers, or whether it is stating that the general international law definition of (indirect) expropriation excludes non-discriminatory, public purpose regulation enacted under due process.

The clearest example of the preclusion approach to date is in the UNCITRAL tribunal's 2006 award in *Saluka v Czech Republic.*[275] Article 5 of the 1991 Netherlands-Czech Republic BIT required that neither party 'take any measures depriving, directly or indirectly investors […] of their investments' unless: 'measures [we]re taken in the public interest and under due process of law';[276] 'measures [we]re not discriminatory';[277] and 'just compensation' was provided.[278] The tribunal recognised that Article 5 was 'drafted very broadly' and 'd[id] not contain any exception for the exercise of regulatory power.'[279] Importantly however, the tribunal held that by using 'the concept of deprivation, Article 5 import[ed] into the Treaty *the customary international law notion* that a deprivation *can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order*.'[280] In support of this position, the tribunal quoted Article 31(3)(c) VCLT that in interpreting

274 ibid, Part IV [15].

275 *Saluka [*254]

276 Article 5(a) 1991 Netherlands-Czech Republic BIT

277 Article 5(b) 1991 Netherlands-Czech Republic BIT

278 Article 5(c) 1991 Netherlands-Czech Republic BIT

279 *Saluka* [254]

280 ibid [254] (my emphasis)

a treaty a tribunal must take account of 'any relevant rules of international law applicable between the parties' and cited the ICJ in *Oil Platforms* as authority that this 'includes relevant rules of general customary international law.'[281]

Having thus established the relevance of the customary international law definition of 'deprivation', the tribunal declared that:

> [i]t is now established in international 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.[282]

The tribunal elaborated that 'the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" *forms part of customary international law today.*'[283] In forming this view of police powers as customary international law, the tribunal placed heavy emphasis on the Harvard Draft (relied upon by the Czech Republic)[284] 'an accompanying note to the 1967 OECD Draft Convention'[285] and the Third Restatement.[286] The tribunal considered that 'there [was] ample case law in support of this proposition' and supplied the final award in *Methanex* as authority.[287]

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281 ibid [254] citing: *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment, 6 November 2003) ICJ Rep 161, 182 at [41]

282 ibid [255]

283 ibid [262]

284 ibid [256]

285 ibid [259]

286 ibid [260]

287 ibid [262]. The Czech Republic does not appear to have employed the phrase 'police power' but instead used the term 'permissible regulatory actions' [250]. The tribunal appears to have introduced the phrase, at [258] - [262]. Interestingly, the tribunal quotes the final award of 3 August 2005 in *Methanex*, citing the 44 ILM 1343, at a paragraph 410. However, the publicly

Perhaps most striking, and a factor that separates the award somewhat from subsequent decisions, is the tribunal's unequivocal finding that there was 'no doubt […] that Saluka ha[d] been deprived of its investment in IPB as a result of the imposition of the forced administration of the bank'.[288] Therefore, the finding that a measure was within police powers in itself precluded a finding of expropriation, whatever the measure's effect. Though the above gives the picture of a high degree of certainty in the tribunal's reasoning, the award did note that:

> international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered 'permissible' and 'commonly accepted' as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law. […] It thus falls inevitably to the *adjudicator* to determine whether particular conduct by a state "crosses the line" that separates valid regulatory activity from expropriation […] international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.[289]

The tribunal did not provide any explicit guidance on when a measure will be within a State's police powers, as it considered that the impugned measures could 'be justified as permissible regulatory actions'.[290] In forming this view however, the tribunal considered: the Czech authority's 'margin of discretion';[291] that the authority relied on

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available version of the award which was extracted in the ILM cited, contains no reference to 'police power', nor a paragraph 410. The quote attributed to *Methanex* does not appear in the award. We can only assume that another award was intended to be referenced, and the erroneous citation survived the drafting process.

288 ibid [267]

289 ibid [263]-[264]

290 ibid [265]

291 ibid [272]

facts 'it was very reasonable for it to consider';[292] that the authority 'applied the pertinent Czech legislation to those facts' in a 'reasonable' manner;[293] and that there was no evidence of error or impropriety.[294]

The reasoning of the *Methanex* and *Saluka* tribunals was cited approvingly by the tribunal in the 2010 *Suez and Vivendi* award:

> [a]s numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interest of public welfare and not to confuse measures of that nature with expropriation. … In the context of investment disputes, the doctrine of police powers has been referred to, for instance, in *Methanex v United States* and *Saluka v the Czech Republic*. In this latter decision, the tribunal noted that 'the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossess alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary law today.[295]'

As in *Sedco*, *Too* and *Saluka*, the tribunal in *Suez and Vivendi* relied on the Third Restatement as authority for police powers as part of customary international law.[296] However, although the tribunal in *Suez and Vivendi* endorsed the preclusion approach to police powers as applied in *Saluka*, it also found that the impugned measures were not expropriatory in effect as 'they did not constitute a permanent and substantial deprivation of the Claimants' investments.'[297] This notwithstanding, the tribunal considered that the measures 'were within the general police powers of the Argentine State'[298]. In dismissing the expropriation claim, the tribunal appears to do so *both*

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292 ibid [272]

293 ibid [272]

294 ibid [273]

295 *Suez and Vivendi* [139]

296 ibid

297 ibid [140]

298 ibid

because the measures were within police powers *and* because they were not expropriatory in effect.

The claim in *Chemtura* concerned certain regulatory measures adopted by Canada to restrict the use of lindane as a pesticide because of the risk to human health, on the basis that the measures constituted, *inter alia*, expropriation under Article 1110 NAFTA.[299] In assessing the expropriation claim, the tribunal focused on the effects of the impugned measures. The tribunal held that, given the sale of lindane-treated seeds only made up a small proportion of Chemtura's total business,[300] that Chemtura 'remained operational' and its sales continued to increase in spite of the measures,[301] 'the measures did not amount to a substantial deprivation of the Claimant's investment.'[302] However, in what can be considered significant obiter dicta, the tribunal remarked that:

> [i]rrespective of the existence of a contractual deprivation, […] in any event […] the measures […] c*onstituted a valid exercise of the Respondent's police powers.* […] [T]he PMRA took measures *within its mandate*, in a *non-discriminatory manner*, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. *A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation*.[303]

The tribunal cited the *Saluka* award in support of this view.[304] The approach in *Chemtura* is clearly structured in terms of preclusion - even if the tribunal had not found there to be no substantial deprivation of the investment, a finding of indirect

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299 *Chemtura Corp v Canada* [Award] (2 August 2010) UNCITRAL [6]-[9];

300 ibid [262]-[263]

301 ibid [264]

302 ibid [265]

303 ibid [266] (my emphasis)

304 ibid, citing *Saluka* at [262]

expropriation was precluded on the basis that the measures 'constituted a valid exercise of [Canada's] police powers.'[305]

Finally, the preclusion approach can be seen, though somewhat equivocally, in the recent award in *de Levi v Peru* concerning the legality of certain measures adopted by Peru's banking superintendency. In *de Levi*, Peru argued that 'not every regulatory measure that might adversely affect the value of an investment can be considered an expropriation', and contended that '"a non-compensable regulation is distinguished from an expropriation by, *inter alia*, the extent to which the investor was deprived of the investment and the character of the governmental measure."'[306] The claimant argued that 'two positions regarding police powers' existed, 'the "Radical Police Powers Doctrine"' and the '"Moderate Police Powers Doctrine"'.[307] The tribunal noted that:

> [a]ccording to the Claimant, under neither of these doctrines can it be argued that [Peru's actions] were based on public interest. The first theory established certain requirements for a measure to be arbitrary: that it should be clearly discriminatory and should have been imposed in bad faith and in violation of due process. The second theory takes into account the effects of the State interference and the purpose of the measure, considering whether there exists a real public interest and legitimate expectations on the part of the investor; and there has to be proportionality between those elements. The proportionality test determines whether there was a balance between the public interest and the adverse effects of the measure.[308]

The *de Levi* tribunal however 'agree[d] with the conclusion reached by [the *Suez* tribunal]: "… in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of

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305 ibid

306 *de Levi* [267]

307 ibid [251]

308 ibid

public welfare and not to confuse measures of that nature with expropriation."'[309] The tribunal went on:

> SBS intervened in BNM pursuant to the laws in force. Later, when it received the PwC audit report it ordered - also in accordance with the applicable law - the dissolution and liquidation of the bank. These were legitimate acts of 'police power' characterised by bank officials because, according to Article 2 of the Banking Law, the main purpose of the Law is 'to provide for the competitive, solid and reliable operation of the financial and insurance systems, so as to contribute to national development.[310]'

> […] it is not true that there was an expropriation in the case of BNM, as affirmed by the Claimant. What happened was a repeated noncompliance with the banking regulations by BNM, which moreover took risks in times of a considerable liquidity crisis that affected it, causing it to fail to perform its obligations and to close its offices. These acts made its intervention and subsequent dissolution and liquidation inevitable. As several Arbitral Tribunals have repeatedly pointed out, no investment treaty is an insurance or guarantee of investment success, especially when the investor makes bad business decisions.[311]

4.3 The non-preclusion approach

Of the awards available in English that mention 'police powers' in the tribunal's reasoning, eight consider 'police powers' as a relevant but not determinative factor in assessing indirect expropriation. These awards generally consider police powers within a broader balancing or proportionality approach.[312] It is not always clear however what normative value the concept bears within such approaches.

We can begin to see evidence of the non-preclusion approach to police powers in the NAFTA tribunal's award in *Pope & Talbot* concerning Canada's 1996

309 ibid [475]

310 ibid [476]

311 ibid [478]

312 see: Kingsbury and Schill (n 200) 90

imposition of limits on the export of softwood lumber under its Export Control Regime.[313] In response to Canada's argument, the tribunal refused to preclude certain categories of regulation from the definition of expropriation under Article 1110 NAFTA, considering that 'the scope of that article does cover nondiscriminatory regulation *that might be said to fall within an exercise of a state's so-called police powers*.'[314] The tribunal considered Canada's argument that 'because the measures under consideration are cast in the form of regulations, they constitute an exercise of "police powers," which, if nondiscriminatory, are supposedly beyond the reach of the NAFTA rules regarding expropriations.'[315] The tribunal rejected this view, and considered that

> [w]hile the exercise of police powers must be analyzed with special care, the Tribunal believes that Canada's formulation goes too far. Regulations can indeed be exercised in a way that would constitute creeping expropriation. […] Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation. For these reasons, the Tribunal rejects the argument of Canada that the Export Control Regime, as a regulatory measure, is beyond the coverage of Article 1110.[316]

From the above, although the tribunal appeared to accept the existence of police powers, it did not elaborate on what it understood this term to entail, and seems to openly reject a preclusion approach in considering police powers in the context of indirect expropriation.

Just as many of the awards in the preclusion group discussed above rely on the IUSCT decisions in *Sedco* and *Too*, the majority of the awards in the non-preclusion

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313 *Pope & Talbot Inc v Canada* [Interim Award] (26 June 2000) UNCITRAL [27]-[40]

314 ibid [96] (my emphasis)

315 ibid [99]

316 ibid [110]

group cite the 2003 ICSID award in *Tecmed v Mexico*.[317] The *Tecmed* claim concerned the non-renewal of a landfill licence by the Mexican Government's National Ecology Institute[318], as, inter alia, an expropriation under Article 5(1) of the 1996 Spain-Mexico BIT. In an oft-cited passage, the *Tecmed* tribunal considered that to establish whether indirect expropriation had occurred:

> it must be first determined [whether the claimant] was radically deprived of the economical use and enjoyment of its investments, as if the rights related to - such as the income or benefits related [to the property] or to its exploitation - had ceased to exist. In other words, if due to the actions of the [State], the assets involved have lost their value or economic use for the holder and the extent of the loss. This determination is important because it one of the main elements to distinguish, from the point of view of an international tribunal, between a state's regulatory measure, *which is an ordinary expression of the exercise of the state's police power* that entails a decrease in assets or rights, and a *de facto* expropriation that deprives those assets and rights of any real substance.[319]

The tribunal considered that the regulatory measure in question had 'definitive and detrimental effects' on the investment and as such constituted a prima facie expropriation under Article 5(1) of the Agreement.[320] However, the tribunal considered that analysis could not conclude after assessing only the effects of the measure, but had to also consider whether the measure was expropriatory 'due to its characteristics and considering not only its effects'.[321] The tribunal considered that '[t]he principle that the State's exercise of its sovereign powers *within the framework of its police power* may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is

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317 *Tecmed v Mexico* [Award] (29 May 2003) ICSID Case No. ARB(AF)/00/2

318 ibid [39]

319 ibid [115] (original emphasis)

320 ibid [117]

321 ibid [118]

undisputable.'[322]

Although not without a degree of uncertainty, the tribunal appeared to reject a preclusion approach to police powers when it stated that 'regulatory actions and measures will not be initially excluded from the definition of expropriatory acts'.[323] This seems to be confirmed as the tribunal continues:

> […] in addition to the negative financial impact of [the] actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures *are proportional to the public interest presumably protected thereby* and to the protection legally granted to investments, taking into account the significance of such impact has a key role upon deciding the proportionality. […] Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State […] to determine whether such measures *are reasonable with respect to their goals*, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. *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 by any expropriatory measure*.[324]

The *Tecmed* tribunal, although careful to make clear that 'due deference' to States' regulatory functions is the starting point of analysis, did not further elaborate on what was meant by 'police powers'. As with the subsequent awards discussed below, it is therefore not clear whether the proportionality approach the tribunal adopted subsumed the police powers analysis or was a *result* of this analysis.

In *Azurix*, 'Argentina, citing *Lauder* and *SD Myers*, [argued that] in order to

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322 ibid [119] (my emphasis)

323 ibid [122]

324 ibid (my emphasis)

determine whether or not an expropriation has occurred the government's intention may not be disregarded'.[325] In doing so, Argentina contended that it was 'not liable for economic injury that is the consequence of *bona fide* regulation within the accepted *police powers* of the State.'[326] The tribunal, in addressing Argentina's argument, noted that '[t]he parties disagree on the relevance of taking into account the intent pursued by the measures concerned'.[327] The tribunal continued to remark that:

> the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, *being* legitimate and serving a public purpose, should give rise to a compensation claim. […] The tribunal in *SD Myers* found the purpose of a regulatory measure a helpful criterion to distinguish measures for which a State would not be liable: 'Parties […] are not liable for economic injury that is the consequence of *bona fide* regulation within the accepted police powers of the State.' This Tribunal finds the criterion *insufficient* and shares the concern expressed by Judge R. Higgins, who questioned whether the difference between expropriation and regulation based on public purpose was intellectually viable […].[328]

The *Azurix* tribunal considered that the *SD Myers* tribunal's argument to be 'somehow contradictory' and that if accepted

> the BIT would require that investments not be expropriated except for a public purpose and that there be compensation if such expropriation takes place and, at the same time, regulatory measures that may be tantamount to expropriation would not give rise to a claim for compensation if taken for a public purpose.[329]

The tribunal then favourably discussed the *Tecmed* tribunal's proportionality approach, and cited the practice of the ECtHR in *James and Others*[330] as 'useful

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325 *Azurix Corp v Argentina* [Award] (14 July 2006) ICSID Case No ARB/01/12 [278]

326 ibid (my emphasis)

327 ibid [309]

328 ibid [310]

329 ibid [311]

330 *James and Others v United Kingdom* (1986) Series A no 98 [50]

guidance'.[331] Although the tribunal seems to have at least entertained Argentina's arguments on police powers, it seems to conflate police powers with 'public purpose' more generally, and does not directly discuss how police powers fits into its proportionality assessment.

The above excerpts in *Tecmed* were also cited in *Fireman's Fund*, when, in reviewing a Mexican recapitalisation programme under Article 1110 NAFTA, the tribunal considered that:

> [t]o distinguish between a compensable expropriation and a non-compensable 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 realised; and the bona fide nature of the measure.[332]

However, although the tribunal considered that whether a measure was within a State's police powers was relevant to determining if a regulatory measure amounted to expropriation, it did not engage directly with the issue of what measures would be considered as 'within the recognised police powers of the host State'. Though the tribunal also did not engage overtly in a proportionality assessment, its mixed analysis focused on discrimination,[333] the effect of Mexico's recapitalisation programme's interference[334] and whether Mexico had made any prior assurances to the investor.[335]

LG&E concerned the review of Argentina's 'pesification' through the 2002

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331 *Azurix* [311]-[312]

332 *Fireman's Fund Insurance Company v Mexico* [Award] (17 July 2006) ICSID Case No ARB(AF)/02/01 [176] (my emphasis)

333 ibid [200-206]

334 ibid [188]-[192]

335 ibid, at eg [193]-[194]

Emergency Law of 'tariffs and prices for public services' provided under public-service contracts.[336] In considering whether the impugned measure amounted to indirect expropriation under Article IV of the 1991 US-Argentina BIT, the tribunal considered that:

> [t]he question remains as to whether one should only take into account the effects produced by the measure or if one should consider also the context within which a measure was adopted and the host State's purpose. *It is this Tribunal's opinion that there must be a balance in the analysis* both of the causes and the effects of a measure in order that one may qualify a measure as being of an expropriatory nature. It is important not to confound the State's right to adopt policies with its power to take an expropriatory measure.[337]

The tribunal then went on to quote the award in *Tecmed*:

> 'This determination is important because it is one of the main elements to distinguish, from the perspective of an international tribunal between a regulatory measure, *which is an ordinary expression of the exercise of the state's police power* that entails a decrease in assets or rights, and a *de facto* expropriation that deprives those assets and rights of any real substance.'[338]

However, the tribunal added that '[…] it can generally be said that a State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, *except in cases where the State's action is obviously disproportionate to the need being addressed*.'[339] This last sentence thus makes whether a measure is an 'exercise of the state's police power' or 'having a social or general welfare purpose' ultimately subject to an overriding proportionality assessment.

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336 *LG&E v Argentina* [Decision on Liability] (3 October 2006) ICSID Case No ARB/02/1 [65]-[67]

337 ibid [194]

338 ibid [194], quoting *Tecmed* [115] (original emphasis)

339 ibid [195] (my emphasis)

In *BG Group* the tribunal noted Argentina's argument that:

> [i]n emphasizing the wide scope of the regulatory and *police powers* of a State, Argentina insisted that a claim for indirect expropriation *calls for a test of proportionality*, balancing the lawfulness and significance of purpose of the measures, including whether such purpose could have reasonably been achieved in a less detrimental manner, against the damage suffered as a consequence of the measures.[340]

In its findings on expropriation, the tribunal did not explicitly refer to 'police powers', but noted that:

> a State may exercise its sovereign power in issuing regulatory measures affecting private property for the benefit of the public welfare. Compensation is required if the measure adopted by the State is *'irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that 'any form of exploitation thereof ...' has disappeared. ...'*[341]

However, the tribunal in *BG Group* considered that, although interfering with the investor's interest in property, the effect of the impugned measures did not rise to the level of 'substantial deprivation' and thus did not constitute expropriation.[342] The award in *BG Group*, although it appears to support the 'relevant factor' approach to police powers, is somewhat equivocal. Its relevance therefore mainly centres on Argentina's acceptance that a proportionality analysis is required when considering police powers.

The award in *El Paso* is perhaps the strongest example of police powers being considered as part of a proportionality approach to indirect expropriation. *El Paso* again concerned a claim based on Argentina's 2002 'pesification' and the impacts on

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340 *BG Group v Argentina* [Final Award] (24 December 2007) [UNCITRAL] [255] (my emphasis)

341 ibid [268], quoting *Tecmed* [116] (original emphasis)

342 ibid [269-271]

investments dependent on public service contracts.[343] In reviewing the impugned measures, the tribunal:

> subscribe[d] to the [earlier] decisions which have *refused to hold* that a general regulation issued by a State and interfering with the rights of foreign investors can *never* be considered expropriatory because it should be analysed as an exercise of the State's sovereign power or of its *police powers*.[344]

Further to this clear rejection of the preclusion approach, the tribunal went on:

> in order to differentiate between situations where a general regulation can be considered tantamount to expropriation and situations where it cannot, the Tribunal has to start from the principle and then look at the exceptions. It considers that the most appropriate approach is to admit that, as a matter of principle, a general regulation – whose object is not the taking of property as in the case of direct expropriation – does not amount to an indirect expropriation (a). This evident proposition finds support in State practice, doctrine and arbitral case-law. Of course, the general principle suffers exceptions and has to be set aside in some circumstances on account of the content of the regulations (b).'[345]

In support of this position, the tribunal discussed and cited Brownlie, the Third Restatement and the awards in *Feldman*, *Tecmed* and *Saluka*[346], and continued:

> [i]n sum, a general regulation is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process. In other words, *in principle, general non-discriminatory regulatory measures, adopted in accordance with the rules of good faith and due process, do not entail a duty of compensation*.[347]

However, although the *El Paso* tribunal adopted the presumed legality of general regulatory measures as its starting point, it considered that in certain cases

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343 *El Paso v Argentina* [Award] (31 October 2011) ICSID Case No ARB/03/15 [94]-[96]

344 ibid [234] (original emphasis)

345 ibid [236]

346 ibid [238-239]

347 ibid [240] (original emphasis)

such regulation could nevertheless constitute indirect expropriation. It considered this question hinged on the paired requirements of the 'reasonableness and proportionality of State measures interfering with private property'.[348] Although ostensibly recognising police powers as established in customary international law, the tribunal approached the issue in the same way as the *Tecmed* and *LG&E* tribunals, as one concerning the reasonableness of the regulation in light of its effects:

> [i]f general regulations are unreasonable, *i.e.* arbitrary, discriminatory, disproportionate or otherwise unfair, they can, however, be considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investor's property rights.[349]

The tribunal considered that '*intentionally discriminatory* regulation' '*objectively discriminatory* regulation', and '*disproportionate* regulation' *would* constitute indirect expropriation.[350] Again, as in *LG&E* and Argentina's arguments in *BG Group*, police powers is framed within a broader proportionality assessment.

Lastly, the recent award in *Servier v Poland*[351] can be described as falling within the non-preclusion group, though the structure of the tribunal's reasoning is somewhat unclear. The *Servier* tribunal noted that: '[t]he Parties agree[d] that, under international law, *a State is not liable for dispossession if its actions were a valid exercise of regulatory, or "police", powers*.'[352] Based on the parties' arguments, the tribunal noted that '[t]he Parties generally agree on the four elements that must be fulfilled for a measure to constitute an exercise of legitimate regulatory power. […] [These were] that the measure in question was (1) reasonable; (2) non-discriminatory;

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348 ibid [241]

349 ibid [241]

350 ibid [243] (my emphasis)

351 *Laboratoires Servier v Poland* [Final Award] (14 February 2012) UNCITRAL

352 ibid [276]

(3) proportionate to the public interest to be protected; and (4) adopted in good faith.'[353] The tribunal noted however that the parties differed as to whether these four criteria should be established cumulatively or considered 'in combination'.[354] It is not immediately apparent that the tribunal was considering the police powers of States as an independent principle of customary international law. It appears more likely that, given the phrase is used adjectivally, the four criteria were considered to constitute requirements under the customary definition of (indirect) expropriation. What is clear however, is the emphasis that both the parties and the tribunal placed on proportionality.

353 ibid [277]

354 ibid

CHAPTER 5:
CRITIQUING POLICE POWERS

In the last chapter I discussed how police powers has been employed by arbitral tribunals in investment protection disputes. I showed that arbitral practice can be divided into two streams: the 'preclusion' and 'non-preclusion' approaches. Although arguably also supporting a 'broad' model of police powers as the customary expression of States' right to regulate in the public interest, it seems from the above that arbitral practice in both streams loosely supports the 'narrow' model of police powers, given that tribunals have generally limited their analysis to claims of indirect expropriation.

In this chapter I critique this practice and show that police powers is not good law on several grounds. In Sections 5.1 and 5.2 I consider the two main criticisms levelled against police powers in academic discussion to date: (i) that police powers is inadequately supported in the formal sources of international law; and (ii) that police powers is incoherent as a legal concept.[355]

5.1 Police powers in the formal sources of international law

There is a notable lack of depth in the reasoning of the arbitral tribunals on the customary nature of police powers within both the 'preclusion' and 'non-preclusion' groups of awards. This dearth is mirrored in the academic writings most enthusiastically supporting the customary law status of police powers, which cite certain of the above awards and the sources on which they are based, but do not

[355] Both of these criticisms could form the basis of an entirely different project. I discuss them here for two reasons: (i) for the sake of completeness and to draw attention to fraught nature of 'police powers' generally; and (ii) because there is a degree of overlap between these criticisms and my own critique in Chapter 6.

elaborate the State practice and *opinio juris* supporting their position.[356]

Arbitral practice on police powers has been criticised on the basis that tribunals' reasoning on its legal source is flawed or inadequate.[357] Rather than focusing on the content or consequences of police powers, sources-based criticisms go to a more central issue: the concept's legal *validity*. Whether we conceptualise police powers in 'narrow' or 'broad' terms, to constitute a valid legal approach it must be supported in a formal source of international law.[358] Given that the phrase is not used in any publicly available IIA, including the more recent BITs containing public interest regulation interpretive clauses or carve-outs for expropriation,[359] police powers cannot be said to exist as a matter of treaty law.

According to Article 38(1) SICJ, there are therefore two options remaining: (i) that police powers constitutes a norm of customary international law; or (ii) a 'general principle of international law'.[360] Arguably scope remains for the argument that police powers constitutes a general principle of international law, originating in the common traditions of States' domestic public law.[361] Ultimately, this argument relies upon establishing that a residual right of regulation for public purposes exists in the majority of domestic legal systems. Investigating whether this is the case could form an entirely separate study.[362] In order to focus on the central questions of *this* study, I

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356 see: Viñuales (n 18) 329 et seq; Alvik (n 23) 262; Henckels (n 17) 225; Newcombe and Paradell (n 23) 357

357 Kurtz (n 23) 284, 289 et seq; Paparinskis (2011) (n 23) 313

358 Kurtz (n 23) 295

359 eg those based on the 2004 and 2012 US Model BITs:

360 Provided we accept the majority view that the sources listed in Art 38 ICJS as authoritative and exhaustive of the valid sources.

361 Thirlway, *Sources* (OUP 2014) 95

362 Indeed, this is the topic considered by my colleague in the Public International Law Group, see: Kate Mitchell, 'Accommodating the public interest in international investment treaties:

will not consider whether police powers exists as a general principle of international law, or the relationship between general principles and customary principles of a general nature.[363]

In both arbitral practice and academic discussion, police powers is alleged to constitute CIL. Recent critique has thus focused on tribunals' attempts to ground police powers in State practice and *opinio juris*.[364] The 'traditional criteria in international law' for determining whether something constitutes 'binding custom' are:

> that there should have been sufficient State practice ([…] examples of consistent following of the alleged custom), and that this should have been accompanied by, or be backed by, evidence of what is traditionally called *opinio juris* or *opinio juris sive necessitatis*.[365]

The ICJ has held that the State practice relied upon must be 'extensive and virtually uniform'[366], and that:

> [n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice i*s rendered obligatory by the existence of a rule of law requiring it*. […] The frequency, or even habitual character of the acts is not in itself enough.[367]

As 'the material of customary international law is to be looked for primarily in

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police powers, expropriation and treaty interpretation' (2014) MPhil Dissertation, Oxford Research Archive <http://solo.bodleian.ox.ac.uk/OXVU1:ORA919f365e-befb-425e-a394-02c48a879207>

363 Thirlway (2002) 294 RCADI 265, 274 et seq; Weil (1992) 237 RCADI 9; Lowe (1983) 9(3) Review of International Studies 207

364 Kurtz (n 23) 284, 289 et seq; Paparinskis (2011) (n 23) 313

365 Thirlway (n 361) 56-57

366 *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, 43 [74]

367 *North Sea Continental Shelf*, 44 [77] (my emphasis)

the actual practice and *opinio juris* of *States*[368], the awards discussed in Chapter 4 are not themselves evidence that police powers constitutes CIL. The decisions of international courts and tribunals are 'judicial decisions' for the purposes of Article 38(1)(d) SICJ, and thus 'subsidiary means for the determination of rules of law', including the ascertainment of custom.[369] Just like ICJ decisions under Article 59 SICJ, investment awards are binding only between the disputing parties and in respect of the particular dispute - they have no formal precedential value.[370] So, although undoubtedly useful in ascertaining the existence and content of CIL, a tribunal's findings are only as persuasive as the evidence the tribunal 'regards as the practice supporting [the norm]'.[371] This view was recently summarised by the ILC:

> While the decisions of international courts and tribunals as to the existence of rules of customary international law and their content are not 'practice', they do serve an important role as 'subsidiary means for the determination of rules of law'. There is no doctrine of *stare decisis* in international law. The decisions of international courts and tribunals cannot be said to be conclusive for the identification of rules of customary international law. *Their weight varies depending on the quality of the reasoning, the composition of the court or tribunal, and the size of the majority by which they were adopted.* […].[372]

Academic writings endorsing police powers have similar authority: to the extent that we can consider them the 'teachings of the most highly qualified publicists of the various nations', they constitute 'subsidiary means' under Article 38(1)(d) SICJ.[373]

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368 *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 29-30 [27]; see also: *Nicaragua*, 97 [183] (my emphasis)

369 For the position that tribunals' decisions form a 'third source' of international law, see cf: Lowenfeld (2003) 42 Colum J Transnat'l L 123; Schwebel (2004) 98 ASIL Proc 27; Alvarez (2009) 42 NYU JIL&P 17

370 Article 32(2) 2010 UNCITRAL Arbitration Rules; Article 53(1) ICSID Convention; Alvarez (2009) (n 369) 45-46

371 Thirlway (n 361) 69; see also: Zammit Borda (2013) 24(2) EJIL 649, 655

372 ILC (27 March 2015) UN Doc A/CN.4/682 [59]-[60] (my emphasis)

373 Zammit Borda (n 371) 660

Custom-formation is based on interrelation between the subjects of international law: 'custom grows from action by one subject of law and the reaction of other subjects of law concerned: acceptance, rejection, or toleration.'[374] As the ICJ alluded to in *Anglo-Norwegian Fisheries*, this occurs through processes of claim, counterclaim, objection and acquiescence.[375] It is axiomatic that CIL can only be created by the 'subjects of law concerned': States.[376] The awards (and academic discussion) adopting or endorsing police powers are relevant for two reasons: (i) as a survey and analysis of *existing* State practice and *opinio juris*; and (ii) as a hub around which *subsequent* State practice and *opinio juris* can *form* - their 'indirect' effect.[377]

5.1.1 *Awards as evidence and analysis of custom*

According to Viñuales:

> [t]he police powers doctrine as it is applied in international investment law seems to have developed from two main sources, one rooted in North-American scholarship and practice, and the other in general international law[378] […] the international source of this doctrine, is a result of a generalisation of municipal practice [concerning government interference with private property].[379]

We can draw from this statement two broad categories of the purported sources of police powers: US domestic 'scholarship and practice' and 'municipal practice' of other States. However, even on a cursory assessment '[t]he few authorities' actually relied upon by tribunals in support of police powers: ‘were either not State practice in the technical sense or reflected US precepts not accepted by States more generally, or

374 Thirlway (n 361) 63

375 see: *Anglo-Norwegian Fisheries*, 138

376 Thirlway (n 361) 63

377 Verdier and Voeten (2014) 108(3) AJIL 389, 420 (my emphasis)

378 Viñuales (2010) (n 23) 310

379 Viñuales (2012) (n 23) 369

upon closer analysis were rather narrower in scope (or indeed all three together)'.[380]

We can see this trend in both the 'preclusion' and 'non-preclusion' approaches discussed above. The awards in the preclusion approach provide a clear illustration. In *Sedco*, the tribunal relied upon the Third Restatement, an award of the Upper Silesian Arbitral Tribunal in *Kügele v Polish State*,[381] and a 1975 article by Weston.[382] In *Too*, the tribunal referred to the Third Restatement, the *Kügele* award, and the Germany-Venezuela arbitration in *Brewer, Moller & Co.*[383] Neither of these awards referred to police powers, but rather held that certain tax measures could not amount to expropriation.[384] In *Saluka* the tribunal cited the 1961 Harvard Draft, 1967 OECD Draft, the Third Restatement and the award in *Methanex*.[385] The *Chemtura* tribunal cited the *Saluka* award.[386] In *Suez and Vivendi* the tribunal relied upon the Third Restatement[387] and the *de Levi* tribunal cited only the *Suez* award.[388] Although with different emphasis, we see the same 'sources' relied upon in the 'non-preclusion' awards.

Arguably with the exception of the OECD Draft (which does not mention police powers), none of these sources constitute evidence of State practice.[389] Although the Harvard Drafts purport to codify existing CIL, in the case of the Third

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380 Paparinskis (2013) (n 23) 223

381 *Kügele v Polish State* [Award, 5 Feb 1932] (1945) 6 ILR 69

382 Weston (1975) (n 261)

383 *Too* [24]-[26]

384 (1960) 10 Rep. Int'l Arb 423

385 *Saluka* [262]

386 *Chemtura* [266]

387 *Suez and Vivendi* [262]

388 *de Levi* [475]

389 Paparinskis (2013) (n 23) 223

Restatement, the drafters did not intend to codify international law, but to codify the US perspective on that law:

> For lawyers in other countries, it is a valuable source of information about the foreign relations power in the United States and prevailing American views on international law. How far these views are identical with the convictions of experts elsewhere must be clarified in the necessary worldwide discussion about the present status and further development of public international law.[390]

Even if we accept that the Third Restatement and Harvard Draft are codification attempts, as with the awards themselves, the authority of these documents depends on the actual State practice assessed and States' subsequent *reactions*.[391] However, both documents reflect 'US perceptions not taken up in general practice'.[392] A picture emerges of an increasingly circular process of self-reference within both arbitral practice and academic discussion of police powers. Any authority must therefore lie in States' *reactions* to the awards and academic discussion. Kurtz is right to conclude that on the basis of the 'poor and selective methodological claims offered' and the sources relied upon in arbitral practice and academic discussion, police powers' existence as custom is not borne out.[393]

The approach mandated by police powers seems to run squarely against the actual terms of most expropriation provisions. However, even if we accept that police

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390 Bernhardt & ors (1992) 86(3) AJIL 620, 609

391 As an illustration, the 1932 Harvard Draft on Piracy, a similar attempt to codify customary international law, was taken up by the ILC in its 1956 Draft Convention on the Law of the Sea, entered into Articles 14-22 High Seas Convention and subsequently into Articles 100-107 and 110 of UNCLOS. In this case, the Harvard Draft formed the hub around which the spokes of State practice and *opinio juris* formed through the acceptance of the ILC Draft's articles in negotiating the HSC and UNCLOS. see: *Report of the ILC on the Work of its Eighth Session*, UN-GAOR. 11th sess, Supp No 9, UN Doc A/3159 (4 July 1956); Convention on the High Seas (completed 29 April 1958, entered into force 30 September 1962) 450 UNTS 11

392 Paparinskis (2011) (n 23) 314

393 Kurtz (n 23) 295

powers is sufficiently established in State practice and *opinio juris* and makes up part of the customary definition of expropriation, the question remains to what extent reference to this custom is possible in interpreting IIA provisions.[394] This raises complex questions concerning the relationship between treaty and custom that cannot be adequately addressed here.[395] It is important to note in this context that international judicial and arbitral practice evidences a range of approaches and emphases.[396] There is considerable debate whether, and if so how, IIA provisions replace, modify or exclude[397] pre-existing custom on the treatment of foreign property interests. The position adopted by the *Saluka* tribunal in interpreting the term 'deprivation' in Article 5 of the 1991 Netherlands-Czech Republic BIT,[398] and ostensibly by the majority of tribunals discussed above,[399] is that reference to CIL on police powers is permissible as it constitutes a 'relevant rule of international law applicable in the relations between the parties' under Article 31(3)(c) VCLT.

5.1.2 *State practice in, or responding to, arbitral proceedings*

Let us turn to States' practice in their pleadings before tribunals and *reactions* to the awards employing the police powers approach. Pleadings may constitute 'subsequent

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394 ibid 294-295

395 ibid

396 See eg: the IUSCT in *Amoco v Iran* (1987) 15 IUSCTR 189, 222; the arbitral tribunal's '*lex specialis*' approach in the *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v UK)* [Final Award] (2 July 2003), (2005) 126 ILR 364 [84]; the ICJ in *North Sea Continental Shelf,* at ia. [63]-[64], *ELSI,*[50], and *Oil Platforms*, eg at [32] [41] [78]; the WTO panel's 'contracting out' approach adopted in *Korea: Procurement - Report of the Panel* (1 May 2000) WT/DS163/R [7.96] and the AB's invocation of customary law in *EC: Bananas III - Report of the Appellate Body* (9 September 1997) WT/DS27/AB/R at [10] [63] [133], *US: Wool Shirts - Report of the Appellate Body* (25 April 1997) WT/DS33/AB/R [14], and *India: Patents - Report of the Appellate Body* (19 December 1997) WT/DS50/AB/R [65].

397 For discussion on this point in the law on FET, see: Orakhelashvili (2008) 46(1) Archiv des Völkerrechts 74, 76-77

398 *Saluka* [254]

399 see: *Sedco*, 274-275; *Too* [26]; *Methanex,* IV [7]; *Suez and Vivendi* [139]

practice' aiding interpretation under Article 31(3)(b) VCLT (where a particular IIA provision is under consideration in several disputes, or disputes concern very closely worded treaty provisions).[400] Importantly, pleadings may also evidence State practice and *opinio juris,* directly relevant to ascertaining CIL. However, although arguably more supportive of police powers than the sources cited by tribunals in the awards considered above, it is debatable whether a clear and unambiguous picture emerges from States' invocation of police powers in their pleadings before investment tribunals.

Based on the awards' summaries of the parties' arguments,[401] Argentina has invoked 'police powers' in nine investment disputes.[402] The Czech Republic has made arguments concerning 'police powers' in five disputes.[403] Somewhat puzzlingly however, the Czech Republic does not seem to have used the phrase 'police powers' in its pleadings in the *Saluka* proceedings, despite it standing as the clearest example of the preclusion approach in arbitral practice.[404] Romania and Mexico have each made arguments on 'police powers' in two disputes.[405] Russia, Kazakhstan, Moldova,

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400 McLachlan, in Nolte (ed) (OUP 2013) 77-78

401 It is not always clear from the final awards considered whether 'police powers' enters discussion through the respondents' pleadings, or whether the tribunal adopts language of 'police powers' independently.

402 *BG Group* [255]; *El Paso* [234]-[239] [253] [261] [322]; *Suez and Vivendi* [88] [139]-[140] [202]; *Sempra* [277]; *Enron* [219] [239]; *EDFI* [428]; *Siemens* [246]; *National Grid* [141]; *Continental Casualty* [85]

403 *Invesmart BV v Czech Republic* [Award] (26 June 2009) UNCITRAL [479]-[480]; *InterTrade Holding GmbH v Czech Republic* [Award] (29 May 2012) UNCITRAL, PCA Case No. 2009-12 [253]; *CE Projektmanagement v Czech Republic* [Award] (19 September 2013) UNCITRAL, PCA Case No. 2010-5 [4.363-4.364; 4.538]; *Lauder v Czech Republic* [Award] (3 September 2001) UNCITRAL [198]; *Nagel v Czech Republic* [Award] (9 September 2003) SCC Case No. 049/2002 [211]

404 Instead using the phrase 'permissible regulatory actions'. See: *Saluka* [250]

405 *Tecmed*; *Fireman's Fund*; *EDF v Romania* [180]; *Roussalis v Romania* [662]-[664] [718]-[719]

Albania and Sri Lanka each made arguments on 'police powers' in one dispute.[406] In three awards, the tribunal adopted the language of 'police powers' on its own initiative, or without referring to the respondent's pleadings in its award.[407] In *de Levi*[408] and *RosInvestCo*[409] the tribunals responded to the *claimant investor's* arguments on police powers. It is difficult to draw conclusions from this diverse practice. Most of the language employed by respondent States is vague and generally amounts to a mere assertion that a particular measure is within the State's police powers. Whether we can see in States' pleadings sufficiently clear and consistent practice remains open to debate. Although present in pleadings in an arguably significant minority of disputes, if police powers makes up part of the customary definition of expropriation, or is an 'autonomous' CIL principle, we would expect to see it crop up in pleadings in the majority of indirect expropriation claims. A further issue remains of the weight we should afford such pleadings as evidence of *opinio juris*, given the clearly pragmatic nature of pleadings in an active investment dispute and that a party to the IIA (the claimant's state of nationality) is absent from proceedings.[410]

Relatedly, if police powers constitutes a customary principle expressing States' sovereign right to regulate,[411] we would expect to see the phrase used outside ISDS,

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406 *Renta 4* [63]; *Anatolie Stati & ors v Kazakhstan* [Award] (19 December 2013) SCC Arbitration V (116/2010) [1163]; *Arif v Moldova* [227]; *Mamidoil v Albania* [527]-[529]; *Deutsche Bank v Sri Lanka* [Award] (21 October 2012) ICSID Case No. ARB/09/2 [416]

407 *Telenor Mobile Communications v Hungary* [Award] (13 September 2006) ICSID Case No. ARB/04/15, in citing the *Tecmed* award, at [65]; *Ron Fuchs v Georgia* [Award] (3 March 2010) ICSID Case No. ARB/07/15 [387]; *Unglaube v Costa Rica* [246]

408 *de Levi*: Claimant's arguments on 'police power' at [251], Respondent used phrase: "the legitimate exercise of its inherent power to regulate for the protection of, *inter alia*, public welfare and order", at [270]

409 *RosInvestCo*, 18, 25

410 see: *Renta 4* [63]; *Deutsche Bank* [416]

411 see: Viñuales (n 18) 327-329, 343-344

particularly in inter-State arbitration concerning the protection of alien property. A search for 'police power' in the UN Reports of International Arbitral Awards and in the PCA's publicly available arbitral awards returned twenty-six results.[412] However in twenty-five instances the phrase was used to refer to the exercise of law enforcement powers by individual government officials.[413] The only relevant use of the phrase occurred in the *Poggioli* arbitration before the Italian-Venezuelan Mixed Claims Commission, when the US umpire 'assume[d]' that Venezuela's closure of the port of Buena Vista to prevent the importation of weapons during the revolution was 'within [Venezuela's] police power'.[414] The umpire considered that in the absence of a contract between the claimant and the government, 'by virtue of which damages could be claimed for the closure of the port, the power of the Government must be regarded as plenary and the reasons for its exercise beyond question.'[415]

According to Paparinskis, the US made similar reference when discussing expropriation during the 1930 Hague Conference, which was not taken up by other participating States.[416] We see no reference to 'police powers' in the notable inter-State disputes concerning the treatment of alien property: *Norwegian Shipowners' Claims*, *Chorzów Factory*, *Oscar Chinn*. Nor does 'police powers' appear in the ICJ's

412 'Reports of International Arbitral Awards' (*United Nations*) <http://legal.un.org/riaa/dtSearch/Search_Forms/dtSearch.html> accessed 28 March 2015>; PCA Case Repository (Permanent Court of Arbitration) <http://www.pcacases.com/web/> accessed 28 March 2015

413 see eg: *James H McMahan (USA) v United Mexican States* [Decision, Mexico-US General Claims Commission] (30 April 1929) (1926-1927) IV UNRIAA 1, 486, 490-491; *Arbitration regarding the Iron Rhine Railway (Belgium-Netherlands)* [Award] (24 May 2005) XXVII UNRIAA 35, 75-76 [87]; *Indo-Pakistan Western Boundary Case* [Award of the Tribunal] (19 February 1968) XVII UNRIAA 1, 534

414 *Poggioli Case* (1903) X UNRIAA 669, 690-691

415 ibid.

416 see: Paparinskis (2013) (n 23) 61, citing: Rosenne, *League of Nations Conference for the Codification of International Law* (Oceana 1975) 684-685

majority judgments, or the Separate or Dissenting Opinions in *ELSI* or *Diallo*.[417] If police powers is a general and autonomous customary concept expressing States' sovereign right to regulate, or even merely part of the customary definition of expropriation, we could justifiably expect to see it referred to beyond a limited number of relatively recent investor-State awards.

5.2 Incoherence and ambiguity

In addition to the above criticisms relating to its validity, police powers has also been criticised on the basis that it is internally inconsistent, ambiguous, or leads to a circular analysis in determining when indirect expropriation has occurred.

5.2.1 *Incoherence*

Higgins raised concerns regarding the coherence of the 'police powers doctrine' as an approach to indirect expropriation in her 1982 Hague Course.[418] Higgins considers the police powers approach, in precluding from the definition of indirect expropriation any general regulatory measures fulfilling a 'public purpose', as generating a circular, logically inconsistent outcome. Higgins questions whether distinguishing between 'takings' in which the property interest is used by or benefits the State, from 'takings' 'in pursuance of the so-called "police power", i.e. for regulatory purposes':

> The position seems to be […] that a taking for public use requires just compensation to be paid; whereas an indirect taking for regulatory purposes does not. The distinction seems to lie not between formal and indirect taking, but rather in the purposes of the taking. […] Is this distinction intellectually viable? Is not the State in both cases (that is, either by a taking for a public purpose, or by regulation) purporting to act in the common good? And in each case has the owner of property

417 Above nn 201 and 202.

418 Higgins (n 21) 330-331

> not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be 'for a public purpose' (in the sense of in the general, rather than for a private, interest). And just compensation would be due.[419]

Whether or not we agree with the socio-economic sentiments behind Higgins's concerns, the issues she raises remain valid. If the text of an expropriation clause, (or the CIL definition of expropriation) requires a State to expropriate or nationalise only for a public purpose and in a non-discriminatory fashion, and to compensate, *even if* the public purpose requirement is met,[420] how then can the pursuit of certain types of public purpose preclude a finding of expropriation? Kurtz likewise makes this argument in his critique of police powers, especially in his assessment of the *Methanex* tribunal's reasoning,[421] in what he claims essentially amounts to a reading-out of the compensation requirement in Article 1110 NAFTA. Again, whether or not we agree with Kurtz's policy arguments, his view of the preclusion approach to police powers as possessing 'a strange circularity'[422] bears out.

The diversity of approaches adopted by tribunals in employing police powers also gives rise to doubt as to the concept's logical and legal coherence. It is useful here that we recall the two main trends in arbitral practice identified in Chapter 4, the 'preclusion' and 'non-preclusion' approaches. Clearly, a finding that a measure is within the police powers of the State cannot constitute both a factor precluding a finding of indirect expropriation, *and* be merely one of several relevant factors in a broader proportionality or balancing assessment. Whereas the tribunals in the

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419 ibid 331

420 As is the case in the vast majority of IIAs. See s.3.2.1 above.

421 Kurtz (n 23) 290. Again, it is important to note that although clearly structuring its analysis consistently with the 'preclusion' approach, the tribunal in *Methanex* did not employ the phrase 'police powers'.

422 ibid

'preclusion' group treat police powers as a set, or at least determinate, category of regulatory measures,[423] it is not clear what, if any, legal weight the phrase carries in the 'non-preclusion' group. Although ultimately forming merely one part of a proportionality assessment, the tribunal in *Fireman's Fund* seemed to treat police powers as a defined and legally significant category of legislative measures. [424] However, often 'police powers' appears to be used in an entirely adjectival fashion, to denote 'valid' or 'legitimate' regulatory measures that survive a balancing, proportionality or effects-based analysis of indirect expropriation, or as a synonym for 'regulatory sovereignty'[425] or 'regulatory' or 'sovereign power'.[426]

5.2.2 *Ambiguity*

If (argument's sake) we accept the narrow model of police powers and treat a finding that a measure is within a State's police powers as precluding the measure constituting indirect expropriation, the question becomes how to identify which measures are an 'ordinary expression' of,[427] or 'commonly accepted'[428] or 'recognized'[429] as falling within this category and thus 'legitimate measures'.[430] The preclusion approach seems to consider that there is, as Paparinskis puts it, a 'taxonomy' of 'legitimate' purposes the pursuit of which categorises a particular measure as police powers regulation.[431] However, even proponents of the 'police powers doctrine' have noted '[i]t would be

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423 *Saluka* [263-264].

424 *Fireman's Fund* [176]

425 Grierson-Weiler and Laird, in Muchlinski & ors (eds) (OUP 2008) 299

426 This is most clear in the awards in: *BG Group* [255] [268]; *Tecmed* [122]; *Azurix* [311]; and *LG&E* [194]; *Servier* [276]-[277]; on this approach, see: Fortier and Drymer (n 198) 300

427 *Tecmed* [115]

428 *Too* [26]; *Saluka* [262]

429 *Fireman's Fund* [176]

430 Dolzer and Schreuer (n 188) 123

431 Paparinskis (2013) (n 23) 222; Kingsbury and Schill (n 200) 91

overly optimistic to see in this "police powers" concept a clear and established meaning' in international law'.[432] The tribunal in *Saluka* (the exemplar of the preclusion approach to police powers) noted that:

> international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered 'permissible' and 'commonly accepted' as falling within the police or regulatory power of States and, thus, non-compensable. […] [I]t has yet to draw a bright and easily distinguishable line between non-compensable regulations [and] measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.[433]

Bonnitcha likewise notes that:

> none of [the awards employing the police powers approach] provides a comprehensive account of the range of public purposes capable of justifying a measure that would otherwise amount to indirect expropriation.[434]

How then do we determine which measures fall within the category of police powers regulation, and which do not? According to Paparinskis, although recent discussion has focused on identifying regulatory *purposes,* State and arbitral practices evinces a greater tendency to assess compensability with reference to the *type* or *means* of measure adopted[435]:

> State practice and case law on the 'purpose' approach suggests that […] the focus on the methods of regulation more accurately states the content of international law up to the 1990s. The US argument for the taxonomy of purposes was unsuccessful both as a general principle and as a rule of customary law, remaining merely a non-representative rule

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432 Alvik (n 23) 262

433 *Saluka* [263-264]

434 Although he remarks that: '[t]aken together, they suggest that public health, environmental protection, banking regulation and economic restructuring in a time of crisis are among the legitimate public purposes that could justify an otherwise expropriatory measure': Bonnitcha (n 8) 260. See further: Fortier and Drymer (n 198) 299

435 Paparinskis (2011) (n 23) 311-312

> of domestic law not generally taken up in State practice and thus having no direct international relevance.[436]

Instead of focusing on developing a list, or 'taxonomy' of 'legitimate' regulatory purposes making up police powers:

> [t]he second approach to identifying non-compensable regulation would rather look at those intrinsically lawful methods of regulation that, *sine qua non*, require substantial interference with property rights and that are indispensable for the functioning of a State.

This split between a 'purposes' and 'means' approach is clearly visible in the parties' submissions and tribunal's reasoning in *Methanex*.[437] According to Paparinskis, there is significant support in State practice and in the decisions of international courts and tribunals for this approach.[438] I do not present Paparinskis's argument here as a potential solution to the ambiguity plaguing police powers. Rather, I present his argument of there being (at least) two methods of identifying permissible police powers regulation to emphasise the fraught conceptual nature of the approach.

As an alleged customary principle, a given purpose would have to be supported in State practice and *opinio juris* as falling with States' police powers.[439] Outside recent BITs based on the 2004 and 2012 US Model BITs[440] which explicitly provide for an expropriation carve-out for measures 'designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment', there are doubts as to whether sufficient State practice establishing a

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436 ibid 318

437 ibid 311-312

438 ibid 314-318

439 ibid 311-312

440 see: Canada Model BIT (2004); US Model BIT (2004); US Model BIT (2012); Colombia Model BIT (2007); Norway Model BIT (2007); Germany Model BIT (2008)

list of permissible 'police power' regulatory purposes exists.[441] The ultimate source of this practice, according to Perkams, will have to be found in the decisions of domestic courts and regional tribunals such as the ECtHR.[442]

Relatedly, if we accept that there are certain purposes that fall in the category of police powers, the question becomes: *who decides*? Is it for the State to determine which purposes fall within its 'police power', or is it for a tribunal hearing an investment or contractual claim to determine? Is this a question of auto-interpretation? Christie considers that whether a measure falls within the State's 'police power' is not subject to auto-interpretation, but requires a case-by-case assessment by a tribunal:

> A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called 'police power' does not preclude an international tribunal from making an independent determination of this issue.[443]

This is the approach endorsed by the tribunal in *Saluka*.[444]

The central issue then becomes the appropriate standard of review a decision-maker should apply.[445] According to Christie if a State's given purpose is 'plausible', there is no justification for a decision-maker to go beyond this to search for 'the unexpressed "real" reasons' of a measure:

> [n]o such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in

441 Paparinskis (2011) (n 23) 311-314

442 Perkams (n 164) 109

443 Christie (1962) 38 BYBIL 307, 338

444 S*aluka* [263-264]

445 See, more generally: Foster (2012) 3(3) JIDS 525; Henckels (n 17); Henckels (2013) (n 8); Roberts (2011) 16 International Council for Commercial Arbitration Congress Series 170; Schill (2012) 3(3) JIDS 577; Vadi and Gruszczynski (2013) 16(3) JIEL 613

> international law.[446] […] But, if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive.[447]

The question also arises as to what law is applicable, and what factual indicia a decision-maker ought to have recourse to in making its assessment. For example, the tribunal in *Servier* placed significant weight on the fact that was valid under EU and domestic law.[448] We can see the same broad trend in other awards.[449] According to Shirlow, the *Servier* tribunal applied a flexible standard of review, in which the level of deference given to Poland's understanding of the 'public interest' was relative to the stage of inquiry.[450]

The process of identifying categories of purposes that constitute police powers regulation is fraught because, as Loughlin notes, the 'nature and scope' of the 'police power' is dependant on historical context.[451] A given society's socio-economic organisation and prevailing political conceptions of the public welfare (and the proper role of government in defining and pursuing it) will determine the categories of regulation that are considered to fall within the 'police power'.[452] The 'public welfare' or 'public interest' at the centre of the police power is an inherently *context-dependent social construct*. Epstein's conception of the 'police power' as a catch-all that adds

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446 Christie (n 443) 332

447 ibid 338

448 Shirlow (2014) 29(3) ICSID Review 559, 565

449 see: *LFH Neer and Pauline Neer (USA) v United Mexican States,* American-Mexican Mixed Claims Commission (15 October 1926) IV RIAA 60, 64; *CE Projektmanagement v Czech Republic* [Award] (19 September 2013) UNCITRAL, PCA Case No. 2010-5 [4.538]; *Saluka* [271]-[275]

450 Shirlow (n 448) 565

451 Loughlin (n 21) 425

452 ibid 426; What Lang has, in the context of international trade law, dubbed the perceived '"optimal" State-market relation': Lang, *After Neoliberalism* (OUP 2011) 5, 8-9, 239 et seq, 343 et seq

back ‘necessary’ powers that have been explicitly limited in the (written) US Constitution is also useful here.[453] Ambiguity stems from the fact that in the international legal order *there are no such limitations*: there is no such written constitution, nor an international judiciary with compulsory jurisdiction to determine the role of government and the powers that are 'necessary' to its functions in the way that domestic courts do.[454]

[453] Epstein (n 168) 107

[454] ibid

CHAPTER 6:
RECONCILING POLICE POWERS WITH GENERAL INTERNATIONAL LAW

It is clear from the above that police powers faces significant obstacles from both legal validity and coherence perspectives. Arbitral practice connecting police powers to a formal source of law is tenuous at best. Likewise, significant ambiguities abound in the 'narrow' model of police powers in identifying 'legitimate' regulation. However, police powers suffers from a further and more pressing problem as an approach to States' regulatory authority: it is doctrinally and conceptually irreconcilable with the general international law governing States' prescriptive jurisdiction.

The criticisms concerning validity and coherence discussed in Chapter 5 apply most directly to the 'narrow' model of police powers. In considering police powers as 'a customary autonomous concept expressing the inherent right and duty of states to regulate',[455] the below applies equally whether we consider the 'broad' or 'narrow' models of police powers.

6.1 The consequences of the 'traditional' approach to States' regulatory authority

Under general international law States have the legally recognised authority to create and apply laws in respect of a sphere of competence delimited by the external aspects of the law on jurisdiction: the rules concerning entitlement and priority. A State's territory is the core, and indeed the basis, of this sphere. Within this sphere, international law recognises States' legal entitlement, or ‘right’ to create and apply laws. This entitlement inheres in the State’s legal personality and is not dependent on

[455] Viñuales (n 18) 332

agreement between individual States: it constitutes a 'sovereign' right.

In accordance with the law on domestic jurisdiction, the content of States' entitlement is defined residually: its limits and content are modified, conditioned, or even reduced through auto-limitation.[456] The legality of any regulatory act is determined by reference to the matrix of international law applicable in any given circumstances. A State reduces its (otherwise plenary) freedom by entering into treaties, or as a member of a community of States to which a customary norm applies. States have no '*essential and irreducible* sphere of freedom',[457] rather their ability to act through regulatory or other measures is always residual: '[States] are only free to [act] to the extent that they have not assumed obligations, in one way or another, not to do so.'[458] Although the matters that fall exclusively within States' domestic jurisdiction may be 'shrinking',[459] the question necessarily remains relative.[460]

Without doubt, the number and detail of limiting rules continues to increase (including through the development of CIL on the treatment of aliens, and the protection standards in IIAs) but this has not upset the starting point, which is always 'freedom-limited-by-voluntary-subtraction':[461] '[w]hat is not prohibited by the law is permitted by the law. If a state has no obligation to behave in a certain way, it is legally free to behave as it pleases.'[462] Lowe captures this sentiment well: 'governments must be presumed to retain the right to govern; but if they promise not

456 see: *Lotus*, 19-22; *Nationality Decrees*, 24; *Nicaragua* [245]

457 Tzanakopoulos (forthcoming 2015) 4 CJICL, 14

458 ibid 15

459 D'Amato (n 132) 676

460 Koskenniemi (n 19) 32

461 Allott (n 26) 312

462 Kelsen (n 34) 383

to do so in a particular manner […] the government should be held to its promise.'[463]

The rules on State responsibility reinforce this position. Pursuant to Article 2 of the ILC Articles on State Responsibility, a State will be responsible under international law for (i) conduct or an omission attributable to it; that (ii) constitutes a breach of an international obligation held by the State. Under Article 3, whether conduct constitutes an internationally wrongful act depends on the existence and application of any applicable (primary) rules of international law. Article 12 further provides that a State has committed an IWA 'when an act of that State is not in conformity with what is required of it by [its international legal] obligation, regardless of its origin or character.' This structure applies irrespective of the material content of the obligations under consideration and it is immaterial that a State's conduct takes the form of regulation. In the context of regulatory exercises within its sphere of competence, a State does not have to justify its exercise with reference to an authorisation contained in a permissive rule. Rather, it must only show that the content and consequences of its regulatory exercise were not prohibited, or if the material conditions for a breach are present, that responsibility was mitigated by a relevant circumstance precluding wrongfulness.[464]

6.2 The consequences of the police powers approach

Within the 'broad' model, police powers is generally presented as safeguarding States' 'right' (and, even, 'duty')[465] to promote the public interest through regulation. Police powers is generally presented as strengthening the States' position vis-à-vis private

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463 Lowe (n 5) 462

464 Articles 22-26

465 Viñuales (n 18) 332; Schill (n 200) 336; Alvik (n 23) 262

parties, or realigning analysis to better accommodate non-economic considerations.[466] However, if we investigate this conception of police powers we see that it generates a structure that departs in significant aspects from how international law has 'traditionally' approached questions of States' regulatory authority. These consequences have not been noted or discussed to date in academic writings concerning police powers.

Police powers departs from the general international law governing States' prescriptive jurisdiction in three main ways: (i) it changes the nature of States' authority to create and apply laws within their territory from a plenary freedom to a conditioned authorisation; (ii) it subjects the entire question of the validity of regulatory conduct to a 'legitimacy' assessment; and (iii) it shifts focus away from the content and consequences of States' assumed obligations. I address each of these in turn.

6.2.1 *The shift from residual plenary freedom to conditional authorisation*

The inquiry generated by the 'police powers doctrine' changes States' entitlement from one of residually defined plenary freedom to one conditioned on (limited) authorisation. Police powers takes the form of a *permissive* rule. Rather than a plenary freedom subject only to auto-limitation, police powers, provides that States may regulate, provided certain (set) conditions are met. The first condition is that regulation (at least if it interferes with private property interests - although if we accept the rationale for the broad model of police powers there is no clear reason to limit its application in this way) must be 'reasonable'. To be considered 'reasonable', a

466 see: Viñuales (2010) (n 23) 309-310; Viñuales (2012) (n 23) 367-369; Viñuales (n 18) 329 et seq; Newcombe and Paradell (n 23) 357; Alvik (n 23) 260 et seq; Henckels (n 17) 225; Yannaca-Small (n 23) 448; Spears (n 23) 277

State's exercise of its right to regulate must be justifiable with reference to: (i) the 'public interest' pursued by the regulation; (ii) whether the regulation is discriminatory; or (iii) arbitrary; (iv) whether due process was afforded; (v) the proportionality of the means employed to the ends pursued; and (vi) whether the State breached any prior assurances.[467] The decision-maker can review the 'legitimacy' of the end pursued - that it fulfils a 'legitimate (public) purpose' - *and* the manner in which it is adopted - that it is 'reasonably balanced'.[468]

Although the awards discussing the 'police power' adopt the language of empowerment or recognition,[469] the 'right to regulate' recognised in the 'broad' model of police powers advocated in academic discussion is more narrow than that recognised under general international law. If we accept that police powers subjects the right to regulate to 'legitimate' public purposes, and imposes non-discrimination and due process requirements to the means of adoption, this in fact *adds* legal conditions, *that attach to the right to regulate itself*. Rather than a (residually defined) plenary freedom, a States' ability to exercise its 'right' is conditioned *ab initio*. Any investigation of the regulatory conduct therefore departs from a very different starting point.

6.2.2 *The shift from legality to 'legitimacy'*

The concept of 'legitimacy' features heavily in both academic and arbitral discussion of police powers. Kingsbury evidences this trend well:

> Even though most investment treaties do not explicitly contain

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467 Viñuales (n 18) 344

468 Kingsbury and Schill (n 200) 91; see also: Schill (n 200) 336

469 see: *Tecmed* [122]; *LG&E* [194]-[195]; *BG Group* [255]; *El Paso* [241]

> exceptions to the protection of property, tribunals acknowledge that host states have the power to restrict property rights without compensation in pursuance of a *legitimate purpose*, so long as the measure taken with this purpose is reasonably balanced in relation to the regulation's effect on the investment.[470]

Alvarez likewise provides a clear example of this emphasis on 'legitimacy':

> the usual canon of interpretation [holds] that in the absence of explicit treaty provision, States ought not to be presumed to intend to deviate from a norm of fundamental importance such as their general *residual right to engage in legitimate regulation*. […] BIT guarantees, such as the international minimum standard, presuppose States' continuing ability to exercise their general police powers.[471]

'Legitimacy' as the final arbiter of State regulation arises too in the awards invoking police powers. 'Legitimacy' is invoked explicitly as the ultimate question being considered through the police powers analysis in *Azurix,*[472] *Servier*, *de Levi*,[473] *Suez and Vivendi*[474] - it is not a stretch to say that this theme runs throughout other awards. The term 'validity' is used in the same manner in *Saluka*,[475] *Chemtura*[476] and seemingly interchangeably with 'legitimacy' in *Servier*.[477]

But what is *meant* by 'legitimacy'? The tribunal's award in *Servier* provides us with a useful guide. The *Servier* tribunal considered that there were:

> four elements that must be fulfilled for a measure *to constitute an exercise of legitimate regulatory power*. […] [These were] that the measure in question was (1) *reasonable*; (2) non-discriminatory; (3)

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470 Kingsbury and Schill (n 200) 91 (my emphasis)

471 Alvarez (n 13) 322 (my emphasis)

472 [310]

473 [476]

474 [139]

475 [263]-[264]

476 [266]

477 [277]

> *proportionate* to the public interest to be protected; and (4) adopted in good faith.[478]

The 'legitimacy' of regulation is thus equated to the satisfaction of general good governance requirements. This is also present within Viñuales's model:

> ['Police powers'] operates as a presumption of regularity unless the claimant can show unreasonableness by pointing inter alia to the lack of public purpose, discrimination, arbitrariness, due process, effects, or prior specific assurances (considerations of good faith). [These] *are components of a broader test of regulatory reasonableness or, as articulated by the ECtHR, of proportionality*.[479]

But, as Klabbers argues, legitimacy is 'problematic' as the 'ultimate criterion' of the (legal) validity of State conduct, because 'legitimacy as such is very much in the eye of the beholder.'[480] According to Klabbers:

> This works in at least two different ways. First, and rather obviously, people of different political orientations may reach different conclusions about the legitimacy of a state, an institution or a piece of legislation. Hence the need, recognised by Franck, to develop further criteria. Second, and more problematically for present purposes, different stakeholders may also reach different conclusions regarding the legitimacy of an entity or an instrument. […] In other words, different stakeholders will operate on different conceptions of legitimacy, even regardless of political cleavages […][481]

Legitimacy 'is not about *normative* substance. Its point is to avoid such substance but nonetheless to uphold a *semblance* of substance'.[482] Reliance on

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478 ibid (my emphasis)

479 Viñuales (n 18) 344

480 Klabbers, in Kammerhofer and d'Aspremont (eds) (CUP 2014) 282. On the fraught nature of 'legitimacy' as a quasi-legal concept, see eg: Crawford (2004) 98 ASIL Proc 271, 271; Roberts, in Alston and MacDonald (eds) (OUP 2008) 202-212; Koskenniemi (2009) 15(3) EJIR, 409; Thomas, 'The Concept of Legitimacy and International Law' (London School of Economics & Political Science 2013) LSE Law, Society and Economy Working Papers 12/2013

481 Klabbers (n 480) 282-283

482 Koskenniemi (n 480) 409 (my emphasis); Capps, in Kammerhofer and D'Aspremont (eds) (CUP 2014) 235

'legitimacy' places absolute dependence on the decision-maker as determiner of what 'legitimacy' is - in this context, the tribunal determining the investment dispute. The equation of 'legitimacy' with 'good governance' or 'procedural fairness' is but one conception - one that seems intrinsically tied up with a particular (political) construction of the role of the State. Lang makes a similar observation concerning the use of 'legitimacy' inquiry in international trade law, where it is used as a label under which a decision-maker inserts a political conception of 'good' and 'bad' regulation and notions of '"optimal" state-market relations'[483]. Although a good governance model is the current (ostensibly politically- and values-neutral) approach tribunals have adopted in the context of police powers, if the ultimate question is 'legitimacy', even this is not set[484]. Except to the extent the legitimacy requirement is generated by a formally ascertained legal rule, the only inquiry open to the decision-maker concerns the *legality* of a particular regulatory exercise, assessed against the State's assumed obligations. We can arguably see here a shift away from objective legal criteria, and a return to subjective structures in tribunals' reliance on 'legitimacy'.[485] I return to these issues below.

As I discussed in Section 5.1, it is doubtful that States have accepted categories of 'legitimate' and 'illegitimate' (public) purposes. Likewise, although certain 'good governance' requirements may exist through the operation of other positive rules,[486] the broad model of police powers subsumes these requirements

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483 Lang (n 452) 5, 165-166, 215-216

484 But is subject, always, to the political: Koskenniemi (n 37) 591. See relatedly, on the equivalence of the concept of the 'public interest' in domestic public law: Feintuck, *Public Interest* (OUP 2004) 3-7

485 see: d'Aspremont (n 16) 124-125; García-Salmones Rovira, *Positivism* (OUP 2013) 361

486 For example through the rules on access to and denial of justice, the ever-elusive 'international minimum standard' and by way of FET provisions: Paparinskis (2013) (n 23)

under the general umbrella term 'legitimacy'. Police powers' reliance on the concept of legitimacy further highlights how radical a departure it represents from the traditional approach to regulatory authority where it is the right of States to decide for themselves, subject to the requirements of international law, what are 'legitimate' ends and means of conduct, *including* regulatory conduct.[487]

6.2.3 *The shift away from States' assumed obligations*

The third major consequence of the 'broad' model of police powers is closely related to both the first and second. Police powers' shift from a freedom-based to an authorisation-based approach to States' regulatory authority, and an increased focus on 'legitimacy' rather than 'legality', is accompanied by a corresponding shift of focus *away* from the content and consequences of States' assumed obligations in IIAs and CIL. If we accept the 'broad' model of police powers as an independent customary norm rather than part of the customary definition of indirect expropriation (the 'narrow' model), the question that arises is what is the continued role (and even *relevance*) of the protection standards the State has agreed to abide by in the relevant IIA, or that applies to its relationship with the foreign national under CIL?

We can see in the broad 'police powers doctrine' a catch-all treatment standard for all State measures involving regulation. The 'public purpose', 'due process', 'reasonableness', 'proportionality' and 'good faith' conditions bound up in the broad model of police powers seem to conflate the requirements of (at least) access to and denial of justice, FET and indirect expropriation.[488] Is police powers the mother of all protection standards that makes recourse to any other redundant? Relatedly, do the

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487 Tzanakopoulos (n 457) 14-15

488 See generally: Paparinskis (2013) (n 23); Francioni (2009) 20(3) EJIL 729; Paulsson, *Denial of Justice* (CUP 2005)

police powers conditions on the right to regulate apply even if a State has *not* agreed to afford any particular standards of protection in an IIA?

As is evident throughout the awards invoking it, through conditioning States' regulatory authority on the establishment of a 'legitimate' public purpose and on the satisfaction of good faith and good governance requirements, the 'broad' model of police powers departs from an approach based on auto-limitation and *legality*,[489] in favour of an accountability-oriented approach. We see this in the language and approaches adopted by the tribunals considered in Chapter 4. Rather than using the language of 'legality', tribunals consider the 'validity', [490] 'legitimacy', [491] 'reasonableness'[492] and 'fairness'[493] of the regulation. If we consider (as I argue in section 5.1 above) that a definitive list of 'permitted' or 'legitimate' public purposes has yet to emerge in State practice and *opinio juris,* we can see the 'broad' model of police powers as symptomatic of a more general shift (evident in investment law and elsewhere) [494] away from legality to accountability. Accountability-oriented approaches '[turn] the traditional scheme of things on its head':[495]

> Whereas the classic position, solidified in the Articles on State Responsibility, held that responsibility could only be attached to an internationally wrongful act, and therewith presupposed the existence and identification of a valid rule or principle of international law, the current trend works the other way around. Recent discussions of accountability in international law start from the position that wherever public authority is exercised on the international level, there must be

489 see: *Kosovo AO*, 436 et seq; *Nuclear Weapons AO*, 237; *Nicaragua* [245]; *Nationality Decrees*, 24; *Wimbledon*, 25

490 *Saluka* [264]; *Chemtura* [254] [266]

491 *Suez and Vivendi* [139]; *de Levi* [475]

492 *Saluka* [272]; *Tecmed* [122]

493 *El Paso* [241]

494 d'Aspremont (n 16) 122 et seq

495 Klabbers (n 480) 277

> the possibility to hold those who exercise it responsible for doing so, regardless of whether their behaviour actually violates any recognised rule or principle of international law. […] Improper behaviour would lead to accountability, regardless of whether or not the improper behaviour would involve any breach of an international legal obligation.[496]

Under the 'traditional' approach, any constraints upon States' plenary freedom to regulate within their sphere of competence must stem from a positive rule based in a valid source of law. Any list of 'legitimate' public purposes and any restrictions on the means able to be adopted in regulating must be readily identifiable in treaty or in CIL. Under the accountability approach suggested by the 'broad' model of police powers, the constraints on the right do not exist as a matter of auto-limitation, but seemingly inhere in the nature of public authority being exercised.[497]

6.3 Explaining police powers

I will now briefly consider why police powers has emerged as an approach to States' regulatory authority. There are several speculative reasons for police powers' emergence. The first explanation lies in the backgrounds and expertise of arbitrators and counsel involved in ISDS. Quite separately to Kurtz's arguments concerning a potential lack of experience or at (at least) of critical engagement on the part of tribunals in customary rule ascertainment,[498] police powers may have emerged as an approach as counsel and arbitrators turn to familiar domestic public law concepts in forming and articulating arguments. This would be unsurprising, given the definitional uncertainty in key areas of the indirect expropriation and FET standards. We can see this in the use of other such concepts, including 'proportionality' and the

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496 ibid 277-278

497 ibid 278

498 Kurtz (n 23) 284 et seq

'margin of appreciation', borrowed from the jurisprudence of domestic and regional courts and tribunals.[499] Once incorporated into arbitral approaches to indirect expropriation, and as I discussed above in Chapter 4, later tribunals add to the analysis, breathing further life into the concept.

The second potential explanation for the emergence and development of police powers is the (completely justified) perceived need on the part of arbitrators to realign the definition of indirect expropriation away from overly effects-oriented approaches to find a more equitable balance between the interests of investors and State parties to IIAs. 'Police powers' is but one approach employed to try to redress the perceived imbalance. As Bonnitcha notes,[500] and as I outline in Chapter 3 above, the majority of tribunals have turned to a proportionality or balancing approach to indirect expropriation (akin to the 'non-preclusion' approach to police powers) *without* employing the language of police powers.[501] In this sense, we can think about police powers as an 'interstitial norm' that sits at the area of 'overlap' between States' prescriptive jurisdiction and their assumed obligations concerning indirect expropriation.[502] According to Lowe, interstitial norms, although not 'law' in the true sense, are presented by decision-makers in dispute settlement in an attempt to

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499 See above, ss. 3.2 and 4.2. For academic works drawing heavily on comparative public law approaches, see: Lowe (n 5); López Escarcena (n 23); Montt (n 13); Henckels (n 17); Kingsbury and Schill, Investor-State Arbitration as Governance (2009) NYU Public Law and Legal Theory Working Paper 146; Kingsbury and Schill (n 200); Leonhardsen (2012) 3(1) JIDS 95; Schill (2012) 27(1) ICSID Review 87; Sweet and Cananea (2013) 46 NYU J Int'l L & Pol 911

500 Bonnitcha (n 8) 47 et seq, 220 et seq

501 Typified in the awards in *Robert Azinian & ors v Mexico* [Award] (1 November 1999) ICSID Case No ARB(AF)/97/2 and *Generation Ukraine Inc v Ukraine* [Award] (16 September 2003) ICSID Case No ARB/00/9. Again, see generally: Lowe (n 5); McLachlan & ors (n 23) 265 et seq; Bonnitcha (n 8); Newcombe and Paradell (n 23) 340-341; Yannaca-Small (n 23); López Escarcena (n 23); Perkams (n 164); Fortier and Drymer (n 198); Dolzer and Schreuer (n 188) 98 et seq; Paulsson and Douglas (n 207)

502 Lowe, in Byers (ed) (OUP 2001) 212-215

accommodate competing policy considerations.[503] In its realignment however, and probably unwittingly, arbitrators have developed a structure of inquiry that (if taken to its logical endpoint) departs significantly from the 'traditional' approach to regulatory authority in international law.

Lastly (and tenuously) we may consider the development of police powers a result of the GAL movement and its project of establishing an internationalised public law. This would not be surprising considering the emphasis the GAL movement has placed on ISDS.[504] Indeed, Van Harten and Loughlin consider investment protection to be perhaps 'the *only* exemplar […] yet to have emerged' of an 'evolving system of global administrative law'.[505] At the centre of the GAL movement is a shift away from traditional formal rule ascertainment and the emphasis on auto-limitation, toward general 'effect- (or impact-) based criteria' and the (amorphous) 'principle of publicness'.[506] Whether certain arbitrators have wittingly adopted GAL approaches to review is open to debate. There is at least some support for the view that such approaches have percolated into pleadings and that academic writings endorsing accountability-based review have influenced the structure and content of decision-making. We can perhaps to some extent explain police powers' shift away from auto-limitation and the legality of conduct, and emphasis on principles of good governance, legitimacy and accountability as the product of the considerable time and energy devoted to the GAL movement worldwide.

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503 ibid

504 eg: Hepburn (2012) 61(3) ICLQ 641; Kingsbury (2009) 20(1) EJIL 23; Krisch (n 13); Montt (n 13); Morgan (2006) 17(1) EJIL 215; Van Harten and Loughlin (n 13); Kingsbury and Schill (n 200); Perkams (n 164); Schill 2010 (n 200); Van Harten (n 13); von Bogdandy and Venzke, *In Whose Name?* (OUP 2014)

505 Van Harten and Loughlin (n 13) 122 (my emphasis)

506 d'Aspremont (n 16) 125

CHAPTER 7:
SUMMARY AND FINAL CONCLUSIONS

This thesis consisted of five substantive chapters. In Chapter 2 I investigated how States' ability to create and apply laws is governed under general international law through the joint concepts of prescriptive jurisdiction and the reserved domain. I showed that in addition to recognising States' *entitlement* to exercise regulatory authority (the 'external' element), general international law also regulates the *content* of that entitlement (the 'internal' element).

Through the rules on prescriptive jurisdiction and reserved domain, States have a plenary, discretionary freedom to regulate for whatever purposes and in whatever manner they deem fit, provided such regulation comports with the States' assumed obligations under conventional and customary international law. There is no fixed category of inherently 'legitimate' or 'illegitimate' regulatory means or purposes in international law - limitations on the ability to regulate domestically can only be generated by States through auto-limitation.

In Chapter 3 I tracked the origins of police powers. I demonstrated that there are two models of police powers: one 'narrow' in which police powers makes up part of the customary definition of expropriation, and one 'broad' in which police powers more generally connotes a State's sovereign right to regulate in the public interest.

In Chapter 4 I described how investment tribunals have employed the concept in ISDS. I showed that arbitral practice invoking police powers is split into two approaches. Under the first, police powers is a factor *precluding* a finding of indirect expropriation. Under the second, a finding that something is within a State's police

powers does not preclude a finding of expropriation, but is merely a *relevant* factor to be considered alongside several others.

In Chapter 5, I began to critically assess police powers. I demonstrated that the criticism that police powers is inadequately supported in State practice and *opinio juris* is justified, and highlighted the defects in tribunals' approaches to customary rule ascertainment. I further demonstrated that even if we accept that police powers exists as a matter of customary international law, it suffers from significant internal incoherence and is ambiguous as an operational legal concept.

In Chapter 6, I showed that, in addition to and notwithstanding the above issues police powers suffers from a more fatal problem: it is doctrinally and conceptually irreconcilable with the general international law governing States' regulatory authority. Police powers' constitutes a significant shift away from these rules on three bases: (i) police powers changes the nature and content of States' right to create and apply laws within their territory from one of residual plenary freedom only capable of auto-limitation to a conditional right dependant on satisfying set criteria; (ii) police powers shifts analysis away from the *legality* of a measure and posits the 'legitimacy' of the measure (conflated with questions of good governance) as the ultimate criterion; (iii) police powers shifts the focus away from the legal content and consequences of States' formal, assumed, obligations under treaty and customary law, with important consequences for consent and auto-limitation as the basis of obligation.

Clearly police powers has emerged as a response by certain tribunals to a particular challenge: the interpretation of extremely broadly worded expropriation provisions and a tendency toward expansive readings of these provisions on the part of earlier tribunals encapsulating (perhaps inappropriately) a very large range of State activity, including so-called 'public interest' regulation. The police powers awards attempt to rein in such expansive readings of indirect expropriation and to balance competing priorities in the protection of foreign investment. Notwithstanding its laudable motivations, police powers nevertheless remains bad law.

In importing a concept developed in the domestic context, tribunals have created structural issues. Police powers is an add-back: in US public law, it is a general recognition of the government's prerogative to regulate, and to interfere with private property interests, *in spite of a positive constitutional principle guaranteeing private property*. This largely explains why it is such a poor fit when transplanted to the international legal order. Unlike in domestic legal orders, there is no formal constitution (written or otherwise) delimiting States' rights, powers and prerogatives vis-à-vis private citizens, nor is there compulsory jurisdiction and a system of hierarchically structured courts in international law.

Rather than developing legal concepts to mitigate vague, openly worded protection standards, tribunals would do better to give effect to provisions in accordance with the conventional and customary rules on treaty interpretation. If this results in undesirable outcomes for States parties, we may see a (continued) shift to more clearly expressed protection standards (or even away from IIAs altogether). As the majority of tribunals dealing with the issue of indirect expropriation seemingly have already done, we should discard police powers as a problematic legal dead end,

and return attention to the content and consequences of the particular treatment standards and any (applicable customary law) under consideration in a given investment dispute. For some this outcome may be frustrating, but better that than to hammer away at a square peg until it fits through a round hole.

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