

**ACCOMMODATING THE PUBLIC
INTEREST IN INTERNATIONAL
INVESTMENT TREATIES: POLICE
POWERS, EXPROPRIATION AND
TREATY INTERPRETATION**

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ABSTRACT

This thesis analyses the extent to which customary international law principles that protect the right of States to regulate in the public interest are accommodated within international investment treaties (IITs). The thesis focuses on the police powers doctrine under customary international law, which acknowledges that States have the right to enact reasonable, non-discriminatory regulation that is aimed at the public interest and enacted in accordance with good faith and due process. Such regulation will not constitute an expropriation. The thesis explores the concept of ‘police power’, articulates the police powers doctrine and situates the doctrine within customary international law.

The thesis then examines how the police powers doctrine can be accommodated within IITs using the principles of treaty interpretation in the Vienna Convention on the Law of Treaties (VCLT). The police powers doctrine may be ‘accommodated’ in two ways: first, pursuant to Article 31(1) VCLT, by looking to the ordinary meaning of ‘expropriation’, and secondly via Article 31(3)(c) VCLT, which allows the police powers doctrine to be taken into account as a relevant rule of international law applicable between the parties. This approach is contrasted with the interpretation of annexures included in recent IITs, concluding that it is unlikely that these annexures provide greater accommodation than the proper application of the VCLT.

The conclusion of this thesis is that the principles of treaty interpretation allow the police powers doctrine to be considered when determining the meaning of an expropriation provision in an IIT. To this extent, the public interest is accommodated in IITs.

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African Charter on Human and Peoples' Rights	<i>African Charter on Human and Peoples' Rights</i> (signed 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58
American Convention on Human Rights	<i>American Convention on Human Rights</i> (signed 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123
ASEAN Comprehensive Investment Agreement (2009)	<i>2009 ASEAN Comprehensive Investment Agreement</i> (adopted 26 February 2009, entered into force 29 March 2012)
CAFTA-DR (2004)	<i>Dominican Republic – Central America – United States Free Trade Agreement</i> (signed 5 August 2004, entered into force 1 March 2006)
Canada-Jordan FIPA (2009)	<i>Agreement between the Government of Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments</i> (adopted 28 June 2009, entered into force 14 December 2009)
Canada-Latvia FIPA (2009)	<i>Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments</i> (signed 5 May 2009)
Canada-Romania FIPA (2009)	<i>Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments</i> (adopted 8 May 2009, entered into force 23 November 2011)
Canada-Slovak Republic FIPA (2010)	<i>Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments</i> (adopted 20 July 2010, entered into force 14 March 2012)
Canada- Tanzania FIPA (2013)	<i>Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investment</i> (signed 16 May 2013)
Canadian Model FIPA (2004)	<i>Canada: Foreign Investment Protection and Promotion Agreement</i> (2004)
Chile – US FTA (2003)	<i>Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile</i> (signed 6 June 2003, entered into force 1 January 2004)

COMESA Common Investment Area Agreement (2007)	<i>Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area</i> (adopted 22 and 23 May 2007)
European Convention on Human Rights	<i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i> (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221
General Agreement on Tariffs and Trade (1994) or GATT	<i>General Agreement on Tariffs and Trade 1994</i> , 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Texts – Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999) 1867 UNTS 187.
ICSID Convention	<i>Convention on the Settlement of Investment Disputes between States and Nationals of Other States</i> (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159
India-Singapore CEPA (2005)	<i>Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore</i> (Signed on 29 June 2005)
Japan – India CEPA (2011)	<i>Comprehensive Economic Partnership Agreement between Japan and the Republic of India</i> (adopted 16 February 2011, entered into force 1 August 2011)
MIGA Convention	Convention Establishing the Multilateral Guarantee Agency (opened for signature 11 October 1985, entered into force 12 April 1988) 1508 UNTS 90
Morocco-US FTA (2004)	<i>Morocco – United States Free Trade Agreement</i> (signed 15 June 2004, entered into force 1 January 2006)
North American Free Trade Agreement or NAFTA	North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (1994) 32 ILM 605
Nigeria-Turkey BIT (2011)	<i>Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Nigeria Concerning the Reciprocal Promotion and Protection of Investments</i> (adopted 2 February 2011, not yet in force)
Oman- US FTA (2006)	<i>Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area</i> (signed 19 January 2006, entered into force 1 January 2009)
Statute of the ICJ	<i>Statute of the International Court of Justice</i> (concluded 26 June

195945, entered into force 24 October 1945) (1945) 39 AJIL Supp. 215

- US – Uruguay BIT (2005) *Treaty Between the United State of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (signed 4 November 2005, entered into force 1 November 2006)
- US- Peru TPA (2006) *United States – Peru TPA* (signed 12 April 2006, entered into force 1 February 2009)
- US- Rwanda BIT (2008) *Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment* (signed 19 February 2008, entered into force January 2012)
- Vienna Convention on the Law of Treaties or VCLT Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

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CHAPTER ONE

INTRODUCTION

1 Introduction

The right of States ‘to choose and implement [their] own political, economic and social systems’¹ is an undisputed principle of customary international law.² Pursuant to this right, States may regulate their political, economic and social affairs and adopt laws to protect matters of public interest.³ This is often referred to as ‘the right to regulate’.⁴ However, the right is not without limits, and may be limited or proscribed by other legal norms.⁵ Legal norms that limit this right to regulate can be found in the international law concerning the protection of foreign investment (‘international investment law’).

International investment law consists in large part of international investment treaties (IITs) pursuant to which States must observe certain standards of treatment to

¹ *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States) (Merits) [1986] ICJ Rep 14, [233]; *Texaco Overseas Petroleum Company v Libyan Arab Republic*, Award on the Merits, 19 January 1977 (1978) 17 ILM 3, [59].

² *Texaco Overseas Petroleum Company v Libyan Arab Republic*, Award on the Merits, 19 January 1977 (1978) 17 ILM 3, [59].

³ *Joseph Charles Lemire v Ukraine*, ICSID Case No.ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, 505; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States) (Merits) [1986] ICJ Rep 14, [233]; Rahim Mooloo and Justin Jacinto, ‘Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law’ in Karl P Sauvant (ed), *Yearbook of International Investment Law and Policy 2011-2012* (Oxford University Press 2013) 550.

⁴ See, for example, Caroline Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’ (2012) 15 *Journal of International Economic Law* 223; OECD, “‘Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law”, *International Investment Law: A Changing Landscape* (OECD Publishing 2005); Katia Yannaca-Small, ‘Indirect Expropriation and the Right to Regulate: How to Draw the Line?’, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010).

⁵ *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v Republic of Hungary*, ICSID Case No.ARB/03/16, Award, 2 October 2006, [423]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, [529].

protect foreign investment, and under which States accept the obligation to arbitrate disputes arising thereunder.⁶ There are presently over 3,000 IITs in existence, the majority of which are bilateral in nature. This proliferation of treaties has shifted scholarly and judicial attention away from the customary international law that coexists alongside these treaties. As a consequence, obligations to protect investment are increasingly considered and scrutinised in the context of treaty law, but States continue to possess the right, under customary international law, to regulate matters of public interest.⁷

This focus of IITs on obligations to protect investment, coupled with the interpretation of these IITs by *ad hoc* investor-State arbitration tribunals, has given rise to a wealth of criticism that IITs may have a negative impact on the right to regulate in the public interest.⁸ These criticisms advocate for a variety of reforms, including reform of IITs,⁹ the adoption of standards of review for investor-State arbitration tribunals,¹⁰ or

⁶ Mārtiņš Pāparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) 1–2.

⁷ Jorge E Viñuales, ‘Sovereignty in Foreign Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 318.

⁸ See, for example: Barnali Choudhury, ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit’ (2008) 41 *Vanderbilt Journal of Transnational Law* 775; Julia Huecknel, ‘Rebalancing Legitimacy and Sovereignty in International Investment Agreements’ (2012) 61 *Emory Law Journal* 601; Osgoode Hall Law School, ‘Public Statement on the International Investment Regime’ (2010) <[http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20\(June%202011\).pdf](http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20(June%202011).pdf)> accessed 9 June 2013; David Schneiderman, ‘Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes’ (2010) 30 *Northwestern Journal of International Law & Business* 383; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007).

⁹ Barnali Choudhury, ‘Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements’ (2010) 49 *Columbia Journal of Transnational Law* 670; Suzanne Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’ (2010) 13 *Journal of International Economic Law* 1037; Kenneth Vandeveld, ‘Rebalancing Through Exceptions’ (2013) 17 *Lewis & Clark Law Review* 449.

State disengagement from investor-State dispute settlement altogether.¹¹ The continued role of customary international law, and how customary international law interacts with IITs, remains under-theorised in these criticisms.¹²

Similarly, while there is scholarship addressing the impact that IITs may have on the formation of customary international law,¹³ and some discussion of the continued role and relevance of customary international law in IIT disputes,¹⁴ there is less consideration of how customary international law principles that protect the right to regulate may continue to interact with, and be accommodated within, IITs using existing international law tools.¹⁵ The aim of this thesis is to contribute to the latter enquiry.

¹⁰ Caroline E Foster, 'Adjudication, Arbitration and the Turn to Public Law "Standards of Review": Putting the Precautionary Principle in the Crucible' (2012) 3 *Journal of International Dispute Settlement* 525; Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 *Journal of International Dispute Settlement* 197; Stephan Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review' (2012) 3 *Journal of International Dispute Settlement* 577.

¹¹ Muthucumaraswamy Sornarajah, 'A Justice-Based Regime for Foreign Investment Protection and the Counsel of the Osgoode Hall Statement' (2012) 3 *Global Policy* 463; Osgoode Hall Law School (n 8).

¹² There are some exceptions to this, for example, Vid Prislán, 'Non-Investment Obligations in Investment Treaty Arbitration - Towards a Greater Role for States?' in Freya Baetens (ed), *Investment Law Within International Law: An Integrationist Perspective* (Cambridge University Press 2013).

¹³ See, for example: José Alvarez, 'A Bit on Custom' (2009) 42 *New York University Journal of International Law and Politics* 17; Tarcisio Gazzini, 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8 *Journal of World Investment & Trade* 691; Andreas Lowenfeld, 'Investment Agreements and International Law' (2004) 42 *Columbia Journal of Transnational Law* 123; Stephen Schwebel, 'Investor-State Disputes and The Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 *American Society of International Law Proceedings* 27.

¹⁴ Gazzini (n 13); Mārtiņš Paparinskis, 'Investment Treaty Interpretation and Customary International Law: Preliminary Remarks' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011); Viñuales, 'Sovereignty in Foreign Investment Law' (n 7).

¹⁵ There are some notable exceptions to this, including Mārtiņš Paparinskis, 'Regulatory Expropriation and Sustainable Development' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011); Paparinskis, 'Investment Treaty Interpretation and Customary

2 Parameters of Enquiry

As the first part of this introductory Chapter indicated, international law recognises that States have the right to regulate in the public interest. This right is considered to be ‘an essential prerogative’¹⁶ or ‘corollary’¹⁷ of sovereignty. But the meaning and content of the expression ‘right to regulate’, like ‘sovereignty’ itself, is not clear.¹⁸ However, it is possible to identify what Jorge E. Viñuales describes as ‘actionable legal concepts’¹⁹ of sovereignty, of which the right to regulate forms part. In this thesis, the right to regulate is explored through the ‘actionable legal concept’ of the police powers doctrine.

Chapter Two establishes that ‘police power’ of States denotes the right to regulate. The police powers doctrine provides that States have the right to enact reasonable, non-discriminatory regulations aimed at the public interest and enacted in accordance with due process, and such regulations will not constitute an expropriation. As will be discussed in Chapter Two, the right to expropriate (subject to certain conditions) is also an incident of State sovereignty,²⁰ and the law of expropriation has

International Law: Preliminary Remarks’ (n 14); Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7).

¹⁶ *Texaco Overseas Petroleum Company v Libyan Arab Republic*, Award on the Merits, 19 January 1977 (1978) 17 ILM 3, [59].

¹⁷ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 337.

¹⁸ See Vaughan Lowe, ‘Sovereignty and International Economic Law’ in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008) who characterises ‘sovereignty’ as useful expression for ‘identifying a framework for inquiry’ but the expression itself is uncertain and changing (at 83-84); Dan Sarooshi, ‘The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government’ (2003) 25 Michigan Journal of International Law 1107; Claus Zimmermann, *A Contemporary Concept of Monetary Sovereignty* (Oxford University Press 2014).

¹⁹ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 317–318.

²⁰ Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010) 288.

been the subject of extensive discussion in scholarship and investor-State disputes.²¹ However, these discussions have not comprehensively considered of the nature, content and scope of the police powers doctrine. This thesis seeks to fill this gap.

After examining the police powers doctrine and its customary international law status in Chapter Two, this thesis explores (in Chapter Three) how the doctrine interacts with IITs through the principles of treaty interpretation in the Vienna Convention on the Law of Treaties ('VCLT'). The central argument advanced in this thesis is that the principles of treaty interpretation, and in particular Articles 31(1) and 31(3)(c) VCLT, allow for the police powers doctrine to be considered when determining the meaning of expropriation provisions in IITs. To this extent, the right to regulate is 'accommodated' within IITs. There is thus no need for explicit reference to the police powers doctrine in IITs, although Chapter Four considers the interpretation of recent treaty provisions that have sought to include such language.

Further, in investor-State arbitration decisions to date, the police powers doctrine has only been successfully invoked in the context of expropriation, and not other standards of investment. While this thesis focuses on the interaction between police powers and expropriation, the thesis lays the foundation for further research into to the broader role the police powers doctrine may play in international investment law.

²¹ See, for example, GC Christie, 'What Constitutes a Taking of Property under International Law' (1962) 38 *British Yearbook of International Law* 307; L Yves Fortier and Stephen L Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2004) 19 *ICSID Review* 293; Jan Paulsson and Zachary Douglas, 'Indirect Expropriation in Investment Treaty Arbitration' in Norbert Horn and Stefan Michael Kröll (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law International 2004).

Other ‘actionable legal concepts’ that may protect the right to regulate, such as circumstances precluding wrongfulness under customary international law, exceptions provisions in treaties, and standards of review such as ‘deference’ or the ‘margin of appreciation’ are not addressed in this thesis.²² This is justified on several grounds. First, it is not possible in the space of an MPhil thesis to explore all of the actionable legal concepts that express the right to regulate in international investment law. Secondly, an analysis of the interaction between the customary international law doctrine of police powers and the interpretation of IITs is an ideal starting point, as it has not been explored extensively in legal scholarship to date.²³ This can be contrasted with the interaction between the necessity defence under customary international law and exceptions provisions in IITs, which has been the subject of considerable debate in scholarship.²⁴ Similarly, there is a growing body of scholarship discussing standards of review such as ‘deference’ or a ‘margin of appreciation’.²⁵

²² Except where such concepts incidentally arise in considering the police powers doctrine.

²³ See above n 15 for recent scholarship that has considered this issue.

²⁴ See, for example, José Alvarez and Tegan Brink, ‘Revisiting the Necessity Defence: Continental Casualty v Argentina’ in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2010-2011* (Oxford University Press 2012); William Burke-White and Andreas Von Staden, ‘Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties’ (2007) 48 *Virginia Journal of International Law* 307; Diane Desierto, *Necessity and National Emergency Clauses* (Martinus Nijhoff 2012); Giorgio Sacerdoti, ‘BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity’ (2013) 28 *ICSID Review* 351.

²⁵ Foster (n 10); Moloo and Jacinto (n 3); Anthea Roberts, ‘The Next Battleground: Standards of Review in Investment Treaty Arbitration’ in Albert Jan van den Berg (ed), *Arbitration - The Next Fifty Years, 16 ICCA Congress Series* (Kluwer Law International 2012); Stephan Schill, ‘Rethinking the Substantive Standards of Protection Under Investment Treaties: How Much Deference Should Investment Treaty Tribunals Pay to the Regulatory or Judicial Acts of Host States?’, *Flaws and Presumptions: Rethinking Arbitration Law and Practice in a New Arbitral Seat: The Proceedings of the Mauritius International Arbitration Conference 2010* (International Bureau of the Permanent Court of Arbitration 2012).

Further, it is only after considering the role of customary international law in IITs that there can be full analysis of any potential reforms to international investment law through, for instance, reform to IITs themselves or reform to investor-State dispute settlement procedures. In addition to the conclusions drawn in this thesis on police powers and on the interaction between treaty and custom, this thesis is intended to inform, and form the foundation of, further research on the right of States to regulate in the public interest in international investment law, including the other actionable legal concepts that the word limit of the MPhil thesis cannot accommodate.

3 Outline of Thesis

This thesis is divided into an introduction, three substantive chapters, and a conclusion. Chapter Two examines the nature and content of the police powers doctrine, including its characterisation as a principle of customary international law. Chapter Three then considers the ways in which the police powers doctrine can be accommodated within IITs using principles of treaty interpretation, namely via Articles 31(1) and 31(3)(c) VCLT. After considering the extent to which treaty interpretation may accommodate police powers in the absence of specific treaty language, Chapter Four considers recent treaty provisions that explicitly include the police powers doctrine, and will analyse whether such explicit language provides greater legal certainty than the approach discussed in Chapter Three. The conclusions of the thesis are presented in Chapter Five.

CHAPTER TWO

CUSTOMARY INTERNATIONAL LAW AND THE PUBLIC INTEREST: THE POLICE POWERS DOCTRINE

1 Introduction

This Chapter first explores the meaning of the expression ‘police power’, and then proceeds to articulate what is a ‘legitimate exercise’ of police power. This Chapter argues that States have the right, in the exercise of their police powers, to adopt reasonable, non-discriminatory regulations aimed at the public interest and enacted in accordance with good faith and due process. This Chapter then establishes that customary international law recognises that a legitimate exercise of police power does not constitute an expropriation, and also examines whether the police powers doctrine could better be characterised as a general principle of law. This Chapter will further establish that the police powers doctrine should not be construed as an ‘exception’ to the law of expropriation. Finally, some preliminary observations about the relevance of the police powers doctrine to investment protection standards other than expropriation will also be made.

2 The ‘Police Power’ of States

As noted from the outset of this thesis, the right of States to regulate its political, economic and social affairs and adopt laws to protect matters of public interest is well accepted in international law.²⁶ The expression ‘police power’ denotes this right.²⁷

²⁶ *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States) (Merits) [1986] ICJ Rep 14, [233]; *Texaco Overseas Petroleum Company v Libyan Arab Republic*, Award on the Merits, 19 January 1977 (1978) 17 ILM 3, [59]; *Joseph Charles Lemire v Ukraine*, ICSID Case No.ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, 505;

The word ‘police’ in this context refers to ‘policy’ or ‘polity’.²⁸ The references to ‘police’ used in this context originated from Greek (‘politeia’) and were used in France in the late fifteenth century,²⁹ where ‘police’ was a reference to public administration or ‘institutional means and procedures necessary to secure peaceful and orderly existence for the population of the land’.³⁰ The expression ‘police power’ came to be widely used in the eighteenth century to describe the regulatory power vested in the ruler.³¹ For instance, lecturing between 1762 and 1764, Adam Smith observed that the power of police signified, among other things, government regulation to ensure ‘the opulence of the state’.³² In 1781, Jeremy Bentham similarly noted that the concept of police was incapable of a single definition but was interlinked with the idea of justice, as both had the same object of ‘maintaining the internal peace of the state’.³³ However, whereas justice was consequential to discovering acts that threatened the peace and security of the

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14, [233].

²⁷ Fortier and Drymer (n 21) 298; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 326–329.

²⁸ Santiago Legarre, ‘The Historical Background of the Police Power’ (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 745, 761.

²⁹ Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 423; Markus Dirk Dubber, *Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press 2005).

³⁰ Marc Raeff, *The Well-Ordered Police State: Social and Institutional Change through Law in the Germanies and Russia, 1600-1800* (Yale University Press 1983) 5.

³¹ Loughlin (n 29) 423.

³² Adam Smith, *Lectures on Jurisprudence* (RL Meek ed, Clarendon Press 1978) 6; See also Dubber (n 29) 65; Loughlin (n 29) 423–424; see also Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 326.

³³ Jeremy Bentham, *Theory of Legislation* (Etienne Dumont and Richard Hildreth trs, 2nd ed., Trübner & Co 1871) 242; Dubber (n 29) 68–69.

state, the concept of ‘police’ was preventive and ‘its expedients [were], not punishment, but precautions; it foresees evils, and provides against wants’.³⁴

In his *Commentaries on the Laws of England*, Sir William Blackstone uses the expression ‘police’ alongside ‘œconomy’³⁵ to connote the sovereign’s prerogative to regulate domestic policy,³⁶ in a similar manner to the way in which a master manages his household.³⁷ Blackstone also uses the expression in a criminal law context when referring to ‘crimes against the public police and œconomy’, by which he meant crimes against public order and ‘the due regulation and domestic order of the kingdom’.³⁸

The Swiss jurist Emmerich de Vattel also spoke of ‘police’,³⁹ describing the word as a reference to:

...the attention of the prince and magistrates to preserve everything in order. Wise regulations ought to prescribe whatever will best contribute to the public safety, utility and convenience, and those who have the authority in their hands, cannot be too attentive to their being observed. By a wise polity, the sovereign accustoms the people to order and obedience, and preserves peace, tranquillity and concord among the citizens...⁴⁰

³⁴ Bentham (n 33) 242.

³⁵ A term also used by Jean Jacques Rousseau to describe ‘the only wise and lawful government of a household for the common good of the whole family’ which ‘extended to cover the government of the greater family, which is the state’: Jean-Jacques Rousseau, *Discourse on Political Economy and the Social Contract* (Oxford University Press 1994) 34.

³⁶ Sir William Blackstone, *Commentaries on the Laws of England*, vol 1 (First Edition, Clarendon Press 1765 - 1769) 264.

³⁷ Dubber (n 29) 49, 58; Loughlin (n 29) 423.

³⁸ Sir William Blackstone, *Commentaries on the Laws of England*, vol 4 (First Edition, Clarendon Press 1765 - 1769) 162.

³⁹ Some English translations of Vattel refer to ‘polity’ instead of ‘police’: see J Brown Scott (ed), *The Classics of International Law* (Oxford University Press 1916); Legarre (n 28) 754.

⁴⁰ Emmerich de Vattel, *The Law of Nations, or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (GG and J Robinson 1797) Book I, Ch XIII, 76–77; quoted in Legarre (n 28) 754; See also Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 6) 222; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 327.

This articulation of ‘police power’ as meaning that States have ‘the inherent legal authority to regulate’⁴¹ is common to all legal systems.⁴² For instance, Blackstone and Vattel’s articulation of police powers was influential on the development of United States (‘US’) law.⁴³ As it was originally conceived, police powers in the US described the ‘residuary sovereignty’ of states within the federal system, being ‘employed to mark off the sphere of [s]tate authority from that of the [g]eneral [g]overnment’.⁴⁴ In *City of New York v Miln*, Justice Barbour cites what he describes as ‘impregnable positions’:

They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the [C]onstitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may- perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.⁴⁵ (Emphasis in the original)

⁴¹ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 327.

⁴² See further Section 4 of this Chapter for an extensive survey of State practice of legal systems that distinguish between ‘regulation’ and ‘expropriation’.

⁴³ Thomas McIntyre Cooley and Victor Hugo Lane, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Little, Brown 1903) 829; Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Callaghan & Company 1904) 2; Christopher Gustavus Tiedeman, *A Treatise on the Limitations of Police Power in the United States, Considered from Both a Civil and Criminal Standpoint* (FHTThomas Law Book Co 1886) 2.

⁴⁴ Westel Woodbury Willoughby, *The Constitutional Law of the United States* (Second Edition, Baker, Voorhis 1929) 1766; Legarre (n 28) 785–786. See *Gibbons v Ogden*, 22 US (9 Wheaton) 1 (1824) 208; *Brown v Maryland*, 23 US (12 Wheaton) 419 (1827) 442-43.

⁴⁵ *Mayor Aldermen, and Commonalty of the City of New York, Plaintiffs v George Miln*, 36 US (11 Peters) 102 (1837) 139.

The ‘police power’ in the US applies across a variety of contexts, including the ability to regulate the practice of medicine,⁴⁶ the suppression of crime,⁴⁷ and firearms regulation.⁴⁸ The police power is also found in the constitutional law of several European States, such as Norway, where the Norwegian Constitution allows the King to ‘issue and repeal ordinances relating to commerce, customs, all livelihoods and the police’.⁴⁹

Further, there are numerous examples in domestic law that acknowledge the regulatory power of the State, using different language to ‘police powers’ but articulating the same idea. For instance, Constitutions of many Commonwealth countries formerly within the British Empire contain provisions giving the government the power to legislate or regulate to ensure ‘peace, order and good government’.⁵⁰ The phrase expresses the conferral of legislative authority or competence on colonies.⁵¹ The Judicial Committee of the Privy Council described the words ‘peace, order and good government’ as ‘connot[ing], in British constitutional language, the widest law-making powers

⁴⁶ *Gonzales v Oregon*, 546 US 243, 270 (2006), where the Supreme Court noted that ‘the structure and limitations of federalism... allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort and quiet of all persons’.

⁴⁷ *United States v Morrison*, 529 US 598, 618 (2000) where the Supreme Court noted ‘[w]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication’.

⁴⁸ *McDonald v Chicago*, 561 US 742, 836 (2010) where Stephens J noted ‘[T]he very text of the Second Amendment calls out for regulation, and the ability to respond to social ills associated with dangerous weapons goes to the very core of the States’ police power’.

⁴⁹ Constitution of the Kingdom of Norway, art 17. ‘Police’ in this context connotes ‘policy’: see Mads Tønnesson Andenæs and Ingeborg Wilberg, *The Constitution of Norway: A Commentary* (Universitetsforlaget 1987). I am indebted to Eirik Borge and Mads Andenæs for alerting me to the Norwegian law.

⁵⁰ See, for example, *Commonwealth of Australia Constitution Act 1900* (Cth), ss 51 and 52 (Australia); *Constitution Act 1867*, s 91 (Canada); *Constitution of the Federal Republic of Nigeria 1999*, s 4(2) (Nigeria). See also Hakeem O Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge 2014); Maria Valverde, ‘Peace, Order and Good Government, Policelike Powers in Postcolonial Perspective’ in Markus D Dubber and Mariana Valverde (eds), *The New Police Science: The Police Power in Domestic and International Governance* (Stanford University Press 2006) 73.

⁵¹ Yusuf (n 50) 22; Valverde (n 50).

appropriate to a Sovereign'.⁵² This description of the broad law-making sovereign power articulated by the Privy Council is reminiscent of how Chief Justice Taney of the US Supreme Court described the police power as 'the power to govern men and things within the limits of its dominion'.⁵³

3 The Legitimate Exercise of Police Power

The police power of States is not absolute.⁵⁴ Reference is often made to the 'legitimate'⁵⁵, 'valid'⁵⁶ or 'normal'⁵⁷ exercise of police power. For consistency, the word 'legitimate' will be used in this thesis.

Before continuing, it must be acknowledged that identifying what is a legitimate exercise of police power is a difficult task. It is frequently acknowledged that a legitimate exercise of police power does not constitute an expropriation,⁵⁸ but the focus in scholarship and in investor-State arbitration is usually placed on expropriation, and not police power. This is entirely understandable, as States cite their police power as a

⁵² *Ibralebbe v The Queen* [1964] AC 900 at 923; *R (Bancoult) v Foreign Secretary (No 2)* [2009] 1 AC 453, 504.

⁵³ *License Cases*, 46 US (5 Howard) 504, 583 (1847).

⁵⁴ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [258]; *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v Republic of Hungary*, ICSID Case No.ARB/03/16, Award, 2 October 2006, [423]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, [529].

⁵⁵ *Les Laboratoires Servier v Republic of Poland*, UNCITRAL, Award, 14 February 2012, [584]; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 624.

⁵⁶ *Chemtura Corporation v Canada*, UNCITRAL, Award, 2 August 2010, [266].

⁵⁷ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [256]; Convention Establishing the Multilateral Guarantee Agency (MIGA)(opened for signature 11 October 1985) 1508 UNTS 90, Article 11(a)(ii); Jan Paulsson, 'Indirect Expropriation: Is the Right to Regulate at Risk?' (2006) 3 Transnational Dispute Management 12.

⁵⁸ The customary international law nature of this doctrine will be more fully explored in Section 4 of this Chapter.

justification for conduct that is alleged to have violated an expropriation provision in an IIT.⁵⁹ As such, the focus of a decision-maker considering the dispute is understandably framed around the treaty provision that is allegedly violated. However, in light of the focus of this thesis on the police power, it is necessary to analyse and articulate the concept of a ‘legitimate exercise of police power’ under customary international law in more depth. In doing so, this section draws together the jurisprudence of investor-State arbitration tribunals, as well as from State practice and the writings of learned societies and eminent publicists. These sources have not necessarily expressed the doctrine comprehensively, but there is a level of consistency that allows for conclusions to be drawn. These sources will be revisited in Section 4 of this Chapter when examining the customary nature of the police powers doctrine.

There are several components that must be satisfied for a regulation to be a legitimate exercise of police power. To be a legitimate exercise of police power, the regulation enacted by the State must be non-discriminatory.⁶⁰ The regulation must also be enacted in accordance with due process.⁶¹ Several tribunals have added that such

⁵⁹ This point will be revisited in Section 5 of this Chapter below when discussing issues surrounding the burden of proof and whether the police powers doctrine is an ‘exception’ to the law of expropriation.

⁶⁰ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [262]; *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [240] – [241]; MIGA Convention, Art 11(a)(ii); OECD, ‘Organisation for Economic Co-Operation and Development: Draft Convention on the Protection of Foreign Property: Text with Notes and Comments’ (1968) 7 International Legal Materials 117; American Law Institute, *Third Restatement of the Law, the Foreign Relations Law of the United States* (American Law Institute Publishers 1987).

⁶¹ *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005, Part IV, Chapter D, Paragraph 7; *Chemtura Corporation v Canada*, UNCITRAL, Award, 2 August 2010, [266]; *TECO Guatemala Holdings, LLC v Republic of Guatemala*, ICSID Case No.Arb/10/23, Award, 19 December 2013, [491]; Paparinskis, ‘Regulatory Expropriation and Sustainable Development’ (n 15).

regulations must be ‘bona fide’.⁶² Some tribunals have qualified that the regulation must be a ‘general’ regulation.⁶³ However, as noted by Viñuales, there are examples of tribunals applying the police powers doctrine in the context of targeted measures, such as the non-renewal of permits.⁶⁴

Another requirement is that regulation must be made in the public interest.⁶⁵ In this context, ‘public interest’ is often used interchangeably with ‘public welfare’,⁶⁶ ‘public purpose’,⁶⁷ ‘general welfare’⁶⁸ or ‘general interest’.⁶⁹ Similarly, tribunals variously noted such measures must be made ‘in defence of’,⁷⁰ ‘in the interests of’⁷¹ or be

⁶² *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [255]; *Les Laboratoires Servier v Republic of Poland*, UNCITRAL, Award, 14 February 2012, [569]; *Ioannis Kardassopoulos v Republic of Georgia*, ICSID Case Nos. Arb/05/18 and Arb/07/15, Award, 3 March 2010, [387]; *SAUR International SA v Argentine Republic*, ICSID Case No.Arb/04/4, Decision on Jurisdiction and Liability, 6 June 2012, [401]; *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [240].

⁶³ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [262]; *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [240] – [241].

⁶⁴ For example, *Chemtura Corporation v Canada*, UNCITRAL, Award, 2 August 2010; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 334-336.

⁶⁵ *Marvin Feldman v Mexico*, Case No.Arb(AF)/99/1, Award, 16 December 2002, [103] – [105], citing American Law Institute (n 60).

⁶⁶ Philip C Jessup, ‘Confiscation’ (1927) 21 American Society of International Law Proceedings 38; John H Herz, ‘Expropriation of Foreign Property’ (1941) 35 American Journal of International Law 243, 251–252.

⁶⁷ *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [241].

⁶⁸ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [255]; *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No.Arb/08/5, Decision on Liability, 14 December 2012, [471].

⁶⁹ *SAUR International SA v Argentine Republic*, ICSID Case No.Arb/04/4, Decision on Jurisdiction and Liability, 6 June 2012, [401] (author translation of ‘l’intérêt général’).

⁷⁰ *Ibid* [401] (author translation of ‘en défense de l’intérêt général’).

⁷¹ *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* ICSID Case No.Arb/03/19, Decision on Liability, 30 July 2010, [139].

‘aimed at’⁷² or ‘for the benefit of’⁷³ the public interest. Some articulations of the doctrine seek to define ‘public interest’ (or its equivalent) in more detail. For instance, the ‘Harvard Draft’ Convention on Responsibility of States for Injuries to the Economic Interests of Aliens, whose authors sought to codify the laws of foreign investment,⁷⁴ noted that ‘public welfare’ included the protection of health, security or morality.⁷⁵ However, this specific identification of a ‘taxonomy of regulatory purposes’⁷⁶ is less common in recent scholarship and tribunal decisions, particularly as States invoking the police powers doctrine do so to justify regulation enacted for a variety of purposes, such as environmental purposes.⁷⁷

The reduced emphasis on the specific purpose of the measure is also consistent with the final element, which is that the regulation under scrutiny must be ‘reasonable’⁷⁸ to be a ‘legitimate’ exercise of police power. One element that has emerged in investor-State arbitration decisions is that for an exercise of police power to be reasonable, the effect of the regulation must be ‘proportionate’ to the public interest being pursued.⁷⁹

⁷² *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [255].

⁷³ *BG Group Plc v The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, [268].

⁷⁴ Louis B Sohn and RR Baxter, ‘Responsibility of States for Injuries to the Economic Interests of Aliens’ (1961) 55 *American Journal of International Law* 545.

⁷⁵ *Ibid*; see also Herz (n 66).

⁷⁶ Allen S Weiner, ‘Indirect Expropriations: The Need for a Taxonomy of “Legitimate” Regulatory Purposes’ (2003) 5 *International Law FORUM du droit international* 166.

⁷⁷ For example, *Chemtura Corporation v Canada*, UNCITRAL, Award, 2 August 2010.

⁷⁸ *Marvin Feldman v Mexico*, Case No.Arb(AF)/99/1, Award, 16 December 2002, [103] – [105], citing American Law Institute (n 60); Jessup (n 66) 40; Francisco Orrego Vicuña, ‘Carlos Calvo, Honorary NAFTA Citizen’ (2002) 11 *New York University Environmental Law Journal* 19, 27. Occasionally the word ‘normal’ is used in lieu of ‘reasonable’: see, for example MIGA Convention, Art 11(a)(ii).

⁷⁹ *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No.Arb(AF)/00/2, Award, 29 May 2003, [122]; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No.Arb/02/1, Decision on Liability, 3 October 2006, [195]; *Les Laboratoires Servier v Republic of Poland*, UNCITRAL, Award, 14 February 2012, [569];

An exercise of police power that is contrary to specific assurances made to an investor may also be unreasonable.⁸⁰ For instance, in *El Paso v Argentina*, the tribunal noted ‘the need for reasonableness and proportionality of State measures interfering with private property’.⁸¹ The tribunal noted that if a measure was unreasonable (which the tribunal considered to mean ‘arbitrary, discriminatory, disproportionate or otherwise unfair’),⁸² it would no longer be considered a legitimate exercise of police power and could be ‘considered as amounting to an indirect expropriation if [the measures] result in a neutralisation of the foreign investor’s property rights’.⁸³ This focus on reasonableness and proportionality does not make the purpose of the measure irrelevant, but rather ‘the reasonableness of the measures in relation their purpose provide[s] the conceptual framework for addressing interferences’.⁸⁴

The *El Paso* tribunal combined many of these considerations when it held:

[A] general regulation is a lawful act ... 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.*

...

Total SA v Argentine Republic, ICSID Case No.Arb/04/1, Decision on Liability, 27 December 2010, fn 232; *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [241].

⁸⁰ *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005, Part IV, Chapter D, Paragraph 7; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 340–342; Rosalyn Higgins, ‘The Taking of Property and the State: Recent Developments’ (1982) 176 *Recueil des Cours* 263, 333–337.

⁸¹ *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [241].

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 6) 224.

If 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.⁸⁵

Taking this jurisprudence together then, when a State adopts reasonable, non-discriminatory regulations aimed at the public interest and enacted in accordance with good faith and due process, the regulation will be a legitimate exercise of police power.

4 The Police Powers Doctrine under Customary International Law

This section will explore how customary international law recognises that a legitimate exercise of police power will not constitute an expropriation, and therefore will not be compensable.⁸⁶ I will refer to customary international law principle as 'the police powers doctrine'.

a) Customary international law status

The police powers doctrine is found (i) in State practice and *opinio juris*, supporting a conclusion that the doctrine is a principle of customary international law. This conclusion is reinforced (ii) in judicial practice of international courts and tribunals, and (iii) in the writings of learned societies and eminent publicists.

⁸⁵ Emphasis in the original. *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [240] – [241].

⁸⁶ Jorge E Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2010) 80 *British Yearbook of International Law* 244, 310; Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (n 4); Esmé Shirlow, 'Les Laboratoires Servier, SAA, and Others v Republic of Poland Defining the Nature of the Police Powers "Defence" and the Deference Applicable in Regulatory Expropriation Cases' (2014) 29 *ICSID Review* <<http://ezproxy.ouls.ox.ac.uk:3207/content/early/2014/06/06/icsidreview.siu009.full>> accessed 11 June 2014.

i) *State Practice and Opinio Juris*

This subsection will first examine State practice in the form of legislative acts and judicial decisions in domestic legal systems, and then proceed to discuss the practice of States in their international relations. It will also examine whether this practice demonstrates a belief on the part of States that this doctrine reflects international law for *opinio juris* purposes. Whether this practice may also constitute a general principle of law under Article 38(1)(c) of the Statute of the International Court of Justice ('ICJ') will be discussed in the Section 4(b) below.

First, a survey of legislative acts and judicial decisions in domestic legal systems supports the view that a legitimate exercise of police power does not constitute an expropriation.⁸⁷ For instance, US law recognises that an exercise of police power could be legitimate even where the exercise infringed economic and property interests. An early articulation of this was in 1851, when Justice Shaw of the Supreme Court of Massachusetts considered the distinction between 'police power' and 'eminent domain' (the right of the government to take property):

All property in this Commonwealth is...held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain, - the

⁸⁷ Both of these sources are widely accepted as evidencing State practice: see Crawford, *Brownlie's Principles of Public International Law* (n 55) 24; Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 62; Sir Michael Wood, 'Second Report on Identification of Customary International Law, A/CN.4/672 (22 May 2014)' 21–25. The methodology applied for examining these legislative acts and judicial systems will be discussed in Section 4(b) below.

right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power - the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances... as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise.⁸⁸

The US Supreme Court has considered whether government regulations could ever amount to a 'taking' contrary to the Fifth Amendment to the US Constitution, which provides that private property shall not 'be taken for public use, without just compensation'.⁸⁹ The jurisprudence has developed such that the 'police power' is not an absolute concept, and that regulation could go 'too far' and constitute a taking.⁹⁰ In *Penn Central*,⁹¹ the Court identified several factors that were relevant in determining whether a 'particular governmental action has effected a taking',⁹² including the economic impact of the regulation on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action.⁹³ The police powers doctrine applies equally in US foreign relations law, as highlighted by the *Restatement (Third) of Foreign Relations Law of the United States*:

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 that is commonly accepted as within the police power of states, if it is not discriminatory.⁹⁴

⁸⁸ *Commonwealth v Alger*, 61 Mass. (7 Cush) 53, 85 (1851); quoted in Cooley and Lane (n 43) 830. See also *Mugler v Kansas* 123 US 623, 663(1887).

⁸⁹ *The Constitution of the United States of America*, Amendment V.

⁹⁰ *Pennsylvania Coal Company v Mahon*, 260 US 393, 415 - 416 (1922).

⁹¹ *Penn Central Transport Corporation v New York City*, 43 US 104 (1977).

⁹² *Ibid* 130-131.

⁹³ *Ibid* 138; *Lingle v Chevron USA Inc*, 544 US 528 (2005).

⁹⁴ American Law Institute (n 60) §712, Comment (g), 201.

Similarly, the power to regulate in such a way that interferes with property rights (without amounting to an expropriation) is familiar to all common law systems.⁹⁵ In Australia, for instance, measures that are ‘a means for enforcing some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest’ would not constitute an ‘acquisition’ of property contrary to the Australian Constitution.⁹⁶ However, like the US doctrine, this power is not without limits. In Australia, for instance, where the regulation is considered to amount to ‘an effective sterilisation of the rights constituting the property in question’⁹⁷ it may be compensable. Similarly in Canada, a regulation has been said to amount to a taking where it eliminates ‘virtually all of the aggregated incidents of ownership’⁹⁸ or where the owner’s proprietary rights are ‘wholly nullified’.⁹⁹

Under German law a distinction is drawn between the regulation of property and expropriation of property.¹⁰⁰ In determining whether a regulation of property falls within

⁹⁵ See, for example, *Commonwealth v Tasmania* (1983) 158 CLR 1 at 283 (High Court of Australia); *British Columbia v Tener* (1985) 17 DLR (4th) 1 at 22 (Supreme Court of Canada); *Kaisik Development Pty Ltd v Urban Renewal Authority* [2002] 291 HKCU 1 at [19] (High Court of Hong Kong); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads & Ors* 2009 (6) SA 391 (CC) [32] (Constitutional Court of South Africa); Thomas Allen, *Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000) 179; Kevin Gray, ‘Can Environmental Regulation Constitute a Taking of Property at Common Law?’ (2007) 24 *Environmental and Planning Law Journal* 161, 163; AJ van der Walt, *Constitutional Property Law* (Juta & Co Ltd 2011).

⁹⁶ *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 39 (Gaudron J); Allen (n 95); Pamela O’Connor, ‘The Changing Paradigm of Property and the Framing of Regulation as a “Taking”’ (2010) 36 *Monash University Law Review* 50.

⁹⁷ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 635.

⁹⁸ *Mariner Real Estate Ltd v Nova Scotia (Attorney-General)* (1999) 177 DLR (4th) 696, 717 (Supreme Court of Canada).

⁹⁹ *Cadamiro Resource Corporation v British Columbia* (1999) 80 DLR (4th) 1, 10-11.

¹⁰⁰ Christian Tomuschat and David P Currie (trs), ‘Basic Law for the Federal Republic of Germany’ (21 July 2010) <http://www.gesetze-im-internet.de/englisch_gg/index.html#gl_p0083> accessed 26 March 2014; FA Mann, ‘Outlines of a History of Expropriation’ (1959) 75 *Law Quarterly Review* 188, 215; Hanri Mostert, *The Constitutional Protection and Regulation of Property and*

the right of the government (under Article 14(1) of the Basic Law of Germany) or violates the protection against expropriation (under Article 14(3)) depends on ‘an equitable balance between the owner’s individual liberty interests and the well-being of the community’.¹⁰¹ Other Constitutions in Africa,¹⁰² the Americas,¹⁰³ Asia,¹⁰⁴ Europe,¹⁰⁵ and the Middle East,¹⁰⁶ contain similar distinctions between regulation and expropriation.¹⁰⁷ Indeed, almost all municipal legal systems contain laws that give the

Its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis (Springer 2002) 307; Markus Perkams, ‘The Concept of Indirect Expropriation in Comparative Public Law - Searching for Light in the Dark’ in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010).

¹⁰¹ Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Third Edition, Duke University Press 2012) 638; Perkams (n 100) 135, 137; van der Walt, *Constitutional Property Law* (n 95) 203.

¹⁰² See, for example, *Constitution of the Republic of Ghana* 1992, art 18; *Constitution of Kenya* 2010, arts 40 and 66; *Constitution of The Republic of Namibia*, art 16; *Constitution of the Republic of South Africa*, art 25. Samuel K Amoo, *Property Law in Namibia* (PULP 2014) 71; Mostert (n 100); van der Walt, *Constitutional Property Law* (n 95). At a regional level, the African Charter of Human and Peoples’ Rights also provides that property may be ‘be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws’: African Charter on Human and Peoples’ Rights, Article 14.

¹⁰³ See, for example, *Constitution of Antigua and Barbuda* 1981, art 9; *Constitution of the Commonwealth of the Bahamas* 1973, art 27; *Constitution of the Republic of Chile* 1980, art 19 n 24. The American Convention on Human Rights provides that ‘the law may subordinate...use and enjoyment [of property] to the interests of society’: American Convention on Human Rights, art 21(1).

¹⁰⁴ See, for example, *Constitution of the People’s Republic of Bangladesh*, art 42(1); *Constitution of the Republic of the Philippines* 1987, Articles II and III; *Local Autonomy Law of Japan*, art 2(2); Tsuyoshi Kotaka and David L Callies, *Taking Land: Compulsory Purchase and Regulation of Land in Asian-Pacific Countries* (University of Hawaii Press 2002) 158.

¹⁰⁵ See, for example, *Constitution of the Republic of Albania* 1998, arts 11 and 41; *Constitution of the Principality of Andorra* 1993, art 27; *Constitution of the Republic of Armenia* 1995, art 31; *Constitution of the Italian Republic* 1947, art 42; *Constitution of the Kingdom of Norway*, art 17; *Constitution of Spain* 1978, art 33(2). At a regional level, the distinction is drawn between deprivation of property and ‘control of use’ of property: European Convention on Human Rights, Article 1 of Protocol 1.

¹⁰⁶ See, for example, the *Constitution of the Kingdom of Bahrain* 2002, art 9; *Constitution of the United Arab Emirates* 1971, art 21.

¹⁰⁷ The methodology applied in examining these constitutional systems and reaching this conclusion is outlined in Section 4(b) below.

State ‘broad authority to regulate the use of movable and immovable things within its territory’.¹⁰⁸

While jurisprudence of domestic courts ‘clearly embodies a sense of legal obligation’,¹⁰⁹ it is necessary to examine the reasoning of these judgments in closer detail to determine ‘whether this sense of legal obligation derives from international law’¹¹⁰ for *opinio juris* purposes. A closer inspection of this State practice also highlights that the *opinio juris* element is also present in much of the jurisprudence of domestic courts. Judges in domestic courts considering the constitutional provisions explored above frequently acknowledge the global acceptance of the power to regulate property (and to provide compensation for taking of property) when considering the domestic provisions. It has been variously described as having ‘a long tradition’,¹¹¹ ‘an essential idea which is both basic and virtually uniform in civilized legal systems’,¹¹² and as something ‘well settled’ in ‘the give and take of civil society’.¹¹³ In the US, Chief Justice Taney reiterated this in the *License Cases*:

¹⁰⁸ John G Sprankling, *The International Law of Property* (Oxford University Press 2014) 209–215, 256. The recent survey of State practice by Sprankling identified that ninety-five percent of the 193 UN member States guaranteed the right to property (p 209), and he characterised the power to regulate use of property as ‘axiomatic’ (p 256); See also AJ van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Juta 1999).

¹⁰⁹ Wood, ‘Second Report on Identification of Customary International Law, A/CN.4/672 (22 May 2014)’ (n 87) 61.

¹¹⁰ Philip M Moremen, ‘National Court Decisions as State Practice: A Transnational Judicial Dialogue?’ (2006) 32 North Carolina Journal of International Law and Commercial Regulation 259, 274; Wood, ‘Second Report on Identification of Customary International Law, A/CN.4/672 (22 May 2014)’ (n 87) 61. See also *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*(Judgment) [2012] ICJ Rep 99, [77].

¹¹¹ *Rodriguez Holding Corp v City of Vaughan* (Ontario Superior Court of Justice, 21 August 2006), [47] (Canada).

¹¹² *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 660 per Kirby J (High Court of Australia).

¹¹³ *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 LRC 167, 178 (Privy Council).

[W]hat are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereign to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, 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 exercises the same power; that is to say, the power to govern men and things within the limits of its dominion.¹¹⁴

The reference by Chief Justice Taney to ‘the powers of government inherent in every sovereign’ highlights the *acceptance* of the police powers doctrine as part of international law for *opinio juris* purposes.

In terms of the practice of States in their international relations, the language of ‘police’ and ‘police powers’ was used frequently in late 19th and early 20th century US foreign relations. For instance, in letters from the US Secretary of State to the Minister of the Brazilian Department of State in 1896 and 1897, the US Government noted its refusal to make a claim for compensation on behalf American producers of watermelons who had their lots destroyed by the Brazilian authorities due to an outbreak of cholera, concluded that the sanitary measures ‘were justified under the circumstances’.¹¹⁵ In 1926, Mexico protested against measures taken by the US in prohibiting liquor, which Mexico claimed caused significant injury to property rights. In his reply denying the diplomatic protest, the then-US Secretary of State noted that ‘the liquor business in the United States has not been a property right but a licensed occupation which was subject to the fullest extent at all times to the police powers’ of the State.¹¹⁶

¹¹⁴ *License Cases*, 46 US (5 Howard) 504 (1847) 583.

¹¹⁵ Reproduced in John Bassett Moore, *A Digest of International Law*, vol VI (Government Printing Office 1906) §1003; see also Andrew Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’ in Thomas Wälde and Philippe Kahn (eds), *New Aspects of International Investment Law* (Martinus Nijhoff 2007) 425.

¹¹⁶ John Bassett Moore, *A Digest of International Law*, vol VI (Government Printing Office 1906) §1003; see also Newcombe (n 46) 425.

There are several UN resolutions that acknowledged what Vaughan Lowe describes as the ‘persistence of regulatory powers’ of States in an international investment context.¹¹⁷ These resolutions are also evidence of State practice and *opinio juris*.¹¹⁸ The 1962 Declaration on Permanent Sovereignty over Natural Resources acknowledged the ‘inalienable sovereignty of States over their natural wealth and resources and reinforces their economic independence’.¹¹⁹ The Charter of Economic Rights and Duties of States,¹²⁰ adopted by the General Assembly in 1974, similarly provided that each State had the right:

[t]o regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.¹²¹

As Lowe notes, notwithstanding the other aspects of the Charter that cannot be said to reflect customary international law,¹²² the statement of principle in the Charter quoted above ‘read with the understanding that the State’s rights are necessarily circumscribed by its duties under international law’¹²³ was generally accepted.

¹¹⁷ Vaughan Lowe, ‘Regulation or Expropriation?’ [2002] Current Legal Problems 448, 450; See also Lowe, ‘Sovereignty and International Economic Law’ (n 18).

¹¹⁸ *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States (Merits)) [1986] ICJ Rep 14, [187]-[189]. It is acknowledged that deducing *opinio juris* from UN resolutions must be approached with caution, as States may ‘have various motives when consenting to (or disapproving of) the text of a resolution’: Wood, ‘Second Report on Identification of Customary International Law, A/CN.4/672 (22 May 2014)’ (n 87) 66.

¹¹⁹ Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962), Preamble.

¹²⁰ Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974).

¹²¹ *Ibid* art 2(2).

¹²² In particular, the statement in the Charter of ‘appropriate’ compensation following an expropriation being a matter of domestic and not international law was considered to be inconsistent with customary international law. See Charles N Brower and John B Tepe, ‘The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?’ (1975) 9 International Lawyer 295, 300.

¹²³ Lowe, ‘Regulation or Expropriation?’ (n 117) 450–451.

State practice in the form of negotiation of, and entry into, multilateral conventions to protect investment is also instructive. The 1967 Organisation for Economic Co-operation and Development ('OECD') Draft Convention on Protection on Foreign Property ('1967 Draft Convention') also sets out a series of provisions relating to investment protection, including expropriation. There was no mention of 'police powers' in the text of that Draft. However, in the commentary to the Draft when discussing permissible derogations, it was noted that measures taken as part of the 'normal governmental process' were lawful and not to be considered as derogations (or exceptions) to the Draft. The commentary provided:

No attempt is made here to provide for those cases of State action which, without being of a discriminatory character, limit freedom of ownership or disposition of property but which are accepted as part of normal governmental process...[these are] measures which Parties are entitled to take and the legality of which, in relation to the Convention, is not dependent on the invocation of a derogation clause.¹²⁴

The 1967 Draft Convention was never adopted as a multilateral convention but instead was commended to member States as a model for investment protection in drafting bilateral agreements.¹²⁵ However, the acknowledgement of the 'sovereign right' and of the legality of 'State action...accepted as part of normal governmental process' is supports a customary principle.¹²⁶

¹²⁴ OECD, 'Organisation for Economic Co-Operation and Development' (n 60) 131.

¹²⁵ United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* (United Nations 1988) 7.

¹²⁶ Karen Wolfke, 'Treaties and Custom: Aspects of Interrelation' in Jan Klabbers and René Lefeber (eds), *Essays on the law of treaties: a collection of essays in honour of Bert Vierdag* (Martinus Nijhoff 1998) 36; Wood, 'Second Report on Identification of Customary International Law, A/CN.4/672 (22 May 2014)' (n 87) 62.

Similarly, in the negotiations for the OECD's Multilateral Agreement on Investment ('MAI'), the negotiators¹²⁷ proposed an interpretive note to the draft expropriation provision that read:

This Article is intended to incorporate into the MAI existing international norms. The reference to expropriation or nationalisation and 'measures tantamount to expropriation or nationalisation' reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if the title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.¹²⁸

The OECD Council of Ministers confirmed this view in a declaration, stating that the 'MAI would establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to an expropriation'.¹²⁹

While neither the OECD's 1967 Draft Convention nor the MAI were ever finalised, the view articulated in those draft agreements that the legitimate exercise of police power would not constitute an expropriation was reflected in other multilateral

¹²⁷ According to the OECD, the participating countries in the negotiations were the Member States of the OECD at the time: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States – and the European Communities. Argentina, Brazil, Chile, Hong Kong and China, Estonia, Latvia, Lithuania and the Slovak Republic were observers: OECD, 'Introduction' (*Multilateral Agreement on Investment: Documentation from the Negotiations*) <<http://www.oecd.org/daf/mai/intro.htm>> accessed 28 June 2014; Rainer Geiger, 'Regulatory Expropriations in International Law: Lessons from Multilateral Agreement on Investment' (2002) 11 *New York University Environmental Law Journal* 94, 94–95.

¹²⁸ OECD, 'The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group)' (*Negotiating Group on the Multilateral Agreement on Investment*, 4 May 1998) 15 <<http://www1.oecd.org/daf/mai/pdf/ng/ng9817e.pdf>> accessed 28 May 2014; OECD, "'Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (n 4) 9.

¹²⁹ OECD, 'Ministerial Statement on the Multilateral Agreement on Investment (MAI)' (*OECD Council Meeting at Ministerial Level*, 27 April 1998) <<http://www.g8.utoronto.ca/oecd/oecd98.htm#tag2>> accessed 28 June 2014; Geiger (n 127) 100–101.

agreements that have entered into force. The Convention Establishing the Multilateral Investment Guarantee Agency ('MIGA Convention'), which seeks to encourage foreign investment through providing investors with guarantees against non-commercial risks (including expropriation),¹³⁰ explicitly excludes from the definition of expropriation (an insurable event under the Convention) 'non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories'.¹³¹

Collectively, the widespread State practice and accompanying *opinio juris* affirms the customary international law status of the police powers doctrine.

ii) *Decisions of international courts and tribunals*

Support for the police powers doctrine under customary international law can also be found in decisions of international courts and tribunals. While not constituting State practice, these decisions 'have a role in the recognition and authentication of rules of customary law'.¹³² Further, to the extent that States rely upon the police powers doctrine in international disputes, the position taken by States in these disputes is also evidence of State practice and *opinio juris*.¹³³

¹³⁰ Antonio R Parra, *The History of ICSID* (Oxford University Press 2012) 6.

¹³¹ MIGA Convention, Art 11(a)(ii).

¹³² Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff 1998) 20; Wood, 'Second Report on Identification of Customary International Law, A/CN.4/672 (22 May 2014)' (n 87) 33–34.

¹³³ Ian Brownlie, *Principles of Public International Law* (7th Edition, Oxford University Press 2008) 24; Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *The American Journal of International Law* 179, 218–219; Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 67; Wood, 'Second Report on Identification of Customary International Law, A/CN.4/672 (22 May 2014)' (n 87) 23. It is acknowledged, however, that Tribunals would need to exercise caution when attributing weight to State pleadings as evidence of custom in an investor-State arbitration context, as the investor in the dispute (unlike the State respondent) is not a position to develop customary international law,

The language of ‘police’ and ‘police powers’ appeared in several early 20th century mixed claims commissions. In 1903, in the *Bischoff Case*,¹³⁴ the claimant had its carriage seized by law enforcement authorities based on (incorrect) information that the carriage had carried persons afflicted with smallpox. When the carriage was returned damaged, the claimant brought proceedings for damages before the German-Venezuelan Mixed Claims Commission. The Commission held that ‘during the epidemic of an infectious disease there can be no liability for the reasonable exercise of police power, even though a mistake is made’.¹³⁵

Similarly, in a case determined by the Italy-Venezuela Mixed Claims Commission in 1903, the Commission rejected a claim for damages arising from the closure of a port (which had caused consequential injury to the claimant’s business) as it was assumed ‘that it was within [the Government’s] police power to close [the port]...the power of the Government must be regarded as plenary and the reasons for its exercise beyond question’.¹³⁶ In 1925 in the *Parson’s Case*, stocks of liquor destroyed under the authority of the military governor-general during an insurrection were considered by the Great Britain- United States Arbitral Tribunal ‘to be a matter of police entirely within the powers of the military government and quite justified by the circumstances’.¹³⁷

and excessive reliance may undermine the equality between the parties: see *Industria Nacional de Alimentos SA v Peru*, ICSID Case No.Arb/03/4, Decision on Annulment, 5 September 2007 (Dissenting Opinion of Sir Franklin Berman) [9].

¹³⁴ *Germany-Venezuela Mixed Claims Commission* (1903) reprinted in (1960) 10 RIAA 420.

¹³⁵ *Bischoff Case* (1903) reprinted in (1960) 10 RIAA 420. The tribunal did award damages in this case, but this was because it was considered there was an unreasonable delay in returning the carriage to the claimant.

¹³⁶ *Poggioli Case*, Italy Venezuela Mixed Claims Commission (1903) reprinted in (1960) 10 RIAA 669, 691. The case was upheld in the claimant’s favour in other claims.

¹³⁷ *J Parsons (Great Britain) v United States* (30 November 1925) reprinted in (1955) 6 RIAA 165.

Other international judicial decisions supported the existence of a police powers doctrine. Prior to its emergence in *ad hoc* investor-State arbitration, the Iran-US Claims Tribunal cited and applied the police powers doctrine, noting that it was 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’.¹³⁸

Importantly, investor-State arbitration tribunals that have been required to consider the police powers doctrine have accepted it as a principle of international law.¹³⁹ For instance, in *Les Laboratoires Servier v Poland*, the Tribunal noted that ‘under international law, a State is not liable...if its actions were a valid exercise of regulatory, or “police”, powers’.¹⁴⁰ The principle has been variously described in investor-State arbitration as ‘undisputable’,¹⁴¹ ‘form[ing] part of customary international law today’,¹⁴² and a ‘matter of general international law’.¹⁴³ Similarly, in the North American Free Trade Agreement (‘NAFTA’) case of *Feldman*, the tribunal noted:

[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff

¹³⁸ *Sedco Inc v National Iranian Oil Company* (1985) 9 Iran-US Claims Tribunal Reports 248, 275-276; See George H Aldrich, ‘What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal’ (1994) 88 American Journal of International Law 585. See also *Too v Greater Modesto Insurance Associates and United States of America* (1989) 23 Iran-US Claims Tribunal Reports 378, [26]; Fortier and Drymer (n 21) 299.

¹³⁹ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 329.

¹⁴⁰ *Les Laboratoires Servier v Republic of Poland*, UNCITRAL, Award, 14 February 2012, [276].

¹⁴¹ *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No.Arb(AF)/00/2, Award, 29 May 2003, [119].

¹⁴² *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [262]; *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No.Arb/03/19, Decision on Liability, 30 July 2010, [139].

¹⁴³ *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005, Part IV, Chapter D, [7]; *TECO Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No.Arb/10/17, Award, 19 December 2013, [490]-[491].

levels, imposition of zoning restrictions and the like. *Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say customary international law recognises this.*¹⁴⁴ (Emphasis added)

iii) *Statements of learned societies and eminent publicists*

The statements of learned societies and eminent publicists are not State practice or *opinio juris*, but may be considered ‘as subsidiary means for determining the existence or otherwise of a principle of customary international law’.¹⁴⁵

Vattel recognised that police powers may limit the economic rights of individuals:

It must also be observed, that individuals are not so perfectly free in the economy or government of their affairs, as not to be subject to the laws and regulations of police made by the sovereign.¹⁴⁶

This acknowledgment is reflected in the writings of learned societies and eminent jurists. In 1927, the American Society of International Law held a Roundtable Conference on the Responsibility of States for Damages Done in their Territories to the Person or Property of Foreigners.¹⁴⁷ At that roundtable, Phillip C Jessup noted the US constitutional jurisprudence on the police powers doctrine and concluded that States ‘may perform acts which affect property rights of individuals which do not constitute illegal

¹⁴⁴ *Marvin Feldman v Mexico*, Case No.Arb(AF)/99/1, Award, 16 December 2002, [103] – [105], citing American Law Institute (n 60).

¹⁴⁵ Wood, ‘Second Report on Identification of Customary International Law, A/CN.4/672 (22 May 2014)’ (n 87) 30; Hugh Thirlway, ‘Law and Procedure, Part Two’ (1990) 61 *British Yearbook of International Law* 1, 59–60.

¹⁴⁶ Vattel (n 40) Book 1, Ch XX, 115; see Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 327.

¹⁴⁷ See the various contributions in American Society of International Law, ‘Second Session: Round Table Conference on the Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners’ (1927) 21 *American Society of International Law Proceedings* 23.

confiscation under international law even though no compensation is paid.’¹⁴⁸

He articulated two propositions:

- 1) That international law forbids the confiscation of private property if compensation is not paid.
- 2) That not every uncompensated injury or destruction of property rights is equivalent to confiscation, provided such result is the consequence of a reasonable measure taken by the state in the interests of the public welfare.¹⁴⁹

At the 36th Conference of the International Law Association, held in New York in 1930, there is an express acknowledgment of the police powers doctrine in international law. At that conference, the report on ‘Protection of Private Property’ noted the following:

[S]ometimes a State prohibits a particular business or commerce for police reasons, the business being dangerous or prejudicial to public health or public order. On the other hand; the State may carry through a similar prohibition in order to create a monopoly. These two possibilities are quite distinct. ... *no compensation is paid where a business is prohibited for police reasons.*¹⁵⁰ (Emphasis added)

Writing in 1936, G Kaeckenbeeck, President of the Arbitral Tribunal for Upper Silesia, considered that it was clear that ‘the exercise by the [S]tate of its police or taxation power whatever sacrifice it may impose on individuals, requires no compensation according to the international standard’.¹⁵¹ In 1941, John H. Herz considered that it was a principle of international law that there was a distinction between

¹⁴⁸ Jessup (n 66) 39.

¹⁴⁹ Ibid 40.

¹⁵⁰ International Law Association, ‘Protection of Private Property’, *Report of the Thirty-Sixth Conference held at New York, September 2nd to 9th, 1930* (International Law Association 1930) 351, 362; Konstantin Katzarov, *The Theory of Nationalisation* (Martinus Nijhoff 1964) 291.

¹⁵¹ G Kaeckenbeeck, ‘The Protection of Vested Rights in International Law’ (1936) 17 *British Yearbook of International Law* 1, 16. See also James-Leslie Brierly, ‘Règles Générales Du Droit de La Paix’ (1936) 58 *Recueil des Cours* 145, 171.

‘measures of police and expropriation for public utility’.¹⁵² While he noted that it was ‘very difficult to draw a sharp line between the existence of the right of eminent domain and that of police power’, he described the state of the law as follows:

[E]ven in the era of most radical non-intervention policy there was always certain cases in which state interference with private property was not considered expropriation entailing an obligation to pay compensation but a necessary act to safeguard public welfare: e.g., measures taken for reasons of police, that is, for the protection of public health or security against internal or external danger.¹⁵³

In the Fourth Report of the Special Rapporteur on State Responsibility, Special Rapporteur FV Garcia-Amador noted that ‘[i]n international jurisprudence exemption from [State] responsibility has also been based on the “police power” of the State’.¹⁵⁴ He further noted ‘the fundamental lawfulness of this class of measures in the international context, regardless of their nature or scope, has seldom been disputed.’¹⁵⁵ However, he did note later in this report that the distinction between acts of State which fall within the exercise of ‘police power’ and an expropriation warranting compensation was ‘daily becoming more difficult to make, because of the evolution which the conception of the State’s social functions has undergone in both those areas’.¹⁵⁶

¹⁵² Herz (n 66) 252. citing, *inter alia*, Kaeckenbeeck (n 151); Brierly (n 151); Jessup (n 66); International Law Association (n 150); Josef L Kunz, ‘The Mexican Expropriations’ (1940) 17 New York University Law Quarterly Review 327, 350.

¹⁵³ Herz (n 66) 251–252.

¹⁵⁴ FV Garcia-Amador, ‘Fourth Report on State Responsibility by Mr FV Garcia-Amador, Special Rapporteur. Responsibility of the State for Injuries Caused in Its Territory to the Person or Property - Measures Affecting Acquired Rights’ [1959] Yearbook of the International Law Commission UN Doc A/CN.4/119, 11.

¹⁵⁵ *Ibid* 11–12.

¹⁵⁶ *Ibid* 12.

The ‘Harvard Draft’ Convention on Responsibility of States for Injuries to the Economic Interests of Aliens also acknowledged police powers.¹⁵⁷ In the section on ‘Taking and Deprivation of Use or Enjoyment of Property’, it provided:

[Article 10(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...¹⁵⁸

These statements of learned societies and eminent publicists also support the characterisation of the police powers doctrine as a principle of customary international law.

b) Customary international law or general principle of law?

As the police powers doctrine (or an equivalent) is found in most legal systems, it is worth considering whether the doctrine may be better characterised as one of the ‘general principles of law recognised by civilised nations’ within the meaning of Article 38 of the Statute of the ICJ.¹⁵⁹

In 1986, Rudolf Dolzer considered that ‘various domestic orders’ uniformly indicated that there was a police power, although he noted the ‘definitional issues [that] have plagued courts and commentators in this area’.¹⁶⁰ He considered, though, that ‘it would be an exaggeration to state that the harvest has been rich enough to yield a

¹⁵⁷ Sohn and Baxter (n 74).

¹⁵⁸ Ibid 553–554.

¹⁵⁹ Article 38(1) Statute of the ICJ.

¹⁶⁰ Rudolf Dolzer, ‘Indirect Expropriation of Alien Property’ (1986) 1 ICSID Review 41, 62.

comprehensive picture of the state of international law in the area...'.¹⁶¹ He considered the police powers doctrine to be a general principle of law within the meaning of Article 38(1)(c) of the Statute of the ICJ.¹⁶²

The line of demarcation between customary international law and general principles can be somewhat unclear.¹⁶³ As noted by Thirlway:

Although these categories of... customary law and general principles are clearly distinguishable in theory, there may well be some overlapping in content, so that a particular rule of law might be attributed convincingly to either of these categories. A rule which can boast an unimpeachable pedigree in custom and practice of States may at the same time correspond closely to a rule found in the majority, if not all, of municipal systems.¹⁶⁴

However, Article 38 of the Statute of the ICJ makes the line of demarcation more clear, to the extent that customary international law is evidence of a general practice among States *accepted by them as law*.¹⁶⁵ It is thus not only general practice, but also the acceptance of its international legal character, or the *opinio juris*, that is required before that practice can be considered customary in nature.¹⁶⁶ This element of consent or acceptance of a practice as law is lacking for general principles.¹⁶⁷ In contrast, general principles can be derived from principles of domestic law and applied in an international

¹⁶¹ Ibid 58.

¹⁶² Ibid 58–59; See also Newcombe (n 115); Perkams (n 100).

¹⁶³ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1994) 23–24; Sir Michael Wood, 'First Report on Formation and Evidence of Customary International Law, A/CN.4/663 (17 May 2014)' (International Law Commission 2013) 17.

¹⁶⁴ Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol 1 (Oxford University Press 2013) 236.

¹⁶⁵ Article 38(1)(b) Statute of the ICJ.

¹⁶⁶ Cheng (n 163) 23–24; Thirlway, *The Sources of International Law* (n 133) 72ff; Wood, 'First Report on Formation and Evidence of Customary International Law, A/CN.4/663 (17 May 2014)' (n 163) 17.

¹⁶⁷ Wood, 'First Report on Formation and Evidence of Customary International Law, A/CN.4/663 (17 May 2014)' (n 163) 13.

law context.¹⁶⁸ The principle must be present ‘in a large number and variety of domestic legal systems’.¹⁶⁹ Further, general principles also consist of ‘general propositions underlying the various rules of law’¹⁷⁰ of nations, including modes of legal reasoning¹⁷¹ and maxims of law including the principles of good faith and *res judicata*.¹⁷²

As the State practice relating to police powers draws upon domestic law provisions, it could also be argued (as Rudolf Dolzer has) that the police powers doctrine is a general principle of law. The examination of State practice in Section 4(a)(i) above indicates that the police powers doctrine is present in a large number and variety of domestic legal systems. That examination entailed a review a sample of constitutional systems based firstly on the type of legal system (common law, civil law, customary law, sharia law), then by geographical location. This was then crosschecked and complemented by looking to the constitutional provisions of all UN Member States beginning with the letter ‘A’.¹⁷³ All States examined acknowledged either explicitly or implicitly the distinction between regulation¹⁷⁴ and expropriation.¹⁷⁵

¹⁶⁸ Thirlway, *The Sources of International Law* (n 133) 94; Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green and co, ltd 1927); Jaye Ellis, ‘General Principles and Comparative Law’ (2011) 22 *European Journal of International Law* 949.

¹⁶⁹ Ellis (n 168) 955.

¹⁷⁰ Cheng (n 163) 24.

¹⁷¹ Crawford, *Brownlie’s Principles of Public International Law* (n 55) 34–35.

¹⁷² Cheng (n 163) 25.

¹⁷³ A similar approach was undertaken recently by Sprankling in the context of the constitutional right to property: Sprankling (n 108) 209–215, 256 Sprankling’s survey of State practice identified that 95 percent of the 193 UN Member States guaranteed the right to property (p 209) and he characterised the power to regulate the use of property as ‘axiomatic’ (p 256); See also van der Walt, *Constitutional Property Clauses* (n 108).

¹⁷⁴ In some of the constitutional systems examined, language such as ‘deprivation’ or ‘control of use’ or ‘limitations in the exercise of a property right’ was used instead of regulation.

¹⁷⁵ In some of the constitutional systems examined, language such as ‘taking’ or ‘alienation’ was used instead of expropriation.

In this thesis, the police powers doctrine is articulated as a principle of customary international law. The doctrine is widely recognised as such in jurisprudence and scholarship,¹⁷⁶ and the review above highlights the acceptance of the doctrine as one of international law for *opinio juris* purposes.¹⁷⁷ This reliance on customary international law as opposed to general principles is also undertaken being mindful that there is a paucity of examples of claims being asserted or upheld on the basis of general principles of law, and a reluctance of international courts and tribunals to appeal to general principles if another source can be relied upon.¹⁷⁸

In any event, if the doctrine were to be characterised as a general principle of law, that characterisation would not affect the arguments in this thesis regarding treaty interpretation. The arguments in Chapter Three discussing the role of customary international law and treaty interpretation apply equally to general principles of law. That is, like customary international law, general principles of law may also be directly relevant to ascertaining the ‘ordinary meaning’ of a treaty provision under Article 31(1) VCLT, and may equally be a ‘relevant rule of international law applicable between the parties’ under Article 31(3)(c) VCLT.¹⁷⁹

c) Criticisms of the police powers doctrine

There are several aspects of the police powers doctrine that have come under criticism. None of these criticisms dispute the existence of the police power, nor do they dispute

¹⁷⁶ See Section 4(a)(ii) and (iii) above.

¹⁷⁷ See Section 4(a)(i) and (ii) above.

¹⁷⁸ Thirlway, *The Sources of International Law* (n 133) 98,100–102.

¹⁷⁹ Campbell McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 *International and Comparative Law Quarterly* 361.

that the exercise of police power may infringe on economic interests. Rather, the criticisms of the doctrine relate to the interaction of the doctrine with the law of expropriation.

The first criticism relates to the overlapping language in the test for a legitimate exercise of police power and the test for the lawfulness of an expropriation. Customary international law recognises the right of States to expropriate property.¹⁸⁰ Like the police power, this right is also an incident of State sovereignty.¹⁸¹ That right is not without limits, and the legality of an expropriation is conditioned by several requirements.¹⁸² These requirements are that the expropriation must be for a public purpose, must not be arbitrary or discriminatory, must accord with due process, and must be accompanied by compensation.¹⁸³ As is apparent, these requirements that condition the legality of an expropriation contain language that overlaps considerably with what constitutes a legitimate exercise of police power. This overlap has come under criticism. For instance, Jürgen Kurtz is critical of tribunals ‘simply transplant[ing] three of [the] four conditions of lawful expropriation – “non-discriminatory regulation”, “public purpose” and “enacted with due process” – to settle the earlier threshold question of whether there is indirect expropriation as a starting point’.¹⁸⁴ The Tribunal in *Azurix v*

¹⁸⁰ Garcia-Amador (n 154); Mann, ‘Outlines of a History of Expropriation’ (n 100) 192; FA Mann, ‘British Treaties for the Promotion and Protection of Investments’ (1982) 52 *British Yearbook of International Law* 241, 246.

¹⁸¹ Salacuse, *The Law of Investment Treaties* (n 20) 288.

¹⁸² Crawford, *Brownlie’s Principles of Public International Law* (n 55) 621–622; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd Edition, Oxford University Press 2012) 98–99.

¹⁸³ Dolzer and Schreuer (n 182) 99–100.

¹⁸⁴ Jürgen Kurtz, ‘Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and Identification of Applicable Law’ in Zachary Douglas, Joost

Argentina was also critical of this, noting that adopting an approach like that in *Saluka v Czech Republic* and *Methanex v United States of America*:

[W]ould require that investments not be expropriated except for a public purpose and 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.¹⁸⁵

The elements of overlap between the police powers doctrine and the test for lawful expropriation are not a reason to deny the existence of the police powers doctrine, for three reasons. First, the two tests ask different questions and apply at different stages of the expropriation enquiry. The police powers doctrine is an enquiry as to whether the measures under challenge can be said to be an expropriation. If it is a legitimate exercise of police power then it will not be an expropriation. In contrast, the ‘non-discrimination’, ‘public purpose’ and ‘due process’ requirements are the conditions under which a State may lawfully expropriate property and will require compensation regardless of the validity of the purpose or process.¹⁸⁶ By the time these requirements are considered, it is already established there has been an expropriation, and the question is whether that expropriation was ‘lawful’. Secondly, the preceding sections of this Chapter have demonstrated that the test for ‘legitimacy’ is not focussed solely on the purpose, non-discriminatory nature and due process of the regulation; the reasonableness (including the proportionality) of a regulation is equally important.

Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 291; See also Higgins, ‘The Taking of Property and the State: Recent Developments’ (n 80).

¹⁸⁵ *Azurix Corp v The Argentine Republic*, Award, ICSID Case No.ARB/01/12, 14 July 2006, [311]; Sprankling (n 108) 283.

¹⁸⁶ Dolzer and Schreuer (n 182) 99.

Thirdly, these criticisms implicitly suggest that the police powers doctrine emerged only in response to the law of expropriation. However, this Chapter has shown that the distinction between a legitimate exercise of police power and an expropriation is widely recognised in international law notwithstanding the overlapping language.

A related criticism of the police powers doctrine is that the doctrine provides no guidance as to where to demarcate the line between a legitimate exercise of police power and an expropriation. The distinction can be difficult to draw in circumstances where a regulation has a significant impact on an investor, to the extent that the investor alleges the regulation amounts to an expropriation. Where the line is demarcated is significant for States and investors alike: a legitimate exercise of its police power does not require a State to compensate an investor, whereas a State must compensate an investor if it expropriates an investment. The tribunal in *Saluka v Czech Republic* addressed this point. After confirming the status of the doctrine in customary international law, the tribunal continued:

... international law 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.¹⁸⁷

The tribunal noted that it fell to the adjudicator to determine whether the State's conduct 'crosses the line' that separates a legitimate exercise of police power from an expropriation.¹⁸⁸ As will be explored further in Chapter Three, a number of tribunals have sought to address this question and have not always been consistent in their approach.

¹⁸⁷ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [263].

¹⁸⁸ *Ibid* [264].

The issue has also received considerable attention in scholarship. Jan Paulsson and Zachary Douglas observed that there was no ‘mechanical formula’ in determining this question.¹⁸⁹ Similarly, L. Yves Fortier and Stephen Drymer considered that the answer at any time would not be ‘crystal clear’ and that much depended on the context.¹⁹⁰ GC Christie considered that the best method, if not the only method, was ‘case-by-case development’.¹⁹¹ Justice Shaw’s remarks in 1851 that ‘[i]t is much easier to perceive and realize the existence and sources of [the police] power than to mark its boundaries, or prescribe limits to its exercise’¹⁹² remain true to this day.

This Chapter does not resolve this question entirely. However, the discussion of what constitutes a legitimate exercise of police power may assist with resolving this difficult question. In particular, the requirement of ‘reasonableness’, including ‘proportionality’, in determining the legitimacy of an exercise of police power may assist with demarcating the line. This point will be explored further in Chapter Three.

For the present purposes, the difficulty in demarcating the line between a legitimate exercise of police power and an expropriation does not undermine the existence of the police powers doctrine under customary international law. In other words, the difficulty in demarcating the line is not a reason to deny that the line exists. As noted by FA Mann, simply because the line is ‘a fine one and cannot be readily drawn’ is not a basis to conclude there is no fundamental principle in existence.¹⁹³

¹⁸⁹ Paulsson and Douglas (n 21) 145; Paulsson (n 57) 9.

¹⁹⁰ Fortier and Drymer (n 21) 327.

¹⁹¹ Christie (n 21) 338.

¹⁹² *Commonwealth v Alger*, 61 Mass. (7 Cush) 53, 85 (1851); quoted in Cooley and Lane (n 43) 830.

¹⁹³ Mann, ‘Outlines of a History of Expropriation’ (n 100) 215.

Further, as Lowe observed, it is important to distinguish between (1) whether there are circumstances that ‘permit some governmental action affecting private interests’; and (2) what limits are placed upon government when in those particular circumstances.¹⁹⁴ Whether there is a police powers doctrine falls under the first line of inquiry. How to determine whether that exercise of police power is better characterised as an expropriation falls under Lowe’s second line of enquiry. This second line of enquiry will be revisited in Chapter Three when discussing the interaction of the police powers doctrine with expropriation provisions in IITs.

5 A principle or an exception?

As this Chapter has shown, the police powers doctrine acknowledges that States have the right to enact reasonable, non-discriminatory regulations in the public interest and in accordance with good faith and due process, and that such measures will not constitute an expropriation. In investment disputes, the police powers doctrine arises most frequently when States raise it in response to a claim that a regulation amounts to an expropriation. It is thus an affirmative right of States that is invoked by way of defence. This makes the characterisation of the doctrine difficult. On the one hand, the doctrine could be construed as a principle that acknowledges this affirmative right when determining whether an expropriation has occurred. On the other, the police powers doctrine could be construed as an ‘exception’ to the law of expropriation.

Tribunals have referred to the doctrine as both a principle and an exception. In *El Paso*, the Tribunal referred to the police powers doctrine ‘[a]s a matter of principle’ and it was ‘[b]y exception’ that unreasonable regulations could be indirect

¹⁹⁴ Lowe, ‘Regulation or Expropriation?’ (n 117) 462.

expropriation.¹⁹⁵ *Saluka* referred to the ‘principle that certain takings or deprivations are non-compensable’ but in the same paragraph referred to the doctrine as the ‘police power exception’.¹⁹⁶ The *Saluka* Tribunal then later referred to (and appeared to apply it as) a principle.¹⁹⁷ In contrast, in *Suez v Argentina* (03/17) the doctrine was described as an ‘affirmative defence’,¹⁹⁸ suggesting it was an exception. However, in *Suez v Argentina* (03/19) a tribunal constituted of the same arbitrators cited with apparent approval the conclusion in *Saluka* referring to the doctrine as a principle.¹⁹⁹

As discussed earlier, the consequence of characterising a regulation as a legitimate exercise of police power is that the regulation will not constitute an expropriation. Therefore, the police powers doctrine should not be considered as an exception to expropriation. An exception evokes a notion of derogation,²⁰⁰ and framing the police powers doctrine as an exception may suggest that an expropriation has occurred, but there is a ‘police powers exception’ that justifies the violation.²⁰¹ However, properly articulated, the question of justification for an expropriation does not arise when considering the police powers doctrine, because the successful invocation of the doctrine means that there is no expropriation to justify. The police powers doctrine is

¹⁹⁵ *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [237] - [241].

¹⁹⁶ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [258].

¹⁹⁷ *Ibid* [262]; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 336-339.

¹⁹⁸ *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No.Arb/03/17, Decision on Liability, 30 July 2010, [116], [144]-[148]; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 336-339.

¹⁹⁹ *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* ICSID Case No.Arb/03/19, Decision on Liability, 30 July 2010, [139].

²⁰⁰ Sacerdoti (n 24).

²⁰¹ Bradley J Condon, ‘Treaty Structure and Public Interest Regulation in International Economic Law’ (2014) 17 *Journal of International Economic Law* 333, 335.

better characterised as a principle that is relevant to determining whether an expropriation has occurred, not as an exception that justifies an expropriation once it has been found to have occurred.²⁰²

This distinction is important, for two reasons. First, the characterisation of a norm as a principle or an exception may help to shape how the area of law develops and is understood normatively.²⁰³ The legitimate exercise of police power is certainly not exceptional, and ought not to be construed as such.²⁰⁴

Secondly, it has been argued by Viñuales that this characterisation may have implications for the burden of proof: if the police powers doctrine is a principle, the burden would fall on a claimant, whereas if it is an exception it would fall upon a respondent.²⁰⁵ This point was considered explicitly in *Servier v Poland*. In that case, the Claimant argued that the ‘police powers standard’ was an ‘affirmative defence’ and that the Respondent bore the burden of proof of showing that their justification for adopting the measures complied with the standard.²⁰⁶ The Respondent disputed this, arguing that the burden of proof of showing that the measures in dispute did not constitute a valid exercise of police power fell on the Claimant.²⁰⁷ The Respondent argued that it was only

²⁰² The way in which this principle interacts with expropriation provisions in IITs will be considered in greater detail in Chapter Three.

²⁰³ Katherine Del Mar, ‘The Effects of Framing International Legal Norms as Rules or Exceptions: State Immunity from Civil Jurisdiction’ (2013) 15 *International Community Law Review* 143, 170.

²⁰⁴ Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 336-339.

²⁰⁵ *Ibid* 336.

²⁰⁶ *Les Laboratoires Servier v Republic of Poland*, UNCITRAL, Award, 14 February 2012, [280].

²⁰⁷ *Ibid* [281].

required to ‘show that there [was] a reasonable connection between its actions and a legitimate policy objective’.²⁰⁸

The Tribunal noted that the Respondent had presented *prima facie* justifications for its measures and that, in light of this, it would not require the Respondent to ‘prove the negative’ in the sense of demonstrating an absence of bad faith and discrimination, or the lack of disproportionateness in the measures’.²⁰⁹ The Respondent having given a *prima facie* explanation, the Tribunal continued:

Thus, the burden then falls onto the Claimants to show that Poland’s regulatory actions were inconsistent with a legitimate exercise of Poland’s police powers. If the Claimants produce sufficient evidence for such a showing, the burden then shifts to Poland to rebut it.²¹⁰

As the police powers doctrine applies as a principle in determining whether an expropriation has occurred, the burden of proof should fall on a claimant in the manner set out in *Servier*. As *Servier* highlights, a respondent’s invocation of the doctrine in response to a claim of expropriation does not alter the burden of proof in this regard.²¹¹

6 Police Powers and Other Standards of Treatment

While the police powers doctrine has thus far only applied in the context of expropriation, there is an additional question as to whether the doctrine applies more generally. In other words, if the police powers doctrine can exclude a measure from

²⁰⁸ Ibid [580].

²⁰⁹ Ibid [583].

²¹⁰ Ibid [584].

²¹¹ The approach in *Servier* was similar to the approach taken by the WTO Appellate Body: see Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323 at 335. Alan Yanovich and Werner Zdouc, ‘Procedural and Evidentiary Issues’ in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 358–359; Condon (n 201).

constituting an expropriation, can it also operate, for instance, to exclude a measure from constituting unfair or inequitable treatment?

In *Suez v Argentina* (03/17), the Tribunal appeared to reject an argument put forward by the Respondent that the police powers doctrine applied outside of the context of expropriation. After acknowledging that States ‘have a legitimate right to exercise their police powers to protect the public interest’,²¹² the tribunal limited the applicability of the doctrine to expropriation cases:

However, the application of the police powers doctrine as an explicit, affirmative defense to treaty claims *other* than for expropriation is inappropriate, because in judging those claims and applying such principles as full protection and security and fair and equitable treatment...a tribunal must take account of a State’s reasonable right to regulate. Thus, if a tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate. Consequently, for the same tribunal to make a subsequent inquiry as to whether that same State has exceeded its legitimate police powers would require the tribunal to engage in inquiry it has already made. In short, a decision on the application of the police powers doctrine in such circumstances would be duplicative and therefore inappropriate.²¹³

The same tribunal hearing a different aspect of the dispute in the separate proceedings of *Suez v Argentina* (03/19) reached a similar conclusion when it held that the measures taken by Argentina to cope with an economic crisis were ‘within the general police powers of the Argentine State, and they did not constitute a permanent and

²¹² *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No.Arb/03/17, Decision on Liability, 30 July 2010, [147].

²¹³ *Ibid* [148].

substantial deprivation of the Claimants' investments' but that conclusion as to expropriation did not mean that Argentina had not violated other treaty commitments.²¹⁴

Viñuales argues that the police powers doctrine is an autonomous concept of general application, questioning the reasoning of *Suez v Argentina* (03/17).²¹⁵ He notes that, if the police powers doctrine only arises in an expropriation claim, 'it is no longer possible to consider it as a customary autonomous concept expressing the inherent right and duty of [S]tates to regulate'.²¹⁶ Additionally, limiting police powers to expropriation claims may amount to 'a licence for claimants to neutralize the police powers doctrine...simply by bringing claims for breach of investment disciplines other than expropriation'.²¹⁷ Indeed, as fair and equitable treatment typically does not require such significant interference with property rights as expropriation,²¹⁸ and many contemporary disputes raise multiple violations of IITs against the same set of facts,²¹⁹ there is some inconsistency if the police powers doctrine operates so as to deny a measure the qualification of expropriation, but does not apply to a lesser interference.²²⁰

To resolve this question finally would necessitate a deeper examination of other investment disciplines, such as fair and equitable treatment, and consider how the police

²¹⁴ *Suez, Sociedad General de Auas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No.Arb/03/19, Decision on Liability, 30 July 2010, [140].

²¹⁵ Viñuales, 'Sovereignty in Foreign Investment Law' (n 7) 331.

²¹⁶ Ibid 332.

²¹⁷ Ibid.

²¹⁸ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 6) 227.

²¹⁹ Jeswald Salacuse, *The Three Laws of International Investment* (Oxford University Press 2013) 387; Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39 *International Lawyer* 87.

²²⁰ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 6) 227–228.

powers doctrine may interact with the disciplines there. For instance, it is apparent that where the right to regulate has been considered in other contexts, it has occasionally been framed in terms of a ‘margin of appreciation’, in which tribunals have given a measure of deference to State authorities and not second-guessed scientific or technical assessments conducted by the State.²²¹ But a more comprehensive enquiry of how tribunals use ‘margin of appreciation’, its interaction with the police powers doctrine and other legal concepts that protect the right to regulate in the public interest, and a contrast with how that concept is used in other areas of international law,²²² cannot be achieved in the limited space of this MPhil thesis.

For the present purposes, it is sufficient to note that, *in principle*, the police powers doctrine may have a role to play in other standards of protection where the conduct under challenge is a regulatory measure enacted in the public interest. That is consistent with the municipal law equivalents of the doctrine, particularly the US, where concept applies across a broad range of cases.

This broader conceptualisation of police powers, however, has consequences for the overall enquiry in this thesis about how treaty interpretation may be used to reconcile the customary international law concepts with investment treaty provisions. These consequences will be explored more fully in Chapter Three.

²²¹ *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [8.35]; *Gemplus SA v United Mexican States*, ICSID Case No. Arb(AF)/04/3 and Arb(AF)/04/4, Award, 16 June 2010, [6.26]; Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 376-379; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 332; Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 6) 221.

²²² Particularly in the context of international human rights law. See Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012).

7 Conclusion

This Chapter has established that the police powers doctrine acknowledges the right of States to enact reasonable and non-discriminatory regulatory measures that are made in the public interest and adopted in accordance with good faith and due process. Such measures will not constitute an expropriation. The police powers doctrine finds support in customary international law, and is a principle that is relevant to determining whether an expropriation has occurred, not an exception to the law of expropriation.

CHAPTER THREE

USING TREATY INTERPRETATION TO ACCOMMODATE THE POLICE POWERS DOCTRINE

1 Introduction

Having set out in the previous Chapter how customary international law acknowledges the police powers doctrine, it is now possible to consider the extent to which the customary international law doctrine may interact with, and be accommodated within, IITs.

While several recent IITs include a formulation of the police powers doctrine explicitly in the text of the treaty,²²³ the majority of the 3,000 IITs currently in existence do not expressly refer to the police powers doctrine.²²⁴ In contrast, the requirement that an expropriation not be arbitrary or discriminatory, be undertaken for a ‘public purpose’, in accordance with due process, and against compensation is reflected in almost all IITs.²²⁵ This Chapter will focus on how the police powers doctrine may be accommodated within IITs in circumstances where there is no explicit reference to the doctrine in the text of the treaty, using principles of treaty interpretation. The more recent treaty formulations that explicitly include the police powers doctrine will be discussed in Chapter Four.

²²³ For example, India – Singapore CEPA (2005) Annex 3; India-Japan CEPA (2011) Annex 10; ASEAN Comprehensive Investment Agreement (2009) Annex 2 (4); COMESA Common Investment Area Agreement (2007) Annex B(4)(b); Canadian Model FIPA (2004) Annex B(13)(1)(c); Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’ (n 9).

²²⁴ Stephan Schill and Marc Jacob, ‘Trends in International Investment Agreements, 2010-2011: The Increasing Complexity of International Investment Law’ in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2011-2012* (Oxford University Press 2013).

²²⁵ Salacuse, *The Law of Investment Treaties* (n 20); Sebastián López Escarcena, *Indirect Expropriation in International Law* (Edward Elgar Publishing 2014) 119.

2 Interpretation of Treaties in light of Customary International Law: General Comments

a) The role of customary international law in treaty interpretation

Treaty and custom may interact in various ways; the two sources of law have been described as ‘entangled’.²²⁶ It is well recognised that, with the exception of *jus cogens* norms, States may depart from customary international law through the conclusion of treaties.²²⁷ In such circumstances, the relevant treaty rule would operate as a *lex specialis* to displace the customary rule.²²⁸ In addition to deviating from custom, treaties may also codify or reflect custom, and play a role in the emergence of customary international law.²²⁹ Customary international law may also play a role in the interpretation of treaties.²³⁰ It is the latter situation that is the focus of this Chapter.

The task of considering a violation of a provision in an IIT necessarily involves an exercise of treaty interpretation.²³¹ As such, the principles of treaty interpretation set out

²²⁶ Oscar Schachter, ‘Entangled Treaty and Custom’ in Yôrām Dinštein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff 1989); Wood, ‘First Report on Formation and Evidence of Customary International Law, A/CN.4/663 (17 May 2014)’ (n 163) 15.

²²⁷ International Law Commission, ‘Formation and Evidence of Customary International Law: Elements in the Previous Work of the International Law Commission That Could Be Particularly Relevant to the Topic. Memorandum by the Secretariat, A/CN.4/659 (14 March 2013)’ 34, Observation 28; Joost Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 *American Journal of International Law* 535, 537.

²²⁸ *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v Republic of Hungary*, ICSID Case No.ARB/03/16, Award, 2 October 2006, [481]; Gazzini (n 13) 7–8; Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14) 75.

²²⁹ Wood, ‘First Report on Formation and Evidence of Customary International Law, A/CN.4/663 (17 May 2014)’ (n 163) 15.

²³⁰ Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14); International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, A/CN.4/L.682 (13 April 2006)’.

²³¹ Michael Waibel, ‘International Investment Law and Treaty Arbitration’ in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos Verlagsgesellschaft 2011).

in the VCLT are relevant. These VCLT principles reflect customary international law,²³² and thus are applicable in disputes where disputing parties are not parties to the VCLT as well as to treaties concluded prior to the entry into force of the VCLT.²³³ The VCLT principles thus set out a useful analytical framework for evaluating how customary international law interacts with the standards of investment protection in IITs.²³⁴

Article 31 VCLT provides for two pathways of introducing customary international law into the interpretation of IITs: first, the ordinary meaning of treaty term(s) may make a direct reference to customary international law (Articles 31(1)); second, customary international law may be taken into account together with context through ‘systemic integration’ (Article 31(3)(c)).²³⁵

This section will proceed to consider Article 31(1) and Article 31(3)(c) separately. However, in doing so, it is acknowledged that Article 31 *as a whole* is the ‘general rule of interpretation’ in the VCLT, and that ‘the singular nature of the rule indicates the holistic and comprehensive approach that is demanded of interpreters when applying Article

²³² *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*(Judgment) [2009] ICJ Rep 213, [417]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*(Judgment)[2007] ICJ Rep 43, [160]; International Law Commission, ‘Formation and Evidence of Customary International Law: Elements in the Previous Work of the International Law Commission That Could Be Particularly Relevant to the Topic. Memorandum by the Secretariat, A/CN.4/659 (14 March 2013)’ (n 227) 6; Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 6) 111.

²³³ *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, ICSID Case No.Arb/01/07, Decision on Annulment, 21 March 2007, fn 69; International Law Commission, ‘Formation and Evidence of Customary International Law: Elements in the Previous Work of the International Law Commission That Could Be Particularly Relevant to the Topic. Memorandum by the Secretariat, A/CN.4/659 (14 March 2013)’ (n 227) 6–7.

²³⁴ This follows the approach adopted by Paparinskis in the context of evaluating the fair and equitable treatment standard. See Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 6) 111; See also Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14).

²³⁵ McLachlan, ‘Investment Treaties and General International Law’ (n 179); Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14).

31.²³⁶ The rules are not mutually exclusive, but are rather two aspects of the same general rule.²³⁷ But, as will be seen below, the effect of the rules may differ slightly (particularly if one takes a narrow view of Article 31(3)(c)), and it is for this reason that the rules will be considered separately.

b) Interpreting the treaty or substituting customary law in place of the treaty?

The absence of the police powers doctrine in IITs could be viewed in several ways. The omission could be read as modifying, as between the parties to the IIT, the approach taken under customary international law.²³⁸ But this reading would be problematic, as absent explicit treaty language making clear an intention to do so, it cannot be presumed that customary international law has been dispensed with or has no relevance to an IIT.²³⁹

Rather, as a starting point, the relevance of the police powers doctrine in an investment treaty dispute will depend on the meaning given to the words of the IIT under consideration. In other words, it will depend on the outcome of the tribunal's interpretation of the treaty.²⁴⁰ Several tribunals have adopted this approach when considering the police powers doctrine, such that the meaning of 'expropriation' in the

²³⁶ Duncan French, 'Treaty Interpretation And The Incorporation Of Extraneous Legal Rules' (2006) 55 *International and Comparative Law Quarterly* 301; Crawford, *Brownlie's Principles of Public International Law* (n 55) 381; Georg Nolte, 'First Report on Subsequent Agreements and Subsequence Practice in Relation to Treaty Interpretation, A/CN/4660 (19 March 2013)' 6.

²³⁷ French (n 236) 302.

²³⁸ Paparinskis, 'Regulatory Expropriation and Sustainable Development' (n 15) 316–317.

²³⁹ *Case Concerning Elettronica Sicula Spa (ELSI)* (United States of America v Italy) (Judgment) [1989] ICJ Rep 15, 42; Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *British Yearbook of International Law* 151, 192–193; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2008) 206–207.

²⁴⁰ International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 230) 207.

treaty is determined in light of the police powers doctrine. The most explicit example of this was in *Saluka v Czech Republic*, where the Tribunal held:

...in using the concept of deprivation, Article 5 imports 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.²⁴¹

As authority for this proposition, the tribunal relied on Article 31(3)(c) VCLT. This interpretive technique will be discussed more fully in Sections 3 and 4 of this Chapter.

However, interpreting a given treaty provision in light of customary international law is often difficult to distinguish from situations where custom is applied directly by a tribunal.²⁴² For example, in *Methanex*, the Tribunal considered the police powers doctrine when determining whether the Claimant had established if the measures in question (a ban on a gasoline additive) were tantamount to expropriation within the meaning of Article 1110 NAFTA. The Tribunal noted that non-discriminatory regulation for a public purpose, enacted in accordance with due process would ‘not [be] deemed expropriatory and compensable’.²⁴³ The Tribunal later noted that the central claim of expropriation failed, as ‘from the standpoint of international law, the [measure] was a lawful regulation and not an expropriation’.²⁴⁴

²⁴¹ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [254].

²⁴² Saverio Di Benedetto, *International Investment Law and the Environment* (Edward Elgar Publishing 2013) 72; See also, discussing this issue in the context of WTO disputes, Joost Pauwelyn, ‘How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?’ (2003) 37 *Journal of World Trade* 997, 1004.

²⁴³ *Methanex Corporation v United States of America*, Final Award on Jurisdiction and Merits, UNCITRAL, 3 August 2005, Part IV, Ch D, [7].

²⁴⁴ *Ibid* [15].

On the one hand, this could be considered an ‘interpretive’ approach, to the extent that the Tribunal considered the police powers doctrine when determining whether the measure was an ‘expropriation’, similar to *Saluka*. However, it could also be considered that this was the Tribunal directly applying the customary concept to the resolution of the dispute, in effect ignoring or not applying the expropriation provision in the treaty. Kurtz takes the latter view, considering that *Methanex* was decided by invoking customary international law to decide the dispute without considering the ‘critical issue’ of ‘whether the treaty at issue incorporates or excludes that customary norm’.²⁴⁵ In his view, the Tribunal ‘side-lined clearly other indicia that would seem inherently necessary given the nature of an inquiry into indirect expropriation’.²⁴⁶ Distinguishing between the interpretation of the IIT using custom, and substituting custom in place of the IIT is made more difficult when Tribunals themselves do not generally articulate the basis on which they are invoking the police powers doctrine – *Saluka* is the exception rather than the norm in justifying the basis upon which it accommodated the doctrine.²⁴⁷

The issue thus becomes one of distinguishing between, on the one hand, a tribunal adopting a particular interpretation of the treaty and, on the other, applying custom to displace the treaty rule.²⁴⁸ The distinction is a fine one, but it is an important one. This issue was recently considered in the *Indus Waters Kishenganga Arbitration (Pakistan v*

²⁴⁵ Kurtz (n 184) 294.

²⁴⁶ Ibid 291.

²⁴⁷ See generally Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’ (2008) 19 *European Journal of International Law* 301; J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press 2012).

²⁴⁸ Di Benedetto (n 242) 71–73; French (n 236) 290.

India).²⁴⁹ In the Partial Award, the Court of Arbitration ('the Court') noted that it was required to 'interpret and apply' the relevant treaty 'in light of the customary international law principles for the protection of the environment in force today'.²⁵⁰ This stemmed from a provision of the applicable treaty that provided that customary international law was to be applied 'whenever necessary for...interpretation or application' of the treaty 'to the extent necessary for that purpose'.²⁵¹ The Court also noted that Article 31(3)(c) VCLT 'required that the Court take account of relevant customary international law...when interpreting the Treaty'.²⁵² In the Final Award, the Court noted that the applicable treaty 'expressly limits the extent to which the Court may have recourse to, and apply, sources of law beyond the Treaty itself'.²⁵³ Importantly, the Court held:

If customary international law were applied not to circumscribe, but to negate rights expressly granted in the Treaty, this would no longer be '*interpretation or application*' of the Treaty but the substitution of customary law *in place of* the Treaty.²⁵⁴ (Emphasis in the original)

Treaty interpretation, or making sense and giving meaning to the treaty,²⁵⁵ comes before any analysis of whether the customary international law otherwise applies to the

²⁴⁹ *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award (2013) 154 ILR 1; *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Final Award, 20 December 2013.

²⁵⁰ *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award (2013) 154 ILR 1, [452].

²⁵¹ *Ibid* [447].

²⁵² *Ibid* fn 654.

²⁵³ *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Final Award, 20 December 2013, [111].

²⁵⁴ *Ibid* [112].

²⁵⁵ *Factory at Chorzów (Germany v Poland) (Jurisdiction)* (1927) PCIJ Series A No 9 (Dissenting Opinion of Judge Ehrlich) [110]; Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014) 16.

resolution of the IIT dispute.²⁵⁶ As will be discussed below, Article 31 of the VCLT provides a useful analytical framework for considering customary international law in treaty interpretation. In such circumstances, customary international law has relevance in determining the meaning of the treaty provision under consideration. It is, in a sense, an ‘internal’ process. The question at the interpretation stage is ‘what does the treaty mean?’.

Only once the meaning of the treaty provision has been determined can the question of whether an ‘external’ rule (whether it be customary international law, or any other law) can be otherwise applied by the tribunal be properly considered. At the application stage, the question is ‘what is the effect of the customary principle in the resolution of the treaty dispute?’. At this stage, the interpretive process required by Article 31 VCLT presumably would have determined that the meaning of the treaty provision did not accommodate customary international law.

Regardless of the meaning given to the relevant treaty provision, a tribunal may still be required to apply customary international law in the resolution of the treaty dispute by virtue of the applicable law clause in the IIT itself or as part of the institutional framework under which the arbitration is convened.²⁵⁷ However, where a tribunal is

²⁵⁶ In the same way that the interpretation of a treaty occurs before the application of the treaty: see Sir Franklin Berman, ‘Evolution or Revolution?’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 666; Jan Klabbers, ‘Reluctant Grundnormen: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law’ in Matthew CR Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff 2007) 146.

²⁵⁷ See, for example, NAFTA Article 1103; ICSID Convention, Art 42(1). Further, as noted by the ICJ in *Nicaragua*, treaty and customary international law coexist in parallel, such that customary international law continues to exist and apply separately from treaty law, even where the treaty codifies the custom: *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v

convened to resolve alleged violations of an IIT, the application of customary international law in the treaty dispute involves different considerations to that of interpretation of the treaty, including whether the treaty provision displaces or modifies the customary international law (or vice versa), and conflict of norms.²⁵⁸ Thus, the two processes (interpretation of the treaty and the application of custom in the dispute) ask different questions²⁵⁹ and therefore must be dealt with separately. As the title suggests, the enquiry in this thesis is directed toward accommodating the public interest *in* IITs. It is thus focused on the ‘internal’ interpretive exercise pursuant to Article 31 VCLT – attempting to harmonize the customary international law and treaty law by interpreting them so as to render them compatible.²⁶⁰ The consequential enquiry of the extent to which customary international law norms that protect the right to regulate, such as the police powers doctrine, otherwise apply to the resolution of the investment treaty dispute (such as through Article 42(1) ICSID Convention) is an important question, but a full enquiry cannot be achieved in the space of this MPhil thesis.

United States (Merits) [1986] ICJ Rep 14 , [179]; James Crawford, ‘Chance, Order, Change: The Course of International Law’ (2013) 365 Recueil des Cours 9, 110–111.

²⁵⁸ See the International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (n 230).

²⁵⁹ It is acknowledged that there is an overlap of language that blurs the conceptual distinction. Article 42(1) of the ICSID Convention, which sets out the ‘applicable law’ for tribunals in the resolution of disputes, requires tribunals to apply, in the absence of agreement between the parties, ‘*such rules of international law as may be applicable*’. There is some overlap of language in this provision with that of Article 31(3)(c) VCLT, which requires an interpreter of a treaty to take into account, together with the context, ‘*any relevant rules of international law applicable in the relations between the parties*’. Thus, when determining both what the treaty *means* (pursuant to Article 31(3)(c) VCLT) and what law more broadly *applies* to the resolution of the dispute (pursuant to an applicable law provision like Article 42(1) ICSID Convention), customary international law rules may be relevant.

²⁶⁰ International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (n 230) 207.

3 Article 31(1) VCLT

a) General Principles

The starting point for any analysis on the meaning to be given to a treaty provision is Article 31(1) VCLT.²⁶¹ That Article directs an interpreter of the treaty to elicit the ordinary meaning of the treaty's terms, in their context and in light of the object and purpose of the treaty and subject the overriding duty of good faith.²⁶²

Customary international law may be relevant to determining the meaning of a particular treaty provision where the treaty provision in question makes a reference to customary international law, such that the 'ordinary meaning' under Article 31(1) of the VCLT is the same as the meaning under customary international law.²⁶³ Similarly, the terms in a treaty may be recognised as having customary international law significance, and so are considered to reflect the 'ordinary meaning'.²⁶⁴ An example of the customary concept equating to the 'ordinary meaning' of the treaty is found in the *Nicaragua* case, where the ICJ noted:

²⁶¹ Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (LGDJ 2009) 284; Jean-Marc Sorel and Valérie Boré Eveno, 'Observance, Application and Interpretation of Treaties, s.3 Interpretation of Treaties, Art.31 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011) 817–818.

²⁶² Sir Franklin Berman, 'Treaty Interpretation in a Judicial Context' (2004) 29 *Yale Journal of International Law* 315, 321; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 319; see also *Industria Nacional de Alimentos SA v Peru*, ICSID Case No.Arb/03/4, Decision on Annulment, 5 September 2007 (Dissenting Opinion of Sir Franklin Berman) [8].

²⁶³ Paparinskis, 'Investment Treaty Interpretation and Customary International Law: Preliminary Remarks' (n 14) 78; McLachlan, 'Investment Treaties and General International Law' (n 179) 371.

²⁶⁴ *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, [76]; cited in Paparinskis, 'Investment Treaty Interpretation and Customary International Law: Preliminary Remarks' (n 14) 79,87.

[The UN Charter] itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the ‘inherent right’...of individual or collective self-defence, which ‘nothing in the present Charter shall impair’. Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ and ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature.²⁶⁵

In such circumstances, customary international law carries considerable interpretive weight, as it establishes the ordinary meaning of the treaty term.²⁶⁶

This approach of, in effect, importing the customary international law meaning of a term into a treaty is particularly relevant in the case of expropriation, as most IITs do not define expropriation and rely on the customary meaning of that term.²⁶⁷ While it did not explicitly invoke the VCLT framework, this idea was captured in *Accession Mezzanine v Hungary*, when discussing UK BITs:

The BIT in this case, as in almost all cases, has no definition of “expropriation” within its text, nor does it contain guidelines that would assist the Tribunal in determining whether or not there has been a compensable taking of property. Expropriation has been and is now part of international law, and the change from dispute resolution under the system of diplomatic protection to investor-state arbitration has not modified that...

UK BITs, including expropriation provisions, have tended to use consistent wording since the early 1970s, *trying to invoke but not go beyond customary international law standards. Given the absence of definitions of expropriation in BITs, the normal practice for investment tribunals is to focus on expropriation within the framework of international law standards....*²⁶⁸ (emphasis added)

²⁶⁵ *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States) (Merits) [1986] ICJ Rep 14, [176].

²⁶⁶ Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14) 86; Crawford, ‘Chance, Order, Change: The Course of International Law’ (n 257) 110.

²⁶⁷ Salacuse, *The Law of Investment Treaties* (n 20).

²⁶⁸ *Accession Mezzanine Capital LP and Danubius Kereskedohaz Vagyonkezelő v Hungary*, ICSID Case No.Arb/12/3, Decision on Respondents Objections Under Arbitration Rule 41(5), 16 January 2013, [68]-[69]; see also *Emmis International Holding, BV & Ors v Hungary*, ICSID Case No.Arb/12/2, Decision on Objection under ICSID Arbitration Rules 41(5), 11 March 2013, [82].

b) The police powers doctrine and the ordinary meaning of ‘expropriation’

Caution should be exercised in placing too much emphasis on ‘general postulates’²⁶⁹ about the meaning of treaty provisions. However, with all due caution, as most IITs leave the word ‘expropriation’ undefined, it is possible to look to the customary international law meaning of the word and draw some general conclusions.²⁷⁰ As customary international law provides that legitimate exercises of police power do not constitute an expropriation, then that same meaning can apply when determining the ordinary meaning of expropriation under the IIT.

i) *Tribunal Jurisprudence*

A review of investor-State arbitration decisions that have considered the police powers doctrine reveals that there is support for the argument that doctrine may be considered at the point of determining the ordinary meaning of expropriation under an IIT, although there is a degree of inconsistency in the decisions.²⁷¹

As noted in Section 2(b) above, in *Saluka*, the Tribunal considered that the use of the word ‘deprivation’ in the relevant BIT ‘import[ed] into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of

²⁶⁹ Berman, ‘Evolution or Revolution?’ (n 256) 668.

²⁷⁰ *Accession Mezzanine Capital LP and Danubius Kereskedohaz Vagyonkezelo v Hungary*, ICSID Case No.Arb/12/3, Decision on Respondents Objections Under Arbitration Rule 41(5), 16 January 2013, [68]-[69]. Evidently, this analysis would not apply to those IITs that have defined expropriation, and is subject to the discussion in Section 3(c) below.

²⁷¹ The cases reviewed were those relied upon in Chapter Two to establish the customary international law doctrine, being those cases that explicitly acknowledged and considered the police powers doctrine.

regulatory actions aimed at the maintenance of public order'.²⁷² Interestingly, the Tribunal relied on Article 31(3)(c) VCLT as justification for this interpretation of the treaty, not Article 31(1). This technique will be discussed more fully in Section 4(b) below.

Decisions made pursuant to NAFTA Article 1110 (the expropriation provision) have similarly considered the police powers doctrine at the point of determining whether an 'expropriation' or 'a measure tantamount to expropriation' has occurred, although none have been as explicit in invoking the VCLT as the *Saluka* Tribunal. In *Fireman's Fund*, the Tribunal noted that Article 1110 did not give a definition for the word 'expropriation', acknowledging cases had defined it differently.²⁷³ The Tribunal continued that 'considering [the] cases and customary international law in general', several elements could be identified when defining expropriation, including the distinction between compensable expropriation and non-compensable regulation by a host State according to the police powers doctrine.²⁷⁴ While the Tribunal did not explicitly invoke the VCLT, it cited the paragraph of *Saluka* quoted above as authority for these propositions.²⁷⁵

Similarly, in *Glamis Gold v United States of America*, the Tribunal noted that 'the term "expropriation" incorporates by reference the customary international law regarding

²⁷² *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [254].

²⁷³ *Fireman's Fund Insurance Company v United Mexican States*, ICSID Case No.Arb(AF)/02/01, Award, 17 July 2006, [176].

²⁷⁴ *Ibid* [176(j)].

²⁷⁵ *Ibid* [176(j)] and accompanying footnote.

that subject’.²⁷⁶ The reference to the ‘incorporation’ of the custom suggests a similar interpretive approach to the *Saluka* Tribunal.²⁷⁷ The Tribunal continued:

Under custom, a State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party’s investor to an action that is confiscatory or that “unreasonably interferes with, or unduly delays, effective enjoyment” of the property. A State is not responsible, however, “for loss of property or for other economic disadvantage resulting from bona fide...regulation...if it is not discriminatory”.²⁷⁸

In *El Paso*, the Tribunal sought to ‘clarify the concept’ of expropriation before proceeding to analyse whether the Respondent’s conduct amounted to an expropriation. In doing so, the Tribunal summarised its view as follows:

In summary, it is the Tribunal’s view that:

1. Some general regulations can amount to indirect expropriation
 - a. As a matter of principle, general regulations do not amount to indirect expropriation.
 - b. By exception, unreasonable general regulations can amount to indirect expropriation.
2. A necessary condition for expropriation is the neutralisation of the use of the investment.
 - a. This means that at least one of the essential components of the property must have disappeared
 - b. This means also, *a contrario*, that a mere loss in value of the investment, even an important one, is not an indirect expropriation.²⁷⁹

In *Total SA v Argentina*, the Tribunal identified how it determined whether a regulatory measure amounted to an expropriation:

²⁷⁶ *Glamis Gold Ltd v United States of America*, UNCITRAL, Award, 8 June 2009, [354].

²⁷⁷ Although the application of the test differed somewhat from *Saluka*, as the Tribunal first considered ‘whether the economic impact of the complained measures is sufficient to potentially constitute a taking at all’, which was dispositive of the case: *Glamis Gold Ltd v United States of America*, UNCITRAL, Award, 8 June 2009, [357].

²⁷⁸ *Ibid* [354].

²⁷⁹ *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [233].

When foreign investors complain of State regulatory actions under a BIT, in order to decide whether the measures also amount to an indirect expropriation (a so-called regulatory taking) a tribunal must take into account their features and object so as to assess their proportionality and reasonableness in respect of the purpose which is legitimately pursued by the host State. *These regulatory measures, when judged as legitimate, proportionate, reasonable and non-discriminatory, do not give rise to compensation in favour of foreign investors.*²⁸⁰

The Tribunal concluded that the measures under challenge (economic measures in response to the Argentine economic crisis) were a ‘*bona fide* regulatory measure of general application, which was reasonable in light of Argentina’s economic and monetary emergency and proportionate to the aim of facing such an emergency’.²⁸¹ For this reason, the Tribunal held that ‘the pesification...[did] not amount to a measure equivalent to expropriation’.²⁸²

Other decisions have invoked the police powers doctrine in a similar manner to the cases above, but have been less explicit about their interpretation of the expropriation provision and instead have considered the police powers doctrine when applying the treaty to the facts of the case. However, to the extent that there is a ‘virtually inseparable link’²⁸³ between interpretation and application of a treaty, and it ‘is not possible to apply a treaty except on the basis of some interpretation of it’,²⁸⁴ it is possible to identify the meaning given to the relevant expropriation provision in light of the tribunal’s application of that provision. For instance, *Chemtura v Canada*, another NAFTA case, arose from a

²⁸⁰ *Total SA v Argentine Republic*, ICSID Case No.Arb/04/1, Decision on Liability, 27 December 2010, fn 232.

²⁸¹ *Ibid* [197].

²⁸² *Ibid* [197].

²⁸³ Sir Franklin Berman, ‘International Treaties and British Statutes’ (2005) 26 Statute Law Review 1, 10.

²⁸⁴ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 57, (Sep Op Judge Shahabuddeen) [11]. See also Bjorge (n 255) 16; Klabbers (n 256).

review and phase-out of all pesticide products containing the pesticide lindane, of which the Claimant was a producer. The Claimant argued that the Respondent had breached various provisions of NAFTA, and the police powers doctrine arose in the context of the expropriation claim. The Claimant argued that the suspension of lindane product registration was tantamount to an expropriation. The Respondent disputed that there had been any substantial deprivation of the Claimant's investment, but further argued that in any event there was no expropriation because the decision to phase-out lindane was a legitimate exercise of police power.

The Tribunal articulated its methodology for assessing the expropriation claim as follows:

...in assessing an expropriation claim, the practice of NAFTA tribunals has been to follow a three-step approach focusing on (i) whether there is an investment capable of being expropriated, (ii) *whether that investment has in fact been expropriated*, and (iii) whether the conditions set out in Article 1110(1)(a)-(d) have been satisfied.²⁸⁵ (Emphasis added)

The Tribunal considered the police powers doctrine in the context of step (ii) set out in the quoted paragraph above. The Tribunal accepted that the measures in question were a legitimate exercise of police power, concluding that:

...the [regulatory agency] 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.²⁸⁶

Again, the police powers doctrine arose at the point of ascertaining what constituted (or did not constitute) an 'expropriation'. This is similar to the approach

²⁸⁵ *Chemtura Corporation v Canada*, UNCITRAL, Award, 2 August 2010, [242].

²⁸⁶ *Ibid* [266].

taken in the earlier decision of *Methanex*, discussed in Section 2(b) above, although in that case the Tribunal first considered that ‘from the standpoint of international law...[the measure] was a lawful regulation and not an expropriation’ and then considered that the Claimant had not established that the measure ‘manifested any of the features associated with expropriation’.²⁸⁷ The same approach occurred in *Martin Feldman v Mexico*, another NAFTA case, which noted that in resolving the ‘key issue’ of whether the Respondent’s actions constituted an expropriation, ‘the essential determination is whether the actions of the...[Respondent] constitute an expropriation...or are valid governmental activity’.²⁸⁸

Other non-NAFTA tribunals have adopted a similar approach. In *Servier*, the Tribunal noted that as a ‘preliminary matter’ it was required to determine whether the measures in question fell within the concept of ‘divestment’ under the France-Poland BIT (the equivalent of the expropriation provision in the relevant treaty).²⁸⁹

When determining whether the measures were a ‘divestment’, the Tribunal continued:

... the Respondent's denial of marketing authorisations would *divest* the Claimants of their property, giving rise to a requirement of compensation under the BIT, if Poland exercised its administrative and regulatory powers in bad faith, for some non-public purpose, or in a fashion that was either discriminatory or lacking in proportionality between the public purpose and the actions taken.²⁹⁰ (Emphasis added)

In *Técnicas Medioambientales TECMED S.A. v United Mexican States*, the tribunal considered the police powers doctrine when discussing expropriation, although

²⁸⁷ *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005, Part IV, Chapter D, [15]-[16].

²⁸⁸ *Marvin Feldman v Mexico*, Case No.Arb(AF)/99/1, Award, 16 December 2002, [97]-[98].

²⁸⁹ *Les Laboratoires Servier v Republic of Poland*, UNCITRAL, Award, 14 February 2012, [563]-[566].

²⁹⁰ *Ibid* [570].

the Tribunal's analysis differed from the other tribunals discussed in this subsection.²⁹¹ When determining the meaning of the expropriation provision under the applicable treaty, the Tribunal looked to the text of the provision itself, and also looked to the test of expropriation under international law.²⁹² The Tribunal noted that it was 'undisputable' that the State's exercise of its police power may cause economic damage to those subject to its powers without an entitlement to compensation.²⁹³ However, the Tribunal further noted:

After reading Article 5(1) of the Agreement and interpreting its terms according to the ordinary meaning to be given to them (Article 31(1) of the Vienna Convention), we find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the Agreement, even if they are beneficial to society as a whole – such as environmental protection – particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.²⁹⁴

The tribunal then adopted a proportionality analysis (taken from jurisprudence of the European Court of Human Rights) to determine whether the regulatory measures could be categorised as an expropriation.²⁹⁵ In doing so, the Tribunal noted the 'due deference owing to the State when defining the issues that affect its public policy'²⁹⁶ but that there must be a 'reasonable relationship of proportionality between the charge or

²⁹¹ *Técnicas Medioambientales TECMED S.A. v United Mexican States*, ICSID Case No. Arb(AF)/00/2, Award, 29 May 2003, [116].

²⁹² Ibid [116].

²⁹³ Ibid [119].

²⁹⁴ Ibid [121].

²⁹⁵ Ibid [122].

²⁹⁶ Ibid [122].

weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure’.²⁹⁷

Some tribunals have not considered the police powers doctrine at all when determining the meaning of ‘expropriation’. For instance, in *Metalclad*, the Tribunal considered that it was the effect of the measure that was relevant in determining whether regulation amounted to expropriation, and that the purpose of the regulation need not be considered.²⁹⁸ Another tribunal considered that a ‘blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation’ and instead focussed whether the regulation was ‘sufficiently restrictive’ to amount to an expropriation.²⁹⁹ *Suez v Argentina* (03/17) also adopted a similar effects-based approach, although the Tribunal also acknowledged the importance of considering the ‘affirmative defence’ of police powers.³⁰⁰ This latter case will be discussed further in Section 3(c) below.³⁰¹

ii) *Analysis*

The approaches of the decisions that considered the police powers doctrine at the point of determining whether an expropriation occurred (*Saluka*, *Fireman’s Fund*, *Glamis Gold*, *El Paso Total*, *Methanex*, *Feldman*, and *Servier*) are broadly consistent with the

²⁹⁷ Ibid [122]. This approach was endorsed in *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No.Arb/02/1, Decision on Liability, 3 October 2006, [195].

²⁹⁸ *Metalclad Corporation v United Mexican States*, ICSID Case No. Arb(AF)/97/1, Award, 30 August 2000, [111].

²⁹⁹ *Pope & Talbot Inc v Canada*, UNCITRAL, Interim Award, 26 June 2000, [99]-[103].

³⁰⁰ *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No.Arb/03/17, Decision on Liability, 30 July 2010, [122].

³⁰¹ See Section 5 of the previous Chapter for a discussion of why referring to the police powers doctrine as an exception to expropriation can be criticised.

interpretive approach required by Article 31(1) VCLT, as all consider the police powers doctrine at the point of determining what is included and excluded from the concept of ‘expropriation’. In contrast, the approach in *Metalclad* can be criticised, as it ignores the customary international law principle that excludes legitimate exercises of police power from the concept of expropriation.³⁰² The approach of the Tribunal in *Tecmed*, which held that the expropriation provision did not *per se* exclude police powers, will be discussed in Section 4 below in the context of Article 31(3)(c) VCLT.

The methodological approach employed in *Saluka* (which was also implicitly employed in *Fireman’s Fund* and *Glamis Gold*) of explicitly identifying the basis on which it was considering the police powers doctrine when interpreting the IIT is particularly apposite.³⁰³ Such an approach respects that the definition of expropriation in the treaty, as under customary international law, is circumscribed by the police powers doctrine. Consistent with the words of caution expressed by the Court in *Kishenganga*, this approach ensures that the police powers doctrine arises at the point of interpretation of the expropriation provision in the treaty, rather than arising in a way that substitutes the expropriation provision with the customary law.

c) Other Article 31(1) considerations – good faith, context and object and purpose.

Of course, it is not only the ‘ordinary meaning’ of a treaty provision that is relevant under Article 31(1) VCLT.³⁰⁴ That provision also requires an interpreter of a treaty to consider

³⁰² It also risks the police powers doctrine being considered as an exception, rather than as a principle: See Section 5 of the previous Chapter.

³⁰³ Subject to the comments in Section 4(b) of this Chapter below.

³⁰⁴ *Auditing of Accounts between the Kingdom of the Netherlands and the French Republic (Netherlands/France)(Rhine Chlorides Arbitration)* (2004) 144 ILR 259, 292-3.

the ordinary meaning in its context, in light of its object and purpose, and subject to the overriding duty of good faith.³⁰⁵

Consideration of the surrounding provisions of the treaty, such as the preamble and annexures, may contextualise the provision being considered (such as ‘expropriation’) in favour of an interpretation that accommodates the police powers doctrine.³⁰⁶ For instance, in *Chemtura*, the Respondent pointed to surrounding provisions of NAFTA to argue that the police powers doctrine was relevant in determining there had been no expropriation under Article 1110 NAFTA. The Respondent pointed to the preamble of the NAFTA, which preserves State flexibility to safeguard public welfare,³⁰⁷ as well as the provision that required Chapter 11 NAFTA not be construed:

[T]o prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.³⁰⁸

The Tribunal did not consider these arguments explicitly in their reasoning, but did accept that the measures in question were a legitimate exercise of police power.

However, considering the context may also lead against considering the police powers doctrine as integral to an expropriation enquiry. In *Suez v Argentina* (03/17), for instance, the Tribunal held:

³⁰⁵ *Kasikili/ Sedudu Islands (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045, 1072; Gilbert Guillaume, ‘Methods and Practice of Treaty Interpretation by the International Court of Justice’ in Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press 2006) 469.

³⁰⁶ See, for a discussion on the role of preambles and annexures in ascertaining the ‘context’: *Indus Waters Kashengaga Arbitration (Pakistan v India)* Partial Award (2013) 154 ILR 1, [406].

³⁰⁷ NAFTA, Art 102; see *Chemtura v Canada*, UNCITRAL, Government of Canada Counter-Memorial, 20 October 2008, [576].

³⁰⁸ NAFTA, Art 1114(1); see *Chemtura v Canada*, UNCITRAL, Government of Canada Counter-Memorial, 20 October 2008, [578].

[N]either of the BITs specifically defines the term “expropriation.” However, Article 5(2) of the Argentina-France BIT, quoted above, provides some elaboration of the term when it refers to “...similar acts of dispossession...” and “...such dispossession measures...” Thus, expropriation, at least in the Argentina-France BIT, requires a “dispossession” of the investor.³⁰⁹

Looking to the language surrounding ‘expropriation’ in the treaty, therefore, led the Tribunal to a conclusion that ‘affirm[ed] the importance of evaluating the effects of a measure on the investment in determining whether an expropriation has taken place’.³¹⁰ It was only after considering the effect of the measure that the Tribunal considered what it described as the ‘affirmative defence’ of police powers.³¹¹

These approaches highlight how the customary concept of police power can be both reinforced or circumscribed by the text of the treaty. It reinforces that the role of custom in treaty interpretation is highly dependent on how the treaty is framed. It also highlights how more explicit language in a treaty accommodating the police powers doctrine may provide more legal certainty. This will be considered further in Chapter Four.

4 Article 31(3)(c) – Systemic Integration

a) General Principles

The second way in which customary international law may be accommodated within IITs is through Article 31(3)(c) VCLT, the provision that expresses the principle of ‘systemic

³⁰⁹ *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No.Arb/03/17, Decision on Liability, 30 July 2010, [122].

³¹⁰ Ibid.

³¹¹ Although it was inapplicable in the case, because the Tribunal had concluded there had been no substantial deprivation: *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No.Arb/03/17, Decision on Liability, 30 July 2010, [147].

integration'.³¹² Article 31(3)(c) VCLT provides that, in interpreting any treaty, '[t]here shall be taken into account, together with the context... any relevant rules of international law applicable in relations between the parties'.³¹³ Campbell McLachlan explained the foundation of the principle of systemic integration in his seminal article on the topic:

The foundation of this principle is that treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system.³¹⁴

In recent years, much has been written on 'systemic integration', flowing from the express use of Article 31(3)(c) by the ICJ in *Oil Platforms*³¹⁵ and consideration of the topic by the International Law Commission.³¹⁶ It has been described in various terms, varying widely from operating 'like a "master key" to the house of international law',³¹⁷

³¹² See, in particular, Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279; McLachlan, 'Investment Treaties and General International Law' (n 179); International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 230); Prislán (n 12); Phillippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 *Yale Human Rights and Development Law Journal* 85.

³¹³ VCLT, Art 31(3)(c); *Indus Waters Kashengaga Arbitration (Pakistan v India)*, Partial Award, 18 February 2013 (2013) 154 *ILR* 1, 171 (fn 564).

³¹⁴ McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (n 312).

³¹⁵ *Oil Platforms (Iran v United States)* (Judgment) [2003] *ICJ Rep* 161; Guillaume (n 305) 470.

³¹⁶ International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 230).

³¹⁷ *Ibid* 211.

to being ‘potentially damaging’³¹⁸ to international law. But role and effect of Article 31(3)(c) on treaty interpretation is not fully known.³¹⁹

Looking to the language of Article 31(3)(c) itself, it is clear that systemic integration occurs in several steps.³²⁰ The first step is that, in order for Article 31(3)(c) to apply, there must be a ‘rule’ of international law, that rule must be ‘relevant’ and that rule must be ‘applicable in the relations between the parties’.³²¹ It is not controversial to suggest that customary international law would constitute rules applicable between the parties.³²² The question of whether a particular customary rule is ‘relevant’ is more controversial: on a narrow view, ‘relevant’ rules may be those that have the same subject matter as the treaty provision being interpreted.³²³ A broader view would allow ‘almost any rule of international law [to be] relevant’.³²⁴

³¹⁸ Mélanie Samson, ‘High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties’ (2011) 24 *Leiden Journal of International Law* 701, 714.

³¹⁹ Philippe Sands and Jeffrey Commission, ‘Treaty, Custom and Time: Interpretation/Application?’ in Malgosia Fitzmaurice (ed), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010); Orakhelashvili (n 262) 366.

³²⁰ Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14); Orakhelashvili (n 262) 366.

³²¹ *Ambiente Ufficio SPA v Argentine Republic*, ICSID Case No.Arb/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, [601]; Sands (n 312) 102; Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps Toward a Methodology’ in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Christoph Schreuer* (Oxford University Press 2009) 690.

³²² *Ambiente Ufficio SPA v Argentine Republic*, ICSID Case No.Arb/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, [600]-[601]; Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2010) 262–263; Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14) 70; Mark E Villiger, ‘The 1969 Vienna Convention on the Law of Treaties: 40 Years After’ (2009) 344 *Recueil des Cours* 123; Samson (n 318) 712; Panos Merkouris, ‘Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)’ (2007) 9 *International Community Law Review* 1, 30.

³²³ Gardiner (n 322) 260; Villiger (n 322) 123.

³²⁴ Simma and Kill (n 321) 696.

If it is deemed to be a relevant rule of international law applicable between the parties, the second step is that the rule shall be taken into account ‘together with the context’, suggesting that the relevant rules play the same role in the interpretive process (and carry the same interpretive weight) as the context.³²⁵ Customary international law plays a contextualising role, as opposed to being directly applicable as part of the ordinary meaning of the treaty provision. The use of Article 31(3)(c) ‘together with the context’ highlights that Article 31(3)(c) ‘is not a provision that should be interpreted completely free of internal constraints’.³²⁶

In other words, Article 31(3)(c) cannot be used to displace the provisions of the Treaty or the applicable law.³²⁷ As Philippe Sands noted:

...[U]nder 31(3)(c), the treaty being interpreted retains a primary role. The customary norm has a secondary role, in the sense that there can be no question of the customary norm displacing the treaty norm, either partly or wholly.³²⁸

b) Police Powers and Systemic Integration

If the ordinary meaning of expropriation excludes legitimate exercises of police power, then Article 31(3)(c) arguably has a limited role to play. That is, the tribunal would be introducing customary international law into the interpretive process because it is directly

³²⁵ Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14) 73; Sorel and Boré Eveno (n 261) 825–826.

³²⁶ French (n 236) 305.

³²⁷ *Oil Platforms (Iran v United States)* (Judgment) [2003] ICJ Rep 161, (Separate Opinion of Judge Higgins) [46]; Berman, ‘Treaty Interpretation in a Judicial Context’ (n 262) 320; Simma and Kill (n 321) 692,694; Rosalyn Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’ (2006) 55 *International and Comparative Law Quarterly* 791; Crawford, *Brownlie’s Principles of Public International Law* (n 55) 383.

³²⁸ Sands (n 312) 102–103; see also Orakhelashvili (n 262) 366.

referred to as part of the ordinary meaning, rather than because it is a ‘relevant rule of international law applicable between the parties’.³²⁹

It will be recalled in *Saluka* that the tribunal considered that the concept of ‘expropriation’ excluded the legitimate exercise of police power. In doing so, however, the Tribunal introduced the police powers doctrine into the treaty and then noted that the rationale for this approach derived from Article 31(3)(c), rather than Article 31(1) VCLT. However, relying on Article 31(3)(c) as the basis for accommodating the police powers doctrine in this way can be criticized, as it appears to use the concept of systemic integration to displace the ordinary meaning of deprivation in the treaty.³³⁰ In contrast, reliance on Article 31(1) would be more methodologically sound, as the customary law meaning would be the ordinary meaning.³³¹

It may be more appropriate to consider the police powers doctrine in the interpretive process using Article 31(3)(c). The focus of the interpretation is still on the treaty terms, rather than on the customary norm. So, it is ‘expropriation’ that is being interpreted, not ‘police powers’. As noted by the International Law Commission, the interpretation does not ‘add anything to the instrument that is being interpreted...

³²⁹ Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14) 90.

³³⁰ *Oil Platforms (Iran v United States)* (Judgment) [2003] ICJ Rep 161, (Separate Opinion of Judge Higgins) [46]; *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Final Award, 20 December 2013, [112]; *Ibid* 89–90; Higgins, ‘A Babel of Judicial Voices?’ (n 327).

³³¹ Paparinskis, ‘Investment Treaty Interpretation and Customary International Law: Preliminary Remarks’ (n 14) 89–90.

[i]t constructs the meaning of the instrument by a legal technique...that involves taking account of its normative environment.’³³²

How would this operate? Taking expropriation as an example, if a tribunal were to conclude (as *Tecmed* did), that the ordinary meaning of expropriation under the IIT did not *per se* exclude police powers, the tribunal may then identify the police powers doctrine as a ‘relevant’ rule of customary international law that is applicable between the parties. It seems unlikely that the police powers doctrine could be considered anything other than relevant: as noted in the previous Chapter, the principle is one of customary international law, and one which gives States a right to regulate property without an accompanying duty to compensate, subject to certain limits. The police powers doctrine could then be used to define the contours of the expropriation provision.

An example of this approach, in a slightly different context, is *Burlington Resources v Ecuador*.³³³ Article 31(3)(c) was invoked to determine whether a taxation could constitute an expropriation. The way in which Article 31(3)(c) was used in *Burlington Resources* is instructive because, like police powers, taxation is generally non-compensable and not considered an expropriation.³³⁴ In that case, the Claimant argued that a tax imposed by the Ecuadorian government amounted to an expropriation. When analysing this issue, the Tribunal started with the acknowledgment that taxation ‘is

³³² International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (n 230) 226.

³³³ *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No.Arb/08/5, Decision on Liability, 14 December 2012.

³³⁴ Indeed, taxation is a result of State’s police powers: *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No.Arb/08/5, Decision on Liability, 14 December 2012, [391].

an essential prerogative of State sovereignty³³⁵ and that general taxation was not an expropriation.

The Tribunal then invoked Article 31(3)(c) to justify its discussion of the customary international law principles concerning taxation (citing *Saluka*):

There are, however, limits to the State's power to tax. There are limits that arise from customary international law on taxation and limits that arise from the protections granted under international law to foreign investments, the only relevant one for present purposes being the protection against expropriation under the Treaty. In the absence of guidance in the Treaty as to the relationship between taxation and expropriation, the Tribunal will consider the limits existing under customary international law recognizing that "[i]n interpreting a treaty, account has to be taken of any relevant rules of international law applicable in the relations between the parties – a requirement which the International Court of Justice ("ICJ") has held includes relevant rules of general customary international law."³³⁶

The Tribunal then proceeded to explore the customary concept of confiscatory taxation, and concluded that 'the notion of confiscatory taxation under customary international law may inform the Tribunal's understanding of ...expropriation by way of taxes under the Treaty'.³³⁷ The Tribunal then noted that:

The most important factor to distinguish permissible from confiscatory taxation is the effect of the tax. The effects required for a tax to be deemed confiscatory do not appear to be different from those required to assess the existence of an indirect expropriation. In other words, confiscatory taxation constitutes an expropriation without compensation and is unlawful.³³⁸

The Tribunal then proceeded to discuss the requirement of 'substantial deprivation' for an indirect expropriation. After considering the facts, the Tribunal

³³⁵ Ibid [391].

³³⁶ Ibid [392].

³³⁷ Ibid [394].

³³⁸ Ibid [395].

concluded that the relevant measure did not amount to a substantial deprivation of the value of the Claimant's investment.³³⁹

The Tribunal in *Burlington Resources* also proceeded to consider the police powers doctrine in the context of other measures that the Claimant alleged amounted to an expropriation. The Tribunal noted that, in considering the measures, it would 'resort to the same test as the one applied to the alleged expropriation by way of [the taxation measures]'.³⁴⁰ It thus can be implied that the Tribunal invoked the police powers doctrine using Article 31(3)(c). The Tribunal held that it was required to ascertain whether the measures in question amounted to a substantial deprivation of the value of the Claimant's investment, on a permanent basis, and found no justification in the police powers doctrine.³⁴¹

Just as taxation under customary international law circumscribes the test applicable to expropriation under the relevant IIT in *Burlington Resources*,³⁴² so too could the police powers doctrine circumscribe the test applicable to expropriation.

³³⁹ Ibid [430] and [456]-[457].

³⁴⁰ *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No.Arb/08/5, Decision on Liability, 14 December 2012, [471].

³⁴¹ Ibid [473]. For one of the measures under challenge, the Tribunal held it did not need to examine whether the measure was justified under the police powers doctrine, as the measures did not substantially deprive the Claimant of the value of its investment: at [485]. However, for other measures under challenge (the entry and taking into possession of blocks), the Tribunal first considered that the measures were not justified under the police powers doctrine, and then subsequently concluded that the measures amounted to an expropriation because the occupation 'deprived Burlington of all the tangible property embodying its investment': at [529]-[530].

³⁴² Ibid [400].

5 Police powers, treaty interpretation and other standards of investment protection

As noted in Chapter Two, the police powers doctrine may, in principle, have a role to play in other standards of investment protection. That conclusion, however, is difficult to reconcile with the argument that the ‘ordinary meaning’ of expropriation can be ascertained by reference to the police powers doctrine. Similarly, the ‘relevance’ of the police powers doctrine for the purposes of interpreting a treaty provision pursuant to Article 31(3)(c) VCLT is less clear outside of the expropriation context.

For instance, the search for a definition of ‘fair and equitable treatment’ has been the subject of considerable debate. There has been consideration of how the customary international law ‘international minimum standard’ may interact (or indeed, be identical in meaning to) the treaty standard of fair and equitable treatment.³⁴³ The inquiry becomes more complex still if one considers how the police powers doctrine interacts with the international minimum standard. It would need to be demonstrated that the police powers doctrine was relevant to determining the meaning of ‘fair and equitable’ treatment. Such an enquiry falls outside of the scope of this thesis, but as noted in Chapter Two, where the right to regulate has been considered in other investment contexts outside of expropriation, it has been framed more in terms of a ‘margin of appreciation’, in which tribunals have given a measure of deference to State authorities and not second-guessed scientific or technical assessments conducted by the State.³⁴⁴

³⁴³ See, for example, Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 6).

³⁴⁴ Viñuales, *Foreign Investment and the Environment in International Law* (n 221) 376-379; Viñuales, ‘Sovereignty in Foreign Investment Law’ (n 7) 332; Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (n 6) 221.

In light of this, the method of ‘accommodating through treaty interpretation’ proposed in this thesis may be limited in its effect to cases of expropriation.

6 Conclusion

This Chapter has explored ways in which treaty interpretation can accommodate the customary international law doctrine of police powers in IITs. Two ways in which police powers can be ‘accommodated’ in investment treaties were identified: accommodation via the ordinary meaning of expropriation, and systemic integration. In both of these cases, police powers can be accommodated when determining the meaning of ‘expropriation’.

While it is not directly relevant to the issue of interpretation, this Chapter also reinforces and builds on the conclusions in Chapter Two. Where the police powers doctrine is accommodated within the expropriation provision through treaty interpretation, the point at which police powers is considered does not appear to affect the outcome of the case, provided that the police powers doctrine is acknowledged at some stage of the enquiry of determining the meaning of the expropriation.

Consistent with Chapter Two, *Methanex*, *Servier*, *El Paso* and *Total* first considered whether the measures were a legitimate exercise of police powers. However, in *Chemtura*, the tribunal first considered whether there had been a substantial deprivation of the claimant’s investment and, after concluding that there hadn’t been a substantial deprivation, then considered ‘in any event’ that the measures fell within the scope of the Respondent’s police powers.³⁴⁵ The *Glamis Gold* tribunal adopted the same

³⁴⁵ *Chemtura Corporation v Canada*, UNCITRAL, Award, 2 August 2010, [265]-[266].

approach, although it did not make *obiter* comments about whether the police powers doctrine had been satisfied after it had concluded there had been no substantial deprivation.³⁴⁶ The *Burlington Resources* tribunal adopted both approaches.³⁴⁷

The approaches in *Chemtura*, *Glamis Gold* and *Burlington Resources* are also broadly consistent with the customary international law police powers doctrine articulated in Chapter Two, as measures that constitute a substantial deprivation of the claimant's investment are unlikely to be reasonable or proportionate and thus are unlikely to be a 'legitimate' exercise of police power.³⁴⁸ Further, while none of these decisions addressed the question of the burden of proof directly, the consideration of the police powers doctrine at the point of determining whether an expropriation has occurred is consistent with the analysis in Chapter Two, and affirms the status of the police powers doctrine as a principle.

In this way, the police powers doctrine as articulated in Chapter Two, coupled with the accommodation of the doctrine using principles of treaty interpretation, assists in resolving the broader issue of demarcating the line between regulation and expropriation.

³⁴⁶ *Glamis Gold Ltd v United States of America*, UNCITRAL, Award, 8 June 2009, [357].

³⁴⁷ *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No.Arb/08/5, Decision on Liability, 14 December 2012, [471]-[473], [485], [529]-[530].

³⁴⁸ The conclusion that a legitimate exercise of police power *will not* constitute an expropriation does not mean that an illegitimate exercise of police power *will necessarily* constitute an expropriation. For instance, a regulation may be an illegitimate exercise of police power because it is non-discriminatory, but not constitute an expropriation because the effect of the regulation is not sufficient to amount to an expropriation. The space constraints of this MPhil thesis do not allow for an exhaustive consideration of when regulatory measures that are an illegitimate exercise of police power *will* constitute an expropriation.

CHAPTER FOUR

EXPRESS INCLUSION OF POLICE POWERS IN INVESTMENT TREATIES: DOES IT MAKE A DIFFERENCE?

1 Introduction

As is apparent from the previous Chapters, the police powers doctrine has been frequently invoked and applied by tribunals, notwithstanding the lack of explicit reference in the treaty text. Seen from this light, there is no need for these customary concepts to be explicitly articulated in the treaty text.³⁴⁹

However, in recent years States have entered into IITs that are greater in length and more detailed and specific in the scope of the obligations imposed upon States.³⁵⁰ In these treaties, attempts have been made to integrate public interest objectives into the substantive obligations owed by the State.³⁵¹ This has been augmented by several investor-State disputes that have implicated purportedly public interest measures, including affirmative action policies,³⁵² public health measures restricting the advertising of tobacco products,³⁵³ the phase-out of nuclear energy,³⁵⁴ environmental regulations,³⁵⁵ and the protection of cultural heritage.³⁵⁶

³⁴⁹ Viñuales, 'Sovereignty in Foreign Investment Law' (n 7) 331.

³⁵⁰ Schill and Jacob (n 224).

³⁵¹ Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (n 9); Suzanne Spears, 'Making Way for the Public Interest in International Investment Agreements' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011).

³⁵² *Foresti et al v Republic of South Africa*, ICSID Case No. Arb(AF)/07/1, Award, 4 August 2010.

³⁵³ *Phillip Morris Asia Limited v Commonwealth of Australia*, Notice of Arbitration, 21 November 2011; *Phillip Morris Brands Sàrl v Uruguay*, ICSID Case No. Arb/10/7, Decision on Jurisdiction, 2 July 2013.

³⁵⁴ *Vattenfall AB and Others v Federal Republic of Germany*, ICSID Case No. Arb/12/12.

This Chapter will focus on annexures that seek to clarify the meaning of expropriation, and contrast their interpretive effect with the IITs that lack such provisions.³⁵⁷ The rationale for focussing on this type of provision is that their language appears to draw directly upon the police powers doctrine, and so offers a useful starting point for any comparison.³⁵⁸ Again, caution should be exercised in placing too much emphasis on ‘general postulates’³⁵⁹ about the meaning of treaty provisions. However, with all due caution, the similarity of language in the various annexures, the apparent shared rationale,³⁶⁰ and the attention the provisions have received in recent scholarship,³⁶¹ allows for some general issues of interpretation to be discussed.

³⁵⁵ *Ethyl Corporation v Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998; *SD Myers Inc v Canada*, UNCITRAL, First Partial Award, 13 November 2000.

³⁵⁶ *Glamis Gold Ltd v United States of America*, UNCITRAL, Award, 8 June 2009.

³⁵⁷ There are separate and important questions of how such annexures may impact the interpretation of IITs that lack such annexures (such as through constituting ‘subsequent practice’ pursuant to Articles 31(1)(a) VCLT), and how the annexures may impact the customary international law. These questions cannot be adequately addressed within the space of this MPhil thesis, however the conclusions in this thesis as to the interpretation of the annexures lay the foundation for further research into these questions.

³⁵⁸ The use of ‘general exceptions’ provisions modelled on Art XX GATT, which also contain some overlap with the police powers doctrine, will not be considered for three reasons. First, there has been no consideration of the provisions by investor-State arbitration tribunals, making any discussion difficult. Secondly, the exceptions provisions often sit along side the annexures, which suggests that the provisions play a different role to the police powers doctrine. Finally, a proper analysis of exceptions provisions would require further consideration of ‘exceptions’ such as necessity, which cannot be achieved in the space of this MPhil thesis.

³⁵⁹ Berman, ‘Evolution or Revolution?’ (n 256) 668.

³⁶⁰ Céline Lévesque, ‘Influences on the Canadian FIPA Model and the US Model BIT: NAFTA Chapter 11 and Beyond’ (2006) 44 *Canadian Yearbook of International Law* 249; Céline Lévesque and Andrew Newcombe, ‘The Evolution of IIA Practice in Canada and the United States’ in Armand de Mestral and Céline Lévesque (eds), *Improving International Investment Agreements* (Routledge 2013).

³⁶¹ See, for example, Lévesque (n 360); Lévesque and Newcombe (n 360); Stephen Schwebel, ‘The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law’ (2006) 3 *Transnational Dispute Management*; Spears, ‘Making Way for the Public Interest’ (n 351); Kenneth Vandeveld, ‘A Comparison of the 2004 and 1994 US Model BITs: Rebalancing Investor and Host Country Interests’ in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2008-2009*. (Oxford University Press 2010).

2 Recent treaty practice

In recent years, several IITs have included language seeking to mediate the perceived tension between investment obligations and the right to regulate.³⁶² One way this has been done has been through including annexures that clarify the States Parties understanding of ‘expropriation’.

Since 2004, the US Model BIT has included an annexure that firstly notes that the expropriation provision ‘is intended to reflect customary international law concerning the obligation of States with respect to expropriation’.³⁶³ It then distinguishes between direct and indirect expropriation, and then proceeds to set out the Parties ‘shared understanding’ of indirect expropriation:

The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

- (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.
- (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect

³⁶² Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’ (n 9) 1044.

³⁶³ US Model BIT (2012) Annex B(1).

legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.³⁶⁴

The explicit reference to customary international law in the annexure to recent US treaties makes explicit what was implicit beforehand: that the treaty provision on expropriation invokes the customary international law meaning of expropriation.³⁶⁵ The three criteria identified in the ‘case-by-case, fact-based inquiry’ reflect the US Supreme Court jurisprudence in *Penn Central*.³⁶⁶ Several recent US BITs,³⁶⁷ and FTAs with investment chapters,³⁶⁸ have included this Annexure. Recent treaties concluded by India include similarly worded annexures.³⁶⁹

The ASEAN Comprehensive Investment Agreement contains a similar provision, although it excludes the words ‘except in rare circumstances’ from its formulation.³⁷⁰ The Common Market for Eastern and Southern Africa (COMESA) Common Investment Area Agreement expresses the provisions on indirect expropriation in light of the right to regulate and ‘the customary international principles on police powers’:

Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health,

³⁶⁴ US Model BIT (2012) Annex B(4).

³⁶⁵ *Accession Mezzanine Capital LP and Danubius Kereskedohaz Vagyonkezelő v Hungary*, ICSID Case No.Arb/12/3, Decision on Respondents Objections Under Arbitration Rule 41(5), 16 January 2013, [68]-[69]; see also *Emmis International Holding, BV & Ors v Hungary*, ICSID Case No.Arb/12/2, Decision on Objection under ICSID Arbitration Rules 41(5), 11 March 2013, [82].

³⁶⁶ Lévesque (n 360) 286; Spears, ‘Making Way for the Public Interest’ (n 351) 277.

³⁶⁷ US- Uruguay BIT (2005) Annex B; US-Rwanda BIT (2008) Annex B.

³⁶⁸ For example, Chile-US FTA (2003) Annex 10-D; CAFTA-DR (2004) Annex 10-C; Morocco-US FTA (2004) Annex 10-B; Oman – US FTA (2006) Annex 10-B; Panama-US TPA (2007) Annex 10-B; US-Peru TPA (2006) Annex 10-B.

³⁶⁹ India – Singapore CEPA (2005) Annex 3; India-Japan CEPA (2011) Annex 10.

³⁷⁰ ASEAN Comprehensive Investment Agreement (2009) Annex 2 (4).

safety and the environment, shall not constitute an indirect expropriation under this Article.³⁷¹

The annexure to the Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA), which has been adopted in several recent Canadian FIPAs,³⁷² differs slightly from the US provision to the extent that it does not expressly clarify that the provision intends to reflect customary international law, and formulates the annexure in more detail:

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.³⁷³

While the number of treaties that include such annexures remains small relative to the number of IITs currently in existence, there is a trend toward including such provisions. For instance, the European Commission has foreshadowed that it intends to include a ‘detailed set of provisions giving guidance to arbitrators on how to decide whether or not a government measure constitutes indirect expropriation’ in future EU investment treaties.³⁷⁴

³⁷¹ COMESA Common Investment Area Agreement (2007) Article 20(8).

³⁷² Canada-Latvia FIPA (2009) Annex B(3); Canada-Jordan FIPA (2009) Annex B.13(1)(c); Canada-Romania FIPA (2009) Annex B(c); Canada-Slovak Republic FIPA (2010) Annex A(c); Canada – Tanzania FIPA (2013) Article 10(5).

³⁷³ Canadian Model FIPA (2004) Annex B.13(1)(c).

³⁷⁴ European Commission, ‘Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements’ (November 2013) <<http://ec.europa.eu/trade/policy/accessing-markets/investment/>> accessed 26 June 2014.

3 Interpretation of the Annexures

a) Overlap between the treaty provision and customary international law

i) Elements of the customary test included in the treaty provision

It is the part of the annexures that explicitly provide that ‘non-discriminatory measures ... that are designed and applied to protect legitimate public welfare objectives’ do not constitute indirect expropriation that are of most interest. In setting out how such measures do not constitute expropriation, the annexures reflect many elements of the police powers doctrine under customary international law.³⁷⁵ For instance, the requirement that that regulatory measures be ‘non-discriminatory’ and be designed and applied in furtherance of public welfare objectives, reflects the customary police powers doctrine.

Similarly, through providing that a legitimate exercise of police power does not constitute expropriation, the annexures preserve the police powers doctrine as a principle, rather than as an exception. This has two consequences. First, from a procedural point of view, it seems likely that the burden of proof would fall on the claimant. Secondly, it reinforces the idea that the police power is not ‘exceptional’ to or does not derogate from the law of expropriation.

However, there are some differences between the annexures and the police powers doctrine under customary international law. In particular, the requirement that such regulatory measures be enacted in accordance with due process, which is reflected

³⁷⁵ Lévesque and Newcombe (n 360).

under customary international law,³⁷⁶ is absent in the formulations. Martins Paparinskis argued that the annexures therefore move away from the customary international law. This is because of what he described as a ‘conscious parallelism’ that is apparent in the drafting of the annexures:

Non-discrimination appears both as a criterion of lawfulness of expropriation and as a criterion for defining expropriation, therefore suggesting a conscious parallelism in treaty drafting. Unlike non-discrimination, ‘due process’ expressly appears only as a criterion of lawfulness, suggesting *a contrario* that this lack of parallelism means the absence of ‘due process’ from the definition.³⁷⁷

This lead Paparanskis to conclude that the US and Canadian Model IITs move the police powers doctrine to an emphasis on the *purpose* of the measure, rather than the more holistic inquiry that also looks to good faith, due process and reasonableness of the measure.³⁷⁸ This point will be returned to further below.

ii) ‘Rare Circumstances’

Another feature of this annexure is the proviso that regulatory measures constitute expropriation only in ‘rare circumstances’. This expression is not found under the customary police powers doctrine. What, then, would constitute ‘rare circumstances’? The recent Canadian IITs shed some light on the expression ‘rare circumstances’, with the provisions explicitly noting that it includes measures that ‘are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith’. Such an approach appears to be broadly consistent with the

³⁷⁶ *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005, Part IV, Chapter D, Paragraph 7; *Chemtura Corporation v Canada*, UNCITRAL, Award, 2 August 2010, [266]; *TECO Guatemala Holdings, LLC v Republic of Guatemala*, ICSID Case No.Arb/10/23, Award, 19 December 2013, [491].

³⁷⁷ Paparinskis, ‘Regulatory Expropriation and Sustainable Development’ (n 15) 320.

³⁷⁸ *Ibid.*

reasonableness enquiry explored in Chapter Two, and it also brings in the customary concept of good faith, but it says nothing of due process.

The meaning of ‘rare circumstances’ could be gleaned from customary international law pursuant to Article 31(3)(c) VCLT. The police powers doctrine could constitute a ‘relevant rule ... applicable between the parties’, and the circumstances when an exercise of police power may be illegitimate (when it is unreasonable, such as being disproportionate or lacking due process) under customary international law could inform a Tribunal’s interpretation of ‘rare circumstances’ in the treaty. In this way, customary international law could still have a role to play through Article 31(3)(c).

Thus, a measure that satisfied the ‘case-by-case, fact specific’ enquiry as to indirect expropriation may constitute ‘rare circumstances’. Similarly, if a host State were to repudiate specific commitments to an investor that it would refrain from imposing certain regulations, it may also constitute a ‘rare circumstance’.³⁷⁹ Finally, a possible resolution to the issue raised by Paparinskis is that that, using Article 31(3)(c), a measure enacted without due process may similarly constitute a ‘rare circumstance’. On this view, the ‘rare circumstances’ requirement would operate similarly to the ‘reasonableness’ enquiry found under customary international law.

b) Consideration in scholarship and investor-State arbitration

Annexures of this type have been subject to both praise and criticism. Stephen Schwebel described the revised US Model BIT as a ‘regressive development of international

³⁷⁹ So much was submitted by the US in *Glamis Gold v United States of America*, UNCITRAL, Counter-Memorial of the United States of America, 19 September 2006, 183 (fn 821).

law’.³⁸⁰ Concerning the part of the annexure dealing with regulatory measures of States, he continued:

If actions by a government interfere with a foreign investor’s investment to an extent that deprives the investor of the value of its investment, should the motivations of the actions be sufficient to insulate the government from liability under the BIT, ‘except in rare instances’? Can it be plausibly maintained that the exception only for ‘rare circumstances’ is found in customary international law?³⁸¹

Others have been less critical. Kenneth Vandeveld, for instance, noted that there was nothing new in the annexures, but rather that the annexures ‘address[ed] an issue on which prior models essentially were silent’.³⁸² Similarly, Gary H Sampliner noted that the annexures would give ‘tribunals, investors and governments additional context and perspective when analysing whether government regulatory activity can constitute an expropriation’.³⁸³

To date, there has been limited consideration of these annexures in investor-State arbitration. However, the annexure under the CAFTA (which is identical to the US Model BIT provision quoted above) has been considered recently in *Railroad Development v Guatemala*, the first decision on the merits handed down under the CAFTA.³⁸⁴ The Respondent argued that the Claimant’s argument ‘contradict[ed] the deference to a State’s use of its “police powers” under customary international law’.³⁸⁵

³⁸⁰ Schwebel, ‘The United States 2004 Model Bilateral Investment Treaty’ (n 361).

³⁸¹ Ibid 6.

³⁸² Vandeveld, ‘A Comparison of the 2004 and 1994 US Model BITs: Rebalancing Investor and Host Country Interests’ (n 361) 294.

³⁸³ Gary H Sampliner, ‘Arbitration of Expropriation Cases Under U.S. Investment Treaties—A Threat to Democracy or the Dog That Didn’t Bark?’ (2003) 18 ICSID Review 1, 41–42.

³⁸⁴ *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No.Arb/07/23, Award, 29 June 2012.

³⁸⁵ *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No.Arb/07/23, Respondent’s Counter-Memorial on Merits, 5 October 2010, [297].

The Respondent submitted that the annexure of CAFTA ‘codifies the extensive deference customary international law accords to a State’s exercise of its police powers’,³⁸⁶ and further argued that the provision accepted ‘the customary international law standard’ of police powers.³⁸⁷ In the end, the Tribunal did not consider police powers, because in undertaking the ‘case-by-case, fact-based inquiry’ that considered (1) the economic impact of the action, (2) the interference with investor expectations and (3) the character of the government action, the Tribunal concluded that ‘the effect on the Claimant’s investment [did] not rise to the level of an indirect expropriation’.³⁸⁸

The Tribunal in *Railroad Development* appears to have adopted a similar methodological approach to the Tribunal in *Glamis Gold*. It is noteworthy that many investor-State arbitration tribunals, such as the *Chemtura* Tribunal, went further than the *Railroad Development* tribunal and considered the issue of police powers *obiter*, notwithstanding the absence of an annexure. This highlights that the inclusion of the annexures does not guarantee an explicit consideration of police powers by the Tribunal if it is not directly relevant to the case.

4 Conclusion

The annexures do allow for some certainty that an expropriation provision would be interpreted by reference to the police powers doctrine. However, there is some inconsistency between the annexures and the customary international law. Further, as the recent CAFTA jurisprudence highlights, the inclusion of the annexures does not

³⁸⁶ Ibid [298].

³⁸⁷ Ibid.

³⁸⁸ *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No.Arb/07/23, Award, 29 June 2012, [152].

guarantee a more comprehensive consideration of the police powers doctrine than that undertaken by tribunals considering the customary international law concept in the absence of an annexure. While the full effect of the annexures remains to be seen, it is difficult to see how the annexures offer any greater certainty than a proper application of the VCLT principles of treaty interpretation.

CHAPTER FIVE

CONCLUSION

This thesis has analysed the extent to which customary international law principles that protect the right to regulate in the public interest are accommodated within IITs, focusing on the customary police powers doctrine. It has clarified the concept of ‘police power’, articulated the police powers doctrine and situated the doctrine within customary international law.

Using the principles of treaty interpretation in the VCLT, the police powers doctrine can be accommodated within IITs in two ways: first, pursuant to Article 31(1), by looking to the ordinary meaning of ‘expropriation’ which excludes the legitimate exercise of police power, and secondly via Article 31(3)(c), which allows the police powers doctrine to be taken into account as a relevant rule of international law applicable between the parties.

Pursuant to the police powers doctrine, reasonable regulatory measures adopted in the public interest will not constitute an expropriation.³⁸⁹ Therefore, it is not the case, as has been suggested in some scholarship, that the absence of treaty provisions addressing the police powers doctrine means that consideration of the doctrine is entirely a matter of a tribunal’s discretion.³⁹⁰ This thesis has presented an approach that allows the doctrine to be considered in a manner that is consistent with the principles of treaty interpretation.

³⁸⁹ Moloo and Jacinto (n 3) 554.

³⁹⁰ See, for example, Jasper Krommendijk and John Morjin, “‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration” in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 438.

The examination of the police powers doctrine in this thesis may also assist in resolving the question of where to demarcate the line between a legitimate exercise of police power and an expropriation.

Against that background, the recent attention directed towards the recent IITs explored in Chapter Four, and their apparent potential to allow for greater ‘balance’,³⁹¹ is arguably misplaced, as it fails to acknowledge the extent to which international law (through treaty interpretation) already provides that balance. While these recent provisions do provide some certainty, in that they make explicit what was implicit beforehand, they are not panacea for all concerns about the extent to which international investment law may intrude on the right to regulate.

This thesis also highlighted some of the more salient issues about the interaction between customary international law and treaties in international investment law, which lays the foundation for further research. Further, the examination of the police powers doctrine has raised additional questions about the broader role this doctrine may play in international investment law. In particular, the way in which this doctrine may interact with other standards of investment protection, such as fair and equitable treatment, and also with other provisions in investment treaties, such as exceptions provisions, requires further research. This thesis has provided the foundation to address these broader questions.

³⁹¹ See, for example, Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’ (n 9); Choudhury, ‘Exceptions’ (n 9); John Beechey and Antony Crockett, ‘New Generation of Bilateral Investment Treaties: Consensus or Divergence?’ in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* (Martinus Nijhoff 2009); UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (United Nations 2013).

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